

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT** **C**  
**CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**



# The Citizens' Right to Information: Law and Policy in the EU and its Member States

STUDY





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

**The Citizens' Right to Information**  
**- Law and Policy in the EU and its Member States -**

**STUDY**

**Abstract**

The study elaborates on the European Union citizens' right to be informed and to enjoy their right to access information. The approach adopted is two-fold: firstly, it aims at analysing the legal and factual situation of the media in the EU Member States; secondly, it explores the conditions under which the citizens can search for information of interest. Country reports represented in their integrality furtheron build the fundament for comparative analysis; another part of the study is dedicated to describing the relevant European benchmark applicable to the freedoms of the media and information.

This study was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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## LIST OF ABBREVIATIONS

Art.	Article
AVMSD	Audiovisual Media Services Directive
CFI	Court of First Instance (now: General Court)
CFREU	Charter of Fundamental Rights of the European Union
CM	Committee of Ministers of the Council of Europe
CoE	Council of Europe
(A/V)DSL	Digital Subscriber Line
DG	Directorate General (European Commission)
DVB(-T/-C/-S/-H)	Digital Video Broadcasting (terrestrial, cable, satellite, handheld/mobile)
EC	European Community
eCD	eCommerce Directive
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	Series of Publication of Decisions of the EU Courts
EESC	European Economic and Social Committee
EP	European Parliament
EU	European Union
IPTV	Internet Protocol Television
ISP	Internet Service Provider
NGO	Non-Governmental Organisation
OJ	Official Journal of the European Union
OSCE	Organisation for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PSB, PSM	Public Service Broadcasting/Broadcaster, Public Service Media
Sec.	Section (§)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

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## EXECUTIVE SUMMARY

By way of an Open Call for Tender issued in June 2011, the Directorate for Citizens' Rights and Constitutional Affairs of the European Parliament indicated its intention to commission a study on "Information of the citizens in the EU", conceived as an "Update of the 2004 study from the European Institute for the Media"<sup>1</sup>, on behalf of the Committee for Civil Liberties, Justice and Home Affairs.

According to the Global ToR for the underlying service contract, the study was expected to cover the following themes of research: freedom of the media, freedom of expression and freedom of information, codes of practice for journalism and self-regulation, legal framework on media ownership and regulation, the media system in Europe. It should take into account in particular the EU Charter of Fundamental Rights and the relevant resolutions adopted by the European Parliament. The study overall should consist of the following parts: (i) introduction, (ii) country reports, and (iii) conclusions, while the country reports as such should deal with the following issues: (1.) Acts, Legislation, Regulation, Codes, (2.) Main players in the Media landscape, and (3.) Conclusions.

In mid-December 2011, the Institute of European Media Law e.V. (EMR), Saarbrücken/Brussels, was entrusted with the pursuit of the research contract.

The EMR has opted to implement a "more normative approach" in order to provide for the basis to assess the situation of the media and the citizens in the EU relating to their respective freedoms of expression and information, which is accompanied by a stocktaking of the media markets' situation in the Member States.

First, the "European benchmark" has been established, delineating the standards which derive from the *acquis unionaire*, on the one hand, and the Council of Europe instruments, foremost Art. 10 ECHR, on the other. Second, on the basis of a questionnaire developed by the EMR and on its behalf, national experts have described and analysed the situation at national level, portraying constitutional law/fundamental rights safeguards, the media legal order as composed of ordinary law and co-/self-regulatory codes of conduct, and the situation on the different media markets, summing-up by way of conclusion with a comparison of the development since 2004 and/or with recommendations aimed at further improving the status quo. Third, on the basis of the foregoing two parts, the EMR has undertaken to suggest possible media policy and legislative steps which could assist to remedy a number of existing concerns in relation to media freedom and the right to information.

After having communicated, in February 2012, to the European Parliament's competent services the first interim results of the work done until that date - which consisted of the questionnaire and six draft country reports covering different kind of Member States, including one that acceded to the Union in 2007 and could therefore not have been covered in the 2004 study -, the EMR was invited to the LIBE committee's meeting on 20/21 March 2012 in order to present the study's approach and its preliminary findings. Subsequently, the correspondents have handed in the remaining country reports, on which EMR staff members working on the study engaged in correspondence with the

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<sup>1</sup> European Institute for the Media (EIM) (ed.; authors: D. Kevin, T. Ader, O.C. Fueg, E. Pertzidou, M. Schoenthal, and experts from countries concerned), "obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed", Dusseldorf, 31 August 2004, („2004 study" or „2004 report") available at: <http://epra3-production.s3.amazonaws.com/attachments/files/1530/original/European%20Citizen%20Information%20Project%20Final%20REPORT.pdf?1323685700>.

respective experts in order to ensure comprehensiveness and completeness of the results. In parallel, the other parts of the study have been drafted.

By letter dated of 12 June 2012, the competent Director of the EP's services declared acceptance of the interim results (draft final report) which had been communicated to it on 31 May 2012.

This document represents the final report of the study, established on 28 June 2012. In the following, the main findings of the study shall be presented:

When taking a comprehensive look at the guarantees afforded both to the freedom of the media and the citizen's right to information - as recognised by the CFREU, EU treaties, Secondary EU legislation such as resolutions adopted by the European Parliament and the directives on the one hand, and the ECHR accompanied by relevant jurisprudence of the ECtHR, the CoE's conventions and recommendations, on the other - it becomes clear that the benchmark at European level has become more and more encompassing and, mostly, directly relevant for the media legal orders of the Member States.

The ECtHR recognises freedom of expression as one of the basic conditions for the progress of democratic societies and for the development of each individual. It stresses the institutional role of the press - not only in its traditional concept - as a "public watchdog". It further confirms that the principles relating to the freedom of expression are also valid in the area of audiovisual communication and further highlights the principle of pluralism and the function of the State as an ultimate guarantor to secure pluralism, particularly in the area of audiovisual media, both public service and private.

The ECJ acknowledges freedom of expression as one of the fundamental principles of a democratic society. In particular in State aid cases the Court was given the opportunity to acknowledge the important role of public service broadcasting in view of its cultural, social and democratic functions and its vital significance for ensuring democracy, pluralism, social cohesion, cultural and linguistic diversity. The ECJ further derived from the freedom of expression guaranteed by Article 10 ECHR the possibility to justify a restriction on the fundamental freedoms of the EC Treaty (now: TFEU), namely the free movement of goods and services and the freedom of establishment, with the legitimate objective of maintaining pluralism and preserving diversity of opinions. Recently, it has stressed the freedom of the citizens to access information, and the freedom of the media and others to impart information.

Still, the framework which is provided for the national media legal orders by EU law is not all-inclusive, not least in purely national situations where the fundamental freedoms of the TFEU cannot represent a yardstick against which restrictions and their legitimacy on the operation of the media could be measured. Besides, due to the principles of enumerative competencies and subsidiarity, the power of the EU to introduce additional regulation, and thereby also to establish safeguards for the rights of the media and of the citizens, is limited. Nevertheless, considered in conjunction with the guarantees afforded by CoE instruments, a rather high level of directions towards the shaping of national media policies is made available.

The constitutions of all Member States guarantee the freedom of expression and develop, on this basis, wider scopes of protection - such as the right to receive and disseminate information and the freedom of the media. Furthermore, there are countries which included in their fundamental laws provisions on media regulatory authorities or on role and organisation of public service broadcasters. Jurisprudence of the (constitutional) courts has had, and continues to have, a major and decisive influence on defining and

extending the notion of the freedom of the media, foremost in cases concerning the fair balance of this freedom with other protected interests/personality rights.

In order to maintain an appropriate and comprehensive legal and regulatory framework - also with a view to ensuring compliance with Secondary EU legislative requirements, such as the AVMS Directive -, the Member States stipulated various provisions on the press sector, on public and private broadcasting and on-demand audiovisual media, on terrestrial analogue and digital transmission and on electronic communication networks. The conditions which exist for media operators and journalists aim, on the one hand, to create a just access to the market and, on the other hand, to impose correspondent obligations and responsibilities. Therefore, the broadcasting market entry is regulated by different procedures, partly depending on the way of programmes distribution. Especially the public service broadcasters (which are generally operating on the basis of the law) are required, freely and independently of any external political, financial or other interests, to function in the general interest and to ensure provision of information which enables the free opinion-forming of the public. Their main duty is to create and disseminate programmes in accordance with the public service remit, to provide a well-balanced offer, with respect to the faith and convictions, national culture and identity or social origin, to support pluralism and diversity and promote new technologic development.

In order to disseminate information through the media in their most traditional form, i. e. by publishing, in most of the countries only a notification or registration duty is stipulated, while in others not even this requirement exist.

Basically, the legislation of many Member States contains provisions that control media ownership only from an economic perspective, following the rules of the general supervision over competition. Sometimes with clear limitations on horizontal concentrations or vertical and cross-media ownership situations, a considerable number of Member States has implemented appropriate measures not only for safeguarding a free activity, but also for preventing situations of dominant positions in the formation of individual and public opinion. Therefore, the regulatory authorities in the media sector (and the ones competent for the implementation of competition law) are supervising the compliance with the legal limitations, e. g. based on annual turnover, audience share, ownership etc., but in some cases apparently face difficulty in doing so, induced by vague or ambiguous terms of the relevant legislation.

The organisation and activity of the public service media in all EU Member States is governed by national law - whether in the form of ordinary law, or based on an agreement between the state and the operator. The most important concerns in this regard relate to political independence of executive and/or supervisory bodies, as long as their members may be designated following political decisions. The financial concerns in view of the ability of public service broadcasters to fulfil their mission also have major relevance. Since many Member States have foreseen a "dual funding" basis, i. e. financial resources originate from state financing (annual state grant/broadcasting licence fees) and commercial revenues, an insufficient level of financing through state funding bears significant risks, as does a decrease in the income from commercial activities. Obviously, the first point also holds true in situations of monistic financing from the State, not least in times of continuous budget restraints.

Safeguarding the journalistic activity is a matter of importance for all Member States. Journalists enjoy a broader freedom of expression than the majority of citizens, because of the particular responsibility of the press as watchdog of the society. In some countries, however, no definition of the notion "journalist" exists bringing about uncertainty on



whether the relevant privileges are applicable – a matter on which courts would then have to adjudicate on a case-by-case basis, not least in relation to journalistic activities on the Internet. Safeguards are mainly contained in the Press Law of the Member States, which grants journalists the right to claim information from administrative authorities, forbids obstructions to information gathering and press criticism. However, at the same time, a fair balance between the freedom of expression and the general personality rights requires a careful scrutiny of the journalists' behaviour. The responsibility against defamation, libel or slander is foreseen by the law, defamation in some countries (still) being criminalized. The freedom of expression has its limits in the correctness of the information provided and, therefore, legal provisions in all countries are stipulating the right of rectification (correction) or reply.

Besides general regulations concerning the content obligations related to programmes – such as the preservation of the cultural heritage, the language(s), the promotion of diversity and the broadcasting of information of public interest –, provisions relating to specific content obligations are only foreseen in few legislations. They are having regard to programmes for children, for ethnic minorities or news, but also to programmes provided for people with disabilities.

Only a very limited number of EU Member States has developed funding schemes for the press or the wider media sector which would focus on content of a "public value" character; rather such aid schemes concentrate on contributing to bearing the costs of distribution, technical equipment used for production, or education.

Having regard to the broadcasting of political information in the EU Member States, a distinction has been made in most of the countries between the presentation of news and reports on politics including coverage of the legislator (Parliament) and administration (Government) on the one hand, and political advertising for political parties, in and outside election campaigns, on the other.

In numerous Member States the founding of self- or co-regulatory institutions, such as Press Councils, with the main task of applying Codes of Conduct for Journalists has been a long-standing tradition. The provisions of the code are established in order to promote editorial principles and values. However, due to the almost non-existent sanctioning powers of those institutions or limited inclusion, concerns as to their efficiency are frequently raised; citizens would seem to tend to submit their cases to the courts.

The regime, purpose and manner of using frequency spectrum for electronic media is stipulated by all Member States' legislation and regulation. Accordingly, capacities are usually allocated to commercial broadcasters based on tender procedures or through a decision or authorisation by the responsible regulatory authority/ies. With regard to digitisation of (radio and) TV broadcasting, many Member States have reserved spectrum to public service channels (which do not have to undergo tender procedures), and devised further concepts with a view to providing incentives for commercial media providers also to participate.

In general, all Member States require and control fair, reasonable and non-discriminatory access by broadcasters and on-demand media service providers to distribution networks; most usually, within this framework a contract will be agreed freely between the parties. Distributors or platform operators, i. e. those who aggregate or package channels and services into various bundles and offer these to end-users, are frequently subjected to a notification regime. In practice, however, cases have been reported where access to distribution facilities has been unduly frustrated, also by the legislator/the executive.

Most of the Member States have established "must-carry" rules in order to ensure the distribution of programmes of national interest, mostly represented by the public service broadcasters, based upon an assessment of the informational, educational and cultural value at hand.

Only a limited number of Member States' bodies of regulation hold provision on distribution systems for print publications, considering as essential equal treatment and universal coverage; otherwise, the issue is entirely left to the application of competition law.

Basically all Member States enjoin specific legislation on transparency requirements concerning the media sector, stipulated either in the Constitution or in ordinary laws. Information is made publicly available either through commercial registers, by the regulator or the individual media organisation itself, but in numerous cases such schemes are not sufficiently comprehensive. Furtheron, only a limited scope of transparency may sometimes be delivered because the applicable regulations do not request revealing of the final beneficiary/owner if there are several levels of shareholders.

In all Member States, public service media are supervised by regulatory bodies (external and/or internal) in respect of the obligations laid down in the laws and/or management contracts, use of budgetary means and fulfilment of the remit; therefore they need to report (on a yearly basis or even twice a year). The regulators entitled to receive the reports and control the accomplishment of the public service media remit are differing: this may either be the Parliament itself, the Government, the Communications/Media Regulatory Authority, a Board of Public Service or a Council. Some countries mention also an obligation for the broadcasters to publish on their own websites reports about the activities, e. g. about new programme formats, audience shares of various programmes, the activity of regional programmes and international activities.

A general obligation regarding the active duty (to ensure that information is disseminated among the public) and the passive one (to assure access to requested documents) of the administration vis-à-vis the media and individuals exists in all Member States, however not always for all areas of activity. The legislation aims at guaranteeing that public authorities (or private institutions acting on their behalf) impart information; exceptions to this rule will often be motivated by legal requirements to maintain confidentiality or secrecy in the interest of the state or other natural or legal persons. In a couple of countries the law introduced financial charges for the access to documents and information, in other cases stipulates a certain maximum delay for the authorities to answer to an information request.

In essence, there are no major obstacles to the access to media products or services, from the perspective of the citizens. Some schemes exist in order to facilitate this access, such as for social reasons a reduction or exemption from broadcasting licence fees, provided to some groups of society, or, rather seldom, schemes which include as a social welfare the provision of TV and radio reception devices.

In most of the Member States either an Ombudsperson institution for the media, collectively or individually, or complaint procedures provided for by broadcasters/publishers, regulatory authorities or self-regulatory bodies, are in operation.

In some countries participation of the viewers/listeners, readers or users in bodies of media operators or in (self-)regulatory institutions has gained in importance, mainly in order to articulate needs and desires with regard to public service broadcasters' output.

However, such participation will mainly be indirect, by way of including representatives of civil society groups or persons with achievements and experience in the fields of culture and media.

In respect of the main players, the comparative analysis highlights a huge divergence among Member States in terms of actors present (public and private) on the different markets, which may be traced back, in first instance, to the size/number of inhabitants of the countries and the economic strength of the national economies, but may also find its roots in different cultural/linguistic traditions and not least in state organisation. In particular, the offer on the newspaper market and the extent to which public service broadcasters are active also on a local and regional level are expressions of these latter considerations. Still, mere figures about the number of players active in a given market can hardly be taken as an indicator for diversity of available media content and comprehensive information provision to the citizens.

The national experts have delivered important information in their final observations, analysing the terms and the practical application of the legal provisions with relevance to the media sector as well as criticising related aspects which are susceptible to endangering freedom of the media or the citizens' right to information. A number of concerns have been mentioned, and the devising as well as adoption of remedies is seen as a duty for both the legislative/regulatory bodies and the media themselves.

Where recommendations have been made, they refer i. a. to enhancing coherence of the national media legal order with the European benchmark, particularly case-law of the ECtHR in respect of Art. 10 ECHR, e. g. to safeguard independence of the psm (in relation to politics and funding) and of media regulators, to increasing media ownership transparency and enforcing existing legislation on concentration/ownership thresholds, to "unlocking" the potential of digitalisation of the media, to providing a better access to documents held by public institutions and to giving effect to means of assistance regarding the protection of journalism in general and specifically on the Internet.

In view of the overall findings of the study, some general recommendations for the future shaping of EU policies are submitted:

- European Union media policy should strive to achieve even greater inclusiveness and coherence, also with regard to other EU policies;
- it should continue to stretch out to other International fora; however, with a view to the added value which the Council of Europe can contribute particularly in respect of subject-matter that will clearly rest outside of EU competencies and of (European) countries which are not (yet) becoming more closely integrated into the EU's accession and neighbourhood policies, a mutually-benefitting, complementary *modus vivendi* should be aimed at;
- the European Parliament should continue to underline the dual character of the media as expressions of culture and of societal needs, on the one hand, as well as their nature as market products and service, on the other, while attempts should be rejected to "artificially" portray these two facets as only being in confrontation with each other;
- the balanced approach which has shown to be instrumental when EU policies are at hand implying a direct impact on national media policies, such as competition law and State aid law, should be preserved;

- the European Parliament should continue to be, together with the Committee of the Regions, the European Economic and Social Committee and also the Council, an advocate for stressing the need to duly observe and respect the existing diversity between and within Member States, their media and economic potentials and the needs of the citizens;
- further initiatives should be envisaged in order to secure and enhance the availability of information on the situation of the media in Europe, in order to maintain a sound basis for devising future policy options;
- more cooperation appears advisable in respect of different organs, institutions and bodies as well as ad hoc or continuously-working expert groups and research institutions, within and outside the framework of the EU, in order to enhance dialogue and increase information and knowledge through pooling existing expertise and competences – and the European Parliament should seek to be an active part in such schemes;
- in particular as far as the area of protection of human rights is concerned, the activities of different expert bodies, e.g. by the FRA, the Ombudsman, the European Data Protection Supervisor, etc., should be followed with great attention and, wherever possible, the possibility and appropriateness of joining resources and knowledge to the advantage of more comprehensive approaches and for countering undue “proliferation” of fora, where this would risk to lead to unsustainable resources being made available to each of them, should be taken into account;
- additional funding should be made available to increase, on a constant basis, the access of the MEPs, the EP’s committees and services to inhouse knowledge in the fields of technologies and economics of media sectors;
- the dialogue with citizens and experts representing “grass-roots” initiatives in the media and information sectors should be upheld to the greatest extent possible, notwithstanding the need to monitor closely the developments in formal procedures like petitions as a form of an “early-alert” system; in view of the expected concrete definition of a framework for citizens’ motions, the EP should maintain a vigilant position as to whether the design of details matches the requirements of fully ensuring participation;
- in the case of further accessions to the EU, emphasis should be laid on the fact that pre-accession undertakings are formulated in a clear manner and accessible to objective assessment as to their fulfilment, particularly where fundamental rights and the rule of law according to the Copenhagen criteria are at hand;
- trade policy developments continue to deserve specific attention, as has been demonstrated not least in the context of ACTA negotiations;
- in the event of future revision of the EU treaties, an additional, careful consideration should be given to the opportunities to at least clarifying the extension of the CFREU to action at Member State level, and to the expediency of assessing the efficacy of Art. 7 TEU material and procedural conditions;
- in the same perspective, while preservation of the diversity of Member States cultures remains an important objective, it should be asked whether the complete and uncompromised exclusion of harmonisation competencies of the EU in the cultural domains still presents itself as the optimal solution for addressing future

problems, not least when bearing in mind that - while devising EU policies in other fields - the impact on the cultural sectors appears to become increasingly significant (anyway).

In relation to more specific and/or current media policy initiatives, the following suggestions are formulated:

- the European Parliament, besides continuing to provide political support, might wish to reflect upon the desirability of formally requesting the European Commission to initiate infringement procedures on matters of national media legal orders, either being of importance *prima facie* for the safeguard of the TFEU's fundamental freedoms or, in combination therewith, for the safeguard of fundamental rights, particularly Art. 11 CFREU;
- the European Parliament could focus more closely - based i.a. upon the soon-to-be-expected outcome of the assessment of the EU competencies in respect of media ownership and transparency legislation, but also on further consideration - investigate into the appropriateness of formally calling on the European Commission to present a proposal for a EU Directive on this subject-matter;
- in light of existing provisions in the AVMSD on the right of reply, transparency requirements for audiovisual media service providers, the right to short news reporting, the prohibition on incitement to hatred, the European Parliament might see prospects in discussing with Member States and the European Commission the opportunities to enhance the formulation of rights and obligations of the media;
- in the same vein, a future revision of the AVMSD might entail, firstly, an additional extension of scope (*ratione materiae*), given that the European Commission has announced to consult on, and possibly put forward a Communication in relation to, Connected-TV, and, secondly, should make the provision on independent regulatory authorities as "biting" as are the parallel, "sister"-provisions in the eCommunications package and in EU data protection law;
- the European Parliament should also explore the avenues of pressing, on the one hand, for a revision of the eCommerce Directive, which lacks - given the current and increasing importance of on-demand services, which are media-like, but not audiovisual - both significant guarantees and requirements and in particular shows need for re-assessing the "safe-harbour" principles for intermediaries, while, on the other hand, in the above context of Connected TV and also beyond, "consumer equipment" regulation requires adaptation to products' and services' design actual realities of new and emerging media markets;
- with regard to universal service obligations, the stand-still in discussions over the appropriateness of including (fast or even ultra-fast, but at least "real") broadband Internet access into the definition, should be overcome, while in parallel different kind of support mechanisms at European and national level should be explored in order to prevent a digital divide; additionally and also in respect of electronic communications regulation, the issue of net neutrality deserves continuous attention by policy makers at all levels, since developments here can impact simultaneously on the distribution of and the access to information which is of public interest;
- a review of existing aid schemes for different kinds of media content production and distribution as well as in view of the underlying conditions (training, equipment) at

national level should be commissioned with the purpose of, firstly, establishing best practices models and, secondly, to help delineate discussions on alleged disability to adapt to new environments and embrace opportunities of the new media "ecosystem" from the more substantial issue of what kind of value is attached to the making available of high-quality and diverse media output;

- the existing or perceived hindrances for the establishment of new business models in the online environment - which might stem from a lack of legal certainty or actually be the result of unsuitability of the existing, applicable legal framework mainly in the field of copyright and related rights - should be addressed in the shortest possible delay, not least in order to maintain awareness particularly of younger generations of the "value of culture"; in parallel, the preconditions should be secured to foresee the introduction of a "cultural flat rate" with the aim to, firstly, compensate rightsholder for the continuing loss of any remuneration presently incurred and, secondly, to provide for a legitimate exception to exclusivity rights where copying happens solely for private, non-commercial purposes - thus transposing the idea of private copy levies into today's "digital realities".

## 1. PREFACE AND CONTEXT

In the following chapters of this first part, initially the scope and objectives of the present study shall be outlined and its methodology explained, before turning to the different guarantees provided for in terms of freedom of the media and the citizens' rights as stipulated in the European Union's and the Council of Europe's fundamental texts and related legislation.

### 1.1. Scope and Objectives of the Study

Defining the manner of how to assess the extent to which media and citizens enjoy the freedom to expression and information, respectively, does not lend itself to obvious and easily-applicable solutions. In this vein, the research objective shows some parallelism to investigating into the question of whether or not media output is of (high) quality and sufficiently diverse. In this latter case, it is generally accepted that already the definition of "quality" and its constituent components in relation to media content is hardly feasible; the approach opted for, therefore, rather turns to the elaboration of a set of criteria or elements which can be seen as contributive to achieving qualitative output of media production.

For present purposes, too, instead of having recourse to subjective views on whether the freedom of the media and the freedom to information of citizens are sufficiently secured in EU Member States, e.g. by establishing guidelines for and, on their basis, having conducted interviews with multiple stakeholders from different sectors (such as journalists, media owners, associations of viewers/ listeners/readers or consumers in general, representatives of self-regulatory bodies and media authorities, academics and research institutes in the domains of communication science, politics, media economies, etc.), this study follows a "more normative approach": the legal and regulatory frameworks in the EU Member States are being analysed in order to learn about the safeguards that exist, on the one hand, for the media themselves theoretically enabling them to pursue their activity in a way which is free from State and/or economic, i.e. undue outside or inside, influence, and, on the other hand, for the citizens providing them with means to request information deemed useful and necessary in order to allow free formation of opinion and decision-making in the democratic context.

This approach is being enriched by a description of the market situation focussing on the main players in the electronic media and print sectors and in the sector of electronic communications networks and services. By this, the interest shall be served to learn about the actual providers of media content supply to the citizens and the accessibility of those services to them, respectively.

In times where it is hardly arguable any longer that there exists only a patchwork of public communications spheres at a national level, which is (meant) to say: not a European one, while an ever-increasing importance is attached to legislation prepared and adopted as well as policies devised within and between the institutions of the European Union - which all have an immediate bearing for the citizens and companies in the EU Member States -, all individual and public opinion-forming should be based on information which is as widely accessible as possible, diverse, independently-produced, reliable and accountable.

The present study hence intends to explore whether favourable conditions exist in the European countries that would allow both the media and the citizens to enjoy their



respective freedoms in relation to imparting and receiving/accessing information through various outlets, by different means, passively or actively.

It shall thus help inform the European Parliament's LIBE committee on the situation of the "citizens' right to information" and the relevant policies followed at the national level, while at the same time portraying the developments at a European level.

For more than three decades now, the European Parliament has been discussing matters of freedom of expression and of the media, together with the citizens freedom to access information which is of interest to them, not least with a view to foster, through information on political debate at a EU level, public formation of opinion and, consequently, democratic participation throughout its Member States. In this context, a major concern has always been the level of media concentration and possible threats to media pluralism as well as diversity/variety of media content. As expressed through various resolutions on own initiative and discussion during legislative processes, this has been accompanied by specific emphasis being laid on the safeguard and promotion of public service media, together with specific attention for schemes enabling production of European and independent content by parties acting separately from the main media operators.

Not least when deciding on the EU policies for electronic communications, radio spectrum; competition and services of general economic interest; culture, film funding and European heritage; copyrights; trade, minors and consumer protection etc., the European Parliament has constantly endeavoured to secure recognition of the media in all its forms (i.a. print, broadcasting, new media, film) as having a dual nature, in other words, to do justice to their character of being both goods and services as well as expressions of culture. The present study, therefore, adopts a broad approach when inquiring about the legal and factual situation in the Member States. It includes several aspects on which, for the time being, there is no legal framework at EU level, but relevant standards being provided by the different instruments issued at the Council of Europe.

Both, the country reports and the study's conclusions/recommendations shall serve to enhance the debate on what measures, where appropriate, the EU could envisage to take in the next future in order to foster freedom of expression throughout Europe.

## **1.2. Methodology applied**

With a view to the methodology applied for the present study, reference should first be made to the elements of the study's overall structure which had already been predefined by the ToR in the open call for tender, i.e. that it should consist of (i) an introduction, (ii) country reports, and (iii) conclusions, while the country reports as such should deal with the following issues: (1.) Acts, Legislation, Regulation, Codes, (2.) Main players in the Media landscape, and (3.) Conclusions.

From this, EMR deducted, in terms of *working methods*, that a suitable research approach should be based on the following steps: after an initial analysis of the most pertinent legal and policy developments in the EU Member States since the finalisation of the 2004 study (including Bulgaria and Romania), (1) for the EMR to establish a questionnaire; on the basis of which (2) the national experts describe (i) the applicable legal and policy framework in their respective country, the most relevant developments which have a bearing on the citizen's right to be informed as well as the measures (both of a regulatory as well as a promotional character) which Member States have taken in order to secure and foster diversity/variety of opinion in the media, (ii) provide



information on the market situation, and (iii) make an assessment and give an outlook as to the expectable future developments; while (3) the EMR assumes responsibility for these country reports inasmuch as both the information provided and the conclusions drawn would be assessed according to own sources of information which are available to it – with the aim to ensure comprehensiveness and plausibility of the country reports; for these purposes, EMR would discuss with the national experts any perceived shortcomings or seek clarification on points which are deemed unclear.

In terms of researching the present *subject matter*, i.e. the extent to which the citizens in the EU can enjoy their right to information, the EMR opted for a three-fold approach which consists of: (1) an overview over the “European benchmark”, i.e. the guarantees and rights, as flowing from Art. 11 CFREU and Art. 10 ECHR for freedom of expression (freedoms of opinion, of receiving and imparting information and ideas, and of access to information) and freedom of the media as well as from the subsequent “secondary legislation”, e.g. the Council of Europe Conventions, Recommendations and Resolutions together with the European Union *acquis*; (2) a description, analysis and evaluation of the national legal and regulatory framework and adjacent practice in the EU Member States; and (3) an assessment of the status quo reached, mainly by way of contrasting whether (at least) the European benchmark is respected and, where this does not provide for sufficiently clear indications, whether the existing framework at European and national level is satisfactorily conducive to fostering the citizens’ rights to be informed and to seek information.

More specifically, the approach adopted for the questionnaire and the country reports based on it was intended to be as conclusive as possible through investigating into (a) the conditions under which the media are in a position to collect, edit and impart/have distributed information (“supply-side perspective”), and (b) the instruments and the procedures available to citizens in order to access information, to exert at least some influence on media output (“demand-side perspective”). These two facets translated into the following five main topics of interest: for the media - (i) “market entry” conditions (such as licensing requirements, media ownership restrictions, legal framework for public service media); (ii) framework for the “pursuit of the core activity” (protection of journalistic work, specific positive content obligations and/or funding schemes for content with a specific societal value, broadcasts of a political nature, codes of conduct and ethics); and (iii) distribution aspects (i.e. how will media content be distributed and reaching of citizens be secured), and for the citizens – (iv) by which means can they access the relevant information (right to access information, media ownership transparency, accountability of public service media) and (v) do they have instruments at their disposal to “have a say” on media output (e.g. through complaint procedures and ombudsmen or via participation in governing bodies of relevant institutions).

Pursuing the aim to render country reports as “vivid” as possible, national experts were not only asked to portray the relevant legal, regulatory and market conditions as deduced from constitutional, ordinary law and self-regulatory provisions, combined with figures on the actual status of the markets, but should also highlight how the relevant norms are being applied in practice. To this end, additionally the jurisprudence and case-law of regulatory bodies had to be taken into account when drafting the country reports. Furthermore, when analysing the existing conditions for freedom of the media and the right of the citizens to be informed, correspondents were invited to give recommendations with a view to improving the situation, by regulatory or other measures, where appropriate.

To portray the actual state of affairs - within the framework provided, and the means available, for the present study - could realistically be pursued on the basis of global, objective indicators only. The *market analysis* thus is mainly based on supply-side figures, sketching a picture of media organisations in the radio, TV, print and online sectors and their respective market shares and shares in the overall advertising market, accompanied by information on the operators of distribution platforms for electronic media.

With the objective of allowing the reader to assess the situation of a given Member State in its own right, or to contrast the situation in two or more Member States, all country reports have been reproduced in their entirety, rendering the basis on which our *conclusions and recommendations* are founded as transparent as possible. When aggregating individual "results" of the research conducted, the EMR deliberately opted to concentrate on a number of specific issues which were deemed of high importance or specific current interest; this is without attaching any kind of value judgement on the importance of other elements of discussion that might otherwise, or at a later stage, show to have a special bearing on the future discussion on whether the freedoms of the media and of the citizens could be candidates for devoting additional attention to them.

### **1.3. The European Legal and Policy Framework**

#### **1.3.1. Media law aspects of European Union law: the *acquis* and its impact on the media law of the Member States**

Besides the benchmark which the Council of Europe and particularly the ECtHR set with respect to Art. 10 ECHR on the media law (see *infra* 1.3.2.), the existing *acquis* of European Union (media) law, also as interpreted by the jurisprudence of the European Court of Justice (ECJ), additionally is of major relevance for the Member States. It should be recalled that Art. 10 ECHR becomes kind of "a part" of the *acquis* as Art. 11 of the Charter of Fundamental Rights of the European Union<sup>1</sup> (CFREU), read together with Art. 52(3) CFREU, has not only to be interpreted in the light of Art. 10 ECHR, but shall have "the meaning and scope" of Art. 10 ECHR.

Art. 11 CFREU reads as follows:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The freedom and pluralism of the media shall be respected."

And Art. 52(3) CFREU reads:

"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. (...)."

The *acquis* is relevant, first of all, for the Member States that acceded to the EU in 2007 (and thus were not covered by the 2004 study): Bulgaria and Romania. For them, but also for the countries whose accession has become effective in 2004 or at an earlier stage, it is important to note that - before joining the EU - they have to bring their

national laws into line with the EU *acquis*, especially including – in the audiovisual field – the Audiovisual Media Services Directive (Directive 2010/13/EU<sup>2</sup>, AVMSD). Promoting the alignment with European standards on media legislation and in particular the AVMSD is one of the initiatives of the European Commission's pre-accession strategy. Furthermore, the alignment of legislation and practices with European standards on media in accordance with fundamental democratic principles is an element of the so-called "Copenhagen criteria" (see *infra*), and is crucial for the promotion of cultural diversity.

This chapter aims at providing an overview of relevant legal provisions of the Treaty of the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), Secondary European Union legislation in the present field – especially the AVMSD, as well as relevant case-law of the Courts of the European Union. It will furthermore discuss the implications of the CFREU for the freedom of the media and the citizens' right to be informed.

#### 1.3.1.1. Obligations deriving from accession to the EU

Besides the obligations for Member States deriving from European Union law, states that assume the status of "candidate" and "potential candidate" countries are already establishing regulations which are influenced by EU law. The reason for this lies within the enlargement procedure: a country that wishes to join the EU submits an application for membership to the Council, which asks the European Commission to assess the applicant's ability to meet the conditions of membership. If the Commission delivers a positive opinion, and the Council unanimously agrees a negotiating mandate, negotiations are formally opened between the candidate country and all of the EU Member States.

The conditions for membership mainly follow from Arts. 6 and 49 TEU. Especially the so-called "Copenhagen criteria", which stipulate that

"[M]embership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union",

are essential for the (potential) candidate countries; hereunder, the protection of human rights, particularly freedom of expression, and the rule of law (including e.g. administrative capacity) feature prominently.<sup>3</sup> This latter element translates, according to the European Commission, into the requirement that

"the candidate country [...] ha[s] created the conditions for its integration by adapting its administrative structures. While it is important for EU legislation to be transposed into national legislation, it is even more important for the legislation to be implemented and

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<sup>1</sup> Proclaimed by the European Parliament, the Council of Ministers and the European Commission on 7 December 2000, newly published in the adapted version in: [2010], OJ C 83, p. 389.

<sup>2</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version), [2010] OJ L 95, p. 1.

<sup>3</sup> See also the European Council Declaration (Madrid Summit 1995): "The European Council also confirms the need to make sound preparations for enlargement on the basis of the criteria established in Copenhagen and in the context of the pre-accession strategy defined in Essen for the CCEE; this strategy will have to be intensified in order to create the conditions for the gradual, harmonious integration of those States, particularly through the development of the market economy, the adjustment of their administrative structures and the creation of a stable economic and monetary environment."

enforced effectively through the appropriate administrative and judicial structures. This is a prerequisite of the mutual trust needed for EU membership.”<sup>4</sup>

In particular, the Commission analyses whether the requirements have been met by the (potential) candidate countries and describes the “*status quo*” in their regular “progress reports”. In the case of negotiations being formally underway, i.e. the Council having unanimously decided – on the basis of a Commission opinion – in favour of the application, for present purposes the chapters referring to “Culture and audio-visual policy” (formerly Chapter 20, now: Chapter 10: “Information society and media”) are most relevant, since they cover the alignment with the *acquis* relevant for these sectors.<sup>5</sup> The same importance applies to the establishment of legal provisions that safeguard the fundamental rights of the CFREU. With regard to the “media sector” especially the freedom of thought (Art. 10 CFREU) and the freedom of expression and information (Art. 11 CFREU) can be named.

The Council will decide to (provisionally) close a negotiating chapter, after the Commission is satisfied with the progress being made.<sup>6</sup> Undertakings accepted by the acceding country thus become part of the relevant obligations that, finally, will become an integral component of the (draft) accession treaty and the accompanying act of accession.

#### 1.3.1.2. Relevant legal framework

##### 1.3.1.2.1. Primary European Union law

According to Art. 2 TEU, the EU is founded on various basic values and principles that are common to all the Member States in a society in which pluralism, among other things, prevails. In view of the role played by the press as well as public service and commercial broadcasting organisations in media pluralism and, thereby, in the freedom of expression, a role that is recognised in all Member States’ constitutions, Art. 2 TEU has an important function in terms of directing the application of the EU treaties and their provisions.

- Fundamental Freedoms

The Fundamental Freedoms as established by the TFEU are essential in primary EU Law. It is the free movement of goods, regulated in Arts. 34 *et seq.* TFEU, the free movement of persons (including workers as well as the freedom of establishment), regulated in Arts. 45 *et seq.* TFEU, the freedom to provide services, regulated in Arts. 56 *et seq.* TFEU, and the free movement of capital, regulated in Arts. 63 *et seq.* TFEU, that are of particular importance for the media sector, although the provisions on the “four freedoms” contain no specific reference to media or broadcasting services. In the following, a closer look at the freedom of establishment (as a part of the free movement of persons) and the freedom to provide services is to be taken.<sup>7</sup>

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<sup>4</sup> Cf. [http://ec.europa.eu/enlargement/the-policy/conditions-for-enlargement/index\\_en.htm](http://ec.europa.eu/enlargement/the-policy/conditions-for-enlargement/index_en.htm).

<sup>5</sup> This *acquis* includes the establishing of independent regulatory authorities and the securing of their independence in various regards, cf. Commission Staff Working Paper of 5 November 2008 accompanying the Commission Communication “Enlargement Strategy and Main Challenges 2008-2009” (COM(2008) 674), SEC(2008) 2694, available at: [http://ec.europa.eu/enlargement/pdf/press\\_corner/key-documents/reports\\_nov\\_2008/croatia\\_progress\\_report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/croatia_progress_report_en.pdf), at p. 37.

<sup>6</sup> See also Commission Staff Working Document on the External Dimension of Audiovisual Policy of 14 July 2009, SEC(2009) 1033, p. 15.

<sup>7</sup> The relevance of the other “two freedoms” should, of course, not be underestimated: The free movement of goods could be applicable for “media carrier” like newspapers, magazines, books, DVDs; see, for instance, ECJ, Case 229/83, Leclerc, [1985] ECR 1, para 20; Joined Cases 60 and 61/84, Cinéthèque, [1985] ECR 2605, paras. 10 *et seq.* The free movement of capital could be of relevance for media organisations, when it comes to transferring any amount of capital from one country to another or, for

In general terms, the principle of freedom of establishment enables an economic operator (whether a person or a company) to carry out an economic activity in a stable and continuous way in one or more Member States. The principle of the freedom to provide services enables an economic operator (providing services in one Member State) to offer services on a temporary basis in another Member State, without having to be established there. Member States must modify national laws that contain unjustified restrictions to the freedom of establishment, or to the freedom to provide services, and that are, therefore, incompatible with these principles.<sup>8</sup> Arts. 45 and 56 *et seq.* TFEU thus require the elimination of all (direct and indirect) discrimination on grounds of nationality as well as any restriction which is liable to prohibit or further impede the activities of economic operators. Member States may only maintain such restrictions in specific circumstances where these are justified by reasons foreseen in Treaty provisions (such as public order in accordance with Arts. 52, 62 TFEU) or by overriding reasons of general interest<sup>9</sup>, for instance – in particular with view to the media sector – on grounds of cultural policy<sup>10</sup>, protection of consumers<sup>11</sup> or of Art. 10 ECHR<sup>12</sup>. Finally, the restrictions must also be proportionate.

- The freedom to provide services

The freedom to provide services was instrumental in liberalising the European broadcasting markets. However, it was the initial point of the ECJ, ruling that broadcasting is protected by the freedom to provide services, in its first major decision (*Sacchi*).<sup>13</sup> Today it is firmly established that Arts. 56 *et seq.* TFEU (ex. Arts. 49 EC-Treaty) cover any form of electromagnetic transmission of information across frontiers, including terrestrial and direct satellite broadcasting and transmission via cable as well as Internet, multimedia and telecommunications services.<sup>14</sup> In the case where the service crosses the border and is accessed by the recipient at his place of residence, the freedom to receive a service shows clear parallelism to the freedom of the citizen to receive information irrespective of frontiers (as protected by Art. 11 CFREU and Art. 10 ECHR), which renders the imposition of restrictions particularly difficult to maintain.<sup>15</sup> The

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instance, when a broadcasting company established in a Member State wants to invest in a broadcasting company established or to be established in another Member State, see ECJ, Case C-148/91, *Veronica*, [1993] ECR I-487. Besides, the free movement of workers, forming part – together with the freedom of establishment – of the free movement of persons, certainly also has a bearing for the media sector, as becomes apparent in the case of actors, cameramen, journalists etc.

<sup>8</sup> Cf. ECJ, Case 33/74, *Van Binsbergen*, [1974] ECR 1299, paras. 7/9 *et seq.* See also a list of the various cases of the ECJ provided by the European Commission, *Guide to the Case Law of the European Court of Justice on Articles 49 et seq. EC Treaty: Freedom to Provide Services*, of 1 January 2001, available at: [http://ec.europa.eu/internal\\_market/services/docs/infringements/art49\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/infringements/art49_en.pdf); and *Guide to the Case Law of the European Court of Justice on Articles 43 et seq. EC Treaty: Freedom of Establishment*, of 1 January 2001, available at:

[http://ec.europa.eu/internal\\_market/services/docs/infringements/art43\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/infringements/art43_en.pdf).

<sup>9</sup> Cf. ECJ, Joined Cases C-34/95, C-35/95 and C-36/95, *De Agostini*, [1997] ECR I-3843, para. 54; ECJ, Case C-352/85, *Bond van Adverteerders*, [1988] ECR 2085, paras. 33 *op cit.*

<sup>10</sup> E.g. ECJ, Case 288/89, *Mediawet I*, [1991] ECR I-4007, paras. 22, 23.

<sup>11</sup> E.g. ECJ, Case C-6/98, *ARD*, [1999] ECR I-7599, para. 50.

<sup>12</sup> E.g. ECJ, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*, [1991] ECR 4007, para. 23. See also the Communication from the Commission of 27 June 2001 on the application of the general principles of free movement of goods and services – Articles 28 and 49 EC – concerning the use of satellite dishes, COM (2001) 351 final, Part II., 2., p. 11.

<sup>13</sup> E.g. ECJ, Case 155/73, *Sacchi*, [1974] ECR 409, para. 6. Since then, the ECJ passed a large number of judgments in the field of audiovisual media, e.g. ECJ, Case 52/79, *Debauve*, [1980] ECR 833, para. 8; ECJ, Case 62/79, *Coditel*, [1980] ECR 881, paras. 14 *et seq.*; ECJ, Case C-260/89, *ERT*, [1991] ECR I-2925, paras 20-25; ECJ, Case C-353/89, *Commission v. Netherlands (Mediawet II)*, [1991] ECR I-4069, para 38; ECJ, Case C-211/91, *Commission v. Belgium*, [1992] ECR I-6757, para. 5; ECJ, Case C-23/93, *TV 10*, [1994] ECR I-4795, paras. 13 and 16; ECJ, Case C-429/02, *Baccardi France*, [2004] ECR I-6613.

<sup>14</sup> Cf. K. Böttcher/O. Castendyk, *Comments on Art. 49 EC*, in: *Castendyk/Dommering/ Scheuer*, *European Media Law*, Alphen a/d Rijn 2008, Art. 49 EC, *rec.* 4.

<sup>15</sup> ECJ, Case C-17/00, *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort*, [2001] ECR I-09445, para.35.

introduction of a municipal tax on satellite dishes has the effect of a charge on the reception of television programmes transmitted by satellite which does not apply to the reception of programmes transmitted by cable, since the recipient does not have to pay a similar tax on that method of reception. Under this consideration, the ECJ has ruled that “the tax on satellite dishes introduced by the tax regulation is liable to impede more the activities of operators in the field of broadcasting or television transmission established in Member States other than the Kingdom of Belgium, while giving an advantage to the internal Belgian market and to radio and television distribution within that Member State”, and that therefore was found incompatible with the freedom to provide services.

The provisions on freedom to “provide” services also apply to the freedom to “receive” services, where the recipient of services crosses borders,<sup>16</sup> as well as to scenarios involving both the provider and recipient of services crossing borders and exchanging services in another Member State.<sup>17</sup> It is essential that the provisions on freedom to provide services do not apply to activities that take place only within a single Member State. The ECJ distinguishes several (non-discriminatory) measures that do also have a restrictive impact on the freedom to provide services, especially in the cases *Baccardi France* and *Commission v. France (Loi Evin)*: Here, the owners of advertising hoardings were subject to restrictions, since they had to refuse, as a preventive measure, any advertising for alcoholic beverages if the sporting event was likely to be retransmitted in France<sup>18</sup>, or, rather, the transmission of television programmes was restricted, since French broadcasters had to refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic beverages marketed in France might be visible.<sup>19</sup> However, these rules on television advertising have been justified as they relate to the protection of public health within the meaning of Art. 52(1) TFEU of the Treaty. Still, all kinds of restrictions on the freedom to provide services set by the States must be carefully assessed on a case-by-case basis, especially taking into account Art. 10 ECHR.

The requirement of the Italian Government that a trade-fair organiser must have a particular legal form or status, by introducing the condition of a permanent national or local headquarters, and also the requirement that he conducts his business of trade-fair organiser on an exclusive basis or the prohibition of pursuing profit were considered by the ECJ as constituting significant restrictions of both freedom to provide services and freedom of establishment. The Court noted that it is difficult to envisage reasons in the public interest which might justify such restrictions and hold that the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the Treaty.<sup>20</sup>

Ruling in an other case regarding the television broadcasting rights and the exclusive licences to broadcast in a single Member State, by bewaring the balance between the freedom to provide services as enshrined in Art. 56 TFEU and the competition (Art. 101 TFEU), the ECJ concluded that, if the national legislation contains provisions with the effect of prohibiting the import, sale or use of foreign decoder cards, this is contrary to the principle of the freedom to provide services and cannot be objectively justified by reference to either the protection of intellectual property rights, nor the protection of closed-periods.<sup>21</sup>

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<sup>16</sup> ECJ, Joined Cases 286/82 and 26/83, *Luisi & Carbone*, [1984] ECR 377, paras. 10-16.

<sup>17</sup> ECJ Case 76/81, *Transporoute*, [1982] ECR 417, para. 14; Case C-55/98, *Vestergaard*, [1999] ECR I-7641, para. 18.

<sup>18</sup> ECJ, Case C-429/02, *Baccardi France*, [2004] ECR I-6613, para. 35.

<sup>19</sup> ECJ, Case C-262/02, *Commission v. France*, [2004] ECR I-6569, para. 26.

<sup>20</sup> ECJ, Case C-439/99, *Commission v. Italy*, [2002] ECR 2002 I-00305, para. 32.



- The freedom of establishment

The freedom of establishment includes the right "to set up and manage" undertakings, in particular companies or firms. This characteristic is fulfilled, as distinct from the provisions of the free movement of capital, where the acquisition of a shareholding of a company in a Member State by an investor/a company

"[...] gives (...) definite influence over that company's decisions and allows (...) to determine that company's activities"<sup>22</sup>.

The ECJ lays the main focus on the question as to how the influence on a company is exercised. This criterion seems to be a crucial tool for the distinction between the two freedoms. However, the distinction based on this criterion may not be evident in all cases.<sup>23</sup> Once affirmed, possible restrictions must be observed.

The European Commission had expressed serious doubts regarding four amendments of the Hungarian Media Law, in the form it had been adopted on 21 December 2010, as it was not regarded compliant with EU law. These amendments, which the Hungarian authorities agreed to modify, concerned disproportionate application of rules on balanced information, application of fines to broadcasters legally established and authorised in other Member States, rules on registration and authorisation of media service providers and rules against offending individuals, minorities or majorities.<sup>24</sup>

- Particularly: Restrictive measures aimed at fostering media pluralism

In the following a special look should be taken on possible constraints on media ownership in a Member State that can have a restrictive effect on companies wishing to establish themselves there. This is the case, for instance, where a broadcasting company is already established in a Member State and the levels of the candidates' holdings and control in other Member States are counted towards the limits, or where an applicant for a broadcasting licence, who already operates a channel legally in another Member State, which is retransmitted in the state in which the licence is applied for, will, in that case, reach the concentration thresholds more rapidly; applicants without channels in other Member States will have an advantage. The question is then, whether the restriction on the freedom of establishment lies within the "general interest" and is proportional according to its legitimate purpose.<sup>25</sup> One should bear in mind that the fostering of "media pluralism" could be a restriction in the "general interest", especially if measures are taken favouring operators which belong to groups representing and linked to the local community and contributing towards strengthening the regional economy.

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<sup>21</sup> ECJ, Case C-403/08 and C-429/08, *Football Association Premier League and Others v. QC Leisure and Others Karen Murphy v Media Protection Services Ltd.*, [2011], para. 117, para. 123.

<sup>22</sup> ECJ, Case C-284/06, *Burda*, [2008] ECR I-4571, para. 69.

<sup>23</sup> Cf. also Germelmann, *Konkurrenz von Grundfreiheiten und Missbrauch von Gemeinschaftsrecht – Zum Verhältnis von Kapitalverkehrs- und Niederlassungsfreiheit in der neueren Rechtsprechung*, EuZW 2008, p. 596 et seq.

<sup>24</sup> The EU law in question comprises the Audiovisual Media Services (AVMS) Directive, the rules laid down in the Treaty on the Functioning of the European Union on the freedom of establishment and the freedom to provide services (Articles 49 and 56 respectively) and the Charter of Fundamental Rights (Article 11 on freedom of expression). After having been strongly and repeatedly criticised by European Union institutions, by the OSCE [cf. <http://www.osce.org/fom/74687>], the Council of Europe [Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media, CommDH(2011)10, available at <https://wcd.coe.int/ViewDoc.jsp?id=1751289>] and also by the national Constitutional Court, the Media Law in Hungary has recently been amended and is claimed to now having found concordance with the new Hungarian Fundamental Law, which entered into force at the beginning of 2012; however, serious concerns still remain [cf. <http://www.osce.org/fom/90823> or <http://www.politics.hu/20120516/council-of-europe-maintains-serious-concerns-over-hungary-media-law/>].

<sup>25</sup> The so-called "Gebhard-Formula"; ECJ, Case C-55/94, *Gebhard*, [1995] ECR I-4165.

The question as to whether national (state induced) measures fostering media pluralism could justify restrictions of the fundamental freedoms is one of the most disputed legal issues in view of the role which the fundamental freedoms play in the field of European media law. This question becomes even more significant, if one supports the idea of "a right to access" of media companies/providers to foreign (national) media markets, following from the basic principle of freedom and pluralism of the media in the sense of Arts. 11(2) CFREU, 2 TEU (read together with Art. 10 ECHR).<sup>26</sup> The ECJ has not yet set up a "general rule" in this regard. However, some "basic tendencies" could be drawn from the still leading judgments "*Commission v. Netherlands*", "*Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*", "*Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*" and "*TV10 SA v. Commissariaat voor de Media*" dealing with single provisions of the – then in force – Dutch "*Mediawet*" (Dutch Law of 21 April 1987, governing the supply of radio and television programmes, radio and television licence fees and press subsidies). The ECJ, in general terms, stated that the *Mediawet* is

"designed to establish a pluralistic and non-commercial broadcasting system and thus forms part of a cultural policy intended to safeguard, in the audio-visual sector, the freedom of expression of the various (in particular social, cultural, religious and philosophical) components existing in the Netherlands. [...] Those cultural-policy objectives are objectives relating to the public interest which a Member State may legitimately pursue by formulating the statutes of its own broadcasting organisations in an appropriate manner."<sup>27</sup>

In the case "*Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*" the ECJ dealt with Art. 57(1) *Mediawet*. The provision states that "apart from producing their programmes, the organisations which have obtained broadcasting time may not pursue any activities other than those provided for or authorised by the *Commissariaat voor de Media*" (the Dutch regulatory authority).

According to the ECJ, this provision contributes to the attainment of establishing a pluralistic and non-commercial broadcasting system:

"It seeks to prohibit national broadcasting organisations from engaging in activities which are alien to the tasks assigned to them by the Law or undermine the aims thereof, in the view of the *Commissariaat voor de Media*. Thus, in particular, it provides that the financial resources available to the national broadcasting organisations to enable them to ensure pluralism in the audio-visual sector must not be diverted from that purpose and used for purely commercial ends".<sup>28</sup>

According to this, rules/regulations that prohibit broadcasting organisations established in a Member State from investing in a broadcasting organisation established or to be established in another Member State must at least ensure the pluralistic and non-commercial character of the audiovisual system (in the respective country). Otherwise, a violation of a fundamental freedom by such provisions can be assumed. It may therefore

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<sup>26</sup> Cf. A. Rossnagel/W. Sosalla/T. Kleist, *Der Zugang zur digitalen Satellitenverbreitung, Gutachten im Auftrag der gemeinsamen Stelle 'Digitaler Zugang' der Landesmedienanstalten*, Visitas Verlag GmbH 2004, p. 78, 79.

<sup>27</sup> ECJ, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*, [1991] ECR I-4007, paras. 22, 23; Case C-353/89, *Commission v. Netherlands (Mediawet II)*, [1991] ECR I-4069, paras. 29, 30; Case C-148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR I-487, paras. 9, 10. Also affirmed in ECJ, Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, [1994] ECR I-4795, paras. 18, 25.

<sup>28</sup> ECJ, Case C-148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, *ibid.*, para. 11.



be relevant to adopt rules, which prohibit national broadcasting organisations from setting up commercial radio and television companies abroad – for the purpose of providing services directed towards their State of establishment –, in order to ensure that such organisations cannot improperly evade the obligations deriving from the national legislation concerning the pluralistic and non-commercial content of programmes.

In the case "*Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*" the ECJ assessed Art. 66(1) para. b) *Mediawet*. The provision states that the operator of a cable network may "transmit programmes [...] which are broadcast by a foreign broadcasting body or a group of such bodies as broadcasting programmes, in accordance with the legislation in force in the broadcasting country. If such programmes contain advertisements, they may be transmitted, solely provided that the advertisements are produced by a separate legal person, that they are clearly identifiable as such and clearly separated from other parts and are not broadcast on Sundays, that the duration of such advertisements does not exceed 5% of the total air time utilised, that the broadcasting body fulfils the conditions laid down in Article 55(1) and that the entire revenue is used for the production of programmes. [...]"

This provision contains two "barriers": First, operators of cable networks established in a Member State can only transmit radio or television programmes supplied by broadcasters established in other Member States if those broadcasters satisfy the conditions in their country. Second, if such programmes contain advertisements, they have to fulfil special conditions: especially, such programmes have to be produced by a separate company. The second "barrier" is of particular interest as it relates to the structure of broadcasting bodies established in other Member States. For the Dutch Government the restriction in the *Mediawet* is justified by "imperatives relating to cultural policy" as this policy is "to safeguard the freedom of expression of the various – in particular social, cultural, religious and philosophical – components of the Netherlands, in order that this freedom may be capable of being exercised in the press, on the radio or on television." Although the ECJ recognised that a cultural policy understood in that sense "may indeed constitute an overriding requirement relating to the general interest, which justifies a restriction on the freedom to provide services", it ruled that

"conditions affecting the structure of foreign broadcasting bodies cannot [...] be regarded as being objectively necessary in order to safeguard the general interest in maintaining a national radio and television system which secures pluralism."

The main reason for this ruling was that the Dutch broadcasting bodies did not have to fulfil all the same conditions (especially the obligation imposed on broadcasting organisations in other Member States not to permit a third party to make a profit), which the foreign broadcasting bodies had to observe. As long as restrictions do not apply to national and foreign persons in the same way, such restrictions cannot be justified by a cultural policy aiming to safeguard pluralism. Therefore, the national legislator has to formulate the same requirements for its own nationals and for foreign operators.

In the case "*TV10 SA v. Commissariaat voor de Media*" the ECJ again was asked to interpret the freedom to provide services with a view to Art. 66 of the – then in force – *Mediawet*. However, this time the question was essential, whether the provisions on the freedom to provide services are to be interpreted as precluding a Member State from treating a broadcasting body constituted under the law of another Member State and established in that State, as a domestic broadcaster if its activities are wholly or principally directed towards the territory of the first Member State (against the background that the broadcasting body was allegedly established in the other Member State in order to avoid the rules which would be applicable to it if it were established

within the first Member State). The ECJ came to important findings: it decided that a radio and television organisation which establishes itself in another Member State in order to provide services there which are intended for the first State's territory could be regarded as a domestic broadcaster. The treatment of a broadcasting body constituted under the law of another Member State as equal to a domestic broadcaster does not *eo ipso* jeopardise the right to freedom of expression guaranteed by Art. 10 and Art. 14 of the ECHR, as long as a national "media policy" (here: the Netherlands broadcasting policy in form of the *Mediawet*) upholds pluralism, which is – according to the ECJ –

"[...] intended to preserve the diversity of opinions, and hence freedom of expression, which is precisely what the European Convention on Human Rights is designed to protect."<sup>29</sup>

In the follow-up to the earlier of the above mentioned ECJ judgements, and after the agreement on the Treaty of Maastricht in 1991, i.e. about 20 years ago, the European Commission had already started to take significant preparatory steps towards the formulation of a legal instrument aimed at a minimum level of harmonisation of national laws in the field of protecting media pluralism through regulations market power based on the measurement of audience shares.<sup>30</sup> However, this initiative by the then-competent Member of the Commission has met harsh criticism, particularly by some Member States, who essentially questioned the competence of the EU (European Community), at that time, to introduce such rules and argued that the issue, since it formed part of the cultural competence of Member States and also was covered by the subsidiarity principle, should rest to be dealt with at Member States level alone. Furthermore, arguments were put forward against the necessity of any Community legal measure in this field, since allegedly media markets would continue to maintain a (purely or mainly) national (or even regional) character. Finally, it was argued that EU rules on competition would provide for sufficient safeguards in this respect.

What should be noted in this context is, firstly, that the issues of concentration and pluralism or media ownership had been addressed against the background of repeatedly formulated requests by the European Parliament to this respect<sup>31</sup>, and seen, at least partly, as a matter of both the completion of the Internal Market and the audiovisual policy. Since the cases underlying the ECJ judgements had shown that, in the absence of harmonisation at a European level, there existed potential hindrances to the exercise of the freedom of establishment and the freedom to provide services, Community action grounded on legal bases to harmonise national law had been envisaged. To date, however, no such instrument has been proposed; instead, a certain change of perspective has been noticed in the approach by the European Commission – towards transparency.<sup>32</sup>

Secondly, it should be noted that the assessment of the question whether the EU has competence to regulate media ownership issues may have gained new momentum (i) through the adoption of the Treaty of Lisbon, including the CFREU, and (ii) in view of the intended accession to the ECHR, and (iii) with regard to the conclusion by the EU and its

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<sup>29</sup> ECJ, Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, [1994] ECR I-4795, para. 25.

<sup>30</sup> COM (92) 480 final, of 23 December 1992; see also COM (94) 353 final, of 5 October 1994. The draft proposals for Directives prepared subsequently, in 1996 and 1997, have not been formally adopted by the College of Commissioners and not published officially.

<sup>31</sup> European Parliament resolution of 20 January 1994, OJ C 44, 14.2.1994, p. 177; European Parliament resolution of 27 October 1994, OJ C 323, 21.11.1994, p. 157; European Parliament resolution of 20 November 2002 on media concentration, OJ C 025, 29.1.2004, p. 205; see also European Parliament resolution of 25 September 2008 on concentration and pluralism in the media in the European Union (2007/2253(INI)).

<sup>32</sup> [http://ec.europa.eu/information\\_society/media\\_taskforce/pluralism/index\\_en.htm](http://ec.europa.eu/information_society/media_taskforce/pluralism/index_en.htm).

Member States of the UNESCO Convention on the Diversity of Cultural Expressions (for more on this see *infra*). To study these issues more thoroughly, the European Commission recently announced to have requested, from the EUI in Florence, an update on the legal bases existing in EU law to come forward with related action.<sup>33</sup>

- Rules on Competition

The basic rules on competition are Art. 101 TFEU (prohibition on cartels), Art. 102 TFEU (prohibition on the abuse of a dominant position), Art. 106 TFEU (as a special competition rule concerning public undertakings and undertakings bestowed with special or exclusive rights), the Council Regulation 139/2004/EC<sup>34</sup> (Merger Control Regulation, ECMR), and Arts. 107 ff. TFEU (State aid). The latter will be examined in an “extra-part” (*cf. infra*).

- Prohibition of cartels

Art. 101 TFEU aims to ensure that “companies play fair” by taking action against all business practices between two or more undertakings that restrict free competition in the internal market.<sup>35</sup> To assess this, it – firstly – has to be clarified whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object, or an actual or potential anti-competitive effect. Secondly, it has to be determined whether a restrictive agreement also produces pro-competitive benefits that outweigh the restricting effects.<sup>36</sup> In the media sector, the question as to whether a cartel should be prohibited or not plays an important role especially when it comes to collective or exclusive agreements on the selling or acquisition of sports rights<sup>37</sup>, or with regard to the collective management of the author’s right to communicate and reproduce his works (online).

In its judgement of 4 October 2011<sup>38</sup>, the ECJ concluded that the grant of exclusive satellite broadcasting licences for the territory of one or more Member States, which included a provision requiring the licensee not to supply decoding cards enabling viewing of PL games outside the licensed territory, restricted competition contrary to Article 101(1) of the TFEU.

- Prohibition of the abuse of a dominant position

Art. 102 TFEU prohibits “any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it [...] in so far as it may affect trade between Member States”. While Art. 101 TFEU aims at preventing the creation of new market power by means of agreements, decisions, concerted practices or concentrations, Art. 102 TFEU is directed towards the abuse of market power, where such power already

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<sup>33</sup> Presentation by *Dr Geraard de Graaf*, DG Information Society and Media, during the LIBE committee meeting on 20/21 March 2012.

<sup>34</sup> Council Regulation 139/2004/EC of 20 January 2004 on the Control of Concentrations between Undertakings, [2004] OJ L 24, p. 1.

<sup>35</sup> *Cf. M. Elspaß/M. Kettner*, Comments on Art. 81 EC, in: *Castendyk/Dommering/ Scheuer*, European Media Law, Alphen a/d Rijn 2008, Art. 81 EC, *rec. 1*.

<sup>36</sup> Commission, Notice 2004/C 101/08, Guidelines on the Application of Art. 81(3) EC, [2004] OJ C 101/97, para. 11.

<sup>37</sup> Collective marketing (also an issue in the context of the prohibition on the abuse of a dominant position) of the right to broadcast certain sport events, for instance, has been in the focus of EC antitrust law on several occasions; see Commission, Decision 2003/778/EC, UEFA Championsleague (Case C.2/37.398), [2003] OJ L 291/25; Commission, Notice, FA Premier League (Cases C.2/38.173 and 38.463), [2003] OJ L 115, p. 3.

<sup>38</sup> ECJ, Case C-403/08 and C-429/08, Football Association Premier League and Others v QC Leisure and Others *Karen Murphy v Media Protection Services Ltd.*, [2011].

exists.<sup>39</sup> To determine whether an undertaking has abused its dominant position, one needs firstly to define the relevant product and geographic market(s)<sup>40</sup>, secondly to determine the dominance of the undertaking, and thirdly to decide whether the undertaking is acting in an abusive manner and therefore affects trade between Member States. The field of collective administering of copyrights<sup>41</sup> and the refusal to supply media content<sup>42</sup> are two of the most important fields of application for Art. 102 TFEU in the media sector.

- Public undertakings and special rights granted to undertakings

Art. 106 TFEU aims to prevent Member States from enacting or maintaining in force measures relating to public undertakings and undertakings to which Member States grant special or exclusive rights which derogate from other obligations under the Treaty, especially from the competition rules in Arts. 101 to 109 TFEU. According to the ECJ, Art. 106 TFEU must be interpreted as being intended to ensure that the Member States do not take advantage of their relations with those undertakings in order to evade the prohibitions laid down by other Treaty rules addressed directly to them, by obliging or encouraging those undertakings to engage in conduct which, if engaged in by the Member States, would be contrary to those rules.<sup>43</sup> However, the granting of a government broadcasting monopoly has been held not to form *per se* an infringement upon this provision.<sup>44</sup> Member States are (only) obliged not to adopt measures which lead to enterprises acting contrary to European Union law, even if they are State enterprises or enterprises which have been granted special or exclusive rights.<sup>45</sup>

- Merger control

The European Community Merger Regulation (ECMR) applies – in principle – to all concentrations with a Union-wide dimension (Art. 1(1) ECMR), which can be assumed, if the combined aggregate world-wide turnover of all the undertakings concerned is more than EUR 5 billion and the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one specific Member State (Art. 1(2) ECMR). Art. 1(3) ECMR sets out special thresholds catching concentrations which, even though they are below the thresholds of Art. 1(2) ECMR, show consequences in at least three Member States. It is the task of the Commission to delineate the relevant product and geographic market and to determine

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<sup>39</sup> See D.G. Goyder, *EC Competition Law* (5<sup>th</sup> edn, Oxford University Press, 2009), pp. 324 *et seq.*

<sup>40</sup> For market definitions in the media sector, see R. Capito, in: *EMR, Media Markets Definitions 2003 and 2005*.

<sup>41</sup> E.g. Commission, Decision 71/224/EEC, GEMA I (Case IV/26.760), [1971] OJ L 134/15; Decision 72/268/EEC, GEMA II (IV/26.760), [1972] OJ L 166/22 and Decision 82/204/EEC, GEMA III (IV/29.971), [1982] OJ L 94/12; see also ECJ, Case 7/82, *GVL v. Commission*, [1983] ECR 483; ECJ, Case 127/73, *BRT v. SABAM*, [1974] ECR 313; ECJ, Case 395/87, *Tournier*, [1989] ECR 2521.

<sup>42</sup> E.g. Commission, Decision 2003/778/EC, *UEFA Championsleague* (Case C.2/37.398), [2003] OJ L 291/25; Commission, Decision 2005/396/EC, *Bundesliga* (Case C.2/37.214), [2005] OJ L 134/46. The leading case on refusal to grant access to content is *Magill*, ECJ, *Joined Cases C-241/91 and C-242/91, Magill*, [1995] ECR I-743.

<sup>43</sup> ECJ, Case C-157/94, *Commission v. Netherlands*, [1997] ECR I-5699, para. 30.

<sup>44</sup> The ECtHR ruled in 1993, that a ban on setting up commercial stations in Austria was in breach of Art. 10 ECHR (see below). This means that the legal obligations under Art. 10 ECHR for the Member States are more far-reaching than under Art. 106 TFEU.

<sup>45</sup> *Cf.* ECJ, Case C-260/89, *ERT*, [1991] ECR I-2925, para. 12; Case C-41/90, *Höfner and Elser*, [1991] ECR I-1979, para 29; J.-D. Braun, *Comments on Art. 86 EC*, in: *Castendyk/Dommering/Scheuer, European Media Law, Alphen a/d Rijn 2008, Art. 86 EC*, paras. 8, 9.

whether a concentration is compatible with the common market by conducting the so-called SIEC-test<sup>46</sup> under Art. 2(3) ECMR.<sup>47</sup>

- Particularly: EU rules on State aid

The fundamental provision of European law governing the evaluation of public funding systems for broadcasting, cinema/film, press or (Internet-)broadband is Art. 107(1) TFEU. In principle, this provision prohibits aid granted to certain undertakings by a Member State or through State resources which distorts competition and affects trade between Member States. Art. 106(2) TFEU provides an exception in favour of undertakings entrusted with the operation of services of general economic interest.<sup>48</sup> Art. 107(2) and (3) TFEU also provide a limited derogation from the rules of the Treaty. Of particular interest for the media sector are the exemptions to facilitate the development of certain economic activities or of certain economic areas within the meaning of Art. 107(3)(c) TFEU and for cultural State aid as defined in Art. 107(3)(d) TFEU.

Small amounts of State aid may be exempted from the above-mentioned rules, since they do not have a potential effect on competition and trade between Member States. The Commission Regulation on so-called *de minimis* aid<sup>49</sup> provides that State aid measures shall be deemed not to meet all the criteria of Art. 107(1) TFEU, and shall be exempt from the notification requirement of Art. 108(3) TFEU, if they fulfil a number of conditions, namely (1) the ceiling for the aid covered by the *de minimis* rule is in general EUR 200,000 per undertaking over any three fiscal-year period (in the present time of financial and economic crisis, the Commission has considered it necessary to temporarily increase the *de minimis* threshold to EUR 500,000 (cash grant) per undertaking<sup>50</sup>); the ceiling applies to the total of all public assistance considered to be *de minimis* aid. It will not affect the possibility of the recipient to obtain other State aid under schemes approved by the Commission; the regulation only applies to "transparent" forms of aid, which means aid for which it is possible to determine in advance the gross grant equivalent. The General Block Exemption Regulation<sup>51</sup> identifies aid for general training measures, up to an aid intensity of 80%, as State aid that can be considered acceptable. Such training aid, not exceeding EUR 2 million per training project, is also exempted from individual notification.

<sup>46</sup> Cf. the analysis of the meaning of the SIEC-test ("significant impediment of effective competition") N. Horner, *Unilateral Effects and the EC Merger Regulation – How The Commission Had its Cake and Ate it Too*, [2006] *Hanse Law Review*, p. 23 et seq.; S. Baxter/F. Dethmers, *Unilateral Effects Under the European Merger Regulation: How Big is the Gap?*, [2005] *ECLR* 380 et seq.; C.-D. Ehlermann/S. B. Völcker/G. A. Gutermuth, *Unilateral Effects: The Enforcement Gap under the Old EC Merger Regulation*, [2005] *World Competition* 28(2), p. 193 et seq.

<sup>47</sup> The Commission has dealt with various mergers under the ECMR, e.g. Decision 2005/188/EC, *Sony/BMG* (Case COMP/M.3333), [2005] OJ L 63, p. 30; Decision 2007/595/EC, *Universal/BMG Publishing* (Case COMP./M.4404), [2007] OJ L 230, p. 12.

<sup>48</sup> Art. 14 TFEU emphasises the importance of these services. Under this provision, the European Parliament and the Council can - without prejudice to the competence of Member States (see below) - in future, by means of regulations, establish principles and conditions, *particularly economic and financial conditions*, for the functioning of these services.

<sup>49</sup> Commission Regulation (EC) N 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, [2006] OJ L 379, p. 5.

<sup>50</sup> Communication from the Commission - Temporary framework for State aid measures to support access to finance in the current financial and economic crisis (consolidated version of the Temporary Framework adopted on 17 December 2008, as amended on 25 February 2009), [2009] OJ C 83, p. 1. Communication of the Commission — Temporary Union framework for State aid measures to support access to finance in the current financial and economic, [2011] OJ C 006, p. 0005 - 0015.

<sup>51</sup> Commission Regulation (EC) No 800/2008 of 6 August 2008, declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (Text with EEA relevance), OJ [2008] L 214, p. 3.



- Financing public service broadcasting and effective supervision of the fulfilment of the public service broadcasting obligations

The far-reaching EU State aid rules are, so to speak, "specified" in further "European rules" that need to be taken into account<sup>52</sup>:

The 1997 Amsterdam Protocol<sup>53</sup> stipulates that the Member States can fund public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit and does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest.<sup>54</sup>

The European Commission confirmed, in line with the Amsterdam Protocol, its approach to the examination of public funding of audiovisual services (again) in its 2009 Broadcasting Communication<sup>55</sup>, stating that the Member States are "free to choose" the means of financing public service broadcasting.<sup>56</sup> Funding schemes are divided into "single funding" and "mixed funding". The "single funding" category comprises all systems in which public service broadcasting is financed only through public funds, in whatever form. "Mixed funding" (previously known as "dual funding") systems comprise a wide range of schemes, where public service broadcasting is financed by a combination of State funds and revenues from commercial activities, such as the sale of advertising space or programmes and the provision of services against payment. In addition, Rec. 77 of the 2009 Broadcasting Communication states, with regard to the control of funding systems for public service broadcasting, that the Member States:

"[...] shall ensure regular and effective control of the use of public funding, to prevent overcompensation and cross-subsidisation, and to scrutinise the level and the use of 'public service reserves'. It is within the competence of Member States to choose the most appropriate and effective control mechanisms in their national broadcasting systems, also taking into account the need to ensure coherence with the mechanisms in place for the supervision of the fulfilment of the public service remit."

Here, the Commission mentions the crucial aspect of the dual control over the use of public funding. There are two types of control: financial control over how funds are used and content-related control aimed at guaranteeing the fulfilment of the public service remit. Still, both forms of control should be viewed together, since the evaluation of the proper use of funds and that of the fulfilment of the public service remit are linked

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<sup>52</sup> See C. Bron, "Financing and supervision of public service broadcasting", IRIS plus 2010-4, pp. 7 ff, on current trends on the financing of public service broadcasting; M. Ridinger, "The Public Service Remit and the New Media", IRIS plus 2009-6, pp. 7 ff.; and EMR *et al.*, "Public Service Media According to Constitutional Jurisprudence – The Human Rights and Constitutional Law Dimension of the Role, Remit and Independence", 2 July 2009, pp. 15 *et seq.* (available at: [http://www.ebu.ch/en/legal/other/EMR\\_Study\\_PSM.php](http://www.ebu.ch/en/legal/other/EMR_Study_PSM.php)) with regard to current trends on the public service remit.

<sup>53</sup> Treaty of Amsterdam amending the Treaty of the European Union, the Treaties Establishing the European Communities and certain related acts – Protocols – Protocol on the Treaty Establishing the European Community – Protocol on the system of public broadcasting in the Member States of 1 May 1997, [1997] OJ C 340, 1997, p. 109 (now: Protocol No. 29, attached to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon, 13 December 2007).

<sup>54</sup> Incidentally, these provisions correspond with the Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, on 25 January 1999 concerning public service broadcasting, [1999] OJ C 30, p. 1, Rec. 2.

<sup>55</sup> Communication from the Commission of 2 July 2009 on the application of State aid rules to public service broadcasting (Text with EEA relevance), [2009] OJ C 257, p. 1. The 2009 Broadcasting Communication replaces the Communication from the Commission on the application of State aid rules to public service broadcasting of 15 November 2001, [2001] OJ C 320, p. 5.

<sup>56</sup> 2009 Broadcasting Communication, *ibid.*, Rec. 58. However, this is on condition that the Commission has verified, under Art. 106(2) TFEU, that the State funding does not affect competition in the common market in a disproportionate manner (rec. 59).

together. In its judgment of 26 June 2008 in the *SIC v. Commission* case<sup>57</sup> regarding measures by the Portuguese Republic for the public service broadcaster RTP in order to finance the public service remit, the Court refers to the statements of the Amsterdam Protocol and to the Resolution of the Council and of the Member States of 25 January 1999 concerning broadcasting.

On the questions of whether the remit is fulfilled by public service broadcasting and whether compliance with financial requirements is secured, the Court distinguishes two manners of such an examination:

Firstly, it is necessary to check whether the quality standards are met, since these requirements, especially at the national level, are the key feature of services of general economic interest in the broadcasting sector. There is, the Court says, no reason for State funding to be continued if the public service broadcasters do not adhere to any particular quality standards and thus operate on the market like any other providers, such as the commercial broadcasters. This is a remit to be attributed to supervisory authorities/bodies at national level (only).

A different question, according to the Court, is whether the services commissioned have actually been provided in the way determined in advance and whether the costs corresponding to these services have not been exceeded. Here, the Commission is able to carry out checks: it can, for example, consult audits by external auditors if they contain information "relevant to the assessment of the costs for the purposes of its assessment of whether the aid is proportional within the context of Art. 86(2) ECT". Only then is it possible to conduct a systematic examination of the cost-performance ratio with respect to the remit.

The Commission recognises that it is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service broadcasting obligations. Especially, the establishment of an independent (regulatory) body in the audiovisual sector is deemed the preferred way to carry out the supervising functions assigned to it in an effective manner. Consequently, the Commission recommends that public service broadcasters be monitored by a body *independent* from the broadcaster. This body should have *appropriate powers and resources* to carry out a regular supervision and impose possible remedies. The independent body must monitor the actions of the public service broadcaster in order to ensure that national definitions of public service broadcasting remits are underpinned by independent, robust and enforceable mechanisms to *monitor* and render entrusted broadcasters *accountable* for the fulfilment of the associated obligations and for the level of public funding (and regulatory assets) assigned to this purpose.

With regard to supervision of the fulfilment of the public service obligations, para. 54 of the Broadcasting Communication states:

"[...] Such supervision would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies in so far it is necessary to ensure respect of the public service obligations."

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<sup>57</sup> CFI, Case T-442/03, *SIC – Sociedade Independente de Comunicação, SA v Commission of the European Communities*, [2008] ECR, p. II-1161.

For financial control mechanisms to be effective, however, the Communication deems it necessary that these be “carried out by an external body independent from the public service broadcaster at regular intervals, preferably on a yearly basis” (para. 78 of the Broadcasting Communication).

- Aid Schemes for the Press

In the absence of specific EU guidelines for dealing with State aid to the press sector, the Commission (mostly) assesses measures directly under Art. 107(3)(c) TFEU.

In 2008, for instance, the Commission authorised subsidies granted by Finland to newspapers and the corresponding electronic media published in national minority languages, such as Sámi and Romany, and in Swedish, as well as for the production of Swedish-language news services under the terms of Art. 107(3)(c) TFEU. The targeted beneficiaries are small circulation newspapers (with a maximum average circulation of up to 15,000 copies) and the subsidies cannot exceed 40% of the operating costs of the newspapers. The overall budget of the measure is EUR 500,000 per year. In view of the Commission, the scheme contributes to media pluralism and to the protection of minority languages in Finland, while having a limited negative impact on competition and trade between Member States.<sup>58</sup>

In 2010, the Commission approved a (modified) Swedish aid scheme in favour of newspapers. The aid includes a maximum aid level of EUR 4.8 million for metropolitan newspapers over a period of five years, starting from 2011. Extra aid can only be granted to cover up to 40% of the additional costs deriving from the specific situation in the metropolitan newspaper markets (e.g. extra editorial costs and Sunday publishing). Support ceilings were fixed at max 40% of total operating costs for high and medium frequency newspapers and at max 75% for low-frequency newspapers. The beneficiaries of the aid do have reporting obligations to enable the granting authority to verify the use of the aid and, in its form, to establish annual accounts to be submitted to the Commission.<sup>59</sup>

- Aid Schemes to the Development of Broadcasting Technologies/ Broadband Internet

The introduction of “digital video broadcasting over a terrestrial network” (DVB-T) as well as broadband internet have also raised State aid issues in a number of Member States. Especially Art. 107(3)(c) TFEU has played an important role concerning State aid for private broadcasters to induce them to switch from analogue to digital terrestrial television<sup>60</sup>, or in cases dealing with the public funding of broadband Internet connectivity.<sup>61</sup>

In its Communication of 17 September 2003 on the transition from analogue to digital broadcasting, the Commission presented two main conditions for State intervention in the switchover process from analogue to digital: First, the intervention from public

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<sup>58</sup> Commission, State aid N 537/2007, 20 May 2008, Finland – Aid to the press.

<sup>59</sup> Commission, State aid E 4/2008, 20 July 2010, Sweden – Publishing of newspapers.

<sup>60</sup> E.g. CFI, Case T-8/06, FAB v Commission, [2009] ECR II-196; Case T-21/06, Germany v Commission, [2009] ECR II-197; Case T-24/06, MABB v Commission, [2009] ECR II-198; Case T-2/08, LfM v Commission, [2009] ECR II-195; Commission, State Aid C 52/2005, 24 January 2007, Italy – Digital Decoders. The Commission has recently opened two investigations on Spanish National Transition Plan for digitisation and extension of terrestrial television network, see IP/10/1195.

<sup>61</sup> E.g. Commission, State Aid N 622/2003, 16 March 2005, Austria – Digitalisierungsfonds; State Aid N 382/2004, 3 May 2005, France – Mise en place d’une infrastructure haut débit sur le territoire de la région Limousin (DORSAL); State Aid N 263/2005, 20 October 2005, Austria – Breitband Kärnten.



authorities to facilitate and supervise the process could be justified insofar as general interests are at stake; that is, how far there are potential benefits and/or problems for the society as a whole, rather than just for certain groups or individuals. Second, in the case of market failure, meaning that the market powers themselves are not able to fulfil the collective welfare.<sup>62</sup> In its Communication of 24 May 2005, the Commission presented the main obstacles to a rapid switchover (e.g. the absence of political decisions such as a fixed date for the national analogue switch-off or political decisions not to set switch-off dates, and the lack of a common European approach) and factors for a successful change (e.g. an effective strategy to inform consumers about programme availability on digital platforms and the equipment needed to receive such programmes).<sup>63</sup>

In order to determine whether a measure is selective or can be regarded as a state aid, the ECJ considered appropriate to examine whether that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable factual and legal situation. Therefore, ruling the case relating to subsidies granted by the Italian Republic<sup>64</sup> to promote the purchase of digital decoders, the Court ruled that the Italian subsidies for the purchase of digital terrestrial decoders in 2004 and 2005 constitute State aid which is incompatible with the European Common Market and constitutes a breach of Art. 107 TFEUV (former Art. 87(1) TEC). None of the exceptions provided for in Article 107 para. 3 TFEU were held to be applicable, since this provision applied only to terrestrial broadcasters and cable pay-TV operators, but not for digital satellite channels and therefore are not technology neutral. As a result, the Court noted that *"such an aspect of selectivity as regards technology affecting an aid measure may be enough in itself to cause a distortion which is sufficient ground for holding that measure to be incompatible with the common market"*.<sup>65</sup>

In the field of Internet high-speed connectivity, the Commission sets one of its future targets on the guarantee of universal high-speed and ultra-fast broadband coverage.<sup>66</sup> Therefore, the Commission has adopted a Communication outlining a common framework within which EU and national policies should be developed to meet the Europe 2020 targets.<sup>67</sup> These policies should, in particular, lower the costs of broadband deployment in the entire EU territory, ensuring proper planning and co-ordination and reducing administrative burdens. For instance, the competent authorities should ensure that public and private civil engineering works systematically, provide for broadband networks and in-building wiring, clearing of rights of way and mapping of available passive infrastructure suitable for cabling.

In 2009, the Commission published guidelines for the application of State aid rules in relation to rapid deployment of broadband networks.<sup>68</sup> The guidelines especially specify how State measures could be compatible with Art. 107(3)(c) TFEU. In this regard, the

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<sup>62</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 17 September 2003 on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off'), COM(2003) 541 final., pp. 9 *et seq.*

<sup>63</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 24 May 2005 on accelerating the transition from analogue to digital broadcasting, COM(2005) 204 final, pp. 4 *et seq.*

<sup>64</sup> ECJ, Case C-403/10 P, Mediaset SpA v European Commission, [2011].

<sup>65</sup> *Ibid.*, para. 104.

<sup>66</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 19 May 2010 "A Digital Agenda for Europe", COM(2010) 245 final, p. 19.

<sup>67</sup> Communication from the Commission of 26 August 2010 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Digital Agenda for Europe, COM(2010) 245 final/2.

<sup>68</sup> Communication from the Commission of 30 September 2009 on Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, [2009] OJ C 235, p. 7.

Commission assesses its balancing test and its application to aid for broadband network deployment. The Commission also states in its guidelines that businesses should support efforts to speed up the renewal and extension of broadband networks in order to close supply gaps, particularly in rural areas.

- The "Culture-clause"

Art. 167 TFEU highlights the "cultural aspect" of the Union. The object and purpose of the norm are both to clarify and to limit the cultural competence of the Union: Art. 167(1) TFEU states that "the Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore". Art 167 (4) TFEU requires the Union to take cultural aspects into account in its action under other provisions of that Treaty, in particular in order to respect and to promote the diversity of its cultures. The meaning of cultural aspects in this regard is limited to the cultural fields mentioned in Art. 167(2) TFEU, where European Union action is extended to artistic and literary creation, including the audiovisual sector (indent 4). The EU's supplementing actions do not only cover print media like books, but also encompass media which disseminate cultural contents by auditory and visual means.<sup>69</sup> Furthermore, Art. 167(2) TFEU authorises the Union to support the production and dispersion of broadcasting as well as Internet programmes, as far as their cultural components are at stake.<sup>70</sup>

Art. 167 AEUV also plays a role for the EU in order to encourage its Member States to co-operate in conserving and safeguarding cultural heritage of European significance, including cinema. With regard to the latter, the Recommendation to Member States on film heritage<sup>71</sup> calls for Europe's film heritage to be methodically collected, catalogued, preserved and restored so that it can be passed on to future generations. EU countries were asked to inform the Commission every two years of what they have done in this regard. The second implementation report has been published recently.<sup>72</sup>

Finally, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions<sup>73</sup> should be mentioned. This UNESCO treaty was jointly negotiated by the European Commission and by the European Council. Its main objective is to take into account cultural diversity when developing other policies (*cf.* the objectives listed in Art. 1). The preamble emphasises "the need to incorporate culture as a strategic element in national and international development policies, as well as in international development co-operation, taking into account also the United Nations Millennium Declaration (2000) with its special emphasis on poverty eradication" and "the importance of culture for social cohesion in general, and in particular its potential for the enhancement of the status and role of women in society". Media including broadcasting (*cf.* Art. 6(2)(h)), film (*cf.* Art. 14) as well as the "new media" is covered by the Convention. Art. 20 of the UNESCO Convention defines the relationship with other international treaties (like the WTO agreements) and specifies the linkage between these treaties in the case of overlap of rights and obligations. This Article also specifies the interpretation of the Convention in

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<sup>69</sup> *Cf.* Council Decision 508/2000/EC, Culture 2000, [2000] OJ L 63/1.

<sup>70</sup> *Cf.* S. Schmahl, Comments on Art. 151 EC, in: *Castendyk/Dommering/Scheuer*, European Media Law, Alphen a/d Rijn 2008, Art. 151 EC, p. 259.

<sup>71</sup> Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities, OJ L 323, p. 57.

<sup>72</sup> Commission staff working document of 2 July 2010 on the challenges for European film heritage from the analogue and the digital era (Second implementation report of the Film Heritage Recommendation), SEC 2010 (853), available at: [http://ec.europa.eu/avpolicy/docs/reg/cinema/report\\_2/2010\\_853.pdf](http://ec.europa.eu/avpolicy/docs/reg/cinema/report_2/2010_853.pdf).

<sup>73</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 20 October 2005, available at: <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>.

relation to other international treaties. The Convention was ratified by the European Union (former European Community) on 18 December 2006. All examined countries are part of the Convention, except for Kosovo.

The binding character of the UNESCO Convention for the EU (as well as for the EU-Member States) is, firstly, of relevance for external trade relations with other Members that have ratified the Convention. This applies especially for external actions of the EU under Arts. 205-207 TFEU. With a view to the so-called Doha-round the EU has – in the light of the UNESCO Convention – pressed its point on “non-liberalising” the audiovisual sector. Secondly, the Convention becomes also a “binding force” for the EU for measures to be taken on an EU level (and for its Members on a national level, respectively). The (binding) measures stipulated in the Convention (e.g. Art. 7, which includes measures to promote cultural expressions) deepen on the one hand the understanding of cultural diversity. The explicitly named measures in the Convention concretise on the other hand the provision of Art. 167(4) TFEU, which says that “the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures”. This kind of a more “abstract principle” is shaped *in concreto* by the UNESCO Convention as all named State measures of the Convention are in principle legitimised and could not, in general, be tackled by the Commission.<sup>74</sup>

- EU competencies to harmonise (the) different sectors of “media law”
  - General remarks

The Treaty on the Functioning of the EU does not contain an explicit competence to regulate press, broadcasting and/or other media services. An exception is Art. 118 TFEU that allows the EU legislator

“to establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, co-ordination and supervision arrangements.”

The competence for harmonisation measures areas named in the former is mostly based on Arts. 114 and 115 TFEU. These provisions allow the adoption of “measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”.

With regard to the freedom to provide services (and the freedom of establishment) there exists a *lex specialis* for the harmonisation on the basis of a directive, namely Art. 53(1) TFEU (read together with Art. 62 TFEU): the AVMSD, which will be dealt with at a later stage (see *infra* at b)), is the prominent example in the field of “Audiovisual Media Law”. Related areas find their basis in Art. 114 (and Art. 115) TFEU instead.

- eCommunications

As far as the transmission of (audiovisual) media is concerned, electronic communications regulation (in an auxiliary as well as an enabling function) comes into play.<sup>75</sup> The allocation and assignment of radio spectrum to electronic media services

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<sup>74</sup> Cf. V. Wiedemann, Ein Kyoto-Protokoll für die Kultur – Die UNESCO-Konvention zur kulturellen Vielfalt, in ARD Jahrbuch 2007, p. 23 (p. 26).

<sup>75</sup> See Directive 2002/21/EC 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), as

(particularly radio and TV) is primarily to be determined by the needs of these services, provided that the latter contribute to promoting media pluralism – one of the goals which regulatory authorities in the electronic communications sector have to take into account in their regulatory activities (see Recital 5, last sentence; and Art. 8(1) of Directive 2002/21/EC, as amended). On the other hand, also the discussion about whether regulatory convergence should follow technological and market convergence<sup>76</sup> leads to the question as to how both sectors are regulated today and which are the differences between the two approaches applied.<sup>77</sup>

Electronic communication is part of the so called “Information Society/New Media” policy, which has set the tone for a knowledge economy based on information technology in a liberalised market. The Transparency Directive on information society services<sup>78</sup> was the first Directive in this field, aiming to extend the notification procedures for technical standards to information society services. The Conditional Access Directive<sup>79</sup>, the e-Commerce Directive<sup>80</sup> and the Electronic Money Directive<sup>81</sup> have expanded the process of harmonising the information society policy up to now.

In order to ensure that the process of transition from analogue to digital broadcasting by 2012 leads to the entry of new players capable of enhancing competition and expanding viewer choice, the Commission monitors that the rules set out in the Competition, Authorisation and Framework Directives for the allocation of this spectrum capacity are complied with. These rules require that rights of use for radio frequencies are allocated by way of open, transparent, objective, non-discriminatory and proportionate procedures, without prejudice to general interest objectives.

On 22 March 2012 the Commission asked Bulgaria to ensure open and non-discriminatory access to the digital terrestrial broadcasting infrastructure market<sup>82</sup>, considering that this Member State did not comply with the requirements of the Competition Directive when it assigned, in 2009, the five spectrum lots available for digital terrestrial broadcasting via two contest procedures, limiting without justification the number of undertakings that could enter the market concerned. Moreover, the selection criteria of the contest procedures were disproportionate and therefore not in

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amended by Directive 2009/140/EC of 25 November 2009, OJ L 108, p. 33; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), as amended by Directive 2009/140/EC of 25 November 2009, OJ L 337, p. 37; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), as amended by Directive 2009/140/EC of 25 November 2009, OJ L 337, p. 37; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), as amended by Directive 2009/136/EC of 25 November 2009, OJ L 337, p. 12.

<sup>76</sup> There are proposals to merge regulatory bodies of these sectors into one, as has already been done in the UK (Ofcom) and a few other Member States (e.g. Italy, Finland). However, it is yet to be discussed on which criteria a decision on this issue shall be based.

<sup>77</sup> See also S. Schweda, “The Telecoms Review: New Impetus for Audiovisual Media?”, *IRIS plus* 2009-10, pp. 7 ff., which analyses the impact of the revision of the regulatory framework for electronic communications networks and services on television broadcasting and other audiovisual media.

<sup>78</sup> Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC, laying down a procedure for the provision of information in the field of technical standards and regulations, [1998] OJ L 217, p. 18 (as amended).

<sup>79</sup> Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, [1998] OJ L 320, p. 54.

<sup>80</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), [2000] OJ L 178, p. 1.

<sup>81</sup> Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, [2009] OJ L 267, p. 7.

<sup>82</sup> European Commission - Press Release, IP/12/298 [2012], available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/298&type=HTML>.

line with the requirements of the Competition, Authorisation and Framework Directives. Applicants were not allowed to have links with content providers (TV channels operators), including operators active only outside Bulgaria, or with broadcasting network operators.

- Consumer and data protection

Media law is also linked with the issue of consumer protection. Consumer protection laws are in principle designed to ensure fair competition and the free flow of truthful information in the marketplace. With regard to media law, especially the AVMSD wants to ensure transparent information by giving a concept of “audiovisual commercial communication” in Art. 1(h) AVMSD, designed to cover all types of advertising.<sup>83</sup> Besides this, a number of other directives target the issue of consumer protection.<sup>84</sup>

Data protection is another important sector in the field of media law. The protection of personal data has been an area of considerable legislative activity both at the European and at the Member State level in the years before and after the adoption of the European Data Protection Directive 95/46/EC.<sup>85</sup> The Directive is aimed at the protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, as well as the free flow of personal data between the Member States (Art. 1). The Directive especially includes an exemption in Art. 9 for the processing of personal data within the objective(s) of freedom of expression. The provision states that

“Member States shall provide for exemptions or derogations [...] for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.”

As Rec. 17 (read together with Rec. 37) of the Directive 95/46/EC states, in particular the processing of sound and image data in the audiovisual field is affected by Art. 9 of the Directive to safeguard the fundamental rights of individuals, while taking into account the freedom of information and notably the right to receive and impart information, as guaranteed in particular in Art. 10 ECHR.

The provisions of Directive 2002/58/EC as amended<sup>86</sup> specify and complement Directive 95/46/EC in the area of data protection by (additionally) covering legal persons; and

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<sup>83</sup> Cf. R. Chavannes/O. Castendyk, Comments on Art. 1(h) AVMSD, in: *Castendyk/Dommering/Scheuer*, European Media Law, Alphen a/d Rijn 2008, Art. 1 AVMSD, pp. 837 ff.

<sup>84</sup> With regard to Arts. 114 and 115 TFEU, the following Directives are to be mentioned: Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (codified version), [2009] OJ L 110, p. 30; Regulation (EC) No. 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, as last amended by Commission Regulation (EU) No. 116/2010 of 9 February 2010, [2010] OJ L 37, p. 16; Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), [2006] OJ L 149, p. 22; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices, [2005] OJ L 149, p. 22; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, [1997] OJ L 144, p. 19.

<sup>85</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281, p. 31. In order to develop the regulation of the data protection sector, on 25 January 2012 a proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) was adopted, 2012/0011 (COD).

<sup>86</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), amended by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in



Directive 2006/24/EC<sup>87</sup> addresses the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data.

- Intellectual property rights

The European Union has adopted a number of horizontal directives on copyright and intellectual property law based on Art. 114 TFEU (sometimes together with Arts. 53, 62 TFEU).<sup>88</sup> One that applies particularly to broadcasting (TV and radio) is the Cable and Satellite Directive from the early 1990s.<sup>89</sup> Its main goal was to facilitate the clearance of rights for satellite broadcasting and cable retransmission.<sup>90</sup> The (Copyright) Directive 2001/29/EC<sup>91</sup> (also known as the Information Society Directive or the InfoSoc Directive) is a directive enacted to implement the WIPO Copyright Treaty<sup>92</sup>, in order to address the rights of reproduction, communication to the public, distribution, and legal protection of anti-copying and rights management systems. It ensures that films, music and other copyright protected material enjoy adequate protection in the single market. However, copyright and media law went along different historical paths.<sup>93</sup> The increasing complexity of electronic communications patterns (now) call for an integrated approach of media law and copyright in the future.

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connection with the provision of publicly available electronic communications services or of public communications networks, [2006] OJ L 105, p. 54 and by Directive 2009/136/EC of 25 November 2009, OJ L 337, p. 12.

<sup>87</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, *ibid*.

<sup>88</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), [2009] OJ L 111, p. 16; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), [2006] OJ 2006 L 372, p. 12; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), [2006] L 376, p. 28; Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, [2004] OJ L 195, p. 16; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, [1996] L 77, p. 20.

<sup>89</sup> Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, [1993] OJ L 248, p. 15.

<sup>90</sup> P. B. Hugenholtz, "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive", *IRIS plus* 2009-8, pp. 7 ff.

<sup>91</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] L 167, p. 10.

<sup>92</sup> World Intellectual Property Organisation Copyright Treaty (WCT), adopted in Geneva on 20 December 1996; see N. Helberger, *Copyright Treaty Enters into Force*, *IRIS* 2002-1:2/1.

<sup>93</sup> The Commission stated in its review report of 2002 that the goals of the Cable and Satellite Directive have only been partially achieved and that the envisaged future of a pan-European satellite broadcasting market has not materialised. Contractual licensing practices reinforced by the application of signal encryption techniques have allowed broadcasters and right holders to continue segmenting markets along national and regional and linguistic borderlines. Report from the European Commission of 26 July 2002 on the Application of Council Directive 93/83/EEC on the Co-ordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, COM(2002) 430 final.

### 1.3.1.2.2. *Secondary European Union law: particularly the Audiovisual Media Services Directive*

- General remarks on the content/scope and the guiding principles

The Audiovisual Media Services Directive<sup>94</sup> (AVMSD) covers all audiovisual media services (Art. 1(1) lit. a) AVMSD): traditional television (linear services) and video-on-demand (non-linear services).<sup>95</sup>

All audiovisual media services have to respect the basic tier of obligations in the following areas: identification of media service providers (Art. 5 AVMSD), prohibition of incitement to hatred (Art. 6 AVMSD), accessibility for people with disabilities (Art. 7 AVMSD), transmission of cinematographic works (Art. 8 AVMSD), qualitative requirements for commercial communications (Art. 9 AVMSD), sponsoring (Art. 10 AVMSD) and product placement (Art. 11 AVMSD). Furthermore, the Directive holds special rules only for television broadcasting, such as television advertising and teleshopping (Arts. 19-26 AVMSD), protection of minors (Art. 27 AVMSD) or the right of reply (Art. 28 AVMSD); and for on-demand services in Art. 12 AVMSD (protection of minors in on-demand services) and in Art. 13 AVMSD for the production and distribution of European works. The Directive also provides a general framework for the latter applicable to linear audiovisual media services in its Arts. 16 and 17 AVMSD, including cinema and TV films.

The authorities in each Member State must ensure that all (providers of) audiovisual media services originating there comply with their own national rules, particularly those giving effect to the Directive (Art. 2 AVMSD – “country-of-origin principle”). This means content has to be checked once, rather than in multiple countries. If any Member State adopts national rules that are stricter than the Directive (as they are principally free to do), these can, in principle, only be applied to providers in that jurisdiction.

Member States may not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields co-ordinated by this Directive (Art. 3(1) AVMSD). Exceptions to this principle, such as the transmission of unsuitable content, are listed in Art. 3(2)-(6) AVMSD. Any restrictions must first be approved by the Commission and are only allowed under exceptional circumstances.

Besides, Member States are free to pass more detailed or stricter rules in the fields co-ordinated by the Directive to media service providers under their jurisdiction as long as such rules are in compliance with the general principles of European Union law (Art. 4 AVMSD).<sup>96</sup>

Finally, it should be noted that Art. 30 AVMSD (read together with Rec. 95) aims at securing the correct application of the Directive as the independent regulators in the Member States must co-operate closely both among themselves and with the Commission. This applies especially to issues of jurisdiction. Although the ECJ has not yet

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<sup>94</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version), [2010] OJ L 95, p. 1.

<sup>95</sup> See the various contributions in EAO (ed.), IRIS Special 2009: “*Ready, Set...Go? – The Audiovisual Media Service Directive*”, on information on how national solutions take into account the various interests covered by the AVMSD.

<sup>96</sup> According to the Commission, an example in this regard is the promotion of a policy in favour of a specific language: “Member States are able to lay down more detailed or stricter rules on the basis of language criteria, as long as these rules are in conformity with European Union law and in particular are not applicable to the retransmission of broadcasts originating in other Member States” (cf. [http://ec.europa.eu/avpolicy/reg/tvwf/provisions/stricter/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/provisions/stricter/index_en.htm)).



had the opportunity to hold on issues relating to (the independence of) regulatory bodies responsible for applying legal provisions in the audiovisual sector, one should take into consideration, for present purposes, the judgment of the Court in the *Centro Europa 7* case.<sup>97</sup> The ECJ stated that Art. 56 TFEU (and Art. 9(1) of the Framework Directive, Art. 5(1), the second subparagraph of Art. 5(2) and Art. 7(3) of the Authorisation Directive and Art. 4 of the Competition Directive) must be interpreted as precluding, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights to broadcast to pursue this service – in the absence of broadcasting radio frequencies granted to him on the basis of objective, transparent, non-discriminatory and proportionate criteria.<sup>98</sup> Given that the ECJ based its decision *inter alia* on the freedom to provide services, the effectuating of which the AVMSD also aims at, this judgment may serve also to more closely define the effectiveness that the work of “independent regulatory bodies”, in the sense of Art. 30 AVMSD, has to provide for.

On 10 December 2009, the Romanian National Audiovisual Council signed a Memorandum of Understanding on mutual co-operation and exchange of information together with the Czech Council for Radio and TV Broadcasting, the Hungarian National Radio and TV Commission, the Polish National Broadcasting Council, the Serbian Republic Broadcasting Agency and the Slovak Council for Broadcasting and Retransmission. Each signatory shall prepare a brief summary of the relevant legislation in the respective country for the regulation of the content of, and advertising in, TV and radio broadcasts with a view to improving the mutual understanding, in the spirit of Rec. 95 of the Preamble and of Art. 30 AVMSD.<sup>99</sup>

- General requirements regarding the implementation of the AVMSD

Art. 36 AVMSD stipulates that the Directive is addressed to the Member States. This entails the obligations stemming from Art. 288(3) TFEU, saying that a Directive is binding “as to the result to be achieved”, “but shall leave to the national authorities the choice of form and methods”. However, the scope left to the Member States may not be used to enact national legislation circumventing the spirit of the Directive or watering down the arrangements made in it in what regards the desired outcome: as set out in Art. 4(3) TEU, Member States “shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”. Both aspects have been highlighted also by Recital 94 of the AVMSD.

The Directive itself requires Member States, among others, to ensure compliance by media service providers with the relevant provisions: Art. 2 AVMSD, establishing the home-state-control principle, in its para. 1, states that a Member State has to

“ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State”;

and, additionally, Art. 4(6) AVMSD sets a focus on the obligation of the Member States to ensure, “within the framework of their legislation” and by appropriate means, that media service providers effectively comply with the provisions of the Directive.

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<sup>97</sup> ECJ, Case C-380/05, *Centro Europa 7 Srl ./. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni*, [2008] ECR I-349.

<sup>98</sup> *Ibid.*, para. 120.

<sup>99</sup> Cf. J. Fučík, *Czech Republic – MoU between Regulatory Bodies*, IRIS 2010-2:1/8, available at: <http://merlin.obs.coe.int/iris/2010/2/article8.en.html>.

The AVMSD deliberately does not prescribe by which means it must be secured that there is compliance.

This first obligation that Member States had to fulfil relates to the “transposition” of the provisions of the Directive into their national legal order. Member States were obliged to transpose the provisions of the Directive by 19 December 2009. Transposition may not require the enacting of legislation that is specific in the sense that it covers *per se* the provisions of the Directive. Also, transposition may not in all circumstances, or as regards every single rule provided for by the Directive, necessitate the adoption of new legislation or the amending of the existing one, if and to the extent that the aims pursued by the Directive can be achieved by existing national rules. Nevertheless, the rights and duties that stem from a provision of the Directive must be implemented in a clear manner so that every person concerned can take due note of his/her entitlements and obligations, respectively.

Co-regulation, as referred to in Art. 4(7) and Rec. 44 AVMSD, may be used as a means to transpose the provisions of the Directive as well. In this case, for instance, the Member State’s legislation intended for serving transposition purposes may lay down general principles, on the one hand, and provide for procedures and instruments to incorporate self-regulatory regimes into the legal framework, on the other.

In order to ensure effective compliance, Member States are, secondly, under an obligation to provide for correct implementation or application. This entails monitoring of the media service providers’ actual pursuit of their activities as falling under the scope of the Directive. The Member State will enjoy some leeway in respect of how this is secured (“appropriate means”). In particular, as long as such systems prove effective, a random-based monitoring of television broadcasts or of the provision of on-demand audiovisual media services may be sufficient. In general, the same would apply to a monitoring system based on complaints by the viewers and/or competitors, for instance.

All Member State authorities are obliged to ensure that a Directive is properly implemented in national law, entailing the legislator, the administration and the jurisdictional branch. However, particularly in respect of broadcasting, there is a long-standing tradition in almost all Member States to have specialised media authorities in place which are responsible, as the case may be, for licensing and monitoring the providers of (television) broadcasting or other (audiovisual) media services. In this respect, the Commission in the past has put some emphasis on a sufficient level of staffing and funding of regulatory authorities in the media field.<sup>100</sup>

As regards sanctioning, by referring to “appropriate means”, the actual text of the Directive foremost reflects on the discussion held among the EC institutions when the Directive was revised for the first time (by Directive 97/36/EC), on the necessity to prescribe in more detail what kind of measures should be used in order to avoid or, where necessary, to prevent future infringements of the provisions of the Directive, as implemented in national law.<sup>101</sup> Where an EU directive does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, the Member States have to take all measures necessary to

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<sup>100</sup> “Furthermore, the Commission notes that Member States have devoted adequate resources to apply national legislation implementing the Directive effectively. Independent regulatory authorities have been established and budgets for technical resources as well as staff have been considerably increased where they were insufficient.” Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC “Television without Frontiers”, COM (2002) 778 final, point 2.

<sup>101</sup> Cf. A. Scheuer/T. Ader, Comments on Art. 3 TWFD, in: *Castendyk/Dommering/ Scheuer*, European Media Law, Alphen a/d Rijn 2008, paras 6 *et seq.*, 54 *et seq.*

guarantee the application and effectiveness of EU law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of European Union law are penalised under conditions, both procedural and substantive, which are *analogous* to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty *effective, proportionate and deterrent*.<sup>102</sup> With regard to labour law for instance, the Court has held that where a Member State chooses to penalise the breach of the prohibition on discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained and have a deterrent effect.<sup>103</sup> Thus, the Member States are in principle free in respect of the choice of the particular sanction.<sup>104</sup> In this context they can choose penal, administrative and other sanctions according to criminal and civil law, or a combination of them.

Where recourse to co-regulation is made, it follows from the AVMSD, but also from primary European Union law, that the Member State remains responsible for the achievement of the results of the Directive. Therefore, independent regulatory bodies must be vested with instruments to oversee the actual performance of the self-regulatory component of the co-regulatory system, and be able to intervene where necessary. This is to be derived particularly from Art. 4(7) AVMSD: the regime has to provide for effective enforcement. One could argue that this requirement has to be regarded as being redundant, as the obligation to secure effective compliance as such is already stipulated in Art. 4(6) AVMSD, and can also be derived from primary EU law. Still, Art. 4(7) AVMSD could have an effect beyond Art. 4(6) AVMSD insofar as it requires the regime *itself* to provide for effective enforcement. This leads to the question of whether modifications of the already existing co-regulatory regimes in some Member States would be required. As the study on co-regulation measures in the media sector<sup>105</sup> has shown, co-regulatory regimes 'often' provide for a sanctioning system<sup>106</sup>, in other words, not all of the investigated regimes do. Other parameters for effectiveness will include in particular: *incentives* for participation; *transparency*; safeguarding of *process objectives*; *openness* to all relevant stakeholders; *broad acceptance* by stakeholders and society (necessitating complaint mechanisms and awareness campaigns); *effective means of enforcement* of the co-regulatory rules; as well as a regular *evaluation* of the system together with 'patience'. Also a 'legal back-stop' is necessary; this is referred to by Rec. 44 as a Member State's possibility to intervene, should the objectives of the co-regulatory regime not be met.<sup>107</sup>

Article 33 of the AVMSD invites the Commission to submit regularly a report on the application of the Directive to the European Parliament, the Council and the European Economic and Social Committee. On 7 May 2012, the European Commission presented its first report on the application of the Audiovisual Media Services Directive<sup>108</sup>, that

<sup>102</sup> ECJ, Case 68/88, *Commission v. Greece*, [1989] ECR 2965, para. 23 *et seq.*; Case C-7/90, *Paul Vandevenne*, [1991] ECR I-4371, para. 11; Case C-382/92, *Commission v. United Kingdom*, [1994] ECR I-2435, para. 55; Case C-383/92, *Commission v. United Kingdom*, [1994] ECR I-2479, para. 40; Commission, COM (2001) 330 final, pp. 1 *et seq.*; Hans-Bredow-Institut/Institut für Europäisches Medienrecht, *Study on Co-Regulation Measures in the Media Sector*, 2006, pp. 160 *et seq.*; available at: [http://ec.europa.eu/avpolicy/docs/library/studies/coregul/coregul-final-report\\_en.pdf](http://ec.europa.eu/avpolicy/docs/library/studies/coregul/coregul-final-report_en.pdf).

<sup>103</sup> ECJ, Case 14/83, *von Colson and Kamann*, [1984] ECR, 1891, para. 23 *et seq.*

<sup>104</sup> *Ibid.*, para. 14.

<sup>105</sup> Hans-Bredow-Institut/Institut für Europäisches Medienrecht (EMR), *op.cit.*

<sup>106</sup> T. Kleist/A. Scheuer, "Neue Regelungen für audiovisuelle Mediendienste – Vorschriften zu Werbung und Jugendschutz und ihre Anwendung in den Mitgliedstaaten", [2006] MMR 206.

<sup>107</sup> A. Scheuer/T. Ader, Comments on Art. 3 AVMSD, in: *Castendyk/Dommering/ Scheuer*, *European Media Law*, *op. cit.*, p. 863.

<sup>108</sup> First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU "Audiovisual Media Services Directive" - Audiovisual Media Services and Connected Devices: Past and Future Perspectives [2012], available at:

essentially covers the period 2009-2010 (with some observations being included on more recent developments).

*1.3.1.3.3. The CFREU and its impact on national media law, particularly safeguards for the media and the citizens' right of information*

The protection of fundamental rights has become even more important for the EU, as demonstrated by the EU fundamental rights charter (CFREU), and the upcoming accession to the European Convention on Human Rights (ECHR). The freedom of expression, including the freedom to receive and impart information, is the fundamental pillar of democracy.

- Legal actions taken and policy initiatives adopted in the present field

The fundamental rights situation in a considerable number of Member States is an increasing cause for concern. Besides EU organs, organisations like the Council of Europe, the OSCE and various NGOs have highlighted serious problems with regard to media freedom, such as overt political influence, disproportionate sanctions on journalists or deficient protection of journalistic sources (as in Hungary), and media concentration (as in Italy). Different initiatives have been taken to date:

The European Parliament had taken position, already in 2004, in the case of Italy<sup>109</sup> and requested transparency of ownership in the media, in particular in relation to cross-border ownership, and for the publication of information on significant interests in the media, *inter alia* under Article 11(2) of the Charter. Parliament "considers that where the Member States fail, either because they are not able, or are not willing, to take adequate measures, the EU has a political, moral and legal obligation to ensure within its fields of competence that the rights of EU citizens to a free and pluralist media are respected, in particular, due to the lack of recourse of the Community courts by individuals in the case of an absence of pluralism in the media".

In order to make the Charter effective for citizens and to ensure its respect by all authorities in the Member States, the European Commission has taken various steps, to promote its implementation, by adopting the Charter Strategy<sup>110</sup> and preparing annual reports<sup>111</sup>.

For enforcing the fundamental rights, the Commission declares to be guided by the principle of prevention – by reminding in appropriate cases to the authorities responsible for transposing legislation of the obligation to also comply with the Charter in implementing the legislation – and in the case of infringements procedures – where a Member State does not respect fundamental rights when implementing Union law, the Commission, as guardian of the Treaties, has powers of its own to try to put an end to the infringement and may, if necessary, take the matter to the Court of Justice.

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<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0203:FIN:EN:HTML>.

<sup>109</sup> European Parliament resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (2003/2237(INI)), 22 April 2004 available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2004-0373+0+DOC+XML+V0//EN>.

<sup>110</sup> Commission Communication: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final, available at: [http://ec.europa.eu/justice/news/intro/doc/com\\_2010\\_573\\_en.pdf](http://ec.europa.eu/justice/news/intro/doc/com_2010_573_en.pdf).

<sup>111</sup> 2011 Report on the Application of the EU Charter of Fundamental Rights, COM(2012) 169 final available at: [http://ec.europa.eu/justice/fundamental-rights/files/2011-report-fundamental-rights\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/2011-report-fundamental-rights_en.pdf).

The Commission paid particular attention, in 2011 and 2012, to the developments related to the new Hungarian Constitution and its implementation, to the extent that it raises EU law issues. A number of concerns have been expressed relating to other provisions of the media law. In this respect, the current Media Law included rules on media authorisation and registration. The provisions of the law applying to on-demand media services, press products and ancillary media services could have implied that they were required to register before being allowed to provide services in Hungary and thus to become subject to an authorisation scheme. These provisions could have created an unjustified restriction of the Treaty rules on freedom of establishment. With regard to the "country of origin" aspect, the power to impose fines on non-resident audiovisual media providers, as foreseen by the Media Law, risked being disproportionate, in particular as it could target media operators established in other Member States that would be in compliance with their own national rules, and thus infringe on the country-of-origin principle.

Following the Commission's intervention on the Hungarian media law, the Hungarian government agreed to amend its national media law so that it should comply with substantive EU law.

Playing a key role in promoting the rights and freedoms enshrined in the Charter, the European Parliament also paid particular attention to the situation in Hungary in respect of media freedom and pluralism, as well as in relation to the new Hungarian Constitution and its implementation. Therefore, in the text of its resolution<sup>112</sup> from March 2011 on this matter, Parliament calls on the Commission to act, "with a view to defining at least the minimum essential standards that all Member States must meet and respect in national legislation in order to ensure, guarantee and promote freedom of information and an adequate level of media pluralism and independent media governance". At the same time, Parliament "calls on the Hungarian authorities to restore the independence of media governance and halt state interference with freedom of expression and 'balanced coverage', and believes that over-regulation of the media is counterproductive, jeopardising effective pluralism in the public sphere".

Furthermore, Parliament adopted, on 16 February 2012, another resolution<sup>113</sup>, calling on the Hungarian government to comply with the recommendations, objections and demands of the Commission, the Council of Europe and the Venice Commission and calling on the Commission, the guardian of the Treaties, to monitor closely the possible amendments and the implementation of the said laws and their compliance with the letter and spirit of the European treaties. When acting as co-legislator, it stressed the fundamental rights dimension of new proposals for EU law.

The ECJ has always played a significant role in European integration, its importance is bound to increase further as the European Union enlarges and the constitutionalization process continues. The expansion of the EU's activities and competencies has given the ECJ a human rights dimension in areas also covered by the ECHR.

In two recent cases, concerning similar issues, the Court considered a requirement for general filtering systems to be installed for the prevention of copyright infringements to be disproportionate. In both cases, the implementation of a general filtering system

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<sup>112</sup> European Parliament resolution of 10 March 2011 on media law in Hungary available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0094+0+DOC+XML+V0//EN>.

<sup>113</sup> European Parliament resolution of 16 February 2012 on the recent political developments in Hungary (2012/2511(RSP)) available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2012-0053%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.



would have implied Scarlet (an internet service provider) and Netlog (an online social-network provider) to perform an active monitoring of the files stored or exchanged by their users on their networks in view of identifying where protected works were shared and to determine whether this sharing was presumably done unlawfully, with the ultimate goal of taking-down or blocking such files. General filtering systems intended to protect copyright challenge several fundamental rights protected under the Charter of Fundamental Rights of the European Union. In the Scarlet case<sup>114</sup>, the Court ruled that the intended general filtering system was disproportionate, i.e. it did not respect the requirement that a fair balance be struck between the different interests at stake. In the Netlog<sup>115</sup> case, the Court acknowledges that, first, it would affect Netlog's freedom to conduct its business as it would require Netlog to install a complicated, costly, permanent computer system at its own expense. Second, it would affect users' right to the protection of their personal data as it would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network.

Finally, such a system would put at risk the freedom of information, i.e. the freedom to receive or impart information, as the system might not have been always able to distinguish between unlawful content and lawful content, eventually blocking lawful communications. The Court recalls therefore that, in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.

- Significance of the Charter for national media policies: the state of debate

The upholding of fundamental rights by Member States when they implement Union law is in the common interest of all the Member States because it is essential to the mutual confidence necessary for the operation of the Union. The Charter does not claim a universal binding effect in the sense that any action of the Member States would be measured against the EU warranties. This does not mean, however, that there is a legal vacuum beyond the Charter's explicit and foremost scope *vis-à-vis* the institutions of the EU, because, according to Art. 2 TEU the Member States, are bound to the "respect for human rights". (Enforcement of this obligation is subject to political decisions, as Art. 7 TEU stipulates.)

Mainly the bodies and institutions of the EU have to respect the CFREU's fundamental rights, guarantees and freedoms. For the Member States, according to Art. 51 para. 1 CFREU, the Charter provisions apply "only when they are *implementing* Union law". And this, from a material and legal point of view, presents the gist of the matter. Execution of Union law is present, insofar as the acts of the Member States are governed by European Union law (e.g. a Regulation, a Decision in a State aid case), or at least have to remain guided by it. There is no doubt that one essential case which represents "implementation" is the transposition, application and enforcement of secondary legislation, such as the AVMSD. But beyond these clear-cut instances?

In the ERT case, the ECJ held that human rights apply also in a situation where a Member State adopts exclusive rights relating to television broadcasting which might at the same time affect the freedom to provide services. While the Member State would have to justify the ensuing restrictions on the fundamental freedom; any such justification must be assessed "in the light of the general principles of law and in particular of fundamental

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<sup>114</sup> ECJ, Case C-70/10, Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), [2011], nyr.

rights"<sup>116</sup>. (At that time, in contrast to the current situation after the Lisbon Treaty, fundamental rights protection, as derived from the ECHR and the national constitutional systems, was regarded as belonging to the "general principles of law", implying a different rank in the EU legal system.) More precisely, under the provisions of the EEC-Treaty in Art. 59 national rules were found by the ECJ to be prohibited "which create a monopoly comprising exclusive rights to transmit the broadcasts of the holder of the monopoly and to retransmit broadcasts from other Member States, where such a monopoly gives rise to discriminatory effects to the detriment of broadcasts from other Member States, unless those rules are justified on one of the grounds indicated in Article 56 of the Treaty, to which Article 66 thereof refers". A fair balance between the (exclusive) rights in the field of radio and television broadcasting and the freedom to provide services must be struck; therefore, the limitations imposed on the power of the Member States to apply the provisions referred to in Articles 66 and 56 of the Treaty on grounds of public policy, public security and public health must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights.

The Court emphasized that (assessment of) the measure's legality is ultimately governed by Union law. The compatibility of the Member State's action with Union law cannot be verified by national courts. Rather, it is for the ECJ to make sure that the Union legal order is properly applied in the Member States for action falling within Union competence. Accordingly, also in these cases of Member State action the determination of substantive legality and final judicial authority is vested with the Union.

In the explanations of the Presidium to the EU Charter of Fundamental Rights<sup>117</sup>, this case is cited as an example of the 'implementation of Union law' by the Member States. The case has been elaborated upon for the purpose of identifying the applicable law (national law or Union law) and the appropriate forum (national or Union courts).

- Possible implications and aspects possibly to be added to the debate

For present purposes, suffice it here to underline that generally speaking Member States' measures which have a bearing on the fundamental freedoms, e.g. the freedom of establishment or the freedom to provide or receive services, are not *per se* outside the scope of control of the EU institutions, having the CFREU as one (central) yardstick of assessment. Any other approach would have to face substantial criticism because it would appear to neglect the fact that the fundamental freedoms are directly applicable and rank superior to "secondary legislation".

Therefore, the discussion should be brought one step further, analysing more precisely under what circumstances the fundamental freedoms "build the bridge" to the "implementation of Union law", which in its turn "activates" the safeguard of the CFREU guarantees. In this vein, it appears safe to argue that steps taken by the competent national authorities in respect of an ECJ judgment – interpreting the scope of the fundamental freedoms and declaring e.g. that these would oppose the contested national measures – would represent a situation of "implementation". Where this holds certainly true, does it then make a difference whether a judgment by the Court is delivered on a certain issue – or not? One might argue with the considerations frequently brought

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<sup>115</sup> ECJ, Case C-360/10, *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) v. Netlog NV*, [2012] nyr.

<sup>116</sup> ECJ, Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925, paras. 42 *et seq.*

<sup>117</sup> Explanations by the Presidium relating to the EU Charter of Fundamental Rights, OJ (2007) C 303/32.



forward by the ECJ that its judgments in such situations are not of a constitutive nature, but rather provide clarification on the “compatibility” of national measures with Union law (*cf.* the ECJ’s constant jurisprudence on Member States’ requests to declare, as an exception (*sic!*), the effects of a judgment to become operational only after the date of handing-down its decision).

Therefore, it may be deduced in line with the principle of direct applicability of the fundamental freedoms, where Member States adopt measures *which come into the scope of application* of these freedoms, they are bound by the CFREU. If one follows this line of reasoning, and bearing in mind the far-reaching scope of the freedom of establishment and of the freedom to provide and receive services (the threshold for the presence of a transfrontier element to be affirmed not being very high), it appears that there is a broader range of elements of national media orders which lend themselves to being tested against the CFREU, in particular its Art. 11. While more in-depth analysis of this strand of arguments would definitively be needed, it could at least prove fundamental for enriching a more political debate as is held at present.

- Importance of the Charter for European Union legislation and policy

Furthermore, the aspect of to what extent the European Union itself is entitled, or even being called upon, to act in the field of media law – going further than the current state of “Europeanization” - seems worth some consideration. For instance, if Art. 11 CFREU is accorded the same meaning as Art. 10 ECHR and if, as will be shown *infra*, the ECtHR sees the Member States (as the current parties to the Convention) as “ultimate guarantor” of media pluralism, having the obligation to ensure its safeguard through the adoption of positive measures, does not then the same level of commitment is imposed on the EU? At the latest when the EU accedes to the ECHR, is this not another important legal argument in order to consider the necessity for action? And, even before such step being finally taken, the accession of the EU and its Member States to the UNESCO Convention on the Diversity of Cultural Expressions, since it also has an impact on internal policies (as the other side of the medal, i.e. besides the external, more trade-related aspect), could be regarded as imposing such an obligation.

Finally, it seems important to bear in mind that the EU has assumed competence to regulate the right of reply. According to the European Commission, in the arguments put forward against some regulations of the then new Hungarian Media Laws, the scope of harmonisation reached through introducing and defining the concept in an EU directive is broad. This approach may find a considerable amount of foundation in the ECJ judgment in the case *Roj TV and Mesopotamia Broadcast vs. Germany* of September 2011. Suffice it here to note that the concept of the right of reply did not appear at first sight - as demonstrated by the Commission’s Green Paper on Televisions without Frontiers which prepared for the TWFD, the predecessor of the AVMSD – to bear an obvious link to Internal Market issues; still it has been regulated in the Directive and gives proof of the competence of the EU to enact harmonising provisions on matters that are essential to the freedom of the media, but generally perceived to be governed in the first place, when regulated upon at national level, by Art. 10 ECHR and the related jurisprudence of the ECtHR.

### 1.3.2. Council of Europe – Article 10 ECHR and Subsequent Conventions / Recommendations

In the following, the Council of Europe standards, particular stemming from Art. 10 European Convention on Human Rights<sup>118</sup> (ECHR), are to be examined. This should serve as a benchmark for the freedom of the media in all European States that have ratified the Convention, in particular the EU Member States.

Art. 10 ECHR reads as follows:

- “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The European Court of Human Rights (ECtHR) has shaped, in its numerous decisions on the present subject matter, basic principles and requirements with regard to Art. 10 ECHR, which widely influence today's European media landscape. The ECtHR refers in various decisions to different Conventions of the Council of Europe and Recommendations passed by the Committee of Ministers addressing the media. Therefore, reference is also made to the relevant Conventions and Recommendations.

#### 1.3.2.1. Legal Background to the Convention

According to the Statute of the Council of Europe<sup>119</sup> it is not a condition for membership in the Council that the respective state ratifies the ECHR. Nevertheless, all current Member States of the Council of Europe (47) are also Contracting States to the ECHR. Still, ratification of the ECHR in principle requires membership in the Council of Europe (Art. 59 (1) ECHR).

The ECHR is only binding for the Contracting States. It needs to be converted into national law to be valid; the way how the conversion of international treaties into the internal national law takes place can be specified by the states.

A fundamental characteristic is that just the (initial) Convention itself is binding for the states. Additional protocols are obligatory only for those states which have ratified them. Consequently, the range of protection concerning the particular guarantees in the Convention may differ in the respective states.<sup>120</sup> Besides, Contracting States have the possibility of making reservations in respect of any particular provision in the Convention when signing it (Art. 57(1) ECHR).

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<sup>118</sup> Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, as amended by its Protocol No. 14 (CETS No. 194) as from the date of its entry into force on 1 June 2010.

<sup>119</sup> Statute of the Council of Europe of 5 May 1949, available at: <http://www.conventions.coe.int/>.

<sup>120</sup> C. Grabenwarter, Europäische Menschenrechtskonvention, Munich 2009, § 2 rec. 4.

According to Art. 1 ECHR,

"[T]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

Thus, regardless of nationality, the legal protection of a person just depends on being affected by the sovereignty of a contracting state, whereas the latter can only be referred to the Court of Human Rights for violations of the ECHR as a Member State.

The European Union has not yet ratified the ECHR. However, Art. 6(2) of the Treaty on the European Union (TEU) now foresees the possibility for the EU to become a member of the ECHR by signing this international treaty. Additionally, Article 6(3) TEU declares that the fundamental rights as they are guaranteed by the ECHR are part of the Union Law as "general principles". Correspondingly, Protocol No. 14 to the ECHR, which entered into force on 1 June 2010<sup>121</sup>, in its Art. 17 amended Art. 59 ECHR, which now states that "the European Union may accede to the Convention". It could be expected that the EU will do so in the near future. A draft accession agreement, elaborated by the Steering Committee for Human Rights (CDDH)<sup>122</sup>, has now been transmitted to the Committee of Ministers of the Council of Europe, with further negotiations ongoing. The EU will accede to the ECHR once the accession agreement has entered into force, which requires the ratification by all 47 states parties to the ECHR as well as the EU itself.

Besides, there is the question of the relationship between the range of the protection provided by the ECHR, on the one hand, and by the national constitutions, on the other hand. The Convention has the function to guarantee a "minimum standard" of protection. Therefore, the states are free to provide their citizens with more comprehensive, detailed and/or additional rights than the Convention itself does. However, the states must not fall short of the level of protection as afforded by the Convention (Art. 57 ECHR).

The Convention ranks on the level of national constitution law in Austria, while in Ireland, Italy and the United Kingdom it has a "constitutional status", thus national legislation has to be in compliance with it. In other Member States it ranks under the Constitution, however, it outranks ordinary, simple-majority legislation, as for example in Romania.<sup>123</sup>

Particularly after the drastic changes of the political systems in the Central European and Eastern European States, the ECHR as well as the jurisdiction of the ECtHR have shown to have – and continue to have – a special significance as both could serve as a model for the construction of a new (legal) system with a European direction and standard in those countries.<sup>124</sup>

The examination by the ECtHR as to whether there is a violation of the Convention is carried out in three stages. Firstly, the Court inspects whether the scope of protection of an article of the Convention is affected. Secondly, it examines whether there is a measure that interferes with a legally protected position of a person. Thirdly, it assesses whether this restriction can be justified. According to Art. 10 ECHR, the interference shall

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<sup>121</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13 May 2004.

<sup>122</sup> Final version of the draft legal instruments on the Accession of the European Union to the European Convention on Human Rights (19 July 2011), available at: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE\\_documents/CDDH-UE\\_2011\\_16\\_final\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents/CDDH-UE_2011_16_final_en.pdf).

<sup>123</sup> See Art. 134 of the constitution of the Republic of Croatia, 21 December 1990, and Art. 20(2) of the constitution of Romania.

<sup>124</sup> Cf. Grabenwarter, *op. cit.*, § 3, rec. 10.

be prescribed by law and pursue a legitimate aim, whereas the interference has to be proportionate to the significance and the value of the aim pursued.

#### 1.3.2.2. The scope of protection

Art. 10 ECHR, first of all, according to para. 1 protects "the right to freedom of expression". In respect to this fundamental right the ECtHR ruled in its "Handyside case" that the

"[f]reedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man."<sup>125</sup>

However, Art. 10 ECHR has a much wider scope, because not only the "freedom of communication", but the entire communication process is covered. This includes at least six sub-areas: the freedom of expression and of information, the freedom of the press and of broadcasting, and the freedom of art and of science.

As there are several forms of communication, it could be said that the freedom of expression is the basis of the protection of the freedom of communication. A reading of the jurisprudence of the ECtHR shows that it is difficult to distinguish between the respective rights, especially the freedom of expression and the freedom of the press. For example, journalists who make statements may be protected by the freedom of expression, as in the majority of the cases this right is concerned, or by the freedom of broadcasting or of the press.

Therefore, in some instances the protection of all rights covered by Art. 10 ECHR may merge and would have to be seen as complementing each other. In the following, different areas of the scope of protection applying to all the media are to be examined.

##### 1.3.2.2.1. *Value judgments and statements of fact*

An opinion can be expressed by giving a value judgment and/or a statement of fact.

The ECtHR points out that:

"the existence of facts can be demonstrated whereas the truth of value judgments is not susceptible of proof."<sup>126</sup>

It determines that a careful distinction needs to be made between value judgments and statements of fact, whereas the dividing line cannot be defined precisely.

In any case, value judgments have a descriptive element and include judgmental parts. In a democratic society they do not have to be proved – especially by journalists. Otherwise,

"it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention."<sup>127</sup>

However, it is necessary that judgments are adequately grounded on a sufficient factual basis which has to be proved itself; otherwise an interference could be proportionate.<sup>128</sup>

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<sup>125</sup> Handyside v. the U.K., judgment of 7 December 1976, Appl. 5493/72, § 49.

<sup>126</sup> Lingens v. Austria, judgment of 8 July 1986, Appl. 9815/82, § 46.

<sup>127</sup> Lingens v. Austria, *op. cit.*, § 46.

Journalists are principally obliged to verify factual statements. But even if their statements are defamatory of private individuals, they might be dispensed from this obligation. The exercise of the freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. They are to be taken into consideration specifically when the reputation of a named individual is attacked and thus the "rights of others" are interfered with. Therefore, special reasons are required before the media can be dispensed from their obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist, depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations.<sup>129</sup> Thus, it has to be decided based on a weighing of interests in the given case.

According to the ECtHR in the *Bladet Tromsø and Stensaas* judgment<sup>130</sup>, the press should normally be entitled to rely on the contents of official reports and their correctness without having to undertake independent research. Otherwise, the vital public watchdog role of the press may be undermined.<sup>131</sup>

It has to be noted that the Court also decided that it is in principle not incompatible with Art. 10 ECHR to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements.

Nevertheless, it is essential,

"in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for."<sup>132</sup>

There are also case configurations conceivable in which a proper value judgment has to be handled as a factual judgment. Where criminal accusations are concerned, a claim implying a negative value judgment includes a precise descriptive element and is therefore more likely to be of factual nature, and needs to be proved.<sup>133</sup>

Both, value judgments and statements of fact, are protected entirely and without limitations by Art. 10 ECHR.

Additionally, the case law of the ECtHR shows that, besides certain forms of expression and types of information, Article 10 also applies to information of a commercial nature.<sup>134</sup>

#### 1.3.2.2.2. *Critical statements*

Criticism on state institutions or private persons are statements that are particularly suitable for affecting the legal sphere of other people or legal assets protected by the ECHR, such as the reputation or the authority and impartiality of the judiciary.

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<sup>128</sup> Jerusalem v. Austria, judgment of 27 February 2001, Appl. 26958/95, §§ 42 and 43.

<sup>129</sup> Tønsbergs Blad AS and Haukom v. Norway, judgment of 1 March 2007, Appl. 510/04, § 89.

<sup>130</sup> Bladet Tromsø and Stensaas v. Norway, judgment of 20 May 1999, Appl. 21980/93, § 68; see mutatis mutandis: Colombani v. France, judgment of 25 June 2002, Appl. 51279/99.

<sup>131</sup> Goodwin v. the U.K., judgment of 27 March 1996, Appl. 17488/90, § 39.

<sup>132</sup> Steel and Morris v. UK, judgment of 15 February 2005, Appl. 68416/01, § 95.

<sup>133</sup> Dommering, Comments on Art. 10 ECHR, in: Castendyk/Dommering/Scheuer, *European Media Law*, p. 55, para. 35.

<sup>134</sup> Markt intern Verlag GmbH and Klaus Beermann v. Germany, judgment of 20 November 1989, Appl. 10572/83, § 26; Casado Coca v. Spain, judgment of 24 February 1994, Appl. 15450/89, § 37.

But the protection by Art. 10 of such statements is not limited to positive or "harmless" criticism or inoffensive statements the particular receiver may want to receive. The Court often reiterates that

"it is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society."<sup>135</sup>

A speaker, however, is obliged to choose his words with caution. If he might have been able to voice his criticism and to contribute to a free public debate without having had recourse to a particular defamatory word which explicitly referred to a criminal offence a conviction based on this statement would not be a violation of Art. 10 ECHR.<sup>136</sup>

Criticism, especially conducted by journalists, is necessary in (and for) a democratic society in order to support political and social development. Therefore, freedom of expression gives the public the singular opportunity to receive information and thereafter to form their own opinions, so it is an integral attribute of a democratic society. A conviction of a journalist in relation to distributing information of public interest may well deter one from contributing to public discussion of issues affecting the life of the community and discourage one from making criticisms in future. It can amount to a kind of censorship and hinder the public opinion-forming process.<sup>137</sup>

Journalists can also refer to Art. 10 ECHR, even if they excoriate, exaggerate or provoke or if they make polemical statements.<sup>138</sup>

Nevertheless, the Court underlines that several rules are to be followed to assure a minimum level in the particular debate. Insults, denigrations, slander or gratuitous personal attacks could not enjoy general, unlimited protection under the Convention. Such statements cannot support a democracy and therefore must not be tolerated.

#### *1.3.2.2.3. Criticism of the judiciary*

Concerning matters of public interest the ECtHR sees the functioning of the judiciary as such a relevant matter because of the fundamental role of the courts as guarantors of justice in a state based on the rule of law, whereas the protection of the authority and impartiality of the judiciary is a legitimate aim mentioned in Art. 10. The respect for the judiciary is also required by the Recommendation No. R (94) "on the independence, efficiency and role of judges".<sup>139</sup>

Public confidence plays an essential role for the courts so that they have to be protected from distorting and unfounded criticism. Attention has to be paid to the special role of the media that allows even an aggressive or harsh tone. Consequently, published articles reporting about decisions of judges, the judges themselves or pending trials cannot be judicially attacked successfully in certain circumstances – especially, if there was detailed research and supporting opinions of experts etc. underlying the publications.<sup>140</sup>

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<sup>135</sup> Handyside v. the U.K., op. cit., § 49.

<sup>136</sup> Constantinescu v. Romania, judgment of 27 June 2000, Appl. 28871/95, § 74 and § 75.

<sup>137</sup> Monnat v. Switzerland, judgment of 21 September 2006, Appl. 73604/01, § 70.

<sup>138</sup> Renaud v. France, Judgment of 25 February 2010, Appl.13290/07, § 40.

<sup>139</sup> Amihalachioaie v. Moldova, judgment of 20 April 2004, Appl. 60115/00, judge Pavlovski in a dissenting opinion.

<sup>140</sup> De Haes and Gijssels v. Belgium, judgment of 24 February 1997, Appl. 19983/92.



Additionally,

“it is not for the Court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists.”<sup>141</sup>

So, the states are not entitled to restrict all forms of public discussion on matters pending before the courts<sup>142</sup>, whereas the press has to pay attention to its “duties and responsibilities”.

“It cannot be excluded that the public’s becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the determination of a person’s guilt or innocence on a criminal charge.”<sup>143</sup>

An article concerning legal proceedings pending, especially criminal proceedings, can also affect the rights of the defendant. It should be added that the defendant is entitled to enjoy the guarantee of a fair trial and the right to be presumed innocent of any criminal offence until proved guilty, a guarantee which is set out in Art. 6 ECHR. This fact has relevance for the balancing of competing interests.<sup>144</sup> Therefore, journalists have to refrain from statements that are likely to prejudice.

Furthermore the ECtHR deduces from the Appendix to the Recommendation Rec (2003) 13 “on the provision of information through the media in relation to criminal proceedings” that even the states are subject to positive obligations under Art. 8 to protect the privacy of convicted persons in such proceedings.<sup>145</sup>

When examining whether the domestic authorities have solved this conflict of rights in conformity with the European law, the Court includes the principles of this Recommendation, saying that

“it rightly points out that the media have the right to inform the public in view of the public’s right to receive information, and stresses the importance of media reporting on criminal proceedings in order to inform the public and ensure public scrutiny of the functioning of the criminal justice system. In addition, the Appendix to that Recommendation states that the public must be able to receive information about the activities of judicial authorities and police services through the media and that journalists must therefore be able to report freely on the functioning of the criminal justice system.”<sup>146</sup>

But it also refers to this Recommendation and its Appendix when it says that

“it is to be noted that the public nature of court proceedings does not function as a *carte blanche* relieving the media of their duty to show due care in communicating information received in the course of those proceedings”<sup>147</sup>,

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<sup>141</sup> News Verlags GmbH & Co. KG v. Austria, judgment of 11 January 2000, Appl. 31457/96, § 39.

<sup>142</sup> Worm v. Austria, judgment of 29 August 1997, Appl. 22714/93, § 50.

<sup>143</sup> Sunday Times v. the U.K., *op. cit.*, § 63.

<sup>144</sup> Worm v. Austria, *op. cit.*, § 50 and 55; Bladet Tromsø and Stensaas v. Norway, *op. cit.*, § 65.

<sup>145</sup> Egeland and Hanseid v. Norway, judgment of 16 April 2009, Appl. 34438/04, § 53.

<sup>146</sup> Dupuis and other v. France, judgment of 7 June 2007, Appl. 1914/02, § 42.

<sup>147</sup> Eerikäinen and others v. Finland, judgment 10 February 2009, Appl. 3514/02, § 63; Flinkkilä and others v. Finland, judgment of 6 April 2010, Appl. 25576/04, § 77.



and that

"under the terms of Article 10 § 2, the exercise of the freedom of expression carries with it 'duties and responsibilities', which also apply to the press. In the present case this relates to protecting 'the reputation or rights of others' and 'maintaining the authority and impartiality of the judiciary'. These duties and responsibilities are particularly important in relation to the dissemination to the general public of photographs revealing personal and intimate information about an individual. The same applies when this is done in connection with criminal proceedings."<sup>148</sup>

With regard to the principles of the Recommendation and Appendix, especially the positive obligations of the states, the Court has already affirmed a violation of Art. 8 ECHR concerning a publication that entailed prejudice against the applicant's honour and reputation and was therefore harmful to his moral and psychological integrity and his private life.<sup>149</sup>

These considerations are also important for the question regarding under which circumstances the press may be excluded from a trial. Such an exclusion can be justified to protect the privacy of a child and other parties, which is protected by Art. 8 ECHR, and to avoid prejudicing the interests of justice.<sup>150</sup>

#### 1.3.2.2.4. Criticism of politicians

The journalists' right of making statements may be restricted by the type of the person that is affected by it; however, generally not so, when it comes to reporting on public figures such as politicians. According to the Court<sup>151</sup>,

"the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual."

A politician is a public figure who voluntarily lays himself open to close scrutiny of his acting and word. Therefore he has to bargain for critical reactions of the public or the press and a higher degree of tolerance has to be displayed. A possible failure of a public figure, even in the private sphere, may, in certain circumstances, constitute a matter of legitimate public interest.<sup>152</sup>

Even the publication of purely private information of public figures may be permitted, if there is a close connection with their function. The Court considers that

"it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent."<sup>153</sup>

But this does not mean that a politician is not entitled to have his person protected. In addition to Art. 10(1) ECHR protecting the right to freedom of expression as the basis of all media, Art. 8(1) ECHR declares a right to respect the private and family life, the home and the correspondence of a person. He/She enjoys this right even when he/she is acting

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<sup>148</sup> Egeland and Hanseid v. Norway, *op. cit.*, § 59.

<sup>149</sup> A. v. Norway, judgment of 9 April 2009, Appl. 28070/06, §§ 73-75.

<sup>150</sup> See B. and P. v. the U.K., judgment of 24 April 2001, Appl. 36337/97 and 35974/97.

<sup>151</sup> Oberschlick v. Austria (no.2), *op. cit.*, § 29; Lopes Gomes da Silva v. Portugal, judgment of 28 September 2000, Appl. 37698/97, § 30.

<sup>152</sup> Tønsbergs Blad AS and Haukom v. Norway, *op. cit.*, § 87.

<sup>153</sup> Társaság a Szabadságjogokért v. Hungary, judgment of 14 April 2009, Appl. 37374/05, § 37.

in his public capacity, whereas both rights need to be counterbalanced in the case of conflicts.

There always has to be a fair balance between the personal interest of the politician and public interests, especially the interests of open discussion of political issues.

This topic has already been the subject of different judgments of the ECtHR. In the case *Dalban v. Romania*<sup>154</sup> the Court observed the application of a journalist who was convicted for criminal libel because of some articles that exposed a series of frauds allegedly committed by a senator and the chief executive. According to the ECtHR, this was an interference that could not be accepted as necessary in a democratic society. The information of the article was about a matter of public interest, namely the behaviour of the senator and the chief executive as a politician, thus a person of public interest, and did not concern their private life. With regard to the vital role of the press, and the fact that the allegations could not be proved as untrue, there was a clear breach of the journalist's right of freedom of expression.

A further question in this context is whether, and to what extent, journalists are allowed to report about persons who are associated with politicians, such as family members, partners in life or friends. Although they are not public figures, meaning that the principles mentioned above are basically not applicable, such reports can be justified by the right to freedom of expression of the journalists. This right has to be balanced against the protection of the private life of the persons affected, while special circumstances can lead to an outweighing of the former.

Therefore, the ECtHR found a violation of Art. 10 ECHR in the *Flinkkilä and others* case. Journalists were sentenced because of the publication of photos which showed a woman who was the partner of a politician. It said that

"[h]er status as an ordinary person enlarges the zone of interaction which may fall within the scope of private life."<sup>155</sup>

Because she had already caught the attention of the public by her behaviour in the past, the Court found furthermore that

"[it] cannot but note that [she], notwithstanding her status as a private person, can reasonably be taken to have entered the public domain.(...) The disclosure of [her] identity in the reporting had a direct bearing on matters of public interest (...)."<sup>156</sup>

In conclusion, the conviction of the journalists was illegal, because they had acted in the public interest.

#### 1.3.2.2.5. *Criticism of the government*

The examination of applications concerning "criticism of the government" is, according to the ECtHR, handled in a similar way to criticism of politicians.<sup>157</sup> The limits are also wider than with regard to a (purely) private person. The government occupies a dominant position, which makes it essential to exercise moderation, especially in resorting to criminal proceedings, where other measures are available.

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<sup>154</sup> *Dalban v. Romania*, judgment of 28 September 1999, Appl. 28114/95.

<sup>155</sup> *Flinkkilä and others v. Finland*, judgment of 6 April 2010, Appl. 25576/04, § 82.

<sup>156</sup> *Flinkkilä and others v. Finland*, *op. cit.*, §§ 83 and 85.

<sup>157</sup> *Incal v. Turkey*, judgment of 9 June 1998, Appl. 22678/93, § 54.

Besides the division of power, the control by the public opinion is essential in a democratic system, while it remains open to the states as guarantors of public order to adopt measures to react, i.e. by law or other proportionate measures.

The Court's judgment in the case *Feldek v. Slovakia*<sup>158</sup> gives an example of the scope of protection of Art. 10 in this context. The applicant had criticised the then new Slovakian Government, especially the new political leaders. He referred to the fascist past of the new Minister for Culture and Education and cast doubts on the personal qualities of the minister as a member of the government in a democratic state. Although the applicant had used harsh words, the Court held that he could draw his statements upon Art. 10 of the Convention, because they were based on facts, and were made in good faith and in pursuit of a legitimate aim. Furthermore they were made in a very political context and were crucial for the development of Slovakia.

An important attribute of a democratic society is a free political debate. There have to be very strong reasons to justify restrictions and states are given little scope for these. In other regards, there is a danger that respect for freedom of expression is affected in general in the state concerned.

There are also cases in which the Court considered that Art. 10 cannot take precedence over conflicting rights, such as the reputation of a politician. In 2008, the Court had to decide in a case<sup>159</sup> that dealt with a journalist who had alleged that a politician had been active in the secret police *securitate*.

In this case, there was no factual basis at all and additionally the statements were very concrete, not "general and undetermined" and did not feature any irony or humour. Therefore, the ECtHR found that even the right of the press to provoke or exaggerate could not be exerted to justify such allegations, and that the bounds of acceptable criticism had been overstepped. In conclusion, a violation of Art. 10 ECHR was not established.

The same direction applied in the Court's judgment in the case *Petrov v. Bulgaria*<sup>160</sup>. In this case a journalist accused the applicant of (indirectly) participating in the assassination of a former chief prosecutor. The national courts did not convict the journalist because of his statement. The Court ruled that the acquittal of the journalist had not violated Art. 10 ECHR, because the applicant's own freedom of expression was not at stake. Furthermore, Art. 8 ECHR was not violated. In several cases concerning complaints brought under Art. 10 ECHR the Court ruled that a person's reputation is protected by Art. 8 ECHR as part of the right to respect for "private life". The protection of private life has to be balanced against the right to freedom of expression, enshrined in Art. 10. The Court ruled in this case that the national courts had balanced, in conformity with Convention standards, the applicant's interest in protecting his reputation against the paramount public interest in the respective matters.

#### 1.3.2.2.6. "Hate speech" and violence

The Court concedes a wider margin of appreciation to the State authorities examining the need for interference, where such remarks constitute an incitement to violence against an individual or a public official or a sector of the population.<sup>161</sup> It considers one of the

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<sup>158</sup> *Feldek v. Slovakia*, judgment of 12 July 2001, Appl. 29032/95.

<sup>159</sup> *Petrina v. Romania*, judgment of 14 October 2008, Appl. 78060/01.

<sup>160</sup> *Petrov v. Bulgaria*, judgment of 2 November 2010, Appl. 27103/04.

<sup>161</sup> *Ceylan v. Turkey*, judgment of 8 July 1999, Appl. 23556/94, § 34; *Gerger v. Turkey*, judgment of 8 July 1999, Appl. 24919/94, § 48.

principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without having recourse to violence.<sup>162</sup> It is necessary in a democratic society to restrict such hate speech which constitutes incitement to violence, hostility or hatred, because violence as a means of political expression is the antithesis of democracy; irrespective of the ends to which it is directed, incitement to it will tend to undermine democracy and it is intrinsically inimical to the ECHR. Unlike the advocacy of opinions on the free marketplace of ideas, incitement to violence is the denial of a dialogue, the rejection of the testing of different thoughts and theories in favour of a clash of might and power. It should not fall within the ambit of Art. 10 ECHR, whereas a distinction between this and pure strong protest referring to a difficult political situation has to be made.<sup>163</sup> However, there could be the risk that media might become "a vehicle for the dissemination of hate speech and the promotion of violence".

These different approaches show that it is important to take the degree of aggressive tone of a statement and its circumstances into account, and whether an inhibition is necessary within the meaning of democracy that benefits from free circulation of information and opinions.

This is also shown by another example of the jurisdiction of the Court. The applicants of this case had shouted some slogans with a violent tone during a demonstration. Regarding the case as a whole the Strasbourg Court found that

"having regard to the fact that these are well-known, stereotyped leftist slogans and that they were shouted during lawful demonstrations – which limited their potential impact on "national security" and "public order" – they cannot be interpreted as a call for violence or an uprising. The Court stresses, however, that whilst this assessment should not be taken as an approval of the tone of these slogans, it must be recalled that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."<sup>164</sup>

It also said that the applicants did not advocate violence, injury or harm to any person by these slogans and the applicants' conduct could not be considered to have had an impact on "national security" or "public order" by way of encouraging the use of violence or inciting others to armed resistance or rebellion. Consequently, there has been a violation of the applicant's right to freedom of expression.

When examining whether there has been a violation of Art. 10 ECHR, the ECtHR reverts to the definition of the term "hate speech" by the Appendix to the Recommendation No. R (97) 20.<sup>165</sup> "Hate speech" has to be understood as

"covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."

Besides its own case-law, the scrutiny by the Court involves the principles of this Recommendation and its Appendix, while the judges consider both of them as

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<sup>162</sup> United Communist Party of Turkey and Others v. Turkey, judgment of 30 January 1998, Appl. 19392/92, § 57.

<sup>163</sup> Karatas v. Turkey, judgment of 8 July 1999, Appl. 23168/94, dissenting opinion of the judges Wildhaber, Pastor Ridruejo, Costa and Baka.

<sup>164</sup> Gül and other v. Turkey, judgment of 8 June 2010, Appl. 4870/02, § 41.

<sup>165</sup> Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "hate speech", adopted on 30 October 1997.

"guidelines designed to underpin governments' efforts to combat all hate speech, for example the setting up of an effective legal framework consisting of appropriate civil, criminal and administrative law provisions for tackling the phenomenon. It proposes, among other measures, that community-service orders be added to the range of possible penal sanctions and that the possibilities under the civil law be enhanced, for example by awarding compensation to victims of hate speech, affording them the right of reply or ordering retraction. Governments should ensure that, within this legal framework, any interference by the public authorities with freedom of expression is narrowly circumscribed on the basis of objective criteria and subject to independent judicial control."<sup>166</sup>

The position contrary to violence in the media of the Council of Europe is reflected in several further legal acts.

With regard to the fact that Art. 10 ECHR also protects opinions that shock or disturb, Recommendation No. R (97) 19<sup>167</sup> says that

"[h]owever, certain forms of gratuitous portrayal of violence may lawfully be restricted, taking into account the duties and responsibilities which the exercise of freedom of expression carries with it."

Thus it sets some guidelines for measures to restrict portrayals of violence in the media.

Moreover the protection of women against violence shall be improved. According to the Appendix of the Recommendation Rec (2002) 5<sup>168</sup>, the Member States should:

- "17. encourage the media to promote a non-stereotyped image of women and men based on respect for the human person and human dignity and to avoid programmes associating violence and sex; as far as possible, these criteria should also be taken into account in the field of the new information technologies;
18. encourage the media to participate in information campaigns to alert the general public to violence against women;
19. encourage the organisation of training to inform media professionals and alert them to the possible consequences of programmes that associate violence and sex;
20. encourage the elaboration of codes of conduct for media professionals, which would take into account the issue of violence against women and, in the terms of reference of media watchdog organisations, existing or to be established, encourage the inclusion of tasks dealing with issues concerning violence against women and sexism."

Concerning videogames the Committee of Ministers of the Council of Europe recommends in the Recommendation No. R (92) 19<sup>169</sup> that the governments of Member States:

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<sup>166</sup> Gündüz v. Turkey, judgment of 4 December 2003, Appl. 35071/97, § 22.

<sup>167</sup> Recommendation No. R (97) 19 of the Committee of Ministers to Member States on the portrayal of violence in the electronic media, adopted on 30 October 1997.

<sup>168</sup> Recommendation No. Rec (2002) 5 of the Committee of Ministers to Member States on the protection of women against violence, adopted on 30 April 2002.

<sup>169</sup> Recommendation No. R (92) 19 of the Committee of Ministers to Member States on video games with a racist content, adopted on 19 October 1992.

“Review the scope of their legislation in the fields of racial discrimination and hatred, violence and the protection of young people, in order to ensure that it applies without restriction to the production and distribution of video games with a racist content;

Treat video games as mass media for the purposes of the application *inter alia* of Recommendation No. R (89) 7 concerning principles relating to the distribution of videogames having a violent, brutal or pornographic content, and of the Convention on Transfrontier Television (ETS 132).”

Additionally, with regard to the fact that the media can make a positive contribution to the fight against intolerance, Recommendation No. R (97) 21<sup>170</sup> includes professional practices which are conducive to the promotion of a culture of tolerance.

#### 1.3.2.2.7. *Criticism by civil servants*

In the following there is the question as to whether a civil servant could be deprived of their freedom of expression just because of their status.

The responsibility of a state under the Convention may arise for acts of all its organs, agents and servants. Thus, the obligations of a Contracting Party under the Convention can be violated by any person exercising an official function vested in them.<sup>171</sup>

Therefore, a judge is not hindered from expressing his opinion among his responsibilities. Reactions to this as interference by a State authority in the form of acting by superiors can give rise to a breach of Art. 10 ECHR, unless it can be shown that it was in accordance with the aims laid out in its para. 2.

In 2008, the ECtHR decided<sup>172</sup> a case which concerned an informant, head of the Press Department of the Moldovan Prosecutor General’s Office. The informant handed over two secret letters to a newspaper without consulting the heads of other departments of the Prosecutor General’s Office and, therefore, was dismissed, as his behaviour was considered as a breach of the press department’s internal regulations. It was revealed that the Deputy Speaker of Parliament had exercised undue pressure on the Public Prosecutor’s Office.

The ECtHR ruled that pressure by Parliament put on the Public Prosecutor and, accordingly, the possible threat for independence of national justice are very important matters in a democratic society, the public has a legitimate interest to know about and that they are issues of public interest. These matters are so important in a democratic society that they outweigh the interest in maintaining public confidence in the Prosecutor General’s Office. It emphasised that the special situation in Moldova supported this view in the given case. International non-governmental organisations had expressed concern about the breakdown of the separation of powers and the lack of judicial independence. Regarding the severe sanction in the form of a dismissal and the danger of a potential chilling effect on an open discussion of topics of public concern, the Court found that this interference could not be considered as “necessary in a democratic society”.

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<sup>170</sup> Recommendation No. R (97) 21 of the Committee of Ministers to Member States on the media and the promotion of a culture of tolerance, adopted on 30 October 1997.

<sup>171</sup> Wille v. Liechtenstein, judgment of 28 October 1999, Appl. 28396/95, §§ 42 and 46.

<sup>172</sup> Guja v. Moldova, judgment of 12 February 2008, Appl. 14277/04.



#### 1.3.2.2.8. *Statements concerning religious beliefs*

Another important issue addresses statements concerning religious beliefs. In its judgment *Kokkinakis v. Greece* the ECtHR pointed out that

"freedom of thought, conscience and religion, which is safeguarded under Article 9 of the Convention, is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life."<sup>173</sup>

The protection of the religious feelings of other people can be a legitimate aim in the meaning of the ECHR. Freedom of thought and freedom of expression need to be counterbalanced in the case of conflicts.

In this context the ECtHR said that

"those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith."<sup>174</sup>

But a distinction has to be made between "provocative opinions" and abusive attacks on one's religion<sup>175</sup>, because

"whoever exercises the rights and freedoms enshrined in the first paragraph of Article 10 undertakes 'duties and responsibilities'. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."<sup>176</sup>

However, the manner in which religious feelings are at stake is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right.

Thus,

"it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any 'formality', 'condition', 'restriction' or 'penalty' imposed be proportionate to the legitimate aim pursued."<sup>177</sup>

The Court allows a wider margin of appreciation to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion:

"This does not of course exclude final European supervision. Such supervision is all the more necessary given the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expression under the

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<sup>173</sup> *Kokkinakis v. Greece*, judgment of 25 May 1993, Appl. 14307/88, § 31.

<sup>174</sup> *Otto-Preminger Institut v. Austria*, judgment of 20 September 1994, Appl. 13470/87, § 47.

<sup>175</sup> See *I.A. v. Turkey*, judgment of 13 September 2005, Appl. 42571/98.

<sup>176</sup> *Otto-Preminger Institut v. Austria*, op. cit., § 49.



guise of action taken against allegedly blasphemous material. In this regard the scope of the offence of blasphemy and the safeguards inherent in the legislation are especially important. Moreover the fact that the present case involves prior restraint calls for special scrutiny by the Court."<sup>178</sup>

#### 1.3.2.2.9. *News reporting based on interviews*

The press benefits from the need for free circulation of views and for open public debate. Any opinions and information that are expressed in this context are to be considered part of a debate on questions of public interest, meaning that there is little scope for restrictions under Art. 10. Therefore, a journalist is not hampered from asking captious or pointed questions or making such statements. He/She can only be convicted of defamation, if there are strong and sufficient reasons.

At the same time news reporting based on interviews is one of the most essential means of how the press can safeguard its elementary role as a "public watchdog". As long as rights of other people are not outweighing, or as long as there are no other strong and sufficient reasons, a journalist must not be punished for assisting in the dissemination of statements made by another person, for example in an interview. Otherwise public discussion on topics of general interest would seriously be hampered.<sup>179</sup>

It should be added that the Court also ruled<sup>180</sup> that there is no general requirement for journalists to systematically and formally distance themselves from the content of a quotation that might insult or provoke others or damage their reputation. This is not reconcilable with the press role of distributing opinions and ideas.

According to the Court, the reputation of the affected person can be a legitimate aim and interference with the freedom of expression can be proportionate if there is an "objective link" between the impugned statement and the person suing in defamation as a requisite element:

"Mere personal conjecture or subjective perception of a statement as defamatory does not suffice to establish that the person was directly affected by the publication. There must be something in the circumstances of a particular case to make the ordinary reader feel that the statement reflected directly on the individual claimant or that he was targeted by the criticism."<sup>181</sup>

These principles also apply in the sphere of television and radio broadcasting.<sup>182</sup>

#### 1.3.2.2.10. *Restrictions on journalistic publication and distribution*

Freedom of expression does not prohibit in terms the imposition of prior restraints on publications. This is conveyed by words like "prevention" or "conditions" used by Art. 10(2) ECHR. According to that, an obligation to register a title of a newspaper is not a violation as such. It is a legitimate interference if it is prescribed by law and additionally necessary in a democratic society. But there are also dangers of such a practice thinkable.<sup>183</sup>

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<sup>177</sup> Otto-Preminger Institut v. Austria, *op. cit.*, § 49.

<sup>178</sup> Wingrove v. the U. K., *op. cit.*, § 58; Observer and Guardian v. the U.K., *op. cit.*, § 60.

<sup>179</sup> Jersild v. Denmark, *op. cit.*, § 35.

<sup>180</sup> Thoma v. Luxembourg, judgment of 29 March 2001, Appl. 38432/97, § 64.

<sup>181</sup> Dyuldin and Kislov v. Russia, judgment of 31 July 2007, Appl. 25968/02, § 44.

<sup>182</sup> Cf. Filatenk v. Russia, judgment of 6 December 2007, Appl. 73219/01, § 45.

<sup>183</sup> Observer and Guardian v. the U.K., *op. cit.*, § 60.

Therefore, it is questionable as to whether and to what extent States are allowed to restrain journalistic publication and distribution.

Because a careful scrutiny becomes important as far as the press is concerned, and news is a perishable commodity and delaying its publication, even for a short period, may well deprive it of all its value and interest<sup>184</sup>, States must put forward strong and replicable reasons to the ECtHR for such measures to stand, whereby their margin of appreciation is limited as far as the freedom of press is at stake.<sup>185</sup>

In the case *Ürper and others* four Turkish newspapers were suspended for periods ranging from 15 days to a month in respect of various news reports and articles. These restraints were not imposed on particular articles, but on the future publication of entire newspapers, whose content was unknown at the time of the national court's decisions. Therefore, these applicants' cases were distinguishable from the earlier case of *Observer and Guardian*<sup>186</sup>. The ECtHR found that

"the preventive effect of the suspension orders entailed implicit sanctions on the applicants to dissuade them from publishing similar articles or news reports in the future, and hinder their professional activities. [...] Less draconian measures could have been envisaged, such as the confiscation of particular issues of the newspapers or restrictions on the publication of specific articles."<sup>187</sup>

It concluded that the national courts had overstepped their margin of appreciation and that they had

"unjustifiably restricted the essential role of the press as a public watchdog in a democratic society. The practice of banning the future publication of entire periodicals went beyond any notion of 'necessary' restraint in a democratic society and, instead, amounted to censorship."<sup>188</sup>

In conclusion, a violation of Art. 10 ECHR was given.

#### *1.3.2.2.11. The protection of journalistic sources*

The protection of journalistic sources is another important issue addressed by Art. 10 ECHR.

- Revealing the identity of an informant

An interference can be given by a disclosure order or the requirement to reveal the identity of the source. Such measures can be justified if there is a legitimate interest in the disclosure which clearly outweighs the public interest in the non-disclosure. The necessity of the disclosure is identified as responding to a pressing social need, while the Member States enjoy a certain margin of appreciation in assessing this need. In this

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<sup>184</sup> *Observer and Guardian v. the U.K.*, *op. cit.*, § 60.

<sup>185</sup> *Editions Plon v. France*, judgment of 18 May 2004, Appl. 58148/00, § 44.

<sup>186</sup> See footnote 61.

<sup>187</sup> *Ürper and Others v. Turkey*, judgment of 20 October 2009, Appl. 14526/07, § 43; see, *mutatis mutandis*: *Demirel and Ateş v. Turkey*, judgment of 9 December 2008, Appl. 11976/03, § 28.

<sup>188</sup> *Ürper and Others v. Turkey*, *op. cit.*, § 44.

context the ECtHR refers<sup>189</sup> to Recommendation Rec (2000) 7 "on the right of journalists not to disclose their sources of information"<sup>190</sup>, especially principle 3, stated therein.

Recalling Committee of Ministers Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information, the Assembly reaffirms that the protection of journalists' sources of information is a basic condition for both the full exercise of journalistic work and the right of the public to be informed on matters of public concern, as expressed by the European Court of Human Rights in its case law under Article 10 of the Convention.

Furthermore, the Court makes use of the explanatory notes for the precise application of the Recommendation. As regards the term "sources", the explanation reads as follows:

"Source:

17. Any person who provides information to a journalist shall be considered as his or her 'source'. (...) Journalists may receive their information from all kinds of sources. Therefore, a wide interpretation of this term is necessary. The actual provision of information to journalists can constitute an action on the side of the source, for example when a source calls or writes to a journalist or sends to him or her recorded information or pictures. Information shall also be regarded as being 'provided' when a source remains passive and consents to the journalist taking the information, such as the filming or recording of information with the consent of the source."

Using these principles, the Court made the following assessments:

"Protection of journalistic sources is one of the basic conditions for press freedom. (...) Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard for the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."<sup>191</sup>

"Far-reaching measures cannot but discourage persons who have true and accurate information relating to wrongdoing of the kind here at issue from coming forward and sharing their knowledge with the press in future cases."<sup>192</sup>

Hence, intensive measures for a certain time period can be proportional, but there has to be a grave sufficient interest in knowing the identity of the source, which overrides the interest in concealing it.

- Searches at a journalist's home and workplace

The ECtHR ruled in *Roemen and Schmit v Luxembourg* that searches carried out at a journalist's home and workplace to ascertain whether there had been a criminal offence, i.e. a breach of professional confidence, are very intensive measures. Such measures can

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<sup>189</sup> *Financial Times Ltd. and others v. the U.K.*, judgment of 15 December 2009, Appl. 821/03, § 36; *Voskuil v. the Netherlands*, judgment of 22 November 2007, Appl. 64752/01, § 43.

<sup>190</sup> Recommendation Rec (2000) 7 of 8 March 2000 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information.

<sup>191</sup> *Goodwin v. the U.K.*, op. cit., §§ 39 and 40; *Voskuil v. the Netherlands*, op. cit., § 65.

only be legitimate if there are no alternative ways to obtain the information or, rather, there have to be very strong reasons to justify such searches.<sup>193</sup> The Court emphasised that there is a fundamental difference between this case and *Goodwin v UK*.<sup>194</sup> In the latter case, the journalist was just required to reveal the identity of his informant, whereas in the instant case searches were carried out at the first applicant's home and workplace, which formed a more drastic measure. This is because investigators who raid a journalist's workplace have access to all the documentation held by the journalist and thus they have very wide investigative powers. Such

"limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court."<sup>195</sup>

- Procedural guarantee

Interferences with the right of protection of sources must be attended with legal procedural safeguards. The ECtHR (again) refers to the above-mentioned recommendation Rec (2000) 7 in the *Sanoma Uitgevers* case demanding that

"any interference with the right to protection of such sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake.(...) First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. (...) The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not.(...) The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established."<sup>196</sup>

This decision was entrusted to the public prosecutor. According to the Court, this person cannot be seen as impartial like an independent judge. Also, the involvement of the investigating judge in this case could not satisfy the ECtHR, because he only had a supporting role.

A law which does not provide regulations which meet these requirements has a deficient quality. Hence, an interference with the freedom of expression based on such a law is not prescribed by law, and thus it is a violation of Art. 10 ECHR.<sup>197</sup>

#### 1.3.2.2.12. *Publishing of confidential documents*

A further question is whether a journalist is entitled to receive and publish confidential documents. An interference, for example by a penalty imposed for such an action, can be justified by the legitimate aim of preventing the "disclosure of information received in confidence", as mentioned in Art. 10(2) ECHR.

Furthermore, journalists exercising the freedom of expression undertake "duties and responsibilities", the Court regularly emphasises. Hence, even with regard to the vital

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<sup>192</sup> Voskuil v. the Netherlands, *op. cit.*, § 71.

<sup>193</sup> Roemen and Schmit v. Luxembourg, judgment of 25 February 2003, Appl. 51772/99, § 56.

<sup>194</sup> Goodwin v. the U.K., *op. cit.*

<sup>195</sup> Roemen and Schmit v. Luxembourg, *op. cit.*, § 57.

<sup>196</sup> Sanoma Uitgevers B.V. v. the Netherlands, *op. cit.*, §§ 88, 90 and 92.

<sup>197</sup> Sanoma Uitgevers B.V. v. the Netherlands, *op. cit.*, §§ 93 ff.

role of the press, journalists cannot be released from their duty to obey the ordinary criminal law.

However,

“press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature”<sup>198</sup>,

because the public rely on the press as their most important purveyor of information concerning these matters to monitor the actions of the government.

Therefore, the conviction of a journalist for disclosing information considered to be confidential or secret may have the effect of a censorship and discourage those working in the media from informing the public, that the press may no longer be able to play its vital role as “public watchdog”, and that the ability of the press to provide accurate and reliable information may be adversely affected.<sup>199</sup> Consequently, a fair balance between interest in the public’s being informed and the “duties and responsibilities” of the press could justify the publication of such documents.

In this context, the ECtHR reviews with great scrutiny whether the objective of protecting fiscal confidentiality, for example, constitutes a relevant and sufficient justification with regard to the interference with the right of freedom of expression.<sup>200</sup>

It declares that

“in essence, that Article leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility and reiterates that it protects journalists’ right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism.”<sup>201</sup>

Where this is given in connection with the specific case, the interest of the public in obtaining information is overwhelming, even if the publication of some information is prohibited.

The same issue is dealt with by a case<sup>202</sup> in which a radio station was sanctioned for broadcasting a telephone conversation of a politician, which was unlawfully obtained. Since the journalists of the station were acting in good faith and the reputation of the politician was not tarnished, their being sanctioned was a violation of their right of freedom of expression.

With regard to all of these issues mentioned above one may refer to the Declaration by the Committee of Ministers on the protection and promotion of investigative journalism<sup>203</sup>, which, for example, pursues the goal to protect and facilitate the work of the journalists by the requirement of ensuring the personal safety of media professionals and their access to information.

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<sup>198</sup> Stoll v. Switzerland, judgment of 10 December 2007, Appl. 69698/01, § 110.

<sup>199</sup> Stoll v. Switzerland, *op. cit.*, § 110 and 154.

<sup>200</sup> Fressoz and Roire v. France, *op. cit.*, §§ 52 and 53.

<sup>201</sup> Fressoz and Roire v. France, *op. cit.*, § 54.

<sup>202</sup> Radio Twist S.A. v. Slovakia, judgment of 19 December 2006, Appl. 62202/00.

<sup>203</sup> Declaration by the Committee of Ministers on the protection and promotion of investigative journalism, adopted on 26.09.2007.

The ECtHR ruled in *Affaire Poyraz v Turkey* that the communication or publication of confidential material is not covered by Art. 10 ECHR.<sup>204</sup> Regarding the privileged position of public officers (in this case the chief inspector of the Ministry of Justice) benefiting from the access to the media, they must exercise their freedom of expression in a restrained manner ("faire montre de retenue") to avoid an imbalance in relation to "ordinary citizens" who have limited access to the media.

Besides, there is the Recommendation No. R (96) 4<sup>205</sup> which provides to especially protect journalistic work also in situations of conflict and tension.

#### 1.3.2.2.13. *Politicians entitled by Art. 10 ECHR*

Freedom of expression is not only a right that may conflict with the reputation of politicians, but also plays a vital role in political actions in general. For example, politicians can refer to this right with regard to their speeches.

"In a democracy, Parliament or such comparable bodies are the essential fora for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein."<sup>206</sup>

Nevertheless, it is possible that conflicting rights of others justify a restriction of their freedom of expression. In 1988, a politician reacted to an article in a local newspaper about him and his actions in the past by calling this work "Nazi-Journalism". Thereupon, an injunction was issued against him prohibiting him from repeating the statement. The Court<sup>207</sup> ruled that there was no violation of Art. 10. Although it held that the article itself was defamatory, it had particular regard to the special stigma that are attached to activities inspired by national-socialist ideas. Besides, it took into consideration that, according to Austrian legislation, it is a criminal offence to perform such activities and that the applicant was only prohibited from repeating his statement or the making of similar statements. He had still been entitled to express his opinion in other words or ways. Such an interference was therefore "necessary in a democratic society".

- Election time

In the *Bowman* case<sup>208</sup>, the politician *Bowman* was charged with an offence because he had distributed more than one million leaflets. The Court held that this measure was an interference with the freedom of expression of the politician, but that it did pursue the legitimate aim of protecting the rights of others, namely the candidates for election and the electorate.

It considered that this action was also necessary in a democratic society because free elections, particularly freedom of political debate – besides the freedom of expression –, form the bedrock of any democratic system. These two rights determine each other.

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<sup>204</sup> *Affaire Poyraz v. Turkey*, judgment of 7 December 2010, Appl. 15966/06.

<sup>205</sup> Recommendation No. R (96) 4 of the Committee of Ministers to Member States on the protection of journalists in situations of conflict and tension, adopted on 3 May 1996.

<sup>206</sup> *Jerusalem v. Austria*, *op. cit.*, § 40.

<sup>207</sup> *Andreas Wabl v. Austria*, judgment of 21 March 2000, Appl. 24773/94.

<sup>208</sup> *Bowman v. the UK*, judgment of 19 February 1998, Appl. 24839/94.



The Court notes that

“freedom of expression is one of the 'conditions' necessary to 'ensure the free expression of the opinion of the people in the choice of the legislature.’”<sup>209</sup>

For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. However, even at the time of elections, these two rights can conflict, meaning that certain restrictions, which usually would not be accepted as compatible with Art. 10, can be required. It can be concluded that the states are free within their margin of appreciation to rule the elections to guarantee free elections as a democratic state’s need, but they are obliged to exactly analyse if there are other measures thinkable to reach this aim, and avoid total barriers, such as in the *Bowman* case.

- Restrictions on political activities

Another example of national measures restricting the actions of a politician are rules that restrict the participation of a substantial number of local government officers in certain kinds of political activities. In its judgment<sup>210</sup>, the Court held that this interference with Art. 10 can be justified by the legitimate aim of the protection of an effective democracy.

However, this aim cannot *eo ipso* suffice as a justification of interference with the rights guaranteed by Art. 10. Otherwise, both the interests served by democratic institutions such as local authorities and the need to make provision to secure their proper functioning – where this is considered necessary to safeguard those interests – would be overlooked.

“The Court recalls in this respect that democracy is a fundamental feature of the European public order. This is apparent from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights.”

There is also a bond of trust between elected council members and the local government officers. The former bank on the loyalty and support of the impartial officers. Besides, there is the expectation of the citizens that the council members they have voted for behave in accordance with their election pledges. Therefore, the rights of the council members and the electorate can be considered as legitimate aims within the meaning of Art. 10(2). The Court examined whether a pressing social need exists and whether the restrictions were proportionate to the pursued aim. In the present case, there had been an abuse of power by certain local government officers which was, in the view of the ECtHR, a sufficient reason to establish a pressing social need.

In 1999, a similar case<sup>211</sup> was decided. In Hungary, a law was enacted which prohibited members of the armed forces, the police and security services from joining any political party and from engaging in any political activity. The Court agreed that there was an interference with the right of freedom of expression, but found that having a politically neutral police force is a legitimate aim. According to the Court, the Hungarian state could also restrict the freedom of the police with regard to their margin of appreciation and their historical background.

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<sup>209</sup> Mathieu-Mohin and Clerfayt v. Belgium, judgment of 2 March 1987, Appl. 9267/81, § 54.

The Court also stated that an absolute ban is not compatible with Art. 10 ECHR and that policemen are entitled to

“undertake some activities enabling them to articulate their political opinions and preferences.”

#### 1.3.2.3. Interferences according to Art. 10 ECHR

##### *1.3.2.3.1. State measures*

According to Art. 10(2) ECHR, interferences are possible by state measures in the form of formalities, conditions, restrictions or penalties. States can interfere with the rights of Art. 10 ECHR if they enact a law which affects the legal sphere of the citizens. The same could apply to administrative action by state authorities as well as national court decisions, which confirm the legality of such action, based on national law.

##### *1.3.2.3.2. Positive obligations*

Recently, the ECtHR again dealt with the question as to whether Art. 10 ECHR creates positive obligations on Member States to take measures protecting the right to freedom of expression.

The case which the judges had to decide upon was about a journalist who was sentenced because of his critical stance on society. A short time later he was murdered by nationalist extremists. The national authorities did not take any safeguard measures although there were concrete indications of an attempt on the life of the journalist.

In this context, the Strasbourg Court stressed that

“the states are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear.”<sup>212</sup>

It drew the conclusion that this requirement leads to a “positive obligation” to protect the right to freedom of expression against attack, also by private individuals, whereas it also clarified that a potential failure can be vindicated by a “pressing social need”.

Consequently, states are not only obliged to refrain from interferences with the rights guaranteed by Art. 10 ECHR, but also to be active in protecting these ones subject to the limits referred to in paragraph 2 of Art. 10 ECHR.

##### *1.3.2.3.3. “Third-party applicability”*

There is the question as to whether an interference is only thinkable by means of a contracting state or also by private individuals.

It has not been conclusively clarified whether the rights of the Convention have a so-called “third-party applicability” (*Drittwirkung*), but in any event the Contracting States have positive obligations to ensure compliance with these rights, because, according to the Court,

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<sup>210</sup> Ahmed and Others v. the UK, judgment of 2 September 1998, Appl. 22954/93, § 52.

<sup>211</sup> Rekvény v. Hungary, judgment of 20 May 1999, Appl. 25390/94.

<sup>212</sup> Dink v. Turkey, judgment of 14 September 2010, Appl. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, § 137.

“the genuine and effective exercise of freedom of expression under Article 10 may require positive measures of protection, even in the sphere of relations between individuals.”<sup>213</sup>

Therefore, the states can be responsible for a breach of Article 10 even by a private person, if they do not attend to their duties. The subject of a decision by the ECtHR is the domestic court’s ruling, which judges the national litigation between private individuals. Thus, it can be assumed that there is not a direct but at least an indirect applicability of the Convention between private individuals. For example, the Court affirmed such an indirect applicability to relations between employer and employee.<sup>214</sup>

In fulfilling their responsibilities the States especially have to ensure that the freedom of expression of journalists working in public broadcasting companies is respected, because

“subject to the conditions set out in Article 10 § 2, journalists have a right to impart information. The protection of Article 10 extends to employed journalists and other media employees. An employed journalist can claim to be directly affected by a general rule or policy applied by his employer which restricts journalistic freedom. A sanction or other measure taken by an employer against an employed journalist can amount to an interference with freedom of expression.”<sup>215</sup>

Therefore, interferences are possible, if there is a policy of restricting an open discussion or the expression of several opinions as, for example, they were considered to be disturbing or politically sensitive.<sup>216</sup>

In this context, the Court had to decide a case<sup>217</sup> in which a journalist criticised the programming changes of a public State-owned broadcasting company. Regarding their own finding that employees owe to their employer a duty of loyalty and discretion<sup>218</sup>, the judges focused on the question of where the limits of loyalty of journalists working for such companies are.

The Court emphasised that

“where a State decides to create a public broadcasting system, the domestic law and practice must guarantee that the system provides a pluralistic audiovisual service. (...) Under the applicable legislation the public television company was charged with a special mission including, among other things, assisting the development of culture, with special emphasis on Polish intellectual and artistic achievements.”<sup>219</sup>

Also as an employee of a public television company, a journalist has the task to impart information and ideas by his own. Therefore, the obligation of discretion and constraint cannot be said to apply with equal force to journalists. Criticising the programme has a cultural relevance and, thus, it is a matter of public interest, which a journalist has the right and the obligation to comment on. The obligation of loyalty must be weighed against this as well as against the public character of the broadcasting company when examining whether there is a pressing social need that can justify an interference as necessary in a democratic society.

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<sup>213</sup> Özgür Gündem v. Turkey, judgment of 16 March 2000, Appl. 23144/93, § 43.

<sup>214</sup> Fuentes Bobo v. Spain, judgment of 29 February 2000, Appl. 39293/98.

<sup>215</sup> Manole and others v. Moldova, op. cit., § 103; Fuentes Bobo v. Spain, op. cit. § 38.

<sup>216</sup> Manole and others v. Moldova, op. cit., § 106.

<sup>217</sup> Wojtas-Kaleta v. Poland, judgment of 16 July 2009, Appl. 20436/02.

<sup>218</sup> Vogt v. Germany, judgment of 26 September 1995, Appl. 17851/91, § 53.

<sup>219</sup> Wojtas-Kaleta v. Poland, op. cit., § 47.

In conclusion, within their margin of appreciation the States always are called upon to find a proportionate relation between the individual rights guaranteed by Art. 10 and its institutional aspects.

#### 1.3.2.4. Legality of interferences

Although the measure in question could interfere with Art. 10 ECHR, it could be "prescribed by law" and therefore be a legitimate restriction of Art. 10 ECHR. This is the case if the aim which, the measure claims to pursue, is legitimate according to Art. 10(2) ECHR and is "necessary in a democratic society".

##### 1.3.2.4.1. *Prescription by law*

Concerning the expression "prescribed by law" the ECtHR declares, firstly, that the impugned measure should have some basis in domestic law. The term "law" includes both "written law", encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. Furthermore "law" must be understood to include both statutory law and "judge-made law".<sup>220</sup> Besides,

"it also refers to the quality of law, which requires that legal norms should be accessible to the person concerned, their consequences foreseeable and their compatibility with the rule of law ensured."<sup>221</sup>

"Firstly the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. These consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."<sup>222</sup>

For example, the ECtHR found<sup>223</sup> that the terms "behaviour *contra bonos mores*" were so unprecise that it was not apparent to the applicants or anyone what to do or to refrain from doing in order to behave lawfully, meaning an interference by a public authority was not "prescribed by law".

##### 1.3.2.4.2. *Legitimate aim and necessity in a democratic society*

If the interference is "prescribed by law", it must safeguard one of the legitimate aims listed in Art. 10(2) ECHR such as "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 the rights of others" or "the disclosure of information received in confidence".

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<sup>220</sup> Sanoma Uitgevers B.V. v. the Netherlands, judgment of 14 September 2010, Appl. 38224/03, § 83.

<sup>221</sup> See among others: Association Ekin v. France, judgment of 17 July 2001, Appl. 39288/98, § 44.

<sup>222</sup> Sunday Times v. UK, judgment of 26 April 1979, Appl. 6538/74, § 49.

<sup>223</sup> Hashman and Harrup v. the U.K., judgment of 25 November 1999, Appl. 25594/94.

With regard to the question, whether the measure is “necessary in a democratic society”, the ECtHR noted that

“whilst the adjective 'necessary', within the meaning of Article 10 para. 2, is not synonymous with 'indispensable', the words 'absolutely necessary' and 'strictly necessary' and, in Article 15 para. 1, the phrase 'to the extent strictly required by the exigencies of the situation', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' and that it implies the existence of a 'pressing social need'.<sup>224</sup>

It has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Art. 10, and it determines whether the interference is “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”; in this, the background to the case submitted to it, particularly national problems, play a role.

“When examining, the Court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.<sup>225</sup>

#### *1.3.2.4.3. Margin of appreciation*

When assessing whether the requirements are met, the national courts may refer to the so-called doctrine of the “margin of appreciation”. This means that the states are in a better position to estimate the particular local circumstances that have an influence on the (perceived) existence of a pressing social need, and, therefore, are to estimate based on the content of these requirements.

It is for the national authorities – the domestic legislator and the bodies, judicial amongst others – to make the initial assessment of the reality of the pressing social need.

This margin is not unlimited:

“Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation. The Court, which, [...] is responsible for ensuring the observance of those States’ engagements (Article 19), is empowered to give the final ruling on whether a “restriction” or “penalty” is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with European supervision. Such supervision concerns both the aim of the measure challenged and its “necessity”; it covers not only the basic legislation but also the decision applying it, even one given by an independent Court.<sup>226</sup>

In addition, when exercising its supervision, the ECtHR observes the case as a whole, including the content of a statement and the context in which it was made. It sees its task not in substituting the national assessment on its own. In fact, it reviews the decisions which the domestic courts delivered pursuant to their power of appreciation, and examines whether the interference is proportionate to the aim, and whether the reasons which shall justify it are “relevant and sufficient.”<sup>227</sup>

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<sup>224</sup> Handyside v. the U.K., op. cit., § 48.

<sup>225</sup> Sunday Times v. the U.K., op. cit., § 65.

<sup>226</sup> Handyside v. the U.K., op. cit., § 49.

<sup>227</sup> Handyside v. the U.K., op. cit., § 50.

#### 1.3.2.4.4. *Public debate*

Especially, there is little scope for restrictions on political speech or on questions of public interest.<sup>228</sup> Besides political and social issues, the ECtHR has also accepted topics related to private corporations and their executives<sup>229</sup>, health and science<sup>230</sup>, foreign countries<sup>231</sup>, and those relating to the public interest.

The Court<sup>232</sup> emphasises that the principles mentioned are of particular importance with regard to the press and carries out a careful scrutiny of measures which concern it. While the press must not overstep the bounds set, *inter alia*, for "the protection of the reputation of others", its task is, nevertheless, to impart – in a manner consistent with its obligations and responsibilities – information and ideas on political issues and on other matters of general interest.

For the examination of the legality of interferences in this area, this means that conflicting rights have to be particularly important to outweigh the freedoms of Art. 10, while there have to be exceptional circumstances to justify such interferences.

#### 1.3.2.5. Freedom of information

Free public debate does not only depend on the protection of the expression of opinions but also on the possibility to receive information and ideas to build one's own opinion.

In this context the Committee of Ministers stressed<sup>233</sup>

"that media transparency is necessary to enable members of the public to form an opinion on the value which they should give to the information, ideas and opinions disseminated by the media."

Thus it recommends in the recommendation that the Member States shall guarantee or promote media transparency as well as to facilitate exchanges of information between Member States on this topic. The Appendix of this Recommendation provides several measures for the states to fulfil the mandate in both the broadcasting and the press sector.

Therefore, Art. 10 ECHR protects the right to receive information, also including the collection of information besides very passive reception.<sup>234</sup> The ECtHR often reiterates in its judgments that

"not only does the press have the task of imparting such information and ideas: the public also has the right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."<sup>235</sup>

It approved the "right of the public to be properly informed" and "the public's right to be informed of a different perspective."<sup>236</sup>

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<sup>228</sup> Wingrove v. the U.K., judgment of 25 November 1996, Appl. 17419/90, § 58.

<sup>229</sup> See Fressoz and Roire v. France, judgment of 21 January 1999, Appl. 29183/95.

<sup>230</sup> See Sunday Times v. UK, op. cit.

<sup>231</sup> See Colombani v. France, op. cit.

<sup>232</sup> Sunday Times v. UK, op. cit., § 65; Lingens vs. Austria, op. cit., §§ 41ff.; Oberschlick v. Austria (no.2), judgment of 1 July 1997, Appl. 20834/92, § 29.

<sup>233</sup> Recommendation No. R (94) 13 of the Committee of Ministers to Member States on measures to promote Media Transparency, adopted on 22 November 1994.

<sup>234</sup> Grabenwarter, *ibid.*, § 23 rec. 6.

<sup>235</sup> Sunday Times v. the U.K., op. cit., § 50, Lingens vs. Austria, op. cit., § 41., Jersild v. Denmark, op. cit., § 31.



In Recommendation Rec(2007)2<sup>237</sup> the Committee of Ministers recommends – especially by recalling Art. 10 ECHR (guaranteeing freedom of expression and freedom to receive and impart information and ideas without interference by a public authority and regardless of frontiers) – “measures promoting the structural pluralism of the media” by addressing ownership regulation, public service and other media contributing to pluralism as well as diversity and access regulation and interoperability. Furthermore, the Convention addresses “measures promoting content diversity” and describes the content of information to safeguard “media transparency”.

There is the question as to whether and to what extent Art. 10 is able to grant a right to receive information that is not generally accessible. In former judgments, the Court declared that

“article 10 does not confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual”<sup>238</sup>

and that

“[t]hat freedom cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion.”<sup>239</sup>

Therefore, the failure by the authorities to spread information could not be a violation of the right to receive information. These cases have to be distinguished from those hindering the public from receiving information from independent media that fulfils their task of a public watchdog, or from freely accessible information resources. In this context, the ECtHR ruled that

“Article 10 prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.”<sup>240</sup>

At a later time, the Court addressed the issue as to whether the public has a right to access public documents. In a case<sup>241</sup> where a request for access to administrative documents was refused by the authorities, the judges explicitly accepted the applicability of Art. 10 and further held that this refusal is an interference with the right to receive information, which has to meet the requirements of Art. 10(2). Hence, this right is not an absolute one. The Court emphasises that, as the exercising of this right can violate the right of others, the security of the state or public health, the scope of the right to have access to the respective information is limited.<sup>242</sup>

Moreover, the Court also declared in these cases that

“it is difficult to derive from the Convention a general right of access to administrative data and documents.”<sup>243</sup>

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<sup>236</sup> Sener v. Turkey, judgment of 18 July 2000, Appl. 26680/95, § 45.

<sup>237</sup> Recommendation Rec(2007)2 of the Committee of Ministers to Member States on media pluralism and diversity of media content, adopted by the Committee of Ministers on 31 January 2007.

<sup>238</sup> Leander v. Sweden, judgment of 26 March 1987, Appl. 9248/81, § 74.

<sup>239</sup> Guerra and others v. Italy, judgment of 19 February 1998, Appl. 14967/89, § 53.

<sup>240</sup> Leander v. Sweden, op. cit., § 74.

<sup>241</sup> Sdružení Jihočeské Matky v. Czech Republic, judgment of 10 July 2006, Appl. 19101/03.

<sup>242</sup> Sdružení Jihočeské Matky v. Czech Republic, op. cit.

<sup>243</sup> Loiseau v. France, judgment of 28 September 2004, Appl. 46809/99.

Nevertheless, in 2009, the ECtHR continued its jurisdiction on this matter. In the respective case, a request to Hungary's Constitutional Court to disclose a parliamentarian's complaint questioning the legality of new criminal legislation, was denied. The Court noted that with regard to the importance of the contribution to the discussion of public affairs, free access to information plays a vital role for an informed public debate on matters of public interest. Furthermore Art. 10 ECHR does not accept a law allowing arbitrary restrictions. If the states should create obstacles to the gathering of information it could result in a form of indirect censorship.<sup>244</sup>

Regarding the "censorship-effect" of an information monopoly, the Court saw an interference with the exercise of the functions of a public watchdog by the press. Moreover, the State's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities. The same would apply to private organisations which the Court also categorised as a 'public watchdog'. Since the requested information was ready and accessible, it considered that the State had an obligation not to impede the flow of information sought by the applicant. Thus, a violation of Art. 10 was affirmed.

Although the judges recalled that it was difficult to derive a general right of access to administrative documents, they also said that

"the Court has recently advanced towards a broader interpretation of the notion of freedom to receive information and thereby towards the recognition of a right of access to information."<sup>245</sup>

Therefore, one may draw the conclusion that the ECtHR obviously tends towards an acceptance of the right of access to public documents.

In this context, it has to be noted that Recommendation Rec (2002) 2<sup>246</sup> provides that

"Member States should guarantee the right of everyone to have access, on request, to official documents held by public authorities."

However, it also admits that limitations, if they are set down precisely in law, are necessary in a democratic society and are proportionate to the aim of protecting. As yet the Court has not referred to this Recommendation in its decisions.

The special significance of the right to receive information especially became clear in a case<sup>247</sup> which the Court had to decide in 2008. The Court classified the possibility of foreign residents to have access to information concerning matters of their country of origin to be so important that it outweighs even other constitutionally guaranteed rights, such as property rights. The judges found that

"that information included, for instance, political and social news that could be of particular interest to the applicants as immigrants from Iraq. Moreover, while such news might be the most important information protected by Article 10, the freedom to receive information does not extend only to reports of events of public concern, but covers in principle also cultural expressions as well as pure entertainment. The importance of the

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<sup>244</sup> Társaság a Szabadságjogokért v. Hungary, judgment of 14 April 2009, Appl. 37374/05, § 27; see mutatis mutandis Kenedi v. Hungary, judgment of 26 May 2009, Appl. 31475/05.

<sup>245</sup> Társaság a Szabadságjogokért v. Hungary, op. cit., § 35.

<sup>246</sup> Recommendation Rec (2002) 2 of the Committee of Ministers to Member States on access to official documents, adopted on 21 February 2002.

latter types of information should not be underestimated, especially for an immigrant family with three children, who may wish to maintain contact with the culture and language of their country of origin."<sup>248</sup>

Therefore, a landlord could not lawfully demand from his tenants the dismantling of a satellite dish.

#### 1.3.2.6. The freedom of the press

The press contributes to the societal opinion-forming process by the special form of distribution of information in textform by its articles in newspapers and journals. The freedom of the press takes a special position because it corresponds to the right of the public to receive this information in the interest of free and open public debate. In this context the ECtHR frequently states that

"it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of public watchdog."<sup>249</sup>

Concerning bounds set to the press, Art. 10(2) ECHR provides that the exercise of this freedom carries with it "duties and responsibilities", which, however, apply to all forms of media. These "duties and responsibilities" are of concern if the reputation of private individuals is attacked and "rights of others" are undermined. Where there is the question of attacking the reputation of individuals and thus undermining their rights as guaranteed in Art. 8 ECHR regard must be had for the fair balance which has to be struck between the competing interests of the individual and of the community as a whole. In both contexts the State enjoys a certain margin of appreciation.<sup>250</sup>

Furthermore, the safeguard afforded by Art. 10 ECHR is subject to the provisions that the journalists are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of the profession of journalism.<sup>251</sup> The Court claims that journalists shall, besides further possible investigations, contact the person that is concerned by their articles and ask their opinion on the matter. Moreover, this person has a right to publish a reply<sup>252</sup>, which also finds a basis in the Recommendation Rec (2004)16.<sup>253</sup>

In the case *Kaperzyński v. Poland*<sup>254</sup>, the ECtHR noted that it is necessary to protect the freedom of expression of the person having submitted a request for rectification, so that it is possible to maintain a balance of power between the media and persons submitting requests for rectification to be published, with the latter generally having more limited opportunity to publicly express their views. The Court is further of the view "that a legal obligation to publish a rectification or a reply may be seen as a normal element of the legal framework governing the exercise of the freedom of expression by the print media. It cannot, as such, be regarded as excessive or unreasonable. Indeed, the Court has

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<sup>247</sup> *Khurshid Mustafa und Tarzibachi v. Sweden*, judgment of 16 December 2008, Appl. 23883/06.

<sup>248</sup> *Khurshid Mustafa und Tarzibachi v. Sweden*, op. cit., § 44.

<sup>249</sup> *Observer and Guardian v. the U.K.*, judgment of 26 November 1991, Appl. 13585/88, § 59.

<sup>250</sup> *Pfeifer v. Austria*, judgment of 15 November 2007, Appl. 12556/03, § 35; *Von Hannover v. Germany*, judgment of 24 June 2004, Appl. 59320/00, § 57.

<sup>251</sup> *Goodwin v. the U.K.* op. cit., § 39; *Fressoz and Roire v. France*, judgment of 21 January 1999, Appl. 29183/95, § 54.

<sup>252</sup> *Flux v. Moldova*, judgment of 29 July 2008, Appl. 22824/04, § 29.

<sup>253</sup> Recommendation Rec(2004)16 of the Committee of Ministers to Member States on the right of reply in the new media environment, adopted on 15 December 2004.

<sup>254</sup> *Kaperzyński v. Poland*, judgment of 3 April 2012, Appl. 43206/07, § 66.

already held that the right of reply, as an important element of freedom of expression, falls within the scope of Article 10 of the Convention. This flows from the need not only to be able to contest untruthful information, but also to ensure a plurality of opinions, especially on matters of general interest such as literary and political debate<sup>255</sup>.

The examination especially depends on the nature and degree of the defamation, the manner in which the impugned article was written and the extent to which an article can reasonably regard its sources as reliable with respect to the allegations in question.

Further factors that have to be considered when assessing the proportionality of sanctions or other measures are the nature and severity of the penalties.<sup>256</sup> These are capable of hampering journalistic work and of discouraging the participation of the media in debates over matters of legitimate public concern, the so-called "chilling effect". In this context the ECtHR considered unpredictably large damages capable of having a chilling effect on the press and, therefore, requiring the most careful scrutiny.<sup>257</sup> Therefore, in the case *Kaperzyński v. Poland* the Court was of the view "that a criminal sentence depriving a media professional of the right to exercise his or her profession must be seen as very harsh. Moreover, it heightens the above mentioned danger of creating a chilling effect on the exercise of public debate. Such a conviction imposed on a journalist can only be said to have, potentially, an enormous dissuasive effect for an open and unhindered public debate on matters of public interest"<sup>258</sup>.

#### 1.3.2.7. Freedom of broadcasting

In contrast to the protection of freedom of broadcasting by national constitutions, Art. 10 ECHR primarily is a human right and not a so-called "*dienende Freiheit*", the latter meaning that the primary task of this right is to ensure the diversity of opinion in the media.<sup>259</sup>

Private broadcasters as well as public broadcasting corporations may refer to the freedom of broadcasting. This right includes radio, television and, at least to some extent, new (audiovisual) media (information and communication) services. The protected activities range from the organisation of broadcasters to the broadcasting and distribution of information as well as to its content.<sup>260</sup>

In the Court's view, neither the fact that its activities are commercial nor the intrinsic nature of freedom of expression can deprive one of the protection of freedom of broadcasting. It applies to "everyone", whether natural or legal persons and it applies not only to the content of information but also to the means of transmission or reception, while the actual reception is involved.<sup>261</sup> Interferences concerning the means of receiving are also interferences with the right of imparting and receiving information and ideas. Thus, Art. 10 also protects the right to install antenna systems or satellite dishes.

In conclusion, both the broadcaster and the broadcast recipient are protected by Art. 10 ECHR.

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<sup>255</sup> See *Melnychuk v. Ukraine* (dec.), judgment of 5 July 2005, Appl. 28743/03, ECHR 2005-IX.

<sup>256</sup> *Skałka v. Poland*, judgment of 27 May 2003, Appl. 43425/98, § 35 and 38.

<sup>257</sup> *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, judgment of 16 September 2005, Appl. 55120/00, § 114.

<sup>258</sup> *Kaperzyński v. Poland*, op. cit., § 74.

<sup>259</sup> *Fink/Cole/Keber*, *Europäisches und internationales Medienrecht*, rec. 255.

<sup>260</sup> *Grabenwarter*, *ibid.*, § 23, rec. 9.

<sup>261</sup> *Autronic AG v. Switzerland*, judgment of 22 May 1990, Appl. 12726/87, § 47.

According to the Court,

"broadcasting is mentioned in the Convention precisely in relation to freedom of expression. Like the Commission, the Court considers that both broadcasting of programmes over the air and cable retransmission of such programmes are covered by the right enshrined in the first two sentences of Article 10 para. 1, without there being any need to make distinctions according to the content of the programmes."<sup>262</sup>

It has to be noted that the action of persons who impart information or ideas in connection with broadcasting is protected by the freedom of expression. In this context interferences have to correspond to the requirements which this right imposes.

Art. 10 ECHR also imposes requirements on the national framework regulating the broadcasting system. The Court determined that the

"effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require it to take positive measures of protection, through its law or practice. The Court considers that, in the field of audiovisual broadcasting, the above principles place a duty on the State to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting *inter alia* the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment. The choice of the means by which to achieve these aims must vary according to local conditions and, therefore, falls within the State's margin of appreciation."<sup>263</sup>

The ECtHR considered in the case of *Nur Radyo Ve Televizyon Yayıncılığı A.Ş.*<sup>264</sup> as constituting an unjustified interference with the broadcaster's right to freedom of expression as guaranteed by Article 10 of the ECHR the decision taken by the regulatory authority of Turkey to revoke a radio broadcasting license just because in the programme a representative of the Mihr religious community had described an earthquake in which thousands of people had died in Turkey as a "warning from Allah" against the "enemies of Allah", who had decided on their "death". The Court therefore considered that the broadcasting ban imposed on the applicant company had been disproportionate to the aims pursued.

In order to protect democracy through media pluralism, the Court stressed that it was not sufficient for a State to provide for the theoretical possibility for operators to access the audiovisual market. For providers it is necessary to have effective access to that market so as to guarantee diversity of the overall programme content, reflecting as far as possible the different opinions in society.

In the case of *Centro Europa 7 S.R.L. and Di Stefano v. Italy*<sup>265</sup>, concerning an Italian TV company's inability to broadcast, despite having obtained a broadcasting licence, because no television frequencies were allocated to it, the Court concluded that the Italian laws in force at the time had lacked clarity and precision and the Italian authorities had failed to put in place an appropriate legislative and administrative framework guaranteeing effective media pluralism. Thereby the Italian State had undermined the freedom of

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<sup>262</sup> *Groppera Radio AG v. Switzerland*, judgment of 28 March 1990, Appl. 10890/84, § 55.

<sup>263</sup> *Manole and others v. Moldova*, op. cit., §§ 99-100.

<sup>264</sup> *Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey* (n° 2), judgement of 12 October 2010, Appl. No. 42284/05.

<sup>265</sup> *Centro Europa 7 S.R.L. and di Stefano v. Italy*, judgement of 07 June 2012, Appl. No. 38433/09.

expression and the freedom to impart and receive information, reducing the competition in the audiovisual sector.

Underlining the importance of the fact that the States duty can also require positive measures of protection, even in the sphere of relations between individuals, the Court states furthermore that the effective exercise of a profession is equally protected under Art. 10 ECHR.

In case of *Frasila and Ciocirlan v Romania*<sup>266</sup> the ECtHR ruled that by failing to take effective measures to enable the applicants to secure the enforcement of the court decision - by ordering third parties to grant them access to the editorial office at the radio station where they worked as journalists - the Romanian authorities had deprived of all useful effect the Convention provisions guaranteeing freedom of expression.

In its Art. 11, The "European Charter for Regional or Minority Languages"<sup>267</sup> stipulates special requirements for the use of regional or minority languages in the media. This applies to public service broadcasters since, for example, such languages play a role to "the extent that radio and television carry out a public service mission", as well as to press organisations which, for example, should encourage and/or facilitate the publication of newspaper articles in the regional or minority languages on a regular basis.

Recommendation Rec (2003) 9<sup>268</sup> contains basic principles addressing the issue of digital broadcasting. Especially public service broadcasters should preserve their special social remit in the new digital environment. Nevertheless, Member States should assist public service broadcasters to be present on the different digital platforms (cable, satellite, terrestrial) with diverse quality programmes and services as well as giving them the possibility of having access to the necessary financial means to fulfil their remit.

#### *1.3.2.7.1. Public service broadcasting*

Recommendation CM/Rec(2012) of the Committee of Ministers to member States on public service media governance

With regard to the public service broadcasting the ECtHR refers<sup>269</sup> to Recommendation Rec(2007)3 on "The remit of public service media in the information society" and to Recommendation No. R (96) 10<sup>270</sup> on "The Guarantee of the Independence of Public Service Broadcasting", including its Appendix which provides *inter alia* that:

"Member States have the competence to define and assign a public service remit to one or more specific media organisations, in the public and/or private sector, maintaining the key elements underpinning the traditional public service remit, while adjusting it to new circumstances. This remit should be performed with the use of state-of-the-art technology appropriate for the purpose."

The legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy.

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<sup>266</sup> *Frasila and Ciocirlan v. Romania*, judgement of 10 May 2012, Appl. No. 25329/03.

<sup>267</sup> European Charter for Regional or Minority Languages of 5 November 1992.

<sup>268</sup> Recommendation Rec (2003) 9 of the Committee of Ministers to Member States on measures to promote the democratic and social contribution of digital broadcasting, adopted by the Committee of Ministers on 28 May 2003.

<sup>269</sup> *Wojtas-Kaleta v. Poland*, judgment of 16 July 2009, Appl. 20436/02, § 21; *Manole and others v. Moldova*, op. cit., § 102.

<sup>270</sup> Recommendation No. R (96) 10 of 11 September 1996 of the Committee of Ministers to Member States on the guarantee of the independence of Public Service Broadcasting.



The legal framework governing public service broadcasting organisations should clearly stipulate that they shall ensure that news programmes fairly present facts and events and encourage the free formation of opinions.

The cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations.”

Recommendation 1878 (2009) Funding of public service broadcasting

Hence, the Court determined that

“[w]hile the Court, and previously the Commission, have recognised that a public service broadcasting system is capable of contributing to the quality and balance of programmes, there is no obligation under Article 10 to put in place such a service, provided that some other means are used to the same end.

Where a State does decide to create a public broadcasting system, it follows from the principles outlined above that domestic law and practice must guarantee that the system provides a pluralistic service. Particularly where private stations are still too weak to offer a genuine alternative, and the public or State organisation is therefore the sole or the dominant broadcaster within a country or region, it is indispensable for the proper functioning of democracy that [broadcasting] transmits impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum of views and opinions as possible can be expressed.”<sup>271</sup>

The Court also ruled that the guarantee of diversity of opinion does not require a public monopoly and refused to accept arguments to refuse a licence of the states:

“Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need. As a result of the technical progress made over the last decades, justification for these restrictions can no longer today be found in considerations relating to the number of frequencies and channels available.”<sup>272</sup>

#### *1.3.2.7.2. Licensing system*

Art. 10(1) sent. 3 allows the Contracting States to require the licensing of broadcasting, television or cinema enterprises. However, the Court emphasises that the purpose of this last sentence and the scope of its application must be considered in the context of the Article as a whole and, in particular, in relation to the requirements of para. 2. This sentence clarifies

“that states are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of

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<sup>271</sup> Manole and others v. Moldova, op. cit., §§ 100 and 101.

<sup>272</sup> Informationsverein Lentia and others v. Austria, op. cit., § 39.

paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole.”<sup>273</sup>

When examining, the Court weighs the legitimate need for the quality and balance of programmes in general against the freedom of expression of the applicant, namely his right to impart information and ideas and assesses whether the national measures are justifiable in principle and proportionate in respect of the case as a whole and the immediate and powerful effect of the media.

According to Recommendation No. R (99) 1<sup>274</sup>

“Member States should monitor the development of the new media with a view to taking any measures which might be necessary in order to preserve media pluralism (...).”

Regarding the exigence of safeguarding and promoting pluralism in the audio-visual media, the states as the ultimate guarantors of the principle of pluralism have to ground their decisions primarily on safeguarding this, especially with regard to broadcasting, because of their very wide reach and strong impact on the public.<sup>275</sup> Domestic authorities have to aim at preventing a one-sided range of programmes.<sup>276</sup>

The national courts are allowed to take special national circumstances into account. In its *Demuth* case the Court had regard to the decision of the Commission<sup>277</sup>, according to which

“the particular political circumstances in Switzerland (...) necessitate the application of sensitive political criteria such as cultural and linguistic pluralism, balance between lowland and mountain regions and a balanced federal policy”,

and it accepted the validity of these considerations

“which are of considerable importance for a federal State. Such factors, encouraging in particular pluralism in broadcasting, may legitimately be taken into account when authorising radio and television broadcasts.”<sup>278</sup>

Moreover, the States are not prohibited from making the granting or refusal of a licence conditional on other considerations, i.e. such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.”<sup>279</sup>

In this scope there is also a margin of appreciation,<sup>280</sup> but the Court has already pointed out that

“it cannot be argued that there are no equivalent less restrictive solutions; it is sufficient by way of example to cite the practice of certain countries which either issue licences

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<sup>273</sup> Groppera Radio AG v. Switzerland, op. cit., § 61.

<sup>274</sup> Recommendation No. R (99) 1 of the Committee of Ministers to Member States on measures to promote media pluralism, adopted on 19 January 1999.

<sup>275</sup> Informationsverein Lentia and others v. Austria, op. cit., § 38.

<sup>276</sup> Demuth v. Switzerland, judgment of 5 November 2002, Appl. 38743/97, § 43.

<sup>277</sup> Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland, decision of the Commission of 16 October 1986, Appl. 10746/84.

<sup>278</sup> Demuth v. Switzerland, op. cit., § 44.

<sup>279</sup> Informationsverein Lentia and others v. Austria, judgment of 24 November 1993, Appl. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, § 32.

<sup>280</sup> Groppera Radio AG v. Switzerland, op. cit., § 72.

subject to specified conditions of variable content or make provision for forms of private participation in the activities of the national corporation."<sup>281</sup>

Furthermore, it emphasised that it could not accept the argument that a national market was too small to sustain a sufficient number of stations to avoid regroupings and the constitution of "private monopolies",

"because their assertions are contradicted by the experience of several European States, of a comparable size to Austria, in which the coexistence of private and public stations, according to rules which vary from country to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed to be groundless."<sup>282</sup>

In the context of the licensing procedure, the ECtHR also refers to Recommendation Rec (2000) 23<sup>283</sup> on the independence and functions of regulatory authorities for the broadcasting sector:

"The Court notes that the guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting regulation domain call for open and transparent application of the regulations governing the licensing procedure and specifically recommend that '[a]ll decisions taken (...) by the regulatory authorities (...) be (...) duly reasoned [and] open to review by the competent jurisdictions."<sup>284</sup>

As a result, the licensing criteria in the underlying process especially must provide sufficient guarantees against arbitrariness, so that a lack of reasons for a decision denying a broadcasting licence infringes the right to freedom of expression.

"A licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression."<sup>285</sup>

Finally, Recommendation Rec (2000) 23 itself refers to the "European Convention on Transfrontier Television", when providing that

"another essential function of regulatory authorities should be monitoring compliance with the conditions laid down in law and in the licences granted to broadcasters. They should, in particular, ensure that broadcasters who fall within their jurisdiction respect the basic principles laid down in the European Convention on Transfrontier Television and, in particular, those defined in Article 7."

The Court also (indirectly) applies the principles of the European Convention on Transfrontier Television using this instrument for

"a proper understanding and interpretation of the relevant rules."<sup>286</sup>

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<sup>281</sup> Informationsverein Lentia and others v. Austria, op. cit. § 39.

<sup>282</sup> Informationsverein Lentia and others v. Austria, op. cit., § 42.

<sup>283</sup> Recommendation Rec (2000) 23 of 20 December 2000 of the Committee of Ministers to Member States on the independence and functions of regulatory authorities for the broadcasting sector.

<sup>284</sup> Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria, judgment of 11 October 2007, Appl. 14134/02, § 51.

<sup>285</sup> Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria, op. cit., §§ 50 and 51; Meltex Ltd. And Mesrop Movsesyan v. Armenia, judgment of 17 June 2008, Appl. 32283/04, § 83.

<sup>286</sup> Autronic AG v. Switzerland, op. cit., § 62.

This convention obligates the parties to

“ensure freedom of expression and information in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention.”

It also provides in its Art. 8 the right of reply and in Art. 10*bis* that the parties shall avoid that programme services endanger media pluralism.

The Convention on Transfrontier Television, and also an earlier instrument issued by the Committee of Ministers of the Council of Europe affecting national broadcasting systems, i.e. Recommendation No. R (91) 5<sup>287</sup>, claim the right to short reporting on major events with the aim of regulating the exercising of the public's right to information. As a result any broadcaster is entitled to provide information on a major event by means of a short report, even if there are contractual agreements between another broadcaster and the organiser of the event.

#### *1.3.2.7.3. Political advertising*

It is especially questionable as to whether a ban on broadcasting political advertising is compatible with Art. 10 ECHR.

Advertisements have not only a political character if they promote a political party. In 1994 the broadcasting of a commercial concerning animal welfare by the “*Verein gegen Tierfabriken – VGT*” (Association against industrial animal production) was refused. The Swiss Commercial Television Company founded this decision on the political character, while Swiss broadcasting law prohibits political advertisements on radio and television. The ECtHR agreed that the commercial could be regarded as “political”, so the ban could legally be founded on the national regulation because

“it reflected controversial opinions pertaining to modern society in general. (...) Indeed, it cannot be denied that in many European societies there was, and is, an ongoing general debate on the protection of animals and the manner in which they are reared.”<sup>288</sup>

Additionally, the Court stated that

“powerful financial groups can obtain competitive advantages in the area of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of the radio and television stations broadcasting the commercials. Such situations undermine the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.”<sup>289</sup>

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<sup>287</sup> Recommendation No. R (91) 5 of the Committee of Ministers to Member States on the right to short reporting on major events, where exclusive rights for their Television Broadcast have been acquired in a transfrontier context, adopted on 11 April 1991.

<sup>288</sup> *VgT Verein gegen Tierfabriken v. Switzerland*, judgment of 28 June 2001, Appl. 24699/94, § 70.

<sup>289</sup> *VgT Verein gegen Tierfabriken v. Switzerland*, op. cit., § 73.

Hence, the Court ruled that a ban on political advertisements is not an infringement of Art. 10 ECHR *per se*, but there can be relevant and sufficient reasons to justify<sup>290</sup>, for example, the need for securing the quality of political debate and pluralism or for securing the political independence of the television broadcasters, besides preventing financially powerful groups from dominating the political forum.<sup>291</sup>

According to the Court a ban on religious advertisements can be more easily justified because of the immediate and powerful effect of the audio-visual media.<sup>292</sup>

However, it has to be noted that the association participated in a topical debate in society and that there is little scope under Art. 10 for restrictions on political speech and on debates relating to questions of general interest, while the national margin of appreciation is reduced. The national authorities could not give sufficient reasons that could justify the refusal in the particular circumstances of the case, so the Court found a violation of the freedom of expression of the association.

Concerning the prohibition of advertisements of political parties and its compatibility with Art. 10 ECHR, the Court found that the Contracting States have a wide margin of appreciation in striking a fair balance between freedom of expression of these parties and the need to place restrictions thereon in order to secure people's independent decision in the election.<sup>293</sup> According to the ECtHR,

"a lack of consensus between the States making up the Convention community with regard to the regulation of the right to vote and the right to stand for election may justify according them a wide margin of appreciation in this area.."<sup>294</sup>

The ECtHR also refers to Recommendation No. R (99) 15<sup>295</sup> "on measures concerning media coverage of election campaigns", which provides that

"the possibility of buying advertising space should be available to all contending parties, and on equal conditions and rates of payment",

as well as to Recommendation Rec(2007)15<sup>296</sup>, which entailed a revision of Recommendation No. R (99) 15, stating:

"In view of the different positions on this matter, Recommendation CM/Rec(2007)... does not take a stance on whether this practice should be accepted or not, and simply limits itself to saying that if paid advertising is allowed it should be subject to some minimum rules, in particular that equal treatment (in terms of access and rates) is given to all parties requesting airtime."

Using these principles for the examination of whether such a ban is proportionate, the ECtHR determined in this case that

"paid advertising on television became the only way for the Pensioners Party to put its message across to the public through that medium. By being denied this possibility under

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<sup>290</sup> VgT Verein gegen Tierfabriken v. Switzerland, *op. cit.*, § 75.

<sup>291</sup> TV Vest AS & Rogaland Pensjonistparti v. Norway, *op. cit.*, § 70.

<sup>292</sup> Murphy v. Ireland, judgment of 10 July 2003, Appl. 44179/98.

<sup>293</sup> Mathieu-Mohin and Clerfayt v. Belgium, *op. cit.*, §§ 52 and 54.

<sup>294</sup> TV Vest AS & Rogaland Pensjonistparti v. Norway, judgment of 11 December 2008, Appl. 21132/05, § 65.

<sup>295</sup> Recommendation No. R (99) 15 of 9 September 1999 of the Committee of Ministers to Member States on measures concerning media coverage of election campaigns.

<sup>296</sup> Recommendation CM/Rec(2007)15 of 7 November 2007 of the Committee of Ministers to Member States on measures concerning media coverage of election campaigns.

the law, the Pensioners Party was at a disadvantage compared with major parties which had obtained edited broadcasting coverage, and this could not be offset by the possibility available to it to use other, less potent, media."<sup>297</sup>

The required "equal treatment to all parties requesting airtime" was not granted to the party, thus there was a violation of Art. 10 ECHR.

#### 1.3.2.8. Freedom of artistic expression

Freedom of artistic expression is not explicitly mentioned in Art. 10 ECHR. However, the ECtHR accepts its protection and argues that

"admittedly, Article 10 does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression. As those appearing before the Court all acknowledged, it includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Confirmation, if any were needed, that this interpretation is correct, is provided by the second sentence of paragraph 1 of Article 10, which refers to "broadcasting, television or cinema enterprises", media whose activities extend to the field of art. Confirmation that the concept of freedom of expression is such as to include artistic expression is also to be found in Article 19 § 2 of the International Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression information and ideas 'in the form of art'."<sup>298</sup>

The protection is not limited to specific forms or content of art, films<sup>299</sup> and books<sup>300</sup>, as they are protected just like paintings<sup>301</sup>, for instance. Finally, art is just another way of communication, because an artist is also able to impart information and ideas by his work.

Besides the conveying of art itself, the scope of Art. 10 ECHR includes the so-called artists "*Wirkbereich*". Therefore also an exhibitor of artistic works, an operator of a cinema or a proprietor and a managing director of a publishing house can refer to this freedom<sup>302</sup>:

"Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression."<sup>303</sup>

Interferences concerning the freedom of artistic expression are thinkable if artistic works are confiscated or if their publication and distribution is forbidden.

So in the *Wingrove* case<sup>304</sup> a film director was refused a distribution certificate because his film was considered as blasphemous. In another case a film was even seized.<sup>305</sup>

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<sup>297</sup> TV Vest AS & Rogaland Pensjonistparti v. Norway, op. cit., § 73.

<sup>298</sup> Müller a.o. v. Switzerland, judgment of 24 May 1988, Appl. 10737/84, § 27.

<sup>299</sup> See *Otto-Preminger Institut v. Austria*, op. cit.; *Wingrove v. the U.K.*, op. cit.

<sup>300</sup> *Editions Plon v. France*, op. cit.

<sup>301</sup> See Müller a.o. v. Switzerland, op. cit.

<sup>302</sup> See Müller a.o. v. Switzerland, op. cit.; *Otto Preminger Institut v. Austria*, op. cit.; *İ. A. v. Turkey*, op. cit.

<sup>303</sup> Müller a.o. v. Switzerland, op. cit., § 33.

<sup>304</sup> *Wingrove v. the U.K.*, op. cit.

<sup>305</sup> *Otto-Preminger Institut v. Austria*, op. cit.



These measures can also be legal. In this context, the Court determined that

"artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10 (art. 10-2). Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, 'duties and responsibilities'; their scope will depend on his situation and the means he uses."<sup>306</sup>

The most common legal interests that conflict with freedom of artistic expression are the protection of morals and the rights of others, both mentioned in Art. 10(2) as legitimate aims to pursue. As already indicated above, when assessing whether an interference was "proportionate to the legitimate aim pursued" and whether the reasons adduced to justify it are "relevant and sufficient", the domestic authorities enjoy a wider margin of appreciation than when assessing interferences with freedom of the press, for example.

The Court ruled that

"today, as at the time of the Handyside judgment, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."<sup>307</sup>

Subject to those rulings the Court has rarely determined a violation of Art. 10 ECHR so far. In the above-mentioned cases<sup>308</sup> it found that the national court could rightly assume the respective measures to be necessary in a democratic society in order to protect the rights of others. Although there is little scope for restrictions on political speech or on the debate of questions of public interest, the Court also emphasised that the states have a wider margin of appreciation with regard to the sphere of morals. Thus it accepted the national decision to give precedence to the rights of the persons affected by the film and to restrict freedom of expression.

#### 1.3.2.9. Protection of the use of the internet, emails and telephone

The use of the medium of internet is also protected by the freedom of expression and information as far as there is an imparting and receiving of information. Art. 10 ECHR also protects the form in which information is conveyed.<sup>309</sup>

Internet archives, for example, are very important tools of preserving and making available news and information. They constitute an important source for education or historical research, particularly as they are readily accessible to the public and are generally free. Therefore, they play an important role for the press that has a further task, beside the role as a public watchdog, to maintain and make available to the public archives containing news. Thus they enjoy protection by Art. 10. However, the Court emphasised that the margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned. In particular, the duty of the

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<sup>306</sup> Müller a.o. v. Switzerland, op. cit., § 34, Handyside v. the U.K., op. cit., § 49.

<sup>307</sup> Müller a.o. v. Switzerland, op. cit., § 35.

<sup>308</sup> See footnotes 163 and 164.

<sup>309</sup> Oberschlick v. Austria No.1, judgment of 23 May 1991, Appl. 11662/85, § 57.

press to act in accordance with the principles of responsible journalism by ensuring the accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material.<sup>310</sup> But according to the case-law of the Court,

“telephone calls (from business) premises are *prima facie* covered by the notions of “private life” and “correspondence” for the purposes of Article 8 para 1<sup>311</sup>. It follows logically that e-mails (sent from work) should be similarly protected under Article 8, as should information derived from the monitoring of personal internet usage.”<sup>312</sup>

According to Recommendation CM/Rec(2007)16<sup>313</sup>, the Member States shall take all necessary measures to promote the public service value of the internet by – *inter alia*– enhancing the protection of human rights , especially

the right to freedom of expression, information and communication on the Internet and via other ICTs promoted, *inter alia*, by ensuring access to them.

Furthermore Recommendation No. R (99) 5<sup>314</sup> of the Committee of Ministers to Member States for the protection of privacy on the internet (guidelines for the protection of individuals with regard to the collection and processing of personal data on information highways) is relevant to the use of the internet. It includes guidelines for the protection of individuals using this medium, where especially internet service providers are concerned. The guidelines concern the question as to how they shall design their systems and technologies to safeguard the user as far as possible. The “Convention on Cybercrime”<sup>315</sup> also pursues the objective of increasing the safety of the use of the internet. The contracting parties set several actions concerning the confidentiality, integrity and availability of computer data and systems, computer-related offences, offences related to child pornography as well as copyright and related rights as criminal. Besides, they laid down provisions with regard to the procedural law.

Additionally, there are the “Guidelines for the co-operation between law enforcement and internet service providers against cybercrime”<sup>316</sup> besides Rec (2001) 8. They recommend the States to encourage content descriptors or search tools and filtering profiles, for example, to increase the protection of cyber users.

Besides, there is a recommendation<sup>317</sup> concerning the use and control of internet filters with regard to freedom of expression and information.

Especially children shall be protected from the dangers of the use of the internet. Thus the Recommendation CM/Rec(2009)5<sup>318</sup> provides that the states shall ensure that there

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<sup>310</sup> Times Newspapers Ltd. (nos. 1 and 2) v. the U.K, judgment of 10 March 2009, 3002/03 and 23676/03, § 45.

<sup>311</sup> Halford v. the United Kingdom, judgment of 25 June 1997, Appl. 20605/92, § 44.

<sup>312</sup> Copland v. the U.K., judgment of 3 April 2007, Appl. 62617/00, § 41.

<sup>313</sup> Recommendation CM/Rec(2007)16 of the Committee of Ministers to Member States on measures to promote the public service value of the Internet, adopted on 7 November 2007.

<sup>314</sup> Recommendation No. R (99) 5 of the Committee of Ministers to Member States for the protection of privacy on the internet (guidelines for the protection of individuals with regard to the collection and processing of personal data on information highways), 23 February 1999.

<sup>315</sup> Convention on Cybercrime, 23. October 2001, available at [www.conventions.coe.int/](http://www.conventions.coe.int/).

<sup>316</sup> Guidelines for the co-operation between law enforcement and internet service providers against cybercrime, 2 April 2008.

<sup>317</sup> Recommendation CM/Rec(2008)6 of the Committee of Ministers to Member States on measures to promote the respect for freedom of expression and information with regard to Internet filters, 26 March 2008.

<sup>318</sup> Recommendation CM/Rec(2009)5 of the Committee of Ministers to Member States on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment, adopted on 8 July 2009.

are safe and secure spaces for children on the Internet and develop the responsible use of labelling systems for online content, for example by creating a pan-European trustmark for labelling systems of online content.

In Recommendation CM/Rec(2007)11<sup>319</sup> the Committee of Ministers encourages the Member States to develop common standards and strategies to promote transparency and the provision of information, guidance and assistance to the individual users of technologies and services in the new information and communications environment. This takes place especially against the background of Art. 10 ECHR, guaranteeing the development of information and communication technologies and services for the benefit of each individual and the democratic culture of every society. The Recommendation also stipulates information on affordable access to ICT infrastructure that Member States should take into account.

The Committee of Ministers has adopted on 15 March 2012 an Internet Governance Strategy to protect and promote human rights, the rule of law and democracy online. The main action lines of the strategy that will govern the Council of Europe's internet-related work between 2012 and 2015 are: maximising rights and freedoms for internet users; advancing data protection and privacy; enhancing the rule of law and effective co-operation against cybercrime; maximising the internet's potential to promote democracy and cultural diversity; protecting and empowering children and young people<sup>320</sup>.

Even more recently, the Council of Europe has adopted two Recommendations in which it calls on its members states to safeguard human rights, notably freedom of expression, access to information, freedom of association and the right to private life, with regard to search engines and social networking services.

In the Recommendation CM/Rec(2012)3 on the protection of human rights with regard to search engines<sup>321</sup>, the Committee of Ministers invites states to engage with search engine providers to increase transparency in the way access to information is provided, in particular the criteria used to select, rank or remove search results. The Recommendation CM/Rec(2012)4<sup>322</sup> contains *inter alia* a number of actions "to protect users from harm without limiting freedom of expression and access to information" and "to ensure accessibility to their services to people with disabilities, thereby enhancing their integration and full participation in society". The Committee recommends that self- and co-regulatory mechanisms are set up in order to contribute to the respect of human rights standards.

### 1.3.3. Evaluation and importance of main European standards

When taking a comprehensive look at the guarantees afforded both to the freedom of the media and the citizen's right to information - as recognised by the CFREU, EU treaties, EU secondary legislation such as resolutions adopted by the European Parliament and the directives on the one hand, and the ECHR accompanied by relevant jurisprudence of the ECtHR, the CoE's conventions and recommendations, on the other - it becomes clear that the benchmark at European level has become more and more encompassing and, mostly, directly relevant for the media legal orders of the Member States.

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<sup>319</sup> Recommendation CM/Rec(2007)11 of the Committee of Ministers to Member States on promoting freedom of expression and information on the new information and communications environment of 26 September 2007.

<sup>320</sup> CM(2011)175 final, Internet Governance – Council of Europe Strategy 2012-2015.

<sup>321</sup> Recommendation CM/Rec(2012)3 of the Committee of Ministers to member States on the protection of human rights with regard to search engines, adopted on 4 April 2012.

<sup>322</sup> Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services, adopted on 4 April 2012.

The ECtHR recognises freedom of expression as one of the basic conditions for the progress of democratic societies and for the development of each individual. It stresses the institutional role of the press – not only in its traditional concept – as a “public watchdog”. It further confirms that the principles relating to the freedom of expression are also valid in the area of audiovisual communication and further highlights the principle of pluralism and the function of the State as an ultimate guarantor to secure pluralism, particularly in the area of audiovisual media, both public service and private.

The ECJ acknowledges freedom of expression as one of the fundamental principles of a democratic society. The aforementioned State aid procedures provided the Court with an opportunity to acknowledge the important role of public service broadcasting in view of its cultural, social and democratic functions and its vital significance for ensuring democracy, pluralism, social cohesion, cultural and linguistic diversity. The ECJ further derives from the freedom of expression guaranteed by Article 10 ECHR the possibility to justify a restriction on the fundamental freedoms of the EC Treaty (now: TFEU), namely the free movement of goods and services and the freedom of establishment, with the legitimate objective of maintaining pluralism and preserving diversity of opinions.

Still, the framework which is provided for national media legal orders by EU law is not all-inclusive, not least in purely national situations where the fundamental freedoms of the TFEU cannot represent a yardstick against which restrictions and their legitimacy on the operation of the media could be measured. Furthermore, due to the principles of enumerative competencies and subsidiarity, the power of the EU to introduce additional regulation, and thereby also to establish safeguards for the rights of the media and of the citizens, is limited. Nevertheless, considered in conjunction with the guarantees afforded by CoE instruments, a rather high level of directions towards the shaping of national media policies is made available.

## 2. COUNTRY REPORTS

### 2.1. Context and Framework

In a number of fields the *acquis unionaire* sets standards that have to be respected by the relevant State institutions at national level, be they the legislature, the judiciary or the administration. In some instances, EU law will be directly applicable also in the relations between private individuals. As seen in the foregoing part, for present purposes, the relevant *acquis* does not only consist of the treaties' provisions which have an impact on the media and the citizens, such as Art. 11 EU Charter on Fundamental Rights, the fundamental freedoms of the TFEU, and rules on competition, including State aid provisions, for instance, but encompasses also a wide range of so-called “secondary legislation” adopted in relation to audiovisual media services, electronic communications, and so forth.

Nevertheless, a broad range of issues has not yet been dealt with at the EU level, in particular media-specific ownership rules, protection of journalists' sources or the citizens' general right to access information held by public authorities. Furthermore, the protection which is afforded – by constitutional law and fundamental rights - to the media, particularly public service media, to media regulatory authorities and in terms of universal services, might vary from Member State to Member State. These aspects, but evenmore the scope of protection in practice, is of key interest when it comes to analysis of the national situation by the national experts engaged in the preparation of the following country reports.

Their description and assessment of the situation at national level, both *de iure* and *de facto*, was based on the questionnaire which the EMR had made available. Therefore, for the vast majority of the relating parts of the country reports, it has been possible to allocate the information providing answers to the different questions at exactly the same point of order so as to ensure easy identifiability and comparability of the findings. As far as the description of the market situation is concerned, for almost all Member States relevant data for each and every market has been accessible and is portrayed in the country reports. Some divergences can be identify, though, in the level of detail in which the correspondents have had recourse to own recommendations relating to possible remedies which might help overcome perceived shortcomings, mainly in view of the design of the legal framework applicable to the media and the citizens.

## **2.2. The Situation in the EU Member States**

On a country-by-country basis, the following reports depict the legal/regulatory as well as factual situation with regard to the freedom of the media and the freedom of the citizens to access information in the EU Member States. The present chapter forms the major part of this study; it provides a considerable level of detail on the fundamental law safeguards implemented at national level, the manner in which - within them and through ordinary law and codes of conduct - the media and communications order is devised, the means available for citizens to obtain information which is of interest to them and the sources of information via radio, TV, print, new (Information Society) media services and electronic distribution networks.

The individual country reports, based on the questionnaire developed by the EMR, are following a three-fold approach: after describing the constitutional law/ fundamental rights framework affording guarantees to the media, the citizens and, where applicable, to media regulatory authorities and the concept of universal service understood broadly, they first examine the situation for the work of the media ("supply-side perspective"), second analyse the situation for the citizens seeking to access information and probably intending also to engage, in different forms, with the formulation of media output strategies ("demand-side perspective"), and third they provide statistics on the media markets situation which aim at enhancing the assessment of the aforementioned two perspectives. These three sections then provide the fundament for conclusions to be drawn and recommendation to be given by the respective national experts.

## AUSTRIA

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### 2.2.1. Austria

This update will rely on the study published in 2004 without recapitulating its content in order to avoid redundancies. It will point to the initial study explicitly, however, when suitable. Where current empirical data is presented the relevant passages (in particular those in Section 2.2.1.2.) have been drafted anew. The major structural changes of the last years in Austrian Media Law will be discussed in the respective sections below.

#### 2.2.1.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.1.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

As indicated in the 2004 Country Report, Freedom of Expression in Austria is protected by Art 13 of the Staatsgrundgesetz 1867 (Basic Law).<sup>1</sup> It has to be noted, however, that in addition to this source, Freedom of Expression and the Freedom to Impart and Receive Information and Ideas (Freedom of Information – see below) are also constitutionally protected by Art 10 ECHR as the *Convention for the Protection of Human Rights and Fundamental Freedoms* has been adopted on a constitutional level in 1964 (retroactive as from 1958).<sup>2</sup> This is of particular importance as the scope of Art 10 ECHR is wider than the scope of Art 13 Staatsgrundgesetz according to the Austrian Constitutional Court's Case Law,<sup>3</sup> by reaching beyond the dissemination of mere opinions.<sup>4</sup>

By Resolution of the Provisional National Assembly of 30 October 1918 "all censorship is abolished as illegal because contradictory to the basic rights of the citizen". Prior restraints on publication therefore are not compatible with Austrian constitutional law; regardless of the medium concerned, or the object pursued by the prohibitory action.

- Specific safeguards and rights for the media

Freedom of the media is not explicitly granted in Austria on a constitutional level. The provision initially designed as special constitutional stronghold of the independence of the media in Austria, eventually was enacted as preamble to the Austrian Media Act,<sup>5</sup> and thus as part a federal act without constitutional status.

As already indicated in the 2004 report, broadcasters enjoy a somewhat special status as the impartiality of their reporting is determined by the Constitutional Act to Secure the Independence of Broadcasters.<sup>6</sup>

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<sup>1</sup> Reichsgesetzblatt 142/1867 as adopted by Federal Law Gazette 1/1920 and State Law Gazette 303/1920.

<sup>2</sup> Federal Law Gazettes 59/1964 and 210/1958.

<sup>3</sup> See VfGH [Constitutional Court] VfSlg 10.948/1986.

<sup>4</sup> Note, however, the restriction-friendly "Broadcast-Clause" in Art 10 § 1 ECHR whereas "[t]his Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises". See, ECtHR 24.11.1993, Informationsverein Lentia and Others v. Austria, No. 13914/88 ea, declaring the monopoly system then operated in Austria incompatible with Art 10 ECHR.

<sup>5</sup> Federal Act on the Press and other Publications (Media Act), Federal Law Gazette 314/1981 as amended by Federal Law Gazette I 49/2005.

<sup>6</sup> Bundesverfassungsgesetz vom 10. Juli 1974 über die Sicherung der Unabhängigkeit des Rundfunks, Federal Law Gazette 396/1974.



Overall, however, freedom of the media in Austria thus is composed by a consideration of the guarantees sketched out above as a whole.

- Freedom to receive and to access information

Art 10 ECHR not only protects the free flow of information and ideas but also grants a fundamental right to Freedom of Information which, according to the Austrian Constitutional Court's case law, encompasses the right to gather information already publicly available.<sup>7</sup> A privileged position of the media is not automatically inconsistent with this guarantee; it must, however, not be designed in a way that would exclude the public from gathering information for the benefit of media representatives.<sup>8</sup>

- Specific rights for the citizens

As stated in the 2004 Country Report on Austria, Art. 20 para. 4 of the Austrian Constitution (B-VG) provides for Freedom of Information.<sup>9</sup>

In order to ensure transparency regarding advertisements in periodical media financed by public entities in January 2012 a Constitutional Act entered into force obliging all entities subject to control of the Court of Auditors (in particular Federation, States, Municipalities and public undertakings) to announce the names and the amounts received by owners of periodical media for media cooperation, and advertising contracts, or as an aid.<sup>10</sup> This Act is a direct consequence of a larger discussion on indirect media subsidizing in Austria by political players allegedly using tax money to influence media reporting.

- Safeguards on regulatory authorities

In 2010 the Austrian Constitution has been amended, introducing Art. 20 para. 3 no. 5a in order to create a legal basis for transforming the Media Authority into a fully independent authority (Austrian Communications Authority - KommAustria).<sup>11</sup>

- Safeguards on "universal service"

The Austrian Constitution contains no provision in respect of the "universal service".

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<sup>7</sup> VfGH [Constitutional Court] VfSlg 11297/1987.

<sup>8</sup> VfGH [Constitutional Court] VfSlg 13.577/1993.

<sup>9</sup> As deriving from this obligation of authorities on the federal, state and the municipal level to impart information about matters pertaining to their respective competence, cf. the "Duty to Grant Information Act", Federal Law Gazette 287/1987 as amended by Federal Law Gazette I 158/1998, and the "Fundamental Act on the duty to grant Information" (federal framework legislation), Federal Law Gazette 286/1987 as amended by Federal Law Gazette I 158/1998; both available in a translated version at < <http://www.ris.bka.gv.at/Englische-Rv/> >.

<sup>10</sup> Bundesverfassungsgesetz über die Transparenz von Medienkooperationen sowie von Werbeaufträgen und Förderungen an Medieninhaber eines periodischen Mediums (Constitutional Act on Media Cooperation and Aid), Federal Law Gazette I 125/2011. A Federal Act implementing the standards defined in the Constitutional Act on Media Cooperation and Aid will enter into force by July 2012, see Federal Law Gazette I No 125/2011, § 7.

<sup>11</sup> Federal Law Gazette I 50/2010.

### 2.2.1.1.2. *Media order (de lege lata and de facto)*

- "Market Entry"

The "Federal Act on the Press and other Publication Media" (Media Act) provides the foundation of media regulation in Austria.<sup>12</sup> It does, on the one hand, however, in its entirety not apply to all media<sup>13</sup> and is, on the other hand, supplemented by several specific regulations on private radio broadcasting, audio-visual media, and public broadcasting.

For the area of broadcasting the Austrian legal system provides for a "Dual Broadcasting Order" – a coexistence of public and private broadcasting corporations. While structure and organization of the Austrian Broadcasting Corporation (ORF) are quite narrowly determined by the ORF Act,<sup>14</sup> the Austrian legislator does rely to a greater extent on competition between the broadcasters in the private sector, providing a more generous framework for their activities according to the Audiovisual Media Services Act (see below) and the Private Radio Broadcasting Act.<sup>15</sup>

- Licensing schemes; remit psm; notification for print publications

In order to comply with the requirements of the Audiovisual Service Directive the Federal Act on Audiovisual Media Services (Audiovisual Media Services Act) was enacted in 2010.<sup>16</sup> Henceforth

- television services by means of wireless terrestrial transmission (ORF being an exception), via satellite and in electronic communications networks,
- the provision of other audiovisual media services,
- and the operation of multiplex platforms

are subject to the requirements stated in this Act.

Accordingly any person who intends to provide terrestrial and mobile terrestrial television or satellite television and is established in Austria must comply with the requirements thus stated. Licenses will regularly be granted by the Austrian Communications Authority (*Kommunikationsbehörde Austria, KommAustria*) for a period of 10 years and do concern both the approval of the programming that has been applied for and the determination of the area and channels of supply. Cable TV broadcasting or the retransmission of programmes only requires notification with the Austrian Communications Authority whereas satellite broadcasters based in Austria have to be licensed by the Authority.

The regulation of private terrestrial, satellite or cable radio broadcasting is subject to the Private Radio Broadcasting Act. Private terrestrial and satellite radio broadcasting requires licensing by the Austrian Communications Authority.

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<sup>12</sup> Federal Law Gazette 314/1981 as amended by Federal Law Gazette I 131/2011. A translated version may be downloaded at <http://www.ris.bka.gv.at/Englische-Rv/>.

<sup>13</sup> As the term „media" is quite broadly defined as "any means for publication of information or representation of thoughts by means of word, writing, sound or image, to a major audience by means of mass production or mass publication".

<sup>14</sup> Federal Law Gazette I 83/2001 as amended by Federal Law Gazette I 126/2011.

<sup>15</sup> Federal Act enacting provisions for private radio broadcasting, Federal Law Gazette I 20/2001 as amended by Federal Law Gazette I 50/2010.

<sup>16</sup> Federal Law Gazette I 84/2001 as amended by Federal Law Gazette I 50/2010. A translated version may be downloaded at <http://www.ris.bka.gv.at/Englische-Rv/>.

Cable radio broadcasting requires notification with the Authority only.

Regarding the ORF's mandate, § 4 of the ORF Act stipulates that ORF shall ensure in particular:

- comprehensive information on all important political, social, economic, cultural and sports-related issues;
- promotion of understanding for all questions of democratic society;
- promotion of Austrian identity from the perspective of European history and integration;
- promotion of understanding for European integration;
- presentation and promotion of arts, culture and sciences;
- due regard for, and promotion of, Austrian artistic and creative productions;
- presentation of varied cultural programmes;
- presentation of entertainment;
- due regard for all age groups;
- due regard for the causes of disabled people;
- due regard for the causes of families and children and for the equal treatment of women and men;
- due regard for the importance of legally recognised churches and religious communities;
- dissemination and promotion of public and youth education with special emphasis on school and adult education;
- information on issues relating to health, and to nature, environmental and consumer protection, having regard to the promotion of understanding of the principles of sustainability;
- promotion of public interest in active involvement in sports;
- information on importance, function and duties of the federal state and promotion of regional identities of the states;
- promotion of understanding of economic issues;
- promotion of understanding of questions of European security policy and comprehensive national defence
- due regard for and promotion of social and humanitarian activities, including raising awareness of the integration of disabled people into society and the labour market.

In creating its programmes and services, the ORF shall also ensure an objective selection and presentation of information in the form of news and reports, the submission and presentation of commentaries, viewpoints and critical statements with due regard for the variety of opinions represented in public life, self-produced commentaries, analyses, and presentations with due regard for the principle of objectivity.

- Media pluralism/ownership; competition law aspects

The Media-Concentration Framework according to the Federal Cartel Act has been outlined in the 2004 Study. In addition to these general regulations, media-specific competition-law requirements, such as a restriction on television advertising for periodical print media,<sup>17</sup> or the prohibition to include cost-free give-aways in periodical print media exist.<sup>18</sup>

- Legal framework for psm; ability to fulfill their tasks

As indicated above, as well as in the 2004 Study, the Austrian Broadcasting Cooperation (ORF) was established by the ORF Act which provides the legal framework for its activities.

Regarding the ORF's performance criticism of excessive influence exercised by the political parties has been frequent in recent years. However, the ORF's editorial staff may be said to be held in high esteem by the general public due to its critical demeanor and strong sense of journalistic independence and impartiality (which is conferred on them as a duty according to § 4 para. 6 ORF Act). In addition, it may be assumed that public awareness regarding problems that arise concerning the dangers of political interference in media activity gradually increases.<sup>19</sup>

According to § 4a ORF Act the General Director set up a quality assurance system defining criteria and procedures to ensure that the core public mandate given is complied with, particularly taking into account the independence and self-responsibility of all programming staff, the free exercise of the journalistic profession and the autonomy and self-responsibility of the Directors and Regional Directors. The quality assurance system was approved by the Foundation Council in May 2011.<sup>20</sup>

- The role and functioning of regulatory authorities in these respects

Licensing according to the Private Radio Broadcasting Act and the Audiovisual Media Services Act is subject to the decision/supervision of the Austrian Communications Authority (KommAustria).

*Inter alia*, the Public Value Review Board has been established within the Austrian Communications Authority in order to evaluate whether new ORF services are to be considered appropriate for the effective fulfilment of the ORF's core public mandate. The

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<sup>17</sup> Cf. § 14 para 8 Federal Act on the Austrian Broadcasting Corporation (ORF-Act), Federal Law Gazette No 379/1984 as amended by Federal Law Gazette I 15/2012.

<sup>18</sup> § 9a Unfair Competition Act, Federal Law Gazette No 448/1984 as amended by Federal Law Gazette I No 136/2001.

<sup>19</sup> An assumption that may also be suggested by the fact that a recent attempt of alleged political exertion of influence on the Austrian Broadcasting Corporation (filling the position of the director general's head of office with a candidate who had close ties to one of the governing parties) has been successfully thwarted by protests of ORF journalists and the larger public.

<sup>20</sup> A German Version of the quality assurance system report may be downloaded at [http://zukunft.orf.at/show\\_content2.php?s2id=176](http://zukunft.orf.at/show_content2.php?s2id=176).

KommAustria is also the supervisory body on the funding determined necessary for the ORF.

- “Pursuit of Core Activity”
  - Ordinary law safeguards for journalistic activity

The rationale and content of the Austrian Freedom of Information Laws have been outlined in the 2004 Study.

Defamation, libel, slander, insult and ridicule claims against media owners in case such an offence is committed in a media are subject to a rather complex and detailed regulation. According to § 6 Media Act in a large variety of cases such claims must not be raised, in particular if the published statement is true or if the public had a predominant interest in the publication and, according to standards of journalistic diligence,<sup>21</sup> there was sufficient reason to take the statement for true.<sup>22</sup> The amount of the damages awarded in such a procedure depends on the scope and the effects of the publication, in particular on the type and circulation of the media. The preservation of the economic basis of the media owner is to be respected. In any event the indemnity must not exceed € 20,000 in case of a defamation or particularly serious effects of libel or slander the maximum is € 50,000.

Media owners, editors, copy editors and employees of a media undertaking or media service have the right to refuse answering questions concerning the person of an author, sender or source of articles and documentation or any information obtained for their profession in a proceeding before court or an administrative authority which must not be circumvented by requesting the person enjoying this right to surrender documents, printed matter, image, sound or data carriers, illustrations or other representations of such contents or confiscating them (§ 31 Media Act).

According to § 2 of the Media Act each editor has the right to refuse contributing to the creation of contents of feature articles or representations that are in contradiction to what he is convinced of regarding fundamental issues or that are in contradiction to the principles of the journalistic profession, unless what he is convinced of is in contradiction to the basic line of the media product published (§ 25 Media Act). The technical editing of feature articles or of representations of others and the editing of news, however, must not be refused. A justified refusal must not result in any disadvantage to the editor.

If an article or a representation is modified as to its meaning, publication accompanied by the name of the copy editor is subject to his consent; quoting the name of the author being equivalent to quoting a pseudonym or code (e.g. initials, abbreviation) generally known to be used by him (§ 5 Media Act).

Labor conditions of those employed in the media are basically governed by general Austrian labor law. In addition to that the “Journalist Act” applies to those employed as a principal occupation by a newspaper, writing texts, or drawing images and to the principal employees of a news agency, a broadcasting company or a film company,

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<sup>21</sup> Considering in particular the gravity of the allegation that has been raised – *cf. i.a.* the judgement of the Vienna Federal Appeals Court, 18 Bs 313/96, and the judgment of the Austrian Supreme Court, 6 Ob 168/97t.

<sup>22</sup> See Austrian Supreme Court, 1 Ob 4/87 – the press is only committed to truthfulness (and thus not to objective truth).

entrusted with the design of the text or the production of motion pictures about current events.<sup>23</sup>

§ 9 of the Austrian Media Act states a right to reply (obligation to publish “counter-statements”): Each person or legal entity (authority) not only generally affected by facts published in a periodical media product is entitled to request publication of a counter-statement in such media free of charge, unless such counter-statement is not true or its publication is not otherwise excluded. A counter-statement has to state in a concise manner that and to what extent the information is incorrect or incomplete and the respective reason. It must either state the correct facts as opposed to the way they were published or add an essential item to the facts published or otherwise refer directly to the facts as published and state what was published in a wrong or misleading way. Its length must not disproportionately exceed the original publication. It must be published in the same language as the publication it refers to.

In addition – according to § 10 of the Media Act – a person who has been reported to be suspected of having committed an offence punishable by the courts or that criminal proceedings have been instituted against her, is entitled to publication of the fact that the proceedings have been withdrawn or terminated by a decision not pronouncing any sentence.

The publication requirement is subject to various exceptions stated in § 11 of the Media Act, in particular a publication of the counter-statement may be refused if its publication would constitute an offence punishable by the courts or an intrusion into somebody's strictly personal sphere (§ 11 para 2 Media Act).

- Funding schemes for specifically desired content

In order to further a pluralistic media landscape as well as public value in the print media and the broadcasting sector, several funding schemes have been created, the Federal Press Subsidies Act (overall subsidies of close to € 20,000,000 p.a in the last years), abetting (comparatively) high-circulating daily and weekly periodicals being of the greatest importance.<sup>24</sup>

In addition funding efforts abetting public political education or the Austrian film sector have been created.<sup>25</sup>

Private and non-commercial broadcasters are being publicly subsidized by the Private-Broadcast Funds and the Non-Commercial-Broadcast Funds.

In addition a reduced VAT applies to the periodical print media, movie screenings, and broadcasting services.<sup>26</sup>

- Political advertising and/or broadcasting time

Political advertising is not explicitly regulated. Concerning the ORF such advertising is regarded to be prohibited; in particular against the background of the manifold provisions

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<sup>23</sup> State Law Gazette No 88/1920 as amended by Federal Law Gazette I No 102/2007.

<sup>24</sup> Federal Press Subsidies Act, Federal Law Gazette I No 136/2004 as amended by Federal Law Gazette I No 42/2010.

<sup>25</sup> See the, the Federal Journalism Subsidies Act, Federal Law Gazette No 369/1984 as amended by Federal Law Gazette I 22/2012, and the Austrian Film Subsidies Act, Federal Law Gazette No 557/1980 as amended by Federal Law Gazette I No 170/2004.

<sup>26</sup> See § 10 para 2 VAT Act, Federal Law Gazette No 663/1994 as amended by Federal Law Gazette I No 135/2009.



of the ORF Act vouching for independence and objectivity and prohibiting the entanglement of the ORF and (party-)politics. The problem is, however, of lesser practical importance as due to these and similar considerations § 3 d) of the ORF's general terms and conditions excludes political content from being accepted as advertisement.<sup>27</sup>

According to § 4 para 5 of the ORF Act the ORF has to ensure an objective selection and presentation of information in the form of news and reports including coverage of the legislators' work and broadcasts of the debates of legislative bodies.

- Codes of conduct and their organisational framing

As described in the 2004 Study, the Austrian Press Council ceased to exist in 2002. The Re-establishment of the Austrian Press Council in 2010 has been supported broadly among the print media. Major players, in particular the high-circulation dailies *Krone* and *Österreich*, however, do not participate in this body.

The main task of this self-regulatory institution is to apply the Austrian Code of Conduct for Journalists ("Ehrenkodex") regarding grievances concerning the press.<sup>28</sup> The Code of Conduct basically ties in with the Media Act and is intended to provide a guideline for the ethical conduct of members of the press.<sup>29</sup>

Anybody assuming personal disadvantage by a violation of the Code of Conduct of the Austrian Press is entitled to file a complaint either directly with the Austrian Press Council or with one of its Ombudsmen. In the complaint procedure the Press Council serves as arbitration panel; thus to file a claim with the courts subsequent to the decision of the Press Council is not permissible. The only sanction, however, the Press Council may impose is the publication of its decision in the media concerned.<sup>30</sup>

- The role and functioning of regulatory authorities in these respects

Most of the areas sketched-out above are subject to the jurisdiction of the Austrian Courts.

Legal supervision on both private broadcasters and the ORF is exercised by the Austrian Communications Authority (KommAustria). Appeals may be filed with the – independently organized – Federal Communications Board (*Bundeskommunikationssenat* – BKS).

Decisions according to the Press Subsidies Act and the Journalism Subsidies Act are, however, made by the Austrian Communications Authority (KommAustria).

Funding decisions according to the Private-Broadcast Funds and the Non-Commercial-Broadcast are made by the CEO of the Austrian Regulatory Authority for Broadcasting and Telecommunications.

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<sup>27</sup> A German version of the ORF's general terms and conditions may be downloaded at: <http://enterprise.orf.at/459>.

<sup>28</sup> For the means of public subsidization of such self-regulatory institutions – see: <http://www.rtr.at/de/foe/Selbstkontrolle>.

<sup>29</sup> The Code of Conduct may be downloaded at [www.presserat.at](http://www.presserat.at).

<sup>30</sup> Recent decisions of the Austrian Press Council may be downloaded at [www.presserat.at](http://www.presserat.at).

- Distribution Aspects
  - Access to frequencies

The access to private radio broadcasting is subject to the conditions stated in the Private Radio Broadcasting Act. Frequencies are allocated by the KommAustria.<sup>31</sup> Due to the yet incomplete digitalization of radio broadcasting in Austria<sup>32</sup>, transmission capacities are, however, scarce.<sup>33</sup> Spectrum capacities have to be allocated through an administrative decision, for the most part in the wake of an invitation to tender procedure carried out by the KommAustria.

- Access to distribution networks and control of actual conditions

Fair and equal access to broadcasting is ensured either by the Communications Authority directly or by the requirements multiplex operators have to abide; their correct application being supervised by the Authority.

- Must-carry/must-offer rules for electronic media

Must-carry obligations apply in particular to multiplex operators: when granting the multiplex license, the regulatory authority is required, according to § 25 para 2 nos 2 and 3 Audio Visual Media Services Act, to ensure to impose that the two analogue television channels broadcast by the Austrian Broadcasting Corporation (§ 3 of the ORF Act) and the channel of that broadcaster who was issued a license for nationwide analogue terrestrial television (ATV+) are integrated into the package of digital channels in the respective coverage area upon request and against a reasonable remuneration, and that a sufficient data volume is available for their dissemination, to the extent such channels are not yet disseminated in a digital terrestrial manner in the respective coverage area.

- Role of platform operators

Multiplex operators are selected in accordance with the requirements stated in the Austrian Digitalization Plan<sup>34</sup> following an invitation to tender for multiplex platforms.<sup>35</sup> Licenses will be granted for a period of 10 years to those applicants that best comply with the selection criteria (such as high supply rate, high technical quality, plurality of opinions in the digital programming, consumer friendliness). Terrestrial television broadcasters are, however, selected directly by the multiplex operator in accordance with the criteria stated in the Audio Visual Media Act and the requirements as specified by the Austrian Communications Authority.<sup>36</sup> This selection is, of course, subject to supervision by the Authority.

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<sup>31</sup> Recent decisions may be downloaded at <http://www.rtr.at/en/m/Entscheidungen>.

<sup>32</sup> The digitalization is, however, scheduled. By an amendment to the Private Radio Act, Federal Law Gazette I No 50/2010, a legal basis (§§ 15 – 15b) has been created for the licensing of multiplex platforms. Licenses are to be put out to public tender in accordance with the Austrian Digitalization Plan (may be downloaded at <http://www.rtr.at/de/m/Digikonzept2011>).

<sup>33</sup> See above. The adoption of digital radio broadcasting has, however, been evaluated (the report may be downloaded at <http://www.rtr.at/de/komp/EndberichtDAB>) and is scheduled (see below at the discussion of the access to radio frequencies for more information).

<sup>34</sup> The Digitalization Plan may be downloaded at <http://www.rtr.at/de/m/Digikonzept2011>.

<sup>35</sup> See e.g. the invitation to tender for multiplex platform C (terrestrial broadcasting on the regional and local level) at the Authority's website.

<sup>36</sup> See e.g. the requirements stated in the Addendum to the initial decision by the Austrian Communications Authority (KOA 23.2.2006, 4.200/06-002) licensing the multiplex operator ORS, pp. 69-70. The decision may be downloaded at <http://www.rtr.at/de/m/KOA4200-06-02-MUX-ORS>.

- Access to Information
  - Transparency of media ownership situations

The Media Act provides for the following general transparency requirements concerning media activities:

Each media product has i.a. to indicate the name or the company of the media owner and of the producer as well as the business place of the publishing house and of the producer as well as the address of the media owner and of the editors' department of the media undertaking as well as the name and address of the publisher (§ 24 Media Act).<sup>37</sup>

The media owner of each periodical media product is required to publish information in order to make the ownership structure transparent (§ 25 Media Act).

- Accountability of public service media

According to § 21 para. 4 ORF Act the Director General has reporting obligations to the Foundation Council.

For the quality assurance system according to § 4a of the ORF Act, see above.

- Freedom of information laws

Conform to the federal framework legislation and the "Duty to Grant Information Act", all entities embodied with administrative duties as well as the other public law corporate bodies shall impart information about matters within their sphere of jurisdiction as long as no conflict with a legal requirement to maintain confidentiality arises. In case the authority addressed is not willing to provide the information required it has to rule on the matter by administrative decision<sup>38</sup> in order to enable the applicant to file an appeal of this decision.

- Accessibility of products/services and distribution networks

According to the Supreme Court's case law there is a right of tenants to use a satellite applicable also to tenants subject only to those restrictions that are set by Community (Union) Law.<sup>39</sup> However, building regulations and local planning have to be met. According to § 3 of the ORF Act the ORF, together with all regional studios, must provide three nation-wide and nine state-wide radio channels, and two national television channels; ensuring that, subject to technical development and economic feasibility, all inhabitants of the national territory who are authorised to operate a radio or television receiver are consistently and permanently provided with one province-wide and two nation-wide radio channels and two nation-wide television channels.

Disabled or persons with no or no significant income can apply to an exemption of their duty to pay licence fees (see § 3 para. 5 of the "Rundfunkgebührengesetz"<sup>40</sup>).

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<sup>37</sup> For particular requirements for audio-visual media see § 29 Audio Visual Media Act.

<sup>38</sup> See for the Federal Administrative Court's recent case law (VwSlg [Collection of the Case Law of the Federal Administrative Court] 17641 A/2009.

<sup>39</sup> For details see OGH 21.10.2003, 5 Ob 199/03f.

<sup>40</sup> Licence Fee Act, Federal Law Gazette I 1999/159 as amended by 2003/71.

- "Have a Say on ..."
- Participation in media operators/(self-)regulatory bodies

To safeguard the interests of the listeners and viewers, an Audience Council of the Austrian Broadcasting Corporation was established (see § 30 ORF Act for a detailed outline of the functions of this body). Members serve a term of four years and are selected either by election of the viewers and listeners or by appointment (see § 28 ORF Act).

## 2.2.1.2. Main Players in the Media Landscape

### 2.2.1.2.1. Radio

The table below shows that to a large extent the Austrian Radio landscape is still dominated by ORF-Stations. As indicated in the 2004 report Krone, Hit Radio is, however, the only radio station broadcasting on a national level. Thus the table below has to fall short of picturing the regional importance some private radio stations may have.

**Table 1 AT: Main radio companies**

Market Shares*				
Broadcaster	Ownership Structure	Programs	Ages 10+	Ages 14-49
ORF	Public Service Broadcaster	Overall	75	68
ORF	Public Service Broadcaster	Österreich 1 Ö2 Bundesländer-Radios Ö3 FM4	6 36 31 2	3 20 41 4
Private radios		Total	23	30
Kronehit Radio Betriebs GmbH	Kurier Hörfunk Beteiligung GmbH	KRONEHIT	6	10
Antenne network	Styria Media Regional GmbH	Antenne Steiermark Antenne Kärnten	2 1	3 2
Antenne „Österreich“ und Medieninnovationen GmbH	Alpha Medien GmbH für Wirtschaftskommunikation	Antenne Salzburg Antenne Tirol Antenne Wien	1 0 1	1 0 1
Vorarlberger Regionalradio GmbH	Eugen Ruß Vorarlberger Zeitungsverlag und Druckerei GesmbH 90%, Telefon & Buch Verlagsgesellschaft mbH 10%	Antenne Vorarlberg	0	1
Arabella network	decentralised ownership	Radio Arabella Wien/NÖ Radio Arabella OÖ Radio Arabella Salzburg	2 0 0	1 0 0

LIFE Radio GmbH & Co KG	J. Wimmer GmbH 25,5%, OÖ Media Data Vertriebs- und Verlags GmbH 9,5%, Gutenberg Werbering GesmbH 5%, Privates Radio OÖ GmbH Nachfolge OEG 9,5%, Plus-City Medienbeteiligungs GmbH & Co KEG 10%, Vereinigung der Österreichischen Industrie Landesgruppe OÖ 5%, Ypsilon Immobilienvermietungs GmbH 5%, RAFIS BeteiligungsgesmbH 3%, Krüger Medien GmbH 2%, Oberösterreichische Rund- schau GmbH 25,5%	Life Radio Oberösterreich	2	3
NRJ - N&C Privatradiobetriebs GmbH	NRJ Radio Beteiligungs GmbH 62,9%, Radio ID 12%, Radio NRJ GmbH 25,1%	Energy Wien Ernergy Tirol Energy Salzburg Radio Eins (Stmk.) Radio Graz	1 0 0 0 0	2 0 0 0 0
Welle 1	80% Stephan Prähauser, 20% AIC Allg. Industrie Consulting	Welle Salzburg/OÖ/ Steiermark	1 1	1
HIT FM Network	decentralised but almost 100% Medien Union GmbH	some in Niederösterreich and Burgenland	0	1
Radio Eins Privatradiog Gesellschaft mbH	Medien Union GmbH	88.6 Der Musiksender (Wien)	1	2

\* Market Shares as reported by RMS Austria, Radiotest second semester of 2011

#### 2.2.1.2.2. Television

As for the Radio Sector also the Austrian television landscape is still dominated by the public service broadcaster. A comparison to the 2004 reports indicates, however, that this dominant position is partly declining. As pictured in the 2004 report the market share of German (public as well as private) broadcasters is significant.

**Table 2 AT: Main Television Companies 2011**

Austrian Broadcasters	Ownership Structure	Remarks	Channel	MS* 12+
ORF	Public service broadcaster		ORF1 ORF2 ORF Sport+ ORF III Kultur u. Information	13.80% 22.60% n.a. n.a.
			Public Broadcaster Overall	36.40%
ATV Privat TV GmbH & Co KG	HKL Medienbeteiligungs GmbH & Co KG 52%, Tele München Fernseh GmbH & Produktionsgesellschaft 48%		ATV ATV II	3.6% n.a.
Puls 4 TV GmbH & Co KG	SevenOne Media Austria GmbH		Puls 4	2.90%
ServusTV Fernsehgesellschaft mbH	Red Bull Media House GmbH		Servus TV	0.70%
Austria 9 TV GmbH	Andmann Media Holding GmbH 41,5%, Josef Andorfer 58,5%		Austria 9	0.4%
			Private Broadcasters Overall	<b>7.60%</b>
(Partly) Foreign Private Broadcasters featuring Austrian programming windows, marketing advertising-breaks in Austria				
SAT.1 Privatrundfunk- und Programmgesellschaft mbH	Medicur Holding GesmbH 24,5%, Styria Media Group AG 24,5%, Sat.1 Satelliten-Fernsehen GmbH 51%	programming windows, marketing advertising-breaks	Sat.1 Austria	6.50%
ProSieben Austria GmbH	SevenOne Media Austria GmbH	programming windows, marketing advertising-breaks	Pro7 Austria	5.20%
			MS Overall	<b>11.70%</b>
Foreign Private Broadcasters marketing advertising-breaks in Austria				
RTL Austria		advertising-breaks	RTL Österreich	6.50%
VOX Österreich		advertising-breaks	VOX Österreich	4.50%
RTL II		advertising-breaks	RTL II	2.20%
Super RTL		advertising-breaks	Super RTL	1.30%
Kabel eins		advertising-breaks	kabel eins	2.80%
			MS Overall	17.30%
Foreign public broadcasters				
ZDF		PSB Germany	ZDF	4.20%
ARD		PSB Germany	Das Erste	3.20%
3Sat		PSB D, A, CH	3Sat	1.90%
			MS Overall	9.30%



\* Adults 12+, Market share 2011, AGTT/GfK

### 2.2.1.2.3. Press and Publishing

Levels of newspaper consumption are still quite high with 73.7% of the population picking up a newspaper on an average day in 2010.

Advertising spending in the printed press continues to account for the largest part of national spend, amounting to a total of 55.6 percent of the "classical spending". Within this segment the daily papers were in the first position with 56.4 of the spending in this sector and 25.5 percent of the total spending.

The Mediaprint Group is the largest player in the field of the printed press, a subsidiary of Kronen Zeitung publishing company and Kurier publishing company with a rather complex structure. It organises printing, distribution, marketing, acquisition of advertisements and administration for both daily papers whereas the editorial staff is organised in different subcompanies. Furthermore the Media Print Group accounts for printing and distribution of several other daily papers. Via Kurier Publishing Company it is linked with the NEWS Group, the strongest player in the field of magazines.

The second important player is the Styria Media Group. This publishing house (which is closely tied to the catholic church) owns the Kleine Zeitung, the second largest daily paper in Austria (distributed in the two southern provinces) as well as two quality dailies (the conservative daily "Die Presse" and the economic daily "Wirtschaftsblatt") which are supra-regional with regard to their editorial concept. As regards magazines, the Styria Media Group is in second position and it is also engaged in cost-free weeklies and private radios in Austria as well as in the sector of the printed press in Croatia and Slovenia.

**Table 3 AT: Austria's largest Media Companies as publishers of daily newspapers**

Major Group	Ownership Structure	Titles	Market Share 2010*
Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG	70 % Krone Verlag GmbH & Co. Vermögensverwaltung KG (Gesellschafter: 49.5 % Verlassenschaft nach Hans Dichand, 49.5 % NKZ Austria Beteiligungs GmbH Essen) and 30 % Kurier Zeitungsverlag und Druckerei GmbH (Gesellschafter: 50.56 % Printmedien Beteiligungs-ges.m.b.H and 49.44 % WAZ, Essen)	Kronen Zeitung Kurier	39.0
Styria Media Group	98.3 % Fa. Katholischer Medien Verein Privatstiftung and 1.7 % Fa. Katholischer Medien Verein	Kleine Zeitung Die Presse WirtschaftsBlatt	15.3
Moser Holding AG	Erben des langjährigen Eigentümers 85.37 % und 14.63 % Raiffeisen OÖ Holding	Tiroler Tageszeitung TT Kompakt (cost-free daily)	3.8
Vorarlberger Medienhaus Gruppe	Eugen A. Russ / EAR Privatstiftung; Kempf-Russ Privatstiftung 38.5 %	Vorarlberger Nachrichten Neue Vorarlberger Tageszeitung	2.7

\* based on the Austrian Circulation Audit (ÖAK) and other sources; market share referring to daily circulation.

Due to the launch of the two (partly) cost-free newspapers "Heute" (2004) and "Österreich" (2006) the market of dailies changed in the last years. The largest of all Austrian daily newspapers (total number: 18; 3 of them are cost-free newspapers) as regards the number of sold copies and coverage still is the "Kronen Zeitung": In 2010, this newspaper reached 38,9 % of the population aged 14+ every day. But the cost-free daily tabloid "Heute" already ranks second, coequal to the regional paper "Kleine Zeitung" which has been in the second position for a long time. The tabloid "Österreich" is in third position. Discussions on whether this publication has to be considered a cost-free daily continue. In the Viennese region it is (in parts) available free of charge at bus stops and underground stations.

**Table 4 AT: Average number of printed copies and reach of the largest Austrian dailies in 2010**

Publication	Circulation*	Daily reach**
Kronen Zeitung	859,760	38.9
Heute (cost-free daily)	541,249	12.0
Kleine Zeitung	301,653	12.0
Österreich (partly cost-free daily)	364,526	9.6
Kurier	176,655	8.1
OÖ Nachrichten	127,686	4.8
Tiroler Tageszeitung	99,260	3.9
Die Presse	85,647	3.8
Der Standard	91,562	5.3
Salzburger Nachrichten	78,814	3.6
Vorarlberger Nachrichten	66,866	2.6

\* based on the Austrian Circulation Audit (ÖAK) and other sources;

\*\* based on the figures of the Austrian Circulation Audit (ÖAK); 'reach' refers to the Austrian population aged 14+

#### 2.2.1.2.4. *Online media (non-linear audiovisual (media) services; websites)*

There are no data to fill in here.

#### 2.2.1.2.5. *Cable/Satellite network operators, IPTV & Internet Access Providers*

Compared to 2003 the number of households with cable TV grew substantially from 1.279 Mio to 1.549 Mio. That is – apart from effective losses in market shares – one of the main explanations for the diminishing share of the major player UPC. Apart from that, as the table below indicates, the cable landscape and the ownership structure have changed since 2003:

**Table 5 AT: Main Cable Companies**

Provider	Ownership Structure	Specification	Outlets*	MS*
UPC Wien, Graz, Tirol, Klagenfurt, Oberösterreich, Wiener Neustadt/Baden	UPC Broadband GmbH (Liberty Global, Inc.) In Wien: UPC Broadband 95% Kabel-TV-Wien Gesellschaft m.b.H 5%	cable	519,000	33.5%
A1 TV	Telekom Austria 100%	IP TV	200,000	12.90%
Liwest	Energie AG 44% Linz AG 40% E-Werk-Wels AG 13%	cable	165,000	10.7%
Kabelsignal/NÖKOM	EVN AG 100%	cable	119,000	7.70%
Salzburg AG (cableLINK)	Land Salzburg 42,56% Stadt Salzburg 31,31% Energie AG Oberösterreich, Service- und Beteiligungs- verwaltungs-GmbH 26,13%	cable	110,000	7.1%

\* various sources – UPC website, A1 TV press release, Liwest website, Kabelsignal business report, Salzburg AG business report

#### 2.2.1.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)

The advertising revenue in 2011 amounted to a total of € 3,844,207,000.00. When compared to 2002 the shares in selected areas changed significantly which is particularly due to the growing importance of online advertising.

**Table 6 AT: Share of advertising revenue within the media sector 2011:**

Television	19%
Print	46%
Direct Marketing	18%
Radio	6%
Outdoor	5%
Online	6%

\* Source: rtr

#### 2.2.1.3. Conclusion and Recommendations

When compared to 2004 the legal framework governing the Austrian media landscape has been altered in various respects. By implementing and executing comprehensive digitalization endeavours, terrestrial television broadcasting has changed significantly. The presence of a growing variety of broadcasting companies overall, however, keeps redefining the Austrian broadcasting system, even though it cannot be denied that the Austrian Public Broadcasting Company (ORF) remains the dominant player outshining its competitors in the field of television and even more so when it comes to radio broadcasting. By constitutional amendment the basis for the subsequent transformation of the Austrian Communications Authority (KommAustria) into a fully independent media authority has been created.

The re-establishment of the Austrian Press Council has put an end to the unsatisfying vacancy of a self-regulatory supervisory body on press activities, even though it has to be considered as regrettable that not all of the leading periodical publications did join this institution. The recently enacted Media Transparency Act, finally, aims at providing for disentanglement of media and political players and thus is very likely to be an important step towards further ensuring and strengthening media independence in Austria.

The last years also have brought significant progress on the technical level: The multiplex-standard now established in the field of television broadcasting is to be expected to be implemented soon also in the field of radio broadcasting; thus providing for a greater degree of diversity and competition among various broadcasters.

Still, the developments made in this regard are significant given the monopolist status the public broadcaster ORF enjoyed only two decades ago. A fact which may also prove to be true when it comes to the exertion of undue political influence on the ORF: rising public awareness of the problems in this area and the recent bestowal of the highly esteemed Concordia Award for Freedom of the Press to the editorial staff of the ORF's main news program for their strong sense of editorial independence provide evidence of such a positive development.

## BELGIUM

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### 2.2.2. Belgium

#### 2.2.2.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.2.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The Belgian constitutional framework concerning the right to freedom of expression and freedom of the press is shaped by Articles 19, 25 and 150 of the Constitution (unofficial translation available at the website of the Belgian Parliament).

Article 19 refers to the freedom of expression, Article 25 introduces the freedom of the press and establishes a cascade liability system for the press (*cf. infra*), and Article 150 stipulates that 'printed press crimes' (except for those inspired by racism or xenophobia) should be brought before a jury at the 'Hof van Assisen'/^Cour d'Assises' (i.e., a court of law composed of both professional judges and a jury of citizens, which adjudicates on the most serious and delicate offences).

The three articles regarding freedom of expression and freedom of the press are still formulated in exactly the same way as in 1831, despite the enormous evolution that has occurred in the media landscape. It is, however, generally accepted that – due to the technology-neutral wording of Article 19 – the constitutionally protected freedom of expression is applicable to any medium: the written press, radio, television broadcasting, movies, the Internet, as well as any future medium.

Articles 25 and 150 are not formulated in the same technology-neutral manner, as they use the word 'press' or 'print press'. The Constitution does not contain a definition of 'printed press crimes'. Over time, legal doctrine has constructed the following description: '*a view or an opinion, criminalised by law, made public by means of printed media*'.<sup>1</sup>

The Belgian courts seem divided about the question whether the traditional freedom of the press should be extended to new information and communication technologies. The Supreme Court ('*Hof van Cassatie*'/^*Cour de Cassation*'), for instance, was already in its judgement of 9 December 1981 of the opinion that Article 25 was not applicable to audiovisual media. This interpretation was later also reconfirmed in its judgment of 2 June 2006. Together with some other - lower - courts, the Constitutional Court in its ruling of 6 October 2004 however seems of the opinion that the scope of Article 25 should not be strictly limited to the print press. The unclarity about the actual scope of the Articles 19 and 25 of the Constitution has given rise to critical remarks from the European Court on Human Rights, which in its case on the public service broadcaster of the French Community – *RTBF v. Belgium* – on 29 March 2011 ruled that the strict interpretation of the constitutional protection of the freedom of expression and of the media conflicts with the requirements as imposed by Article 10 ECHR.

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<sup>1</sup> Dirk Voorhoof & Peggy Valcke, *Handboek Mediarecht* (Brussel: Larcier, 2011), Part 1, Chapter 3, Section 3, p. 93.

The protection of Article 150 of the Constitution does not extend to criminal opinions broadcast through radio or television, and until recently it was quite unclear whether 'printed press crimes' could be committed over the Internet. In the past, several lower courts had explicitly adopted a teleological interpretation by considering the Internet as a type of 'press' and accepted without much hesitation that a printed press crime could be committed for instance on Internet newsgroups or forums. This interpretation was later followed by an increasing number of Courts of Appeal, and was finally confirmed by the Belgian Supreme Court in its ruling of 6 March 2012.

- Freedom to receive and to access information

The right to freedom of expression in Belgium is further supplemented by a number of additional constitutional rights relating to the freedom to receive information and the right to access information, such as:

#### Article 32 Constitution

Everyone has the right to consult any administrative document and to obtain a copy, except in the cases and conditions stipulated by the laws, federate laws or rules referred to in Article 134.

- Safeguards on regulatory authorities

There are no specific constitutional references or guarantees regarding press or media regulatory authorities, but all communities have created regulatory authorities in the television and radio broadcasting sector, while the federal powers relating to audiovisual media in Brussels are assigned to the telecommunications regulator, BIPT.

- Safeguards on "universal service"

Not taking into account implemented EU obligations (e.g. provisions on must-carry, access to major events, short news reporting, obligations for conditional access providers), there are no additional specific constitutional references or institutional guarantees to the concepts of "universal service" in the Belgian media sectors.

#### 2.2.2.1.2. *Media order (de lege lata and de facto)*

- "Market Entry"
  - licensing schemes; remit psm; notification requirements for print publications

When it comes to broadcasters other than from the PSB sphere, first, it should be recalled that both the Flemish and French communities - going one step further than the European legislator - considered it necessary to not only impose obligations on content providers and network operators (following the current EU division between *content* and *transmission* regulation in the European legislative framework) but also on a third category of actors, i.e., the distributors.

To be more precise, the 2003 reform of the Broadcasting Act in the French Community already led to the introduction of new classifications of the different players in the broadcasting value chain: '*éditeurs de services*', '*distributeurs de services*', and '*opérateurs de réseau*'. This threefold classification was maintained in Article 2, §2 of the 2009 French Community Audiovisual Media Services Act (French Community Media act).

When implementing the Audiovisual Media Services Directive, the Flemish legislator also adopted this three-layered approach, being of the opinion that the category of distributors gained in importance in the audiovisual media landscape. The 2009 Flemish Community Radio and Television Broadcasting Act (Flemish Media act) consequently also applies to the three above-mentioned categories of actors:

- the '*editors of broadcasting services*' (or 'content providers'): those who produce (and have the editorial responsibility over) radio or television channels or other information services; this category of market players is subject to advertising rules, programme requirements (protection of minors, prohibition of hate speech and racism), etc. Depending on whether they use scarce resources (*in casu* frequencies) or not, they will have to apply for a license or submit a notification;
- the '*distributors of broadcasting services*' (or 'service providers'): those who aggregate or package channels and services (either their own productions or acquired from third parties) into various bundles and offer these to end-users; they have to submit a prior notification or declaration to the respective media regulators;
- the '*network operators*' (or 'network providers'): those who control the technical exploitation of broadcasting networks and provide transmission capacity for the delivery of audiovisual media services. Operators of cable networks are subject to prior notification, operators of terrestrial networks have to apply for an individual authorization linked to a specific frequency.

It can be noted that, in practice, market players will often perform several functions simultaneously; hence, they could fall under more than one of the above categories. A radio station transmitting over the air, for instance, acts at the same time as content provider (editing its own radio programme), service provider (offering its programme to the listener) and network provider (operating its own broadcasting equipment). The Flemish commercial television broadcaster, VMMA, is an editor of broadcasting services, but is not a distributor of services or network operator (since it does not aggregate channels in packages, nor has transmission facilities of its own; its channels are only distributed via the cable networks of other companies). Maintaining the network and offering programme packages to end-users are considered different operations, which can be performed by separate entities (e.g. TV Vlaanderen for digital satellite television).

The Flemish Media act distinguishes the following categories of private radio broadcasters are distinguished in Flanders:

(1) Private *linear* radio broadcasters (Article 127 Flemish Media act):

- (a) *National or communitywide* radio broadcasters: they offer a range of programmes (including information and entertainment) to the whole of the Flemish Community (Article 137 Flemish Media act).
- (b) *Regional* radio broadcasters: they offer a variety of programmes (including regional information; regional cultural, sports and other events; and entertainment) to (maximum) one province (Article 140 Flemish Media act).
- (c) *Local* radio broadcasters: they provide a range of programmes (including local information and entertainment) to a city, municipality, a limited number of joined municipalities or a particular target group (Article 144 Flemish Media act).



- (d) *Other* radio broadcasters: broadcasters that transmit their programmes solely via a cable network, digital terrestrial network or via the Internet (i.e., all broadcasters who do not use AM or FM frequencies) (Article 147 Flemish Media act).
- (2) Private *non-linear* radio broadcasters (Article 150 Flemish Media act): they offer radio services on demand.

The Flemish Media act lists following categories of private *television* broadcasters:

- (1) Private *linear* television broadcasters (Article 159 Flemish Media act):
  - (a) *Private commercial* television broadcasters: they offer TV programmes, and may carry out activities that directly or indirectly contribute to the achievement of their goal (Article 160 Flemish Media act).
  - (b) *(Non-profit) Regional* television broadcasters: they offer regional information (including news casts, background information, debates, election programmes and service programmes (Article 165 Flemish Media act).
- (2) Private *non-linear* television broadcasters (Articles 174–176 Flemish Media act): they offer non-linear television broadcasting services.

Private *radio* broadcasting in the French Community is structured as follows:

- (1) *Analogue terrestrial* radio (Article 52 French Community Media act):
  - (a) *Network* radios (private radio broadcasting service using a network of frequencies)
  - (b) *Independent* radios (private radio broadcasting service using one single frequency)

It can be noted that the French Community inserted several provisions in its broadcasting legislation dealing with '*radios associatives et d'expression à vocation culturelle ou d'éducation permanente*' ('*community radios*'). These are independent radios mainly staffed by volunteers with programmes focused either on information, education, cultural development and citizen's participation, or on musical genres that do not belong to the most popular ones (Article 1, 42° French Community Media act).

- (2) *Other* private radios (Articles 59 et seq. French Community Media act)
- (3) *School* radios (Article 63 French Community Media act).

The structure of television broadcasting in the French Community is as follows:

- (1) *Public* television broadcaster (RTBF, *supra*)
- (2) *Non-profit local* television broadcasters ('*télévisions locales*') (Articles 64–75 French Community Media act): a separate category of editors of broadcasting services with a specific authorization regime and a special public mission
- (3) *Private commercial* television broadcasters (not actually mentioned as such; no further distinctions are made).

Obligations in the area of public service broadcasting (e.g. programmes of the Flemish public service broadcaster) should allow to contribute to the development of the identity and diversity and of a democratic and tolerant society; e.g. programmes of the French

public service broadcaster should contribute to a democratic and tolerant society and stimulate communication and public debate.

According to Article 6 Flemish Media act, the mission of the Flemish PSB is to reach as many media users as possible with a diversity of high quality programmes which are of interest to these users. The "Vlaamse Radio en Televisie" (VRT) needs to provide a varied offer of high quality programmes in the fields of information, culture, education and entertainment (including sports and original fiction). Quality, professionalism, creativity and originality are of the utmost importance. There is an explicit mission to bring children's programmes. The programmes should contribute to the development of the identity and diversity of the Flemish culture and of a democratic and tolerant society. Through its programmes the VRT has to contribute to the formation of an independent, objective and pluralistic public opinion in Flanders. Importantly, Article 6 also states that the VRT should closely follow technological developments in order to offer, if necessary and desirable, its programmes via new media applications to its viewers and listeners. The public service mission and funding for it are further elaborated in four-yearly management contracts concluded between the Flemish government and the public broadcaster (*cf. infra*).

According to Article 3 of the act regulating the public service broadcaster of the French Community, RTBF, of 1997 (hereinafter: RTBF Act), the mission of the French Community, i.e., the RTBF, is to offer television and radio programmes to the French-speaking citizens of Belgium by various means. The RTBF must provide a diverse, varied offer, in different genres (information, entertainment, education, culture, youth ...), attracting for the widest possible audience, catering for both wide and narrow interests. Moreover, the RTBF must also promote social cohesion, while reflecting the different ideological, philosophical, religious, cultural opinions and ideas (also of social-cultural minorities) in society, contribute to a democratic and tolerant society and stimulate communication and public debate. In addition, the RTBF should make significant efforts in creating, and favouring original productions and in valorizing the French Community patrimony.

Given the explicit freedom of print media (Art. 25 and 150 Constitution), no formality is required before launching commercial operations.

- Media pluralism/ownership; competition law aspects

A limited number of ownership rules exists for specific categories of radio and television stations, based on the number of licenses (in Flanders) or capital or audience shares (in Wallonia).

It is typical for the Flemish broadcasting legislation to limit control over media companies not via an ownership share model, but through limiting the number of executive boards of which a single person can be a member. For example: one cannot be a member of the board of governors of more than one communitywide radio in Flanders, nor can a member of the board of governors of a communitywide radio also be a member of the executive board of the public service broadcaster (Article 138, §1, 2<sup>o</sup>, a Flemish Media act); one cannot be a member of the board of governors of more than one regional radio station in Flanders, nor can a member of the board of governors of a regional radio station also be a member of the executive board of a communitywide radio or of the public service broadcaster (Article 141, §1, 2<sup>o</sup>, a Flemish Media act); one cannot be a member of the board of governors of more than one regional television station (Article 169, 1<sup>o</sup> Flemish Media act).

The VRM has the task to 'map' (monitor) concentrations in the Flemish media sector and to report annually (Article 218, § 2, 8° Flemish Media act). Since 2007 VRM developed a 'media database', which is used for its annual reports on media concentration<sup>2</sup> and for ad hoc reports in response to specific questions. The purpose is merely to enhance transparency; the regulator cannot take any direct action in case of increases in concentration which may endanger pluralism.

There is only one similar restriction to combining positions in various executive boards of radio or television broadcasters in the French Community: one cannot combine membership of the board of governors of a local television station with holding a position at or being member of the executive board of other editors of broadcasting services or of press companies (Article 73 French Community Media act).

In its Broadcasting Act of 2003, the French Community introduced a monitoring system with a view to protecting media pluralism. But, as the scope of this mechanism is limited to the audiovisual sector, we cannot speak of a genuine 'crossmedia' ownership regulation. The monitoring system is installed in Article 7 French Community Media act. This Article prohibits the exertion by an editor or a distributor of a *significant position* in the audiovisual sector *if this would harm people's right to have access to a pluralist offer of broadcasting services*. A 'pluralist offer' is described as a wide range of media products offered by a plurality of independent and autonomous players representing the widest diversity of opinions and ideas possible. An editor or distributor of broadcasting services is presumed to have a significant position in following situations:

- (1) the same person holds more than 24% of two (or more) editors of radio broadcasting services;
- (2) the same person holds more than 24% of two (or more) editors of television broadcasting services;
- (3) the accumulated audience share of two or more editors of radio broadcasting services reaches 20% or more of the total radio production market and lies in the hands of the same person;
- (4) the accumulated audience share of two or more editors of television broadcasting services reaches 20% or more of the total television production market and lies in the hands of the same person.

Should the case arise, the 'Higher Council for the Audiovisual Sector' (the *Conseil supérieur de l'audiovisuel* – CSA) will have to assess the possible repercussions that this position has for the diversity of broadcasting services being offered in the relevant market. If the CSA concludes that the concentration of ownership interests implies a threat to pluralism, it will start a procedure in order to negotiate possible remedies that could restore pluralism. If the editor or provider in question and the CSA do not reach a compromise within six months, the CSA can impose sanctions, such as fines or the withdrawal of the license. In October 2009, the CSA launched a special website dedicated to media pluralism: <[www.csa.be/pluralisme](http://www.csa.be/pluralisme)>.

Further, in order to safeguard the specific character of each radio station, cooperation/networking/affiliation agreements between terrestrial radio stations (and with the public broadcaster of the Flemish Community) are restricted in Flanders. Radio stations may only cooperate in 'ad hoc' cases (for instance, at the occasion of a special

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<sup>2</sup> Available at: [www.vlaamseregulatormedia.be/nl/documentatie.aspx](http://www.vlaamseregulatormedia.be/nl/documentatie.aspx).

event) and/or cooperation may not lead to 'structural uniformity' in the programming policy (for instance, cooperation for advertising purposes is allowed, but not for the production of programmes; see Articles 137 and 144 Flemish Media act). Affiliation agreements between local radio stations have to be limited to a maximum of sixty radios (Article 144, al.3 Flemish Media act).

Apart from the general competition rules, which are laid down in the federal Act on the protection of economic competition, coordinated on 15 September 2006, there are virtually no crossmedia ownership restrictions in the media sector. This is mainly the result of the division of powers in Belgium between the federal state (press, film) and communities (radio and television), limiting each legislator's scope for action to one of these media types. In the French Community, however, there is a special rule for local television stations, prohibiting their control, directly or indirectly, by another radio or television broadcaster, a distributor of broadcasting services, an advertising agency or a holding company (*'société à portefeuille'*) (Article 67, §1, 3° French Community Media act).

Some transparency provisions and limited regulatory powers (mainly monitoring) on ownership exist in the audiovisual sectors (*cf. infra*), but there are no sector specific obligations for other media (e.g. newspapers) to identify their owners/shareholders (e.g., in their newspapers or on their website, or to a monitoring body). All media (including newspapers) are of course subject to the general competition rules and accounting rules in the same way as they apply to other sectors.

- Legal framework for psm; ability to fulfill their tasks

Article 6 para. 1 of the Flemish media decree states that "the VRT's purpose is to provide radio programmes, television programmes and other types of programmes within the mandate of the public broadcaster as set forth below, as well as to carry out activities which directly or indirectly contribute to this, including producing programmes or having programmes produced, acquiring programmes, putting together programming, broadcasting programmes, having these broadcast and publicising them in the broadest sense of each of these terms". Para. 2 adds that "as a public broadcaster, the VRT has the task to reach the largest possible number of media users with a diversity of high-quality programmes which attract and meet the interests of the media users". The task to provide high-quality programming is mainly relevant in the information, culture, educational and entertainment sectors. Further, the article also states that "VRT's programming shall appropriately target certain specific population and age groups, in particular, children and young people" and that programmes must contribute to the continued development of the identity and diversity of Flemish culture and of a democratic and tolerant society.

The public service mission and funding for it are elaborated in four-yearly management contracts concluded between the Flemish government and the public broadcaster. The most recent management contract (see chapters 6.1.1. and 6.1.5) states that the radio and television offer of the PSB may be distributed through all relevant platforms, including the Internet and mobile. Moreover, the existing thematic websites, such as *deredactie.be* (news), *sporza.be* (sport) and *cobra.be* (culture) remain a part of the PSB offer, although video is considered the most important element.

According to Article 3 of the Act of 1997 regulating the public service broadcaster of the French Community (RTBF), the mission of the RTBF, is to offer television and radio programmes to the French-speaking citizens of Belgium by various means. The RTBF must provide a diverse, varied offer, in different genres (information, entertainment,

education, culture, youth ...), attracting for the widest possible audience, catering for both wide and narrow interests. Moreover, the RTBF must also promote social cohesion, while reflecting the different ideological, philosophical, religious, cultural opinions and ideas (also of social-cultural minorities in society, contribute to a democratic and tolerant society and stimulate communication and public debate. In addition, the RTBF should make significant efforts in creating, and favouring original productions and in valorizing the French Community patrimony. These legal provisions are further elaborated in a management contract which specifies that the RTBF must also act as a driving force in promoting the cultural identity of the French Community in the domain of new media and has a major role to play in the digital switchover (Articles 33 and 35 RTBF management contract).

Both public service broadcasters in Belgium are funded on a 'dual funding' basis. This entails that the major part of the financial resources originates from state funding (tax money, e.g. around 65% in Flanders), and that the other part is derived from commercial revenues (merchandising, advertisement on radio, sponsoring on television and radio). Details of the state funding are included in the respective management contracts.

The public service broadcasters in both the Flemish and French community overall fulfil their public service mission. In its 2010 report on the compliance by the public broadcaster of the management agreement with the Flemish Community, the VRM states that the VRT has respected the vast majority of the objectives. However, the VRM notes that an insufficient number of television programs was subtitled: while the management agreement states that in 2010 95% of the programs had to be subtitled, the VRT in practice only reached about 88%.

The discussions on the public service mission of the public broadcasters also regain momentum every time new management contracts need to be negotiated. The private sector (broadcasters and other media) is arguing for a more limited role (and funding) for the public broadcaster, while others argue oppositely. In the Flemish community, the public service mission of the VRT is definitely not decreasing, since the VRT in 2012 will receive more public funding, will start a third analogue television channel and will offer radio and TV on all relevant platforms, including the Internet and mobile. The management contract 2007-2011 for the RTBF has only recently temporarily been prolonged for one year<sup>3</sup>.

- The role and functioning of regulatory authorities in these respects

The competent regulatory bodies in Belgium are the *Vlaamse Regulator voor de Media* (VRM) ('Flemish Regulator for the Media') in Flanders, and the CSA in the French Community, and the *Medienrat* ('Media Council') in the German-speaking Community.

The regulatory authority of the Flemish community (VRM) is charged with the enforcement of Flemish media regulation, the settlement of disputes regarding media regulation and the granting of authorizations and licenses, in accordance with the regulation. The VRM is also supervising the compliance of the public service broadcaster with the management contract with the Flemish government, and reporting about this on a yearly basis.

The VRM is composed of two chambers: the General Chamber and the Chamber for impartiality and protection of minors (Article 215, §2 Flemish Media act). The General Chamber supervises the compliance with and sanctioning of infringements on other

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<sup>3</sup> [http://www.rtbef.be/entreprise/rtbf-groupe/entreprise\\_statut-et-financement?id=3433](http://www.rtbef.be/entreprise/rtbf-groupe/entreprise_statut-et-financement?id=3433).

provisions of the Flemish Media act (Article 218, §2, 1° Flemish Media act). The majority of the decisions of the General Chamber relate to the non-observance of the rules regarding commercial communication. Other tasks of this Chamber are: issuing, changing, suspending and withdrawing broadcasting licenses; awarding, suspending or withdrawing licenses to offer a free-to-air broadcasting network; granting and revoking permission to distributors to transmit broadcasting programmes; receiving the different types of notification which are addressed to the VRM; defining the relevant markets and their geographical scope for products and services in the sector of electronic communication networks, analysing these markets in order to determine whether they are competitive; identifying undertakings with significant market power in the defined markets, and imposing, if necessary, certain requirements (mentioned in Article 192 Flemish Media act); performing special assignments which the Flemish government can assign to the VRM if required, insofar that these assignments are related to other tasks of the VRM (Article 218, §2, 2° to 9°).

The organisation of the regulatory authority in the French community is somehow different, since the CSA is composed of two committees (the advisory committee, the *Collège d'avis*, and the regulatory committee, the *Collège d'autorisation et de contrôle*), a *Bureau* and a *Sécrétariat d'instruction* (Article 134 French Community Media act). According to Article 136 French Community Media act, the *Collège d'autorisation et de contrôle* has the following tasks: taking note of the declarations of editors of services and award authorizations to certain editors of services (except for local television and the RTBF); granting authorizations for the use of radio frequencies; delivering a preliminary advice to the government regarding the authorization of local television; delivering a preliminary advice on each proposal for an agreement between the government and an editor or distributor of services; advising on the realization of the obligations of the local televisions; advising on the realization of the obligations laid down in Articles 41 (contribution to the production of audiovisual works, *supra*), 43, 44 and 46 (quota) French Community Media act; issuing specific or general recommendations; establishing all violations of laws, decrees and regulations in the field of audiovisual media and all violations of agreements between the French Community and an editor or distributor of services, of the agreement between the government and the local televisions as well as the commitments entered into in the framework of tendering procedures in the French Community Media act; defining the relevant markets, the operators with significant market power, and the obligations imposed on such operators (Articles 90–96 French Community Media act).

The VRM has a specific task in monitoring the performance of the VRT, since it has the obligation to annually report on this issue to the Flemish government (art. 218, §2 9° Flemish Media Act). These reports are also publicly available on a dedicated website of the regulator: [www.vrmrapporten.be](http://www.vrmrapporten.be). In preparation of every new management contract, the scope of the public service mission is also advised upon by the "Sectorraad Media", part of the advisory council for Culture, Youth, Sports and Media (art. 20 Flemish media Act). Finally, if the VRT wants to provide additional new services which are not foreseen in the management contract, it needs to acquire the explicit permission of the Flemish government after advice of the "Sectorraad Media" (art. 18 Flemish media Act).

The CSA has the task to report on the compliance of the RTBF with the obligations and objectives as listed in its management contract with the government (art. 136 §1 5° French community Media Act). The most recent report was published on December 8<sup>th</sup>, 2011 and is full-text available online: <http://csa.be/documents/1655>.



- “Pursuit of Core Activity”
  - Ordinary law safeguards for journalistic activity

There are no legal registration or notification obligations to work as a journalist in Belgium. Journalism is an open profession, there even is no specific education required. The Act of 30 December 1963 on the recognition and protection of the title of professional journalist attaches a number of conditions to the use of the title ‘*beroepsjournalist*’/‘*journaliste professionel*’ (‘professional journalist’), but – as mentioned – this title is not necessary in order to exercise the profession (it mainly offers the journalist some practical advantages). These conditions are: being 21 years or older; not being deprived of political and civil rights; taking part in the editing of general reports for newspapers, magazines, radio or television, etc. as main occupation and against salary; having exercised this activity at least two years; not being involved in any form of trade.

With regard to the protection of journalistic sources, it should be noted that the Belgian Constitutional Court interprets the notion of journalist in a very broad manner. In a case related to the Act concerning the confidentiality of journalistic sources of 7 April 2005 the Court in 2006 decided that everyone undertaking journalistic activities could invoke the aforementioned rules, which aim to guarantee press freedom. Therefore, the Constitutional Court decided that Article 2, 1° of the Act indeed violated the Constitution and Article 10 of the ECHR to the extent that it denies the right to confidentiality of sources to certain persons, namely those practising journalistic activities without being employed or self-employed and those that do not practise journalistic activities on a regular basis. As a result, the Constitutional Court extended the scope of application of the Act to ‘*everyone who directly contributes, edits, produces or disseminates information aimed at the public via a medium*’. This is a very broad description and could, for instance, imply that bloggers who often publish news facts and/or opinions on their web pages would also fall within that scope and therefore enjoy the protection of their sources.

Journalists enjoy a broader freedom of expression than the majority of citizens, because of the particular responsibility of the press as a watchdog of society. Jurisprudence has emphasized the importance of press freedom for the correct and adequate functioning of the state. This watchdog function also entails that journalists have the right to criticize public persons and to write polemic, critical and even provoking articles. However, at the same time journalists’ behaviour is carefully scrutinized. Critique needs to be well-founded and based on objective indications, and cannot go so far as to constitute defamation.

Article 25 of the Constitution not only establishes the freedom of the press. It also states that censorship can never be introduced and establishes a cascade liability system for the press. This entails that when the author of a publication is known and resides in Belgium, neither the publisher, nor the printer, nor the distributor can be prosecuted. The aim of the constitutional legislator was to prevent that a publisher would exert (preventive) pressure on an author if there was a chance that the publisher would be prosecuted, even in cases where the author is known and lives in Belgium. The cascade liability system only applies to printed press crimes.

Hence, with regard to crimes which cannot be classified as a ‘printed press crime’, for instance, broadcasting crimes, the cascade liability is not applicable and hence, other individuals than the author might be prosecuted.



With regard to the liability of journalists who exercise their profession under an employment contract, the Belgian Constitutional Court decided that Article 18 of the Act of 3 July 1978 regarding employment contracts (which states that an employee is not liable for damages to his employer or third parties caused by an accidental, slight mistake) is not applicable to such journalists as this Article is contrary to the spirit of Article 25 of the Constitution. Hence, in principle, it will be the journalist, who will be held liable, and not his publisher, unless a separate fault of the publisher can be demonstrated (e.g., making special publicity for the article concerned). This ruling has been criticised in legal doctrine.<sup>4</sup>

Although journalists enjoy a far-reaching freedom of expression, this does not extend to defamatory or libellous publications. However, it can be noted that there will be a higher degree of tolerance with regard to criticism and insults directed at certain categories of persons, such as politicians. This has repeatedly been emphasized by case law, which often refers to the watchdog function of journalists in this context. Nevertheless, journalists cannot field completely unfounded accusations at politicians. Allegations at least need to be based on a grain of truth or serious and objective indications. In Belgium, defamation and libel is criminalized by Articles 443 and 444 of the Belgian Criminal Code. Article 443 considers that a person who maliciously charges someone of a certain fact, which may offend his honour or may expose him to public contempt, and which is not legally proven, is guilty of libel (*'laster'/'calomnie'*) if the charge is not proven, or defamation (*'eerroof'/'diffamation'*) when the law does not allow this proof. Article 444 determines the punishment (imprisonment and fine) that can be applied when the charges are made: in public meetings or places; or in the presence of several individuals in a place which is not public, but nevertheless accessible to a number of individuals which have the right to meet or visit; or wherever, in the presence of the offended individual and witnesses; or by means of writings, printed or not, by means of pictures or symbols, which are posted, distributed or sold, being offered for sale or publicly exhibited; or by means of writings which have not been made public, but which have been sent or communicated to several individuals.

It should, however, be recalled that Article 150 of the Constitution states that 'printed press crimes' can only be judged by a jury (i.e. the *Court of Assisen*), which *de facto* leads to impunity for 'printed press crimes'. Moreover, since the Constitutional Court in 2012 extended the scope of Article 150 to the Internet, the criminalisation of defamation and libel is caved even further. Persons who suffer damage therefore in practice need to turn to civil law procedures in cases of defamation or libel in printed press or on the Internet.

Individuals who suffer material or moral damage through the fault (Article 1382 Civil Code) or through negligence or imprudence (Article 1383 Civil Code) of another individual (for instance, a journalist) can claim damages if they can demonstrate the causal link between the fault and the damage. In this context, jurisprudence developed the criterion that the unlawfulness of a public statement needs to be judged from the perspective of a '*normal, careful and prudent journalist*'.<sup>5</sup> Although, according to Voorhoof and Valcke, neither strict correctness, scientific accuracy nor absolute reliability can be required from a journalist with respect to a publication, journalists may not base themselves on rumours or unreliable information. Furthermore, although a journalist has a certain duty to investigate the reliability of his or her sources and the veracity of facts, this duty does not entail that a journalist may be held liable simply because an article

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<sup>4</sup> Constitutional Court, 22 Mar. 2006, n° 47/2006 (with comment Koen Lemmens), AM 3 (2006): 290-295; Court of First Instance Hasselt 4 Jan. 2010, AM 2 (2010): 215.

<sup>5</sup> Dirk Voorhoof and Peggy Valcke, *Handboek Mediarecht* (Brussels: Larcier, 2011), 188.

contains inaccuracies. The unlawfulness of a publication will be assessed on a case-by-case basis, taking for instance into account: the context of the publication, the characteristics of the newspapers or journals in which writings are published and the function of individuals who have been criticized.

- Specific positive content obligations

The "Vlaamse Radio en Televisie" (VRT) has a specified mission to bring children's programmes.

With regard to news and current affairs programmes, a number of provisions put emphasis on norms regarding journalistic deontology, impartiality and editorial independence, for instance:

- Article 29, §1 Flemish Media act regarding the news service of the Flemish public service broadcaster;
- Article 131 Flemish Media act regarding news casts of linear radio broadcasters;
- Article 141, §1, c) and 145, §1, c) Flemish Media act regarding the news services and news casts of regional and local radio broadcasters (cf. also *supra*, paragraph 159);
- Article 164 Flemish Media act regarding newscasts and programmes of private television broadcasters.

In the framework of its task to inform the public the Flemish public service broadcaster must offer a weekly fifteen-minute television programme or a twice weekly thirty-minute television programme to explain socio-economic issues (except in July and August) (Article 29, §2 Flemish Media act).

According to Article 18 RTBF management contract the RTBF has the general obligation to bring news and information regarding current affairs at international, European, federal, Community, regional and local level, covering every domain of political, economic, social, cultural, and sports life. This information must be objective, honest, independent, in-depth, pluralist, complete, analytical, and must stimulate reflection and debate on issues relevant to a democratic society.

- Funding schemes for specifically desired content

The government has established a number of measures to provide (financial) support to the press. Initially, the federal state was in charge of granting subsidies to the press. Since 1978, such a system of direct support to the written press existed with the aim of ensuring pluralism in the press (reflecting all opinions in society) and guaranteeing the viability of the newspapers. During the state reform of 1988, powers over press subsidies were transferred to the Communities (Article 4, 6<sup>o</sup>*bis* BWHI), which have since then established their own systems and developed their own policies. For instance, in the Flemish Community a first agreement to safeguard a pluralist and independent opinion press was reached in 1993; in 1998 the Flemish government restructured the system of direct support and replaced it by a programme concentrating on digital diversification, education, and the preservation of good, quality based and autonomous editorial staff teams.

The Flemish Government grants annual subsidies (one million EUR) to the print press. A protocol has been established between the Government and the Flemish press sector in which the conditions for the support are outlined. The overall objective is to ensure a high quality, pluralist and objective press. Emphasis is put on education and training in order to guarantee editorial skills and expertise, and on foreign coverage. In addition, the Fund Pascal Decroos for exceptional journalism (*Fonds Pascal Decroos voor bijzondere journalistiek*) aims to support high quality, exceptional journalism in and outside Flanders, both in print and audiovisual media. It grants subsidies to individual journalists who would like to work on an exceptional journalistic project, the costs of which exceed the normal budgetary capacities of the newspaper, editor or broadcaster. The Fund is financed by an annual grant from the Flemish Government (usually EUR 250,000 per year; although in 2009 a one-off extra amount of EUR 250,000 was made available by the Minister for Media), fees for membership (currently around EUR 9,000) and gifts. News media initiatives (e.g. [www.stampmedia.be](http://www.stampmedia.be), an online press agency for and by youngster) are criticising the fact that most of these subsidies are assigned to traditional media.

The Press Fund of the French Community (*Centre de l'aide à la presse écrite*) grants several types of subsidies: (1) support for the creation of new titles; (2) support for long-term employment of journalists and use of new technologies; (3) support for the preservation of the largest possible diversity in newspapers (giving priority to less profitable titles); (4) support for initiatives to distribute newspapers in schools. The Centre receives an (indexed) annual subsidy of EUR 6,200,000.<sup>6</sup> In addition, from 2009 onwards, the French Community Government also attributes EUR 250,000 a year to the *Fonds pour le journalisme* which supports investigative journalism.

- Political advertising and/or broadcasting time

Until 2005, the Flemish Community Television and Broadcasting Act contained a prohibition to offer broadcasting time to political representatives in return for payment (in its Article 98, 1°). This provision was in conformity with the federal legislation on election expenses, which states that political parties and candidates are prohibited from showing commercial advertising spots on radio and television in the period shortly before elections. The Flemish Media act of 2009, however, has abandoned this principle, and in its article 49 now states that is allowed to offer (audiovisual) commercial communication to politicians and political parties in pre-electoral periods on the condition that the federal legislation regarding election expenses is respected, which still contains a prohibition in the pre-election period.

In the Flemish Community, the only additional references that are still made to election periods are in Article 34, § 5 and Article 36, § 5 of the Flemish Media Act regarding the suspension of announcements of the Flemish government (except in urgent cases) and the suspension of the programmes of representative societal organizations, and in Article 165 Flemish Media Act which relates to the obligation for regional television broadcasters to provide regional information, including election programmes.

Regarding the French Community, the Constitutional Court on 22 December 2010 (judgement 161/2010) ruled that an absolute and permanent prohibition of political commercial communication for audiovisual media (Article 12, § 1 first sentence of the French Community Media act) could not be reasonably motivated in the light of the jurisprudence of the ECtHR. The Court annulled this provision, thereby leading to the

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<sup>6</sup> Up until 2008, the RTBF and a number of private broadcasters also had to contribute to the fund. From 2008 onwards the French Community is the sole contributor to the fund.

situation that only the federal prohibition on political commercial communication in pre-election periods applies.

Specific obligations are imposed on the public service broadcaster of the French Community, the RTBF, to cover elections and bring news, talk shows and interviews, both on radio and television with the aim of informing the citizens about the discussion items and the various viewpoints (Article 19 RTBF management contract).

Other (paper based) media enjoy a much wider freedom, since they are allowed to bring political advertising, taking into account the maximum spending as defined in the federal voting legislation.

In practice, political advertising in the audiovisual media sector, both in Flanders and in the French community is almost non-existent, contrary to other media (e.g. print press and internet).

- Codes of conduct and their organisational framing

The Belgian Ethical Code for Journalists of 1982<sup>7</sup> recognizes the important role of journalists. The code was agreed to between the Belgian Association of Newspaper Publishers (*Belgische Vereniging van de Dagbladuitgevers*, BVDU), the General Association of Professional Journalists of Belgium (*Association Générale des Journalistes Professionnels*, AGJPB) and the Federation of Belgian Magazine Editors (*Fédération Belge des Magazines*, FEBELMA) in 1982. Regarding the independence of journalists, the Code states that '*[n]ewspapers and journalists should resist pressure of any kind*'.

In contrast to radio and television organizations, there are no legal obligations for newspapers to have an editorial statute. However, in Belgium there exists a tradition of foundations (*stichtingen*) within the (Flemish) newspapers. These foundations are established in order to take care of the editorial principles and values (in relation to editorial texts and advertisements) of the newspapers and the statutes of the foundations contain explicit safeguards with regard to the editorial staff's independence (e.g., guaranteeing the autonomy of the editorial staff). For example: in case of a change in the editorial cooperation with other newspapers, the preliminary approval of the foundation is required, and in case of a change in ownership (to a shareholder or to a third party), the vendor or liquidator has to impose on the stakeholder or the third party the obligation to respect the editorial principles and values as described in the statutes. If the buyer acquires the titles without respecting the editorial line, he has to pay damages. The statutes also confer special powers on the editorial staff e.g., a preliminary advice of the foundation regarding the appointment or dismissal of a chief editor; a preliminary approval of the foundation regarding the appointment or dismissal of a journalist, trainee journalist and chief editor. A substantial change in the task of a journalist (e.g., he would be no longer linked to the editorial staff), is equated with a dismissal and therefore a preliminary approval of the foundation may be required. Nevertheless, the Flemish Association of Professional Journalists has called for a formalization of safeguards for editorial independence by introducing editorial statutes in all news media; they are of the opinion that the Flemish government has an essential role to play in that regard, for instance, by making press subsidies dependent on the presence of an editorial statute.

From 1988 until 2001 a Council for Deontology, founded by the Belgian Association of Professional Journalists (*Algemene Vereniging van Beroepsjournalisten in België*, AVBB), existed in Belgium.

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<sup>7</sup> [www.rvdj.be/node/63](http://www.rvdj.be/node/63).

In 2002, the Flemish (print and audiovisual) journalists and publishers established a (self-regulatory) Flemish Press Council (*'Vlaamse Raad voor de Journalistiek'*).

The Flemish Press Council is a fully independent self-regulatory body without any statutory framework. It is composed of eighteen members (six journalists, six publishers and six external members), who are nominated by the sector without any governmental interference. The Press Council is funded by the journalists union (50%) and by the publishers (50%). It does not receive direct public funding, but the union of journalists receives a governmental subsidy, part of which must be used for the financing of the Press Council.

The Press Council is considered by the sector, the audience and the legislator as the main body that deals with ethical conflicts with regard to journalism.<sup>8</sup> The Council covers the complete journalistic spectrum, the different phases of the journalistic process, and all categories of media, i.e., print, audiovisual, electronic and other media; general as well specialized media.

The Press Council performs four tasks. In addition to fine-tuning journalistic deontology, the Council is involved in mediation, treatment and assessment of complaints, and the supply of information and guidelines. The Ombudsman within the Press Council mediates in cases of conflicts and acts as an advisor. If case mediation does not succeed, the Press Council deals with the complaint. The Press Council addresses all complaints, also complaints against bloggers/weblogs.<sup>9</sup> In addition to the treatment of complaints, the Press Council also issues guidelines (for instance, with respect to undercover journalism or dealing with user-generated content).<sup>10</sup>

On 20 September 2010, the Press Council issued its consolidated code of conduct on ethical aspects of professional journalism. After some incidents, the Press Council on 24 April 2012 issued additional guidelines on the use of information and images from personal websites and social media<sup>11</sup>.

The establishment of a counterpart to the Flemish Press Council in the French Community has been the subject of a lengthy debate, which resulted in the adoption of the Act of the French Community of 30 April 2009 on the establishment of the conditions for the recognition and subsidization of a body for the self-regulation of journalistic deontology. The Act contains detailed provisions regarding the establishment and functioning of the self-regulatory body, which encompasses a 'Council for journalistic deontology' (*'Conseil de Déontologie journalistique'*). The financing of the body is organized similarly to that of the Flemish Press Council. The French Community Government attributes a subsidy of EUR 80,000 to the journalists' association. The Act also imposes the membership of the self-regulatory body on certain actors, e.g., the RTBF, or press organizations who want to benefit from press subsidies.

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<sup>8</sup> Before 2006, the (old) Flemish media regulator could also judge on conflicts in the area of journalists' ethics; this duplication of competences was the reason why the public broadcaster for a long time did not join the Press Council; however, to avoid confusion, the legislator decided to delete these powers when establishing the new media regulator in 2005/2006, thereby acknowledging that deontology is the sole competence of the Press Council.

<sup>9</sup> With regard to one such decision, in 2009, a peculiar judgment was pronounced in summary proceedings (Pres. Court of First Instance Brussels (in summary proceedings) 24 Jun. 2009). The publication of a decision of the Press Council was prohibited by the President of the Brussels Court because of the non-opposability of the statutes of the Council to a journalist/blogger who is not a member of the journalists' association. This decision has been sharply criticized. For more information: cf. Dirk Voorhoof, *Rechter legt bom(metje) onder de Raad voor de Journalistiek*, [www.psw.ugent.be/Cms\\_global/uploads/publicaties/dv/05recente\\_publicaties/KG%20RvdJ%20VOORHOOF2009%20kort29%206.pdf](http://www.psw.ugent.be/Cms_global/uploads/publicaties/dv/05recente_publicaties/KG%20RvdJ%20VOORHOOF2009%20kort29%206.pdf).

<sup>10</sup> Available from: <http://www.rvdj.be/node/61>.

<sup>11</sup> <http://www.rvdj.be/sites/default/files/pdf/richtlijn201208.pdf>.

The Council for journalistic deontology was officially installed on 7 December 2009. The Council deals with the French and German Community media, and counts 40 members. The tasks of the Council are the same as the tasks of its Flemish counterpart (deontology, mediation, treatment of complaints, and provision of information and guidelines).

- The role and functioning of regulatory authorities in these respects

The role of regulatory authorities is very limited. The organisation and monitoring of journalists is mainly left to the self-regulatory instruments described above. As indicated, the recognition as professional journalist is even not necessary in order to exercise the profession, but only brings the journalist some practical advantages.

- Distribution Aspects

As the Belgian Constitutional Court interprets the powers of the cultural communities to regulate radio and television as encompassing transmission of broadcasting signals, the three community legislators have – each for their respective territories – implemented the market analysis procedure in the European directives on electronic communications networks and services. Given the fact that the regulatory authorities of the different communities in principle are also competent to regulate the transmission aspects of broadcasting, they are also empowered to allocate the necessary frequencies.

- Access to frequencies

As stipulated in the Flemish Community Media act, the content providers, depending on whether they use scarce resources (*in casu* frequencies) or not, will have to apply for a license or submit a notification. At the same time operators of terrestrial networks have to apply for an individual authorization linked to a specific frequency.

- Access to distribution networks and control of actual conditions

Apart from general market entry, market behaviour and competition law rules, there are no specific or cross-sectoral media provisions on access to distribution networks.

For audiovisual media services, the monitoring of access to distribution networks and the control of the actual conditions that apply are assigned to the respective regulatory authorities, VRM and CSA (cf. art. 218 Flemish Media Act and art. 136 French community Media Act). Distributors, i.e., those who aggregate or package channels and services (either their own productions or acquired from third parties) into various bundles and offer these to end-users, are subject to a notification regime.

In Flanders, this notification should be sent to the VRM, at least fourteen days before the start of the service, in accordance with Article 219 Flemish Media act (Article 177 Flemish Media act). The notification must contain the identification of the legal entity, the service offer with the contractual terms for including the services and the electronic communication network that will be used to transmit the services. Article 198 Flemish Media act also obliges cable operators to keep separate accounts for their cable network activities and for the provision of other networks and services established under special or exclusive rights.

In the French Community, according to Article 77 French Community Media act, distributors must submit a declaration to the Collège d'autorisation et de contrôle of the CSA, containing the identification of the distributor as well as the composition of the offer



of the services and the commercial terms. It is prohibited for distributors to introduce geographic price differentiation ('for the same offer of audiovisual media services, distributors are obliged to guarantee the same price for all subscribers'; Article 78 French Community Media act) and they are obliged to keep separate accounts for their distribution activities, on the one hand, and network operating activities, on the other hand (Article 79 French Community Media act).

Partly because of the fragmented repartition of powers, there are no specific provisions on the access to distribution networks which apply across the different media. The normal (federal) competitions rules however remain applicable.

Further, it should be noted that in the federal parliament, there have been proposals to regulate the issue of "net neutrality", following the examples of the Netherlands and France. The Parliament has organised hearings about the issue and agreed to first ask further advice from the European Commission on the issue. Finally, some frictions have in recent years also materialised between editors of traditional media providers and new distribution formats, such as Google News (taking over news headlines), or between newspapers editors and the public service broadcaster (launching free high-quality internet news sites). Regarding the latter, the Commercial Court of Charleroi in a judgement of 30 December 2011 stated that this could not be considered as an (illegal) unfair business practice<sup>12</sup>.

- Must-carry/must-offer rules for electronic media

In Flanders, must-carry rules for audiovisual media are laid down in the articles 185 – 188 of the Flemish Media Act. Since 2005, they were brought in line with article 31 of the European directive on universal service in electronic communications, although in some conditions, the Flemish government can decide that other linear channels also have to be transmitted. In the French community, the articles 82, 83 and 87 of the French Community Media act contain a similar additional possibility to obtain the must-carry status. Article 48 of the French community Media Act states that the government can allocate to one or more services of an editor the right of "obliged transmission". The only limitation that is imposed on the government is the fact that an agreement has been concluded between the editor in question and the government. At first sight, and given the unclarity about the content of those agreements, it can be questioned whether this approach is in line with the current European provisions.

- Role of platform operators

'Network operators' (or 'network providers'), who control the technical exploitation of broadcasting networks and provide transmission capacity for the delivery of audiovisual media services, are subject to prior notification (in the case of cable networks), or an individual license linked to a specific frequency (in the case of terrestrial networks). This is in line with Article 3 of the Authorisation Directive, which stipulates that the provision of electronic communications networks may only be subject to a general authorization, implying that the undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority. A system of individual licenses ('individual rights of use') may only be maintained when the undertaking needs radio frequencies or numbers for its operations.

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<sup>12</sup> [http://www.psw.ugent.be/cms\\_global/uploads/publicaties/dv/RTBFOline.Jugement%20du%2030%20d%C3%A9cembre%202011.pdf](http://www.psw.ugent.be/cms_global/uploads/publicaties/dv/RTBFOline.Jugement%20du%2030%20d%C3%A9cembre%202011.pdf).



In the summer of 2009, Norkring (which had been the only applicant) has been allocated a license to launch DTT services in the Dutch-speaking part of Belgium by the Flemish broadcast regulator, the VRM. The license is valid for fifteen years. Under its terms, Norkring Belgium has to start broadcasting within the next two years, including the launch of television and radio services via DVB-T, and/or services to mobile receivers via DVB-H. The company also owns the license for digital radio in Flanders. While Norkring will operate the digital terrestrial network (i.e. provide the technical services), one or more service providers (distributors) will sell bundles of radio and television programmes to the public (i.e. provide the content). This 'wholesale' model is inspired by the Finnish model and implies that the network operator enters into agreements with service providers, but is not active in the retail business itself (acting like a 'common carrier'). Spring 2010, Norkring selected Telenet as a first service provider on the basis of a beauty contest, but the offer is not yet commercially available. One multiplex has been reserved for the public service channels of VRT, which will be distributed for free.

In the French Community, RTBF operates its own multiplex for digital terrestrial television. It thereon offers *RTBF La Une* and *RTBF La Deux*. RTBF also launched a new channel exclusive to DTT called *RTBF La Trois*, and they added a fourth channel to the multiplex, namely *Euronews*, a pan-European news channel.

- The role and functioning of regulatory authorities in these respects

In July 2011, the regulators of the communities, together with the federal telecommunications regulator (*Belgisch Instituut voor Postdiensten en Telecommunicatie, BIPT*) decided to force their cable companies and Belgacom to open their networks in an attempt to further stimulate competition.<sup>13</sup>

- Access to Information
  - Transparency of media ownership situations

The French Community Media act imposes transparency obligations on radio and television broadcasters. *First*, they have to ensure transparency towards the public: all editors of broadcasting services have to make available 'basic information' to the public in order to allow it to form its opinion about the value of information and ideas distributed in the programmes of that editor (Article 6, §1 French Community Media act). *Second*, in order to ensure transparency of ownership and control structures, as well as their level of independence, editors, distributors and network operators are obliged to send the regulator (the CSA) the following information: the identification of shareholders (and percentage of shareholding), the interest of these shareholders in other broadcasting or media companies, and the identification of natural or legal persons active in programme supporting businesses, contributing to a substantial level to the production of programmes.

There are no special obligations for newspapers to provide transparency with regard to ownership capital structure.

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<sup>13</sup> For more info:  
<http://www.vlaamseregulatormedia.be/media/16511/20110718%20-%20televisieomroepmarkt%20-%20non%20conf%20-%20ondertekende%20versie.pdf>.

- Accountability of public service media

According to the Articles 136 of French Community Media act and Article 218 of the Flemish Media Act, the respective regulators (i.e. the Vlaamse Regulator voor de Media and the *Collège d'autorisation et de contrôle* have the obligation to report and/or advise on the realization of the obligations laid down in the management contracts and to establish all violations of the management contracts. Both public service broadcasters are also obliged to publish annual reports, while the financial aspects and their budget are monitored by the Accounts Chamber (*'Rekenhof'*). Further, a representative of the government also takes part in the Management Board of VRT and RTBF.

- Freedom of information laws

The conditions and the necessary procedures for access to administrative information have been laid out in legislation of the different entities of the federal state:

For the federal level: the act of 11 April 1994 on the public access to administration, most recently amended by the act of 4 February 2010 (Belgisch Staatsblad 10 March 2010);

For Flanders: act of 26 March 2004 on the public access to administration, most recently amended by the act of 27 March 2007 (Belgisch Staatsblad 5 November 2007);

For the French Community: act of 22 December 1994 on the public access to administration, most recently amended by the act of 30 March 2007;

For the provinces and communes, in principle: act of 12 November 1997 on the public access to administration for provinces and communes, most recently amended by the Royal decree of 5 August 2006 (Belgisch Staatsblad 28 August 2006).

Most of these acts reflect a double approach to access to public sector information: an *active* duty, on the one hand, to ensure that government information is disseminated among the public, and a *passive* right, on the other hand, for individuals to request information and access to government documents.

- Accessibility of products/services and distribution networks

Compared to the analogue offer, cable customers do not need to pay an extra subscription for the basic package of about thirty-five digital channels, but they must purchase a set-top box in order to view these digital channels and use the interactive services. In the French Community, the cooperation between Brutélé and ALE-Télédis led to the creation of VOO, which offers analogue as well as digital television in Wallonia and Brussels (where also Numéricable is active). All of these offers include interactive services, such as on-demand movies and catch-up TV.

- "Have a Say on ..."

- Complaint procedures, "Ombudsmen"

The Flemish Press Council is involved in mediation, treatment and assessment of complaints, and the supply of information and guidelines. The Ombudsman within the Press Council mediates in cases of conflicts and acts as an advisor. In case mediation does not succeed, the Press Council deals with the complaint. The Press Council

addresses all complaints, also complaints against bloggers/weblogs.<sup>14</sup> In addition to the treatment of complaints, the Press Council also issues guidelines (for instance, with respect to undercover journalism or dealing with user-generated content).

Apart from the Ombudsman within the Flemish Press Council, there are no ombudsmen or specific complaints procedures for the entire media sector. At the level of the communities, the regulatory authorities have established complaints procedures for radio and television. A specific complaints-handling procedure for example exists in the VRM-procedural decree. It states that complaints are examined by the staff of the VRM and then forwarded to the relevant chamber (Article 12 government decree on VRM-procedure). The threshold for the complaints procedure is very low since it is accessible through the public website of the VRM (including an identification through the electronic id-card): <http://www.vlaamseregulatormedia.be/nl/klachten.aspx>. As with all other regulatory decisions of the chambers of the VRM, also these ones have to be motivated according to general administrative law. Moreover, they should also be made available publicly (Article 219 Flemish Broadcasting Act, Article 11 VRM procedural decree of 30 June 2006, Articles 9-15 and 33 internal rules chambers 18 July 2009).

- Participation in media operators/(self-)regulatory bodies

The management contracts concluded between the respective governments and their public service broadcasters contain a number of general provisions and criteria related to the orientation of their offer to all users. The respective media decrees however do not contain further specific provisions on the involvement of citizens or other co- or self-regulatory bodies in the development of their offer. In the German speaking community, the *Offener Kanal* is a channel specifically aiming at contributions for the public.

#### 2.2.2.2. Main Players in the Media Landscape

First, it is important to take into account the fact that there is no such thing as a homogenous Belgian media landscape. Different media markets can be distinguished which run parallel to the country's communities, i.e., the Flemish Community, the French Community and the – much smaller – German-speaking Community. Being a small country with three official languages, Belgium has always turned to its neighbours. This is especially the case for the small German-speaking Community looking towards Germany, but also for the French Community, which is strongly oriented towards France and French television channels. In Flanders, before the introduction of commercial television, the channels from the Netherlands were very popular. But the Flemish public massively turned to its own commercial channels as soon as these were introduced in the late eighties.

##### 2.2.2.2.1. Radio

In Flanders, there are four communitywide ('*landelijke*') and five regional public radio stations and one public world service, operated by the public broadcasting organization VRT. In the French Community, the public service broadcaster, RTBF offers five FM radio

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<sup>14</sup> With regard to one such decision, in 2009, a peculiar judgment was pronounced in summary proceedings (Pres. Court of First Instance Brussels (in summary proceedings) 24 Jun. 2009). The publication of a decision of the Press Council was prohibited by the President of the Brussels Court because of the non-opposability of the statutes of the Council to a journalist/blogger who is not a member of the journalists' association. This decision has been sharply criticized. For more information: cf. Dirk Voorhoof, *Rechter legt bom(metje) onder de Raad voor de Journalistiek*, [www.psw.ugent.be/Cms\\_global/uploads/publicaties/dv/05recente\\_publicaties/KG%20RvdJ%20VOORHOOF2009%20kort29%206.pdf](http://www.psw.ugent.be/Cms_global/uploads/publicaties/dv/05recente_publicaties/KG%20RvdJ%20VOORHOOF2009%20kort29%206.pdf).

channels and eleven 'hors FM' radio channels (such as web radios, or its international radio channel 'RTBFi' via AM, internet and satellite).

As more spectrum has been freed up for private initiatives, new types of radio stations have emerged during the last ten years. In Flanders, local radio stations have existed since the sixties, but only in 2001 did the legislator introduce the regulatory framework for commercial communitywide radio. Two commercial radio stations obtained such a license: *Q-music* (owned by VMMA) and *4FM* (renamed 'Joe FM' in 2009; formerly owned by Talpa Radio International, currently owned by VMMA). In 2002, the city radios, covering the Brussels, Ghent or Antwerp conglomerate, have been replaced by the category of 'regional radio stations', covering more or less the area of one province. Besides these terrestrial radios, 'other radio stations' (transmitting via cable networks) and 'radio services' ('Internet radios') are also a part of the radio scene.

In the French community, there are also 96 private radio broadcasters, broadcasting on 335 frequencies, as well as 21 school radios. The major private channels are the *BeIRTL* channel, operated by RTL group, *Contact*, *Nostalgie* and *NRJ*, which cover the whole territory of the French Community ('réseaux communautaires'). In addition, there are a number of local radios ('réseaux urbains' and 'réseaux provinciaux'), community radios ('radios associatives et d'expression à vocation culturelle ou d'éducation permanente'), web radios (sometimes broadcasting only temporarily, e.g., a Christmas web radio), and radio services on demand.

#### 2.2.2.2.2. Television

The three public broadcasting organizations in Belgium also offer television, i.e., VRT in Flanders (*Vlaamse Radio en Televisieomroep*; <[www.vrt.be](http://www.vrt.be)>); RTBF in the French Community (*Radio-Télévision belge de la Communauté française*, <[www.rtbf.be](http://www.rtbf.be)>) and BRF in the German-speaking Community (*Belgisches Rundfunk- und Fernsehzentrum*; <[www.brf.be](http://www.brf.be)>). VRT has three TV channels: *één* (general interest, focuses on a large audience), *Canvas* (in-depth, focus on news and culture) and *Ketnet* (aimed at children and young people); RTBF also has three TV channels: *La Une*, *La Deux* and *La Trois*.

Twenty years ago, commercial television was introduced in both the Dutch and French-speaking regions and since then, the number of broadcasters has continuously grown. In Flanders, those 'private' broadcasters offer channels which target the whole of the Flemish Community, thematic channels, pay TV channels and regional channels.<sup>15</sup> The major players in the Flemish private broadcasting market are VMMA (jointly owned by de Persgroep and Roularta), with its channels *VTM*, *2be* and *JimTV*, and De Vijver, which recently took over the channels *VT4* and *VijfTV* (soon to be rebranded as "vier" (four) and "vijf" (five) from SBS Belgium). Besides these major broadcasting networks (which attract more than 75% of the viewers together with the public broadcaster VRT), various smaller television channels offer thematic or niche programming (for instance, *Kanaal Z* for financial and business news, *TMF* for music and *Actua TV* for political news). Recently, Alfacam, a Belgian-based company providing TV facilities and services to broadcasters and production houses throughout the world, entered the Flemish television market (via its subsidiary EURO1080) with its high-definition digital channels *EXQI Sport* and *EXQI Culture*, as well as the wide-interest analogue channel *EXQI*. These new offers however did not succeed in reaching their targets. In July 2009 Belgacom launched the music channel "Anne", specializing in music of Flemish soil. On 1 October 2009 VMMA launched a new children's channel *VTMKzoom*. On 2 June 2010, the culinary channel *Delicious!* was

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<sup>15</sup> A full list can be seen at: [www.vlaamseregulatormedia.be/nl/omroepen/overzicht-private-televisieomroeporganisaties.aspx](http://www.vlaamseregulatormedia.be/nl/omroepen/overzicht-private-televisieomroeporganisaties.aspx).

announced. On 5 November 2011 it was announced that VMMA would take over Media ad Infinitum. The television landscape in Flanders has recently evolved significantly after the take-over of the SBS/ProSiebenSat 1 channels, VT4 and VijfTV by "De Vijver" a holding company owned by Corelio (publisher of popular newspapers like *Het Nieuwsblad* and *De Standaard*, and also active in regional TV), Sanoma (publishers of popular magazines like *Story* and *Humo*) and Wouter Vandenhoute/Erik Watte (of the successful production house *Woestijnvis*).

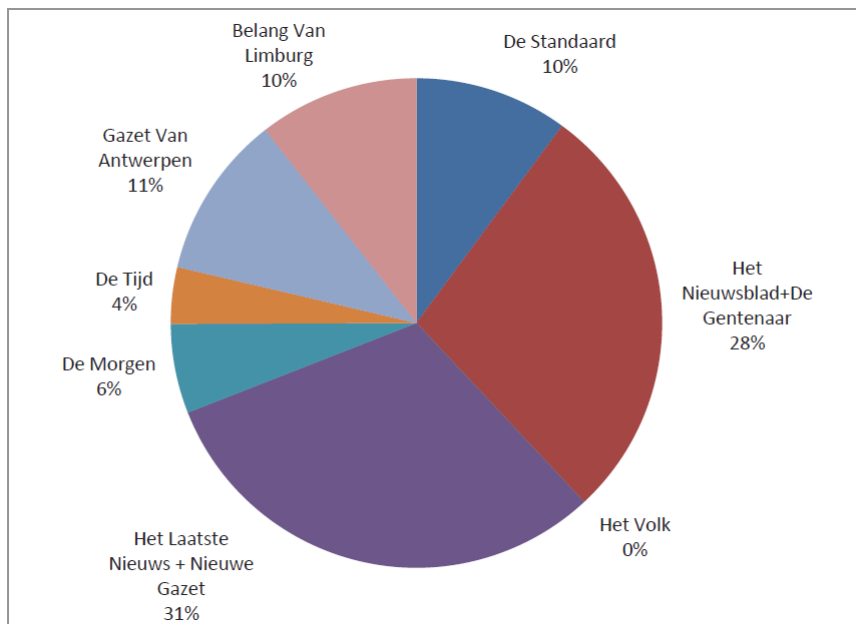
The first commercial television broadcaster in the French Community of Belgium was Radio Télévision Luxembourg – Télévision Indépendante (RTL-TVI, operating since 1987). RTL-TVI is part of the Luxembourg RTL Group which is controlled by Bertelsmann. In 2006, RTL-TVI abandoned the 'double licensing regime' it had voluntarily committed to in the past (implying that it had 'two nationalities' and thus respected broadcasting legislations of both Luxembourg, and the French Community of Belgium) and is now exclusively established in Luxembourg. The RTL Group currently offers two other TV channels in the French Community, *Club RTL* and *Plug RTL*. In October 2001, a Belgian branch of the French AB Groupe launched a new commercial channel *AB3* (focusing on a young public, 15–44 years) and two years later *AB4*. Some additional private broadcasters are operating niche programs (such as *Liberty TV* for tourism, *MCM Belgique* for music, and *Canal Z* for business TV).

As noted above, the German-speaking Community in Belgium has its own public broadcasting service (BRF) with one television channel, but its citizens predominantly turn to German channels or the channels of the French Community for television information and entertainment.

Over the past decade broadcasters started to branch out into other fields of media, making use of the opportunities provided by the rise of new technologies. In April 2003, for instance, the Flemish public broadcaster VRT launched its multimedia news channel, combining text messages, pictures, sound, moving images of the items presented, on the Internet, [www.deredactie.be](http://www.deredactie.be). Around the same period, the Flemish commercial broadcasting channel, *VTM*, started to offer its 'breaking news' service via SMS.

#### 2.2.2.2.3. *Press and Publishing*

Also the Belgian print media landscape is divided in a Flemish (Dutch-speaking) and Walloon (French-speaking) market. Print companies active in the north of the country are not necessarily active on the Walloon market, and vice versa, although most communitywide and some regional newspapers are available throughout the country. When looking at the paid daily newspapers, both the Flemish and Walloon newspaper market are controlled (each) by three publishers: in Flanders *De Persgroep* publishes the most popular newspaper (31% in 2010) *Het Laatste Nieuws*, as well as the quality newspaper *De Morgen*, and *De Nieuwe Gazet* (regional version of *Het Laatste Nieuws* for the region of Antwerp); Corelio publishes the second most popular newspaper *Het Nieuwsblad* (28%), the most popular quality newspaper *De Standaard* (10%), as well as *De Gentenaar* (regional version of *Het Nieuwsblad* for the region of Ghent), and finally Concentra publishes the regional newspaper *Het Belang van Limburg*, as well as (via its subsidiary *De Vlijt*) the largest regional newspaper for Antwerp, *Gazet van Antwerpen* (11%):



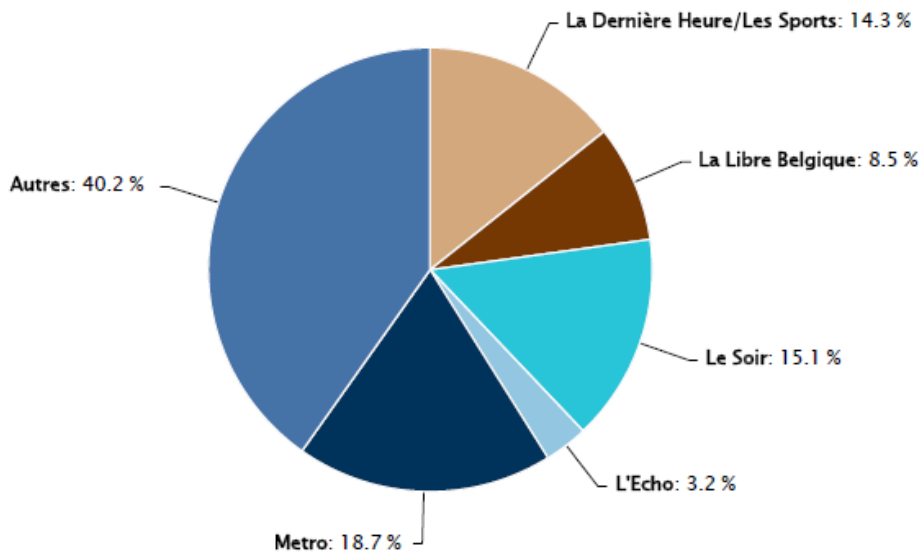
**Figure 1 BE: Print newspaper market shares in Flanders**

(Source: VRM media concentration report 2011, p. 169)

In Wallonia, *La Dernière Heure/Les Sports* (14,3% in 2008) and *Le Soir* (15,1%) are the most popular communitywide newspapers, published by respectively IPM (which belongs to Groupe IPM) and Rossel (which belongs to Groupe Rossel). IPM also publishes *La Libre Belgique* (8,5%), while Rossel is also responsible – via Sud Presse – for a number of regional newspapers (*La Meuse, La Capitale ...*). The various regional titles of the third publisher, Editions de L’Avenir (including *L’Avenir du Luxembourg, Le Courrier, Le Courrier de l’Escaut, Le Jour Huy-Waremme, Le Jour Verviers, Vers l’Avenir Basse-Sambre, Vers l’Avenir Brabant Wallon, Vers l’Avenir Entre Sambre-et-Meuse, Vers l’Avenir Namur/Dinant*) represent 16,6% of the daily newspaper market. Editions de l’Avenir belongs to the Corelio group, which is also active in Flanders. All three groups, IPM, Corelio and Rossel, have – via Audiopresse – a minority share in RTL Belgium, which edits three television broadcasting channels (*RTL-TVi, Club RTL and Plug RTL*), and which is co-owned by the Luxembourg based CLT-UFA.

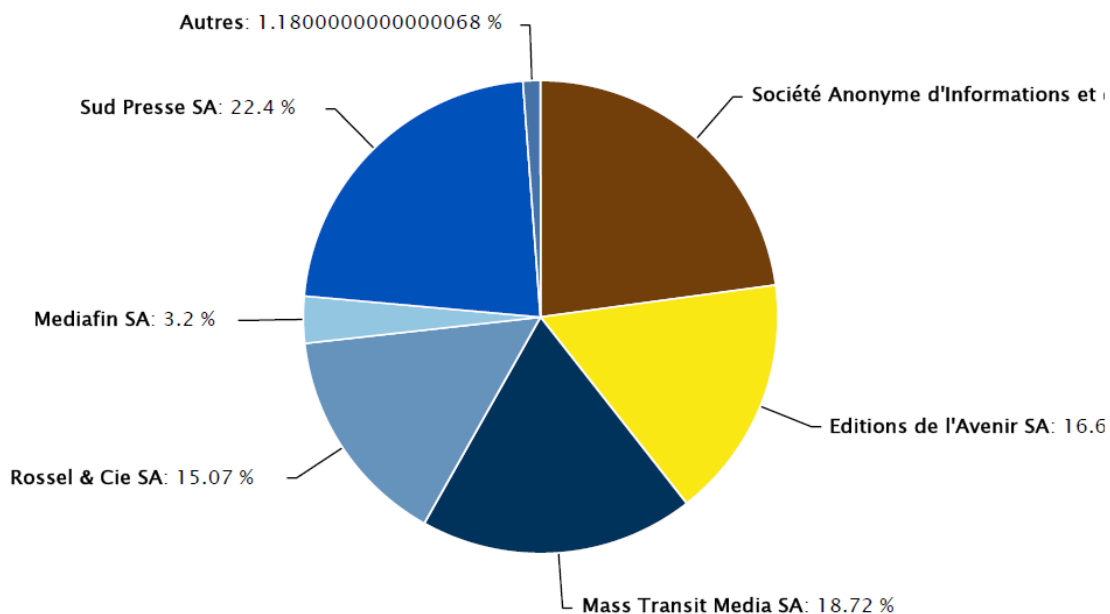
Finally, it should be noted that since 2005, the Flemish and Walloon economic-financial newspapers, *De Tijd* respectively *L’Echo*, belong to one company Mediafin (50% owned by Rossel and 50% by De Persgroep):

Parts de marché par service en Presse écrite d'information en 2010



**Figure 2 BE: Print newspaper market shares per title in Wallonia**  
(Source: [www.csa.be/pluralisme/audience/secteur/3](http://www.csa.be/pluralisme/audience/secteur/3))

Parts de marché par éditeur en Presse écrite d'information en 2010



**Figure 3 BE: Print newspaper market shares per title in Wallonia**  
(Source: [www.csa.be/pluralisme/audience/secteur/3](http://www.csa.be/pluralisme/audience/secteur/3))

There is also a wide variety of periodic magazines (both general interest magazines and specialized, thematic publications). In the Flemish market the three main actors are Roularta (*Trends, Knack*), Sanoma (*Flair, Humo, Libelle, Story, TeveBlad*) and De Persgroep (*Dag Allemaal, TV Familie, Joepie, Blik*, etc.). Roularta is also active in Wallonia with *Tendance*, the French-language version of the business magazine *Trends* and – via *Le Vif Magazine* – with the popular *Le Vif/ L'Express*. Sanoma Belgium belongs



to the Finnish media group Sanoma WSOY that is active in print, radio and television in various European countries.

A final category contains free newspapers and magazines (which cover their costs only by means of advertising revenues). In Flanders, these free print media have gained a significant share in the market in recent years. In addition to the very popular newspaper *Metro* (available at train stations and bus stops, and owned – via Mass Transit Media – by Concentra), *Roularta* (*De Zondag* and *De Streekkrant*), *de Persgroep* (*Immozone* and *Vacature*), and *Corelio* (*Jobspotter*) are the major players in this segment. Concentra also participates in the free weekly newspapers *De Streekkrant* (20%) and *Vacature* (33%). Mass Transit Media (which is 51% owned by Concentra and 49% by Rossel) also publishes *Metro* in Wallonia.

2.2.2.2.4. *Online media (non-linear audiovisual (media) services; websites)*

Specifically for Flanders, the Annual Report of the VRT and the media concentration reports of the VRM also contain a number of figures on the consumption of video over Internet. In its media concentration report, the VRM notes big differences in the visiting of websites of radio and television broadcasters. Very strong brands or television channels such as *dereadactie.be* (news) and *sporza.be* (sports) also attract huge amounts of website visitors. One of the reasons for this is the fact that these sites offer specific content, while most other sites of the public broadcasters are only a representation of the corporate brand on the Internet. In this category, the website of the main public general channel (“Eén”) also scores quite well. The VRM however draws the attention to the fact that these different types of websites can hardly be compared.

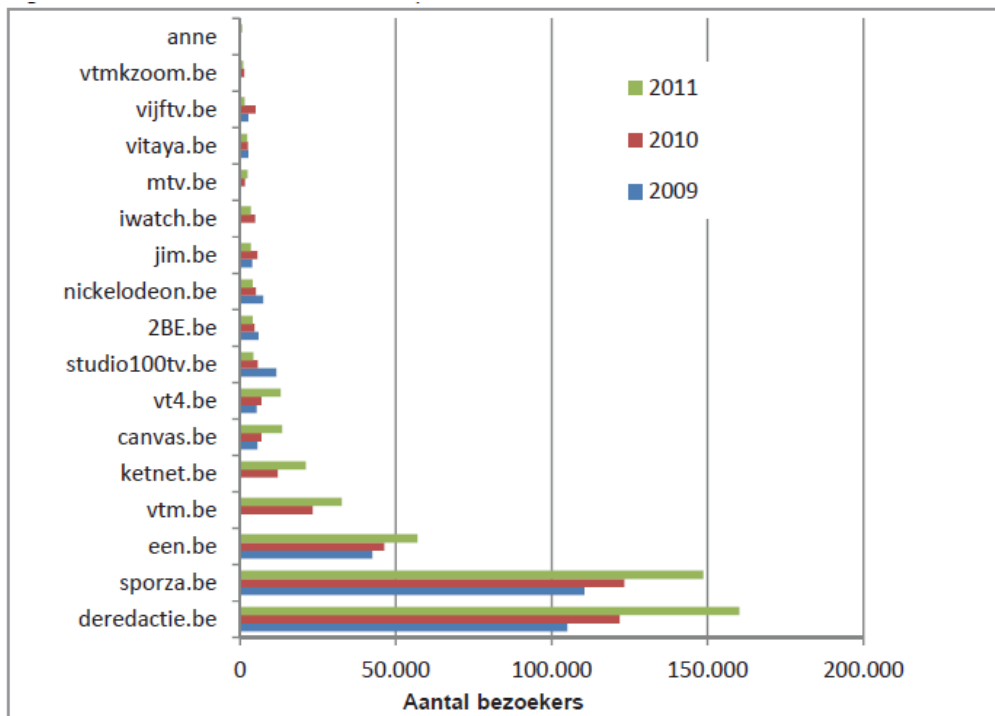


Figure 4 BE: Unique visitors based on week averages of 15 July 2009, 2 August 2010 and September 2011

(Source: VRM media concentration report2011, p. 178)

Specifically for the public broadcaster's websites, more than 10 million video download sessions are launched every month. Towards the end of 2010, the number of video clips launched even reached 16 million. Apparently, especially the video zones of "deredactie.be" (news) and "sporza.be" (sports) seem to attract the internet media user. Overall, in 2010 around 150 million video downloads were initiated, an increase of 75% compared to the year before.

**Table 7 BE: Video consumption on VRT-websites**

Deredactie.be	69.166.659
Sporza.be	56.421.933
Cobra.be	1.208.562
Een.be	8.084.229
Canvas.be	2.768.611
Ketnet.be *	5.228.103
Stubru.be	7.800.366
<b>TOTAAL</b>	<b>150.678.463</b>

(Source: VRT Annual Report 2010, p. 37, note that Ketnet on 11 June 2010 started a separate Ketnet Internet zone)

The Research Department of the Flemish Government also provides figures of the numbers of unique visitors of the other websites of the public broadcaster over a longer period of time:

**Table 8 BE: Unique visitors per day of VRT websites**

VRT website	2010	2009	2008	2007	2006	2005
VRT	8.784	10.463	11.999	14.157	13.491	10.992
Eén	56.013	51.088	51.540	50.996	47.791	38.160
Canvas	9.768	8.146	7.766	7.856	7.772	6.418
Ketnet	14.620	11.347	10.947	9.260	8.180	6.509
Vrtnieuws	NB	NB	NB	130.445	100.525	57.646
Deredactie.be	145.250	110.158	84.696	NB	NB	NB
Sporza.be	144.192	111.290	89.194	NB	NB	NB
Cobra.be	4.174	NB	NB	NB	NB	NB
Radio1	9.327	8.111	8.356	8.893	8.096	7.411
Radio2	11.683	11.679	13.453	10.034	7.929	5.212
Klara	3.628	6.920	5.093	3.375	3.047	2.580
StuBru	25.896	22.999	24.214	23.573	18.837	15.630
MNM (voorheen Donna)	10.313	12.082	10.915	13.457	11.338	12.446
Rvi	161	387	1.379	1.086	1.066	670
Internet radio	22.960	24.600	27.484	28.059	31.797	23.693

(Source: Studiedienst Vlaamse Regering, <http://aps.vlaanderen.be/>)

#### 2.2.2.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers

Currently, broadcasting content is transmitted via a range of distribution means, such as cable, but also via satellite and terrestrial networks, both in an analogue and digital manner.

Cable, however, remains the predominant means to convey broadcasting signals. Traditionally Belgium has been characterized by its high cable penetration rate of around 95%. Only a small amount of viewers receive television programmes via antenna. Satellite mainly attracts subscribers in city areas (or since the launch of TV Vlaanderen so-called 'secondary' subscribers using satellite as their second means of television reception, e.g., in their holiday resort).

While the cable networks were traditionally operated by small – public or private/public – undertakings, called 'intercommunales', covering the territory of one or a few municipalities, the cable industry has witnessed considerable consolidation over the last fifteen years. In Flanders, Telenet has invested considerably in the modernization and interconnection of the existing cable networks. It started to offer Internet access via cable in 1997 and added voice telephony to its product range as soon as the telecommunications market was fully liberalized on 1 January 1998. Initially, Telenet was granted an 'exclusive right of use' on the cable networks, while the property rights remained in the hands of the 'intercommunales'. In 2001, the mixed intercommunales decided to sell their cable networks (representing two thirds of all cable networks in Flanders) and their television distribution activities to Telenet (who is since then a 'triple play' provider), while the pure intercommunales, united in 'Interkabel', decided to launch a separate offer of digital television under the brand 'INDI'. Mid 2008, after difficult negotiations and protest by Belgacom, Telenet also took over the television distribution activities of Interkabel. In the meantime, Telenet also acquired – in 2007 – the private cable distribution company, UPC (active in Leuven and Brussels). In 2003, Telenet had also already acquired the only pay TV channel active in Flanders, *Canal+* (currently *Prime*).

Eight of the cable companies in the Walloon region have merged into Tecteo, which cooperates with the Brussels cable company Brutélé under the common brand 'VOO'. Like Telenet in Flanders, Tecteo also acquired the pay TV operator active in the south of Belgium, BeTV (the former Canal+ Belgique), in October 2008. In Brussels, besides Tecteo and Telenet, the British-American-Luxemburgian-owned cable television operator, Numéricable (operating in France, Belgium and Luxemburg), is also active, currently offering standard quadruple-play services at very competitive prices.

Digital television in Belgium is currently offered via cable distribution networks (DVB-C), DSL, terrestrial network (DVB-T) and satellite. There is a fierce competition between the historical CATV network operators (Telenet, Tecteo, Numéricable, Newico) and the incumbent telecommunications operator, Belgacom. The latter introduced digital television via xDSL in Belgium in June 2005 with national football as its trump card (Belgacom acquired the broadcasting rights for the national *Jupiler* league for the years 2005 to 2008). The launch of Belgacom TV made the Belgacom Group a quadruple-play actor, active in the field of fixed as well as mobile telephony, Internet access and television services. In Flanders, Telenet disposes of a very strong position on the audiovisual market. In 1997 it started as challenger of Belgacom with Internet access and value-added services (*infra*), joined the fixed telephony market on 1 January 1998, stepped into the analogue cable TV distribution business when it acquired two thirds of the Flemish cable networks in 2001 and launched Telenet Digital TV in September 2005. It currently offers twenty-five analogue TV channels which are also available digitally

(MHP over DVB-C). In total about eighty TV channels are available digitally. This includes some TV channels that were already available in analogue and digital form: Prime (in Dutch) or BeTV (in French) are pay-TV operators broadcasting several SDTV channels over one DVB-C multiplex.

*Digital terrestrial networks* are also taking up, although, for the time being, only the channels of the two Belgian public TV networks, the VRT on the Flemish side and the RTBF on the French-speaking side, are available via DVB-T. The VRT channels can be received all over Flanders and Brussels. Analogue terrestrial TV transmission of VRT één and VRT Ketnet/Canvas ended on 3 November 2008 ('analogue switch-off'). In December 2008, the VRT sold a 49% stake in its broadcast transmission network to Norkring, a subsidiary of Telenor. The VRT holds the remaining 51% stake in the network, but the plan is to increase Norkring's stake to 75% during the next couple of years.

The RTBF launched its DTT platform on 30 November 2007, which is now available to most of French-speaking Belgium and Brussels. The RTBF shut down the analogue transmitters within the timespan put forward by the EU, in November 2011. In the summer of 2009, the CSA published the results of the consultation on its DTT strategy. It should however be noted that the development of a strategy regarding the digital dividend is extremely complicated in Belgium as a result of the division of powers between the federal and community authorities.

TV Vlaanderen supplies *DVB-S satellite television* aimed at the Flemish, Dutch speaking market, broadcasting (encrypted, Seca 2/Irdeto 2) via the Astra 1G satellite at 19.2°E. It has more than 60,000 subscribers. In December 2008, a French language satellite platform called TeleSat was launched via the Eutelsat Hot Bird satellite position at 13°E. It broadcasts in MPEG4/DVB-S2 in SD and consists of *RTBF La Une, RTBF La Deux, RTL-TVi, Plug TV* and *Club RTL* as well as a number of French language Belgian radio stations. Both TV Vlaanderen and TeleSat are Belgian subsidiaries of the Airfield Holding, who also owns the Dutch DTH platform, CanalDigitaal. VRT and RTBF both have international channels on digital satellite (DVB-S) called *BVN* (as a cooperation between the Flemish VRT and the Dutch NOS) and *RTBF Sat*.

#### **2.2.2.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)**

For figures on audience shares, readership, usage of Internet offers, see 2.2.2.2.1 to 2.2.2.2.4 above.

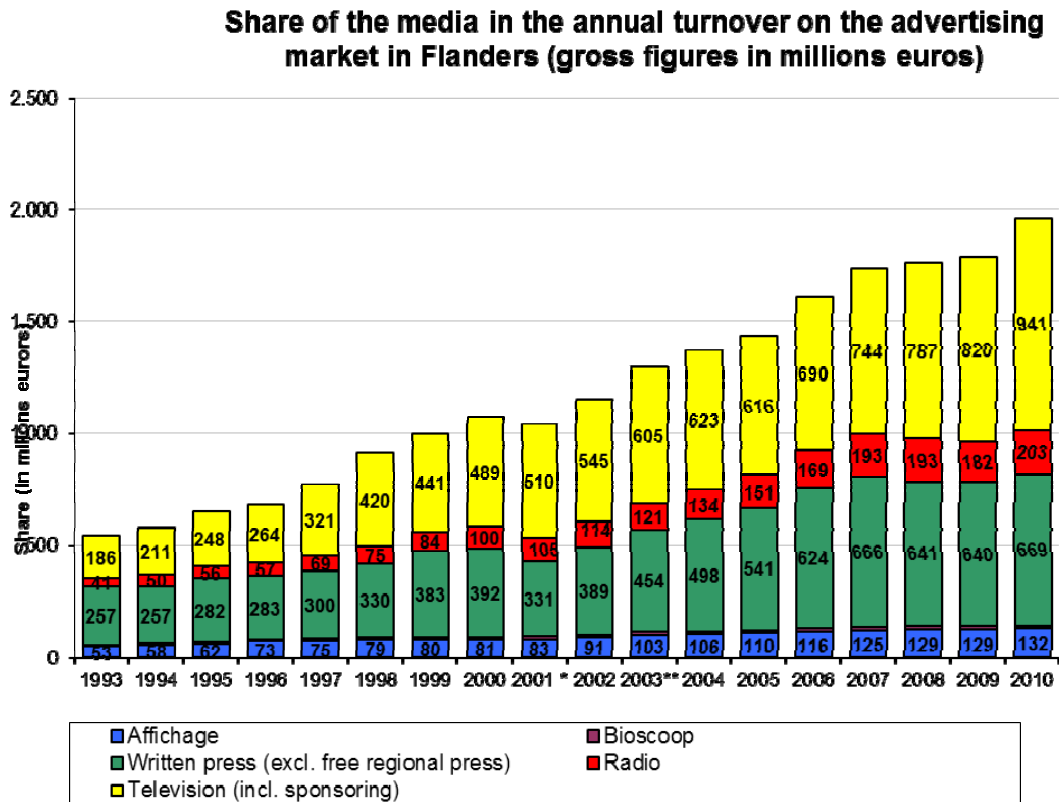
The Research Department of the Flemish Government publishes figures about the overall advertising revenues in Flanders:

**Table 9 BE: Turnover of advertising market in Flanders (gross, in million euro)**

Media (in million euros)	2010	2009	2008	2007	2006	2005
Affichage	131.6	129,2	129,1	124,7	115,8	109,8
Bioscoop	14.2	13,5	14,8	14,7	16,3	15,3
Written press (excl. free regional press)	669.1	640,0	641,3	666,2	624,2	541,4
Radio	202.7	182,5	193,1	192,6	169,0	151,3
Television (incl. sponsoring)	941.2	820,1	787,1	744,1	689,8	615,6
Internet	107.8	83,7	75,2	51,6	27,9	
Free regional press	75.7	63,7	54,1	55,9	73,3	
Total	2,142.2	1.932,7	1.894,7	1.842,17	1.716,4	1.433,4

Source: Studiedienst Vlaamse Regering, <http://aps.vlaanderen.be/>

Graphically, these figures can be summarised as follows:



**Figure 5 BE: Turnover of advertising market in Flanders**

(Source: Studiedienst Vlaamse Regering, <http://aps.vlaanderen.be/>)

### 2.2.2.3. Conclusion and Recommendations

Main changes in comparison to the 2004 Report:

- establishing of audiovisual media services regulatory authority in Flanders ("Vlaamse Regulator voor de Media", 2005);
- start of competition between digital television platforms, mainly cable and twisted pair (2005);
- Act on the confidentiality of journalistic sources of 7 April 2005; Constitutional Court in 2006 expanding the protection even to non-professional journalists;
- 2005 – 2012: Implementation of the EU electronic communications directives and AVMS directive by the different communities and federal authority;
- 2009 – 2010: establishing of self-regulatory press councils and codes of conduct in Flanders and French community;
- 2011: European Court finds existing safeguards of freedom of expression violating ECHR in case RTBF v. Belgium;
- 2012: Highest Court extends the constitutional protection of 'printed press crimes' to the internet, potentially leading to *de facto* impunity;
- markets: shift from analogue to digital audiovisual media, including analogue switch off and launching of DTT; convergence between traditional and new media.

Overall, we consider the obligations for the media and the institutions concerning the citizens' right to be fully and objectively informed are sufficiently implemented into the Belgian constitutional, legal and regulatory frameworks. Generally speaking, the provisions on the freedom of expression and freedom of the media guarantee an effective and efficient protection. The main concern relates to the unclarity about the precise scope or delimitation of the existing constitutional safeguards regarding freedom of expression, which are still essentially different for printed and other media, and to the fact that powers regarding different media are divided between different authorities (e.g. federal for competition issues, communities for audiovisual media), thereby creating barriers for a truly cross media regulatory approach. Some additional concerns can be expressed about the application of these rights by the Courts when dealing with new trends, such as user-generated content or other new technologies. In this respect, it remains to be seen what the actual impact will be of extending the protection of journalistic sources to non-professional journalists, or even to individual bloggers. The question has not yet been answered to what extent this protection could make more difficult the defence of a citizen against the allegations of another citizen. Moreover, some concerns could also be raised about the recent judgement of the Supreme Court (6 March 2012), in which it confirms that 'printed press crimes' could also be committed over the Internet. Specifically in this case, it remains to be seen to what extent this could lead to a *de facto* impunity, given the fact that the procedure before the *Hof van Assisen* is such a high threshold.

This possible "overprotection" of the freedom and rights of individual citizens by courts contrasts quite significantly with the actual position of journalists and the organisation of their profession. Associations of journalists since a number of years are stressing the fact that technological and economic trends are creating an enormous pressure on their work.

The distribution of news through the Internet has obliged redactions to truly work across different media (quite often leading to internal reorganisations, or reductions in FTE), and always against the clock. Precisely because of the pressure they perceive, associations of journalists are pleading for an increased protection of their role through the formalization of safeguards for editorial independence by introducing editorial statutes in all news media.

Pluralism and diversity of the media are pro-actively monitored by the respective regulatory authorities. These monitorings are however limited to creating awareness through transparency, and to the broadcasting sectors (television and radio). The VRM for example publishes a yearly report on media concentration, but does not dispose of regulatory powers in order to remedy any possible shortcoming or market failure. In broadcasting, the markets are characterised by quite strong public service broadcasters, challenged by quite vibrant and successful commercial broadcasters. Recently, the activities of SBS Belgium in Flanders were taken over by a Flemish production company ('De Vijver'), thereby offering additional guarantees in the local "anchoring" of content production. Since the beginning of the financial and economic crisis, different market players have criticised the increasing role of the distributors in the audiovisual media sector. The regulatory authorities have performed an analysis of the market and came in July 2011 to the conclusion that besides obligations on the main telecommunications operator (Belgacom), obligations to open their networks should also be imposed on the operators of cable networks. These decisions are now being implemented.

It is clear that during the last decade, mainly the role of the regulatory authorities in the audiovisual broadcasting sector has significantly increased. In Flanders, the previously existing regulatory authorities have in 2005 been replaced by the new "Vlaamse Regulator voor de Media" (VRM), which supervises the application and compliance of the media act. As the CSA for the French community, the VRM does not only do so for the commercial broadcasting sector, but also monitors the behaviour and legal compliance of the public service broadcaster. Moreover, the VRM also reports about the implementation of the management contract of the public service broadcaster. Additional powers were assigned to the different media regulatory authorities through the implementation of the (revised) EU eCommunications framework, as well as the implementation of the AVMS Directive. This has enabled the media regulatory authorities to gather a sufficient level of critical mass relating to the audiovisual media sectors. A true cross-media policy remains however extremely difficult to realise, given the complex and fragmented nature of the repartition of power in the Belgian federal state.

#### Recommendations

- the constitutional safeguards regarding freedom of expression should be revised and harmonised in the light of the judgement of the ECHR in *RTBF v. Belgium*, as they should not essentially vary depending on whether print media or audiovisual media are concerned;
- the expansion of the protection of journalistic sources (including citizens journalists) and the potential *de facto* impunity for 'printed press crimes' on the Internet should be thoroughly and critically evaluated in the light of the freedom of expression;
- the current legal frameworks in the Flemish and French community are unstable and unclear about the possibility to offer political commercial communication in audiovisual media and should therefore be reconsidered;



- editorial independence of journalists has to remain an important point of attention of the government; offering more guarantees through the establishment of editorial statutes for all news media should be considered;
- the involvement of many different authorities creates a barrier for a truly cross-media policy or approach; against the background of growing convergence between all different kinds of media, the governments in Belgium should consider a more consistent and future-proof approach (e.g. acknowledging the role of user-driven journalistic initiatives); more pro-active powers for the existing audiovisual media regulatory authorities should in this respect also be considered.

## BULGARIA

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### 2.2.3. Bulgaria

#### 2.2.3.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.3.1.1. *Human rights/Fundamental freedoms*

The Bulgarian constitution<sup>1</sup> provides for the three fundamental freedoms: freedom of expression, freedom of press and other mass information media and freedom of seeking, obtaining and disseminating information (art. 39, 40 and 41).

- Freedom of expression/Freedom of the media

According to the official translation<sup>2</sup> of Art. 39 the freedom of expression is described as follows:

*Art. 39. (1) Everyone shall be entitled to express an opinion or to publicize it through words, written or oral, sound or image, or in any other way.*

*(2) This right shall not be used to the detriment of the rights and reputation of others, or for the incitement of a forcible change of the constitutionally established order, the perpetration of a crime, or the incitement of enmity or violence against anyone.*

Art. 40 specifies the freedom of expression with regard to the press and other mass information media:

*Art. 40. (1) The press and the other mass information media shall be free and shall not be subjected to censorship.*

*(2) An injunction on or a confiscation of printed matter or another information medium shall be allowed only through an act of the judicial authorities in the case of an encroachment on public decency or incitement of a forcible change of the constitutionally established order, the perpetration of a crime, or the incitement of violence against anyone. An injunction suspension shall lose force if not followed by a confiscation within 24 hours.*

- Freedom to receive and to access information

The freedom to receive information is enshrined in Art. 41:

*Art. 41. (1) Everyone shall be entitled to seek, obtain and disseminate information. This right shall not be exercised to the detriment of the rights and reputation of others, or to the detriment of national security, public order, public health and morality.*

*(2) Everyone shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others.*

According to the interpretative decision of the Bulgarian Constitutional Court the freedom of expression is the basic of the other two freedoms and it incorporates them.<sup>3</sup> The

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<sup>1</sup> State Gazette No. 56 from 13 July 1991, last amendments state Gazette No. 12 from 6 February 2007.

<sup>2</sup> <http://www.parliament.bg/en/const>.

<sup>3</sup> Decision No. 7 from 1996 of the *Bulgarian Constitutional Court*, available at

reason for mentioning the freedom of the mass information media is to underline their important public function but not to give them a "special privilege" with regard to the other citizens'.<sup>4</sup> Furthermore, the Constitutional Court pointed out that restrictions of the three fundamental rights can only be based on reservation by the Constitution itself. The right to seek and obtain information under Art. 41 (1) encompasses the government institutions' obligation to guarantee access to information of public significance. The content of that obligation is subject to further definitions like in Art. 82 of the Constitution, where is foreseen that the sessions of the National Assembly shall be open. The Rules of organisation and procedure of the National Assembly<sup>5</sup> regulate the modalities of the access and special provisions with regard to the public radio, television and journalists. According to Art. 41 of the Rules the **open assemblies of the National Assembly can be broadcast live, but only by the public broadcaster (the Bulgarian National Radio and the Bulgarian National Television) or through the web-site of the Assembly.** This can be seen as an unjustified discrimination of private broadcasters.

Further, according to Art. 121 (3) of the Constitution, all courts shall conduct their hearings in public, unless provided otherwise by law.

- Safeguards on regulatory authorities

The Bulgarian Constitution does not hold specific provisions on the statute, remit and/or powers of the regulatory authorities in the media and electronic communications sectors.

- Safeguards on "universal service"

No stipulations are contained in the Bulgarian Constitution that would hold specific guarantees for the citizens in respect of universal service of the (electronic) media.

#### 2.2.3.1.2. *Media order (de lege lata and de facto)*

- "Market Entry"

Bulgaria has a dual broadcasting system consisting of two public television and radio broadcasters, Bulgarian National Television (BNT) and Bulgarian National Radio (BNR) on the one hand and private broadcasters on the other.

- Licensing schemes; remit psm; notification for print publications

The main law regulating broadcasting in Bulgaria is the Law on Radio and Television (LRT).<sup>6</sup> The adopted approach in connection with the broadcasting-market entry regulates different procedures, in accordance with the way of programme broadcasting. Two licensing regimes exist, depending on whether the broadcaster will broadcast its programmes through a terrestrial analogue network or a digital one. In the first case, the CEM issues a programme license, and the telecommunications regulator – the CRC – issues a communication permit to the broadcaster. The number of licenses is limited to the number of potentially available frequencies. Till the present day, this licensing procedure has been used *de facto* only in the radio sector. In the second case, the licensing is not related to a specific frequency, the number of licenses is not limited, and

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<http://www.constcourt.bg/Pages/Document/default.aspx?ID=323>.

<sup>4</sup> *Ibid.*

<sup>5</sup> State Gazette No. 58 from 27 July 2009, last amendments State Gazette No. 80 from 14 October 2011, available at <http://www.parliament.bg/en/rulesoftheorganisations>.

<sup>6</sup> State Gazette No. 138 from 24 November 1998, last amendments State Gazette No. 38 from 18 May 2012.

the choice of programmes is given to the multiplex operator, while abiding by the legal requirements and the must-carry rules. The CEM issues only a programme license to the broadcaster. This procedure is being applied today only for television broadcasters.

Broadcasters using exclusively cable and/or satellite networks are subject of mere registration. With amendments in the Law on Electronic Communication (LEC)<sup>7</sup>, a fourth alternative was provided, according to which the CRC temporarily provides already registered broadcasters with usage rights for analogue frequencies, without having to follow the complex procedure of analogue terrestrial licensing under the LRT.

101 permissions have been issued in June 2009 to five applicants (TV 7, TV 2 (after that Pro.BG and now bTV action), Television Evropa, MSat, Evrocom International Cable TV) based solely on two criteria - advertising revenues and technical equipment.

These legal provisions were one of the reasons why the European Commission has launched an infringement procedure against Bulgaria in May 2011. Other irregularities mentioned by the Commission were: the reservation of the terrestrial frequencies over the territory of Sofia only for the Bulgarian National Television since the latter had no regional programming license for this territory at that time; the requirement that bidders for the digital multiplexes shall not perform television activities, and the Bulgarian model of must-carry rules as far as the digital distribution of television programmes is concerned.

On 22 March 2012 the Commission considered that Bulgaria did not comply with the requirements of the Competition Directive when it assigned in 2009 the five spectrum lots available for digital terrestrial broadcasting via two contest procedures, limiting without justification the number of undertakings that could enter the market concerned. Moreover, the selection criteria of the contest procedures were disproportionate and therefore not in line with the requirements of the Competition, Authorisation and Framework Directives. Applicants were not allowed to have links with content providers (TV channels operators), including operators active only outside Bulgaria, or with broadcasting network operators.<sup>8</sup>

The decision takes the form of a reasoned opinion. Bulgaria now has two months to inform the Commission of the measures taken to address the breach of EU Law. The official Bulgarian position on these issues was previously that Bulgaria did not breach the EU rules.<sup>9</sup>

Furthermore, Bulgaria has not yet implemented the new EU telecoms rules (the deadline to do so was 25 May 2011). Because of that a second infringement procedure has been launched by the European Commission. The Commissions' request from 24 November 2011 took the form of "reasoned opinions".

The non-linear services (video on-demand) are subject of a notification to be sent to the CEM.

The press market entry has not been regulated by special legislative provisions.

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<sup>7</sup> State Gazette No. 41 from 22 May 2007, last amendments State Gazette No. 44 from 12 June 2012.

<sup>8</sup> See:  
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/298&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>9</sup> [http://www.capital.bg/biznes/media\\_i\\_reklama/2011/07/22/1127707\\_ek\\_zabavia\\_no\\_ne\\_zabraviva/](http://www.capital.bg/biznes/media_i_reklama/2011/07/22/1127707_ek_zabavia_no_ne_zabraviva/).

- Media pluralism/ownership; competition law aspects

There are no rules which regulate specifically the control over media concentrations. They are controlled only from an economic perspective, following the rules of the general supervision on competition under the Law on Protection of Competition<sup>10</sup>, and exercised by the Commission for Protection of Competition (CPC).

- Legal framework for psm; ability to fulfill their tasks

The LRT provides specific obligations related to the public service broadcasters. According to Art. 6 (2) LRT they shall provide inter alia for broadcasting political, economical, cultural, scientific, educational and other socially important information; provide access to the national and global cultural values and popularise the scientific and technical achievements through broadcasting Bulgarian and foreign educational and cultural programmes for all age groups.

A special provision is applicable for BNR and BNT as they provide a nationwide programme. According to Art. 6 (3) LRT, BNR and BNT have to provide media services for all citizens of the Republic of Bulgaria; to assist the development and popularisation of the Bulgarian culture and Bulgarian language, as well as of the culture and the language of the citizens in compliance with their ethnic belonging; to provide access to the national and European cultural heritage; to inform, educate and entertain; to apply the new information technologies; to relate the various ideas and convictions of the society by pluralism of the points of view in each and every news and current affairs programmes of political and economic subject; to contribute to the mutual understanding and tolerance in the relations between people; to provide possibility for the citizens to acquire information regarding the official position of the state on important issues of the public life.

LRT contains detailed provisions regarding the financing through fees of the public radio and television broadcasters, and of the CEM. For this purpose a special fund must be created, where funds from the fees from the population must be collected. The practical implementation of those provisions is being postponed every year since 2002 through amendments of the law. They extend the subsidising of the public broadcasters and of the CEM every year and from the state budget, including until the end of 2012. Thus, the public broadcasters in Bulgaria are funded through state budget subsidies, advertising revenues (which are more limited in scope than those of commercial broadcasters), revenues from other activities related to the broadcasting, donations, testaments and interests. There is no mechanism foreseen how to calculate the amount of the subsidy and how much it is really needed to fulfil the public remit.

In accordance with Art. 32 (2) LRT the CEM elects and relieves from duty the General Directors of the BNT and BNR, as well as the members of their management boards, following proposals from the General Directors. It also issues an opinion on the draft proposal for the state budget subsidies to the BNT and BNR.

- The role and functioning of regulatory authorities in these respects

The competent regulatory authority on the content of the private and public radio and television programmes is the Council for Electronic Media (CEM). The Council consists of a Management Board of 5 members, 3 of which are elected by the National Assembly,

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<sup>10</sup> State Gazette No. 102 from 28 November 2008, last amendments State Gazette No. 73 from 20 September 2011.

and 2 are appointed by the President (Art. 24 Law on Radio and Television, LRT). The law contains certain guarantees, regarding the independence of the members, for instance the rules on incompatibility (Art. 26 and Art. 27 LRT), an obligation to declare every type of significant interest when taking a specific decision (Art. 28 LRT), very limited options for relief of duty according Art. 30 LRT (resignation, continuous inability to perform activities of more than six months, imprisonment). The bodies, who have elected or appointed them, do not have the right to relieve them from duty.

The CEM regulates radio and audiovisual activities (linear and non-linear media services) through registration or issuing of licenses for radio and television activities, and through continuous supervision over the activities of the private and of the public radio broadcasters and audiovisual media services providers. In case their activities are not in compliance with the legal provisions or with the conditions included in the licenses, the CEM decides whether to impose a fine on the respective radio broadcaster or media service providers, and on the extent of it or to revoke the license or the registration.

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

Art. 15 LRT foresees in its section (1) that the media service providers shall disclose their sources of information not only in cases of pending court proceedings, but also in case of pending proceedings by CEM. According to Art. 15 (2) LRT journalists are in the former case also obliged to disclose the sources of information not only to the audience but also to the management of the media service providers. And Art. 15 (4) LRT says that "*the journalists shall be obliged to keep secret of the source of information if this is explicitly requested by the person who has provided it*".

These regulations provide obligations which weaken the freedom of expression in broadcasting when compared against Art. 10 ECHR. Not only that they foresee the active obligation to disclose sources of information also in case of a simple authority's demand and also to the management of the media providers. Moreover, the person who has provided the information must explicitly request its protection.

- Specific positive content obligations

According to Art. 10 of the LRT, the public and private broadcasters shall be guided in carrying out their activities by the following principles: guaranteeing the right to free expression of opinion; guaranteeing the right to information; preservation of the secret of the source of information; protection of the personal inviolability of the citizens; non-admission of programmes suggesting intolerance among the citizens; non-admission of programmes contradicting the good manners, especially if they contain pornography, praise or excuse cruelty or violence or incite hatred based on race, sex, religion or nationality; guaranteeing the right to reply; guaranteeing the copyright and related rights; preservation of the purity of the Bulgarian language.

In 2011, controversial amendments of the Bulgarian Penalty Code have been adopted. The amended Art. 162 (1) provides 1 to 4 years of imprisonment or sanctions from 5,000 BGN (2,556 Euro) to 10,000 BGN (5,113 Euro) for the incitement to discrimination, violation and hate by mass media based on race, nationality or ethnic belongings.<sup>11</sup> The

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<sup>11</sup> Amendments State Gazette No. 33 from 26 April 2011.

imprisonment sentence of up to 4 years has been criticised as a disproportionate measure.<sup>12</sup>

- Funding schemes for specifically desired content

No such funding schemes exist in Bulgaria.

- Political advertising and/or broadcasting time

The political advertising during the pre-election campaigns has been regulated by the new Electoral Code.<sup>13</sup> It provides strict rules for the public broadcaster, BNR and BNT. According to Art. 147 (1), all campaign broadcasts of BNT and BNR and their regional programmes are to be paid for by parties, coalitions and nomination committees according to a predetermined tariff. Art. 147 (2) foresees only two exceptions, namely for the closing addresses and debate appearances of presidential candidates during a possible second round. This undermines the responsibility of the public broadcaster to ensure a fair, balanced and thorough coverage of elections in their news and current affairs programs.<sup>14</sup> The conclusion is confirmed by the report on the monitoring of the pre-election campaign in Bulgaria for the election of the President and Vice-president as well as of mayors and municipal councilors issued by CEM after the first election since the new Electoral Code is entered into force.<sup>15</sup> Furthermore, the *"private broadcasters fail to make sufficient use of the potential freedom in their programmes to let journalism dominate, rather than paid propaganda."*

- Codes of conduct and their organisational framing

In 2004, the Code of Ethics of the Bulgarian media was adopted. It is the code of conduct for the Bulgarian journalists which applies for broadcasting, press and online services. Regarding dissemination of truthful information to the society it provides three obligations: correctness of the information, correction of untruthful information and using trustful sources. Besides, the way how to collect information and which kind of information can be disseminated is regulated. Moreover, it is foreseen that the human dignity and personal life are inviolable and that media shall interfere with the personal or family life only in case of significant public interest. Besides there are provisions for the protection of minors and persons who are accused but not condemned yet.

The Code provides also for editorial independence from political and economic powers. On the next it regulates the relationships between the different media which have to be grounded on fair competition and observance of the copyrights. The notion *"public interest"* in terms of the Code is defined as: *"protection of the health, safety and security; participation in prevention or detection of violation or abuse of power; protection of the society to be seriously fooled."* However, the provisions of the Code do not apply if the action in question unambiguously serves the public interest.

The "National Council for Journalistic Ethics" Foundation was established and is responsible for monitoring the compliance with the Code. There are two commissions within the foundation – Ethics Commission on Printed Media and Ethics Commission on Electronic Media, each of which consists of 12 members. But since the beginning of their

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<sup>12</sup> See for more information OSCE/ODHIR Limited Election Observation Mission Final Report, 2011, p. 14-15.

<sup>13</sup> State Gazette No. 9 from 28 January 2011, last amendments State Gazette No. 45 from 14 June 2011.

<sup>14</sup> OSCE/ODHIR Limited Election Observation Mission Final Report, 2011, p. 16.

<sup>15</sup> Report on the monitoring results on radio and television programmes of media service providers during the pre-election campaign for the election of the president and vice-president and members of local authorities, 23 September-23 October 2011.



work in 2006 they reviewed and decided only 18 cases with print media and 11 cases with electronic media up to now. Most of the cases do, in view of the Commissions, not violate the Ethic Code. The only stated violations by the Commission concerned incorrectly given information, one-sided data entry, picking and choosing the sources of information.<sup>16</sup> One of the reasons for the poor practice is that in cases of violation the Commission can only publicly reprimand the respective media by expressing its disapproval of the form or content of the contested material. There are no other sanctions that can be imposed. In consequence the citizens prefer to use the civil or criminal law procedures, if their rights have been abused.

- Distribution Aspects
  - Access to frequencies

On 31 January 2008, the Bulgarian government approved a Digital Plan for Introduction of DVB-T in Bulgaria.<sup>17</sup> The Plan was updated again in April 2010 and in March 2012 for not meeting the deadlines. According to the new Plan, the analogue/digital switch-over is supposed to take place in two stages: Stage One is supposed to start with three national networks (*MFNs*) by simulcast broadcasting on 1 March 2013. The switch-off date for the first stage is planned for 1 September 2013. The timeframe of Stage Two depends on when the frequencies used for analogue transmission during Stage One and the frequencies used by the Ministry of defence will be released. Three more national networks (*MFNs*) are provided on Stage Two. CRC issued permits for operation and construction of the six national networks in 2009 and 2010.<sup>18</sup>

The amendments of the Law on Electronic Communication (LEC) from December 2011<sup>19</sup> and the new Digital Plan allow for the launch of a new tender procedure for selecting a new platform operator of a seventh national digital network before 1 September 2013.

More information on the grant of licences (permits) which provide for the right to use a telecommunications infrastructure, particularly frequencies for the terrestrial emission of broadcasting services, is provided *supra* in relation to the "market entry" of broadcasters.

- Access to distribution networks and control of actual conditions

The access to distribution networks (cable and satellite) has not been regulated by law. It is a matter of private legal agreements between the operator of the network and the broadcaster. According to most of these agreements the network operator pays to the broadcaster for the allowance to distribute his programmes. The regulation concerning the access to terrestrial networks is described under "market entry" and "role of platform operators".

The circulation instruments for print media have not been regulated by law. But in August 2011 the Commission for Protection of the Competition started analysing the market for publishing and distribution of publications, because some publishing companies had stated that 80 % of the market was dominated by the "New Bulgarian

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<sup>16</sup> Decision No. 12 from 20 July 2007, Decision No. 14 from 14 September 2007, Decision No. 17 from 30 October 2008.

<sup>17</sup> A Summary of the first Plan in English (not updated version) can be seen at: [http://ec.europa.eu/information\\_society/policy/ecomms/current/broadcasting/switchover/national\\_plans/index\\_en.htm](http://ec.europa.eu/information_society/policy/ecomms/current/broadcasting/switchover/national_plans/index_en.htm).

<sup>18</sup> See for more information the "role of platform operators".

<sup>19</sup> State Gazette No. 105 from 29 December 2011.

Media Group Holding" JSC. This company publishes inter alia the dailies "Monitor", "Telegraph" and the weekly "Politic".

- Must-carry/must-offer rules for electronic media

In regard to the broadcasting programmes, intended for terrestrial digital broadcasting, CEM performs licensing without call of a tender, because the number of licenses is unlimited. In addition, the CEM must define the type and profile of part of the licensed programmes, which are mandatory for broadcasting by multiplex operators, while, for the other part of the batch of programmes, coordinate their type and profile. Therefore, according to the LRT the multiplex operator has to transmit three type programmes: programmes which have must-carry status according to the law; programmes whose type and profile have been assigned by the CEM, and programmes whose type and profile have been agreed with the CEM. Which criteria CEM has to apply by assigning respectively agreeing the type and profile is not regulated by the LRT. These provisions apply only to private television programmes. For the programmes of the public broadcaster BNT one multiplex on the Stage One has been reserved.

According to § 37 (1) of the Transitional and Final provisions of the LRT, the following programmes have to be transmitted via terrestrial digital network by the multiplex operator (must-carry) on the Stage One: programmes for which the broadcaster has a nationwide license for broadcasting, which use terrestrial analogue networks, to which not less than 50 % of the population has access to.<sup>20</sup> Furthermore, according to § 37a (1), the multiplex operator has to transmit the television programmes which have been distributed to not less than 50 percent of the population via electronic communications networks for terrestrial analogue broadcasting at the time of launching his services.<sup>21</sup> On a third place the multiplex operator must distribute two more programmes of those broadcasters, who have a license for terrestrial analogue broadcasting with nationwide coverage, which expires after 2010, § 37a (2).<sup>22</sup> These programmes have to be agreed with the CEM, § 37a (4).

On Stage Two of the digital switch-over the multiplex operator is obliged to distribute three programmes of which the type and profile is defined by the CEM and another three programmes which have to be agreed with the CEM and come from broadcasters, who have a license for terrestrial analogue broadcasting with nationwide coverage, which expires after 2010, § 38 LRT.<sup>23</sup>

- Role of platform operators

The issuing permit for operation and construction of electronic networks for terrestrial digital broadcasting (multiplex) has been regulated by the rules of the telecommunication law (Chapter 4, Section VI LEC). The competent CRC issues the permit in a tender procedure.

On 5 June 2009, the CRC issued a permit for operation and construction of two national networks to TOWERCOM BULGARIA for Stage One, with a duration of 15 years. On 22

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<sup>20</sup> De facto these are the television programmes bTV, bTV action (former Pro.BG and TV2) and Nova.

<sup>21</sup> De facto this rule applies to the programmes of the registered broadcasters who received temporarily permits according to the Law on Electronic Communication to use analogue frequencies, without having to follow the complex procedure of analogue terrestrial licensing under the LRT, and especially the permits of the programmes TV7 and TV2 (today the permits of TV2 belong to the bTV group). Other programmes which meet the requirements are Bulgaria on air, Darik radio and television and Balkan Bulgarian Television.

<sup>22</sup> De facto these broadcasters are bTV and Nova.

<sup>23</sup> De facto these are three programmes of bTV and three programmes of Nova.

June 2009, the permit for the three national networks from Stage Two was issued to HANNU PRO BULGARIA, again with a duration of 15 years. In July 2010 CRC chose HANNU PRO BULGARIA as well as an operator and constructor of the third national digital network that is reserved for transmitting the programmes of the public broadcasters. One of the bidders in the tender procedure for the public multiplex appealed against the decision of the CRC. He stated that the chairman of the CRC has exercised pressure on the other members by taking the decision. The last instance of the Supreme Administrative Court in Sofia rejected the claim in January 2012.

The two permits for Stage One belong today to NURTS (National Governance "Radio and Television Stations") who bought in the summer of 2010 TOWERCOM BULGARIA. NURTS belonged to the main fixed-line telephony operator in the country – Bulgarian telecommunication company (BTC) who had the permit for terrestrial digital transmission over the territory of Sofia and was the sole owner of the national analogue network which transmits the programmes of BNT and BNR, bTV and Nova. In the summer of 2010 BTC sold 50 % of the "NURTS" to the Cyprus offshore company Mancelord Limited. The acquisition of the other 50 % by the Bluesat Partners Ltd. (registered in the United Arab Emirates) was approved by decision of the Commission for Protection of Competition (CPC) in 2011.<sup>24</sup> The new name of NURTS is NURTS Digital.

- The role and functioning of regulatory authorities in these respects

The Bulgarian authority for media infrastructure is the Communications Regulation Commission (CRC), which consists of a Management Board with five members. The chairman is appointed by the Council of Ministers, the vice chairman and two other members are elected by the National Assembly, and one is appointed by the President (Art. 22 Law on Electronic Communication, LEC). The provisions concerning the independence of the Management Board are similar to those of LRT concerning CEM.

- Access to Information
  - Transparency of media ownership situations

The Law on compulsory deposit of printed or other works (LCDPOW)<sup>25</sup> provides the obligation for compulsory depositing printed or other works at the National Library. According to Art. 7a of the Law, every periodical printed work shall publish information about the "real owner" of the publication in the first issue of the year and to update the information on the web page of the publication, if any, Art. 7a (6). Currently, the information about the "real owner" has been published only on the web sites of the publications belonging to the newspapers group Economedia.

Further, the publisher is obliged to submit a statement to the Ministry of Culture which identifies his "real owner". Every change of the "real owner" has to be published and notified by the Ministry and the Ministry has to publish the information on its own internet site, Art. 7a (5). This publishing obligation is fulfilled by the Ministry, but not all publishers have submitted a statement. There is no publicly available data if sanctions have been imposed.

The notion "real owner" is defined as "the natural persons, who are the end beneficiaries of the ownership in the legal person, who individually or through related parties

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<sup>24</sup> Decision No. 1098 from 30 August 2011.

<sup>25</sup> State Gazette No. 108 from 29 December 2009, last amendments State Gazette No. 101 from 28 December 2010.

*participates in the publisher*". According to the motives to the law, the amendments shall guarantee the transparency of the press ownership and the effective protection of the human rights such as the protection of the honesty and reputation.

For broadcasters there are no obligations related to the "real owner", but according to Art. 125k LRT, the CEM has to maintain a public register for the linear and non-linear media service providers and the operators who distribute Bulgarian and foreign programmes. The register is publicly available on the web page of the CEM.<sup>26</sup> However, the register contains only the information about which legal entity owns a certain media service provider. Often, this information is worthless, because they are offshore companies.

E.g. some journalists estimate that *Tzvetan Vassilev* is the real natural person who stands behind the offshore company "Crown Media", which owns the television programmes TV7 and Super 7.<sup>27</sup> The same person is owner of the Central Cooperative Bank, which is connected to firms like "New Bulgarian Media Group Holding" JSC. The last one tried to monopolise the press publishing and distributing market by acquiring quite a number of publications during the last years. It is remarkable that this group has never fulfilled its obligation to publish and inform the Ministry of Culture about the "real owner" of the publications.

Attention must also be paid to the fact that the Cyprus offshore company Mancelord Limited, which acquired 50 % of the NURTS, has been represented in Bulgaria by Tzvetan Vassilev as well. On the other hand a great amount of the state money (ministry funds and funds of state owned companies) is deposited in the Central Cooperative Bank. According to reports in the press from 16 February 2012 the European Commission has begun checking unacceptable state-aid for the bank.<sup>28</sup>

How exactly *Tzvetan Vassilev* is connected to the press, electronic media and the media distribution market and who might stand behind him, is not clear. But all this shows that there is no media ownership transparency in Bulgaria and no authority for over-viewing it.

#### - Accountability of public service media

According to Art. 68 (1) P. 8 LRT the general directors of the public service media, BNT and BNR, have to prepare the annual financial reports concerning their budgets. The Managing Boards of BNT and BNR approve the financial reports. The National Audit Office controls the legal implementation of the budgets according to the rules of the Law on the National Audit Office.<sup>29</sup> This act applies to all institutions which spend state funds, but there is no special control as regards the fulfilment of BNT's and BNR's public tasks.

Since June 2007 the BNT publishes on its website semi-annual reports about its activities, e.g. about new programme formats, new film series, audience shares of the various programmes, the activities of the regional programmes and international activities. These reports are not mandatory and they only have the function to inform the public. Hence it follows, that there are no publicly available reports on the activities of BNR.

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<sup>26</sup> [http://www.cem.bg/public\\_reg.php?action=1](http://www.cem.bg/public_reg.php?action=1).

<sup>27</sup> <http://www.glasove.com/misteriya-okolo-mistur-ikonomika-17861>.

<sup>28</sup> <http://www.trud.bg/Article.asp?ArticleId=1233044>.

<sup>29</sup> State Gazette No. 98 from 14 December 2010, last amendments State Gazette No. 99 from 16 December 2011.

- Freedom of information laws

State and local authorities are obliged to provide information of public significance according to the procedures of the Law on access to public information<sup>30</sup>. Any citizen of the Republic of Bulgaria is entitled to get all information which is necessary to inform the citizens' fully and objectively, from public institutions. This right is often used by journalists, especially the legal possibility to appeal to the court in case of an unlawful refusal of access to information by the institutions.

- Accessibility of products/services and distribution networks

The public broadcaster, BNT and BNR are obliged, according to the media content legislation, to provide media services for all citizens of the Republic of Bulgaria (Art. 6 (3) LRT). The network operators have to distribute the programmes of BNT and BNR according to the modalities of § 3 of the Transitional and Final Provisions of the LEC.

- "Have a Say on ..."

Every natural or legal person may submit a complaint against a radio and television broadcaster to the CEM. The CEM has internal guidelines on how to proceed with these complaints. According to the last report of the CEM, there were 229 complaints filed in the first half of 2011. 58 of them were connected to the programme content and quality and 22 were in connection with the right to reply and to get access to recorded broadcasting content.<sup>31</sup>

## 2.2.3.2. Main Players in the Media Landscape

### 2.2.3.2.1. Radio

The private Bulgarian radio landscape consists of four major groups. Until November 2011, they all were owned by international companies, when the SBS Broadcasting was acquired by the A.E. Best Success Services Bulgaria Ltd., a company registered in Bulgaria but owned by an offshore company. The remaining three foreign groups are the Communicorp. Group, the Balkan News Corporation and the Emmis International Holding. All of their radio stations are licensed as regional programmes but constitute nationwide radio chains. There is only one independent private radio station which has a single nationwide license and coverage, the news radio programme Darik.

On a public side of the radio landscape there is only the Bulgarian National Radio (BNR) which broadcasts 8 regional programmes and three nationwide programmes (Horizont, Hristo Botev and Bulgaria).

Altogether CEM has issued 260 licenses for terrestrial radio broadcasting and has registered 32 radio programmes for broadcasting via cable and satellite.<sup>32</sup>

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<sup>30</sup> State Gazette No. 55 from 7 July 2000, last amendments State Gazette No. 39 from 20 May 2011.

<sup>31</sup> CEM, Activity report for the period between 01.01.2011 and 30.06.2011, p. 16, available at <http://www.cem.bg/cat.php?id=110>.

<sup>32</sup> The list of these programmes is available at: <http://www.cem.bg>. in a form of an extract from the public registry kept by the CEM.

**Table 10 BG: Main radio broadcasters**

Companies	Ownership Structure	Main Radio Stations	Audience Listenership*
BNR	Public Service Broadcaster	Horizont Hristo Botev	29 % 10.3 %
Agency Vitosha Ltd.	A.E. Best Success Services Bulgaria Ltd.	Vesselina Vitosha The Voice Magic FM Express	22 % 7.1 % 4 % 3.5 % -
Signal Plus Ltd.	Darik Radio JSC	Darik	17.4 %
Radio 1 Ltd. Radio Tangra JSC Metro radio Ltd.	Communicorp. Group. Limited or through Metro Radio International LLC	Radio 1 Veronika BG Radio City	13.6 % 9.9 % 9.8 % 6.9 %
Bulgarian Radio Company Ltd.	Communicorp. Group. Limited (77 %), NRJ Ltd.(11 %), Media Team Ltd.(11 %) and Liliana Drumeva (11 %)	Radio 1 Rock	6.5 %
Radio Company CJ Ltd.	Balkan News Corporation R 1 Ltd.	NJoy Jazz FM Classic FM	12.2 % 3.4 % 3 %
Pleven Plus JSC Radio FM + JSC	Emmis International Holding	Fresh FM +	9.8 % 8.2 %

\* Audience Listenership second half of 2011, + 18 years, multiple answers were possible. Source: Alpha Research, available at: [http://alpharesearch.bg/bg/marketingovi\\_izsledvania/danni\\_i\\_publikacii/Radio\\_auditoria.html](http://alpharesearch.bg/bg/marketingovi_izsledvania/danni_i_publikacii/Radio_auditoria.html)

### 2.2.3.2.2. Television

The Bulgarian television market is dominated by two international media groups: the Modern Times Group MTG AB (MTG) and the Central European Media Enterprises (CME). Due to several significant transactions MTG acquired in 2007 a few programmes transmitted only via cable and satellite and in 2008 the terrestrial programmes NOVA TV, Nova+ and 80 % of EVA magazine. At present, five more television programmes belong to the group of Bulgaria's second most-watched programme Nova (licensed for analogue and digital terrestrial transmission and via cable and satellite), Nova Sport, KinoNova, Diema and Diema Family.

In July 2008 CME bought 80 % of TV2 (today bTV Action), Ring TV (today Ring.BG) and Mila radio station (today bTV Radio). Moreover in 2010 CME acquired the most watched TV-channel bTV and the programmes bTV Cinema and bTV Comedy. Besides CME acquired the rest of the shares of TV2 and launched with bTV Lady a new TV programme in 2012. Accordingly CME has six television programmes – bTV, bTV Action, bTV Cinema, bTV Comedy, bTV Lady and Ring.BG.

Besides these two dominant groups the cypress Offshore Company Crown Media holds two licenses for terrestrial digital broadcasting according to the controversial Must-Carry Rules of the LRT,<sup>33</sup> namely for the programmes TV 7 and Super 7.

<sup>33</sup> See above 2.2.3.1.2.

The Bulgarian public television broadcaster BNT distributes one programme with a national analogue terrestrial coverage (BNT 1), one cable and satellite programme (BNT World); one programme with regional analogue terrestrial coverage in 18 regions (BNT 2) and one licensed programme for terrestrial digital coverage at the territory of Sofia (BNT Sofia).

**Table 11 BG: Main television broadcasters**

Broadcaster	Ownership Structure	Main TV Stations	Audience share*	Market share**
bTV Media Group JSC	CME Bulgaria BV	bTV bTV Comedy bTV Cinema bTV Action Ring.BG bTV Lady	36.1 % 2.5 % 1.8 % 1.9 % 0.3 % -	46.1 % 1.4 % 1.4 % 0.8 % 0.5 -
Nova Broadcasting Group JSC	MTG Broadcasting AB (95 %) Apace Media JSC (5 %)	Nova Diema Diema Family KinoNova Nova Sport	14.6 % 2.9 % 2.6 % 2.5 % 0.2 %	14.5 % 3 % 2.3 % 1.5 % 0.3 %
BNT	Public service broadcaster	BNT 1 BNT World BNT 2 BNT Sofia	5.5 % 0.3 % - -	7.6 % 0.5 % - -
TV 7 Seven JSC	Crown Media JSC	TV 7 Super 7	- -	1.4 % 0.3 %

\* 2011, Target All Day Audience Share. Source: TNS TV/Plan.

\*\* 1st week of 2012, for audiences from 3 years, source: GARB, Bulgaria, available at: [http://garb.bg/online/resources\\_top\\_40.htm](http://garb.bg/online/resources_top_40.htm)

### 2.2.3.2.3. *Press and Publishing*

Since 1997, the main player on the Bulgarian newspaper market was the "Newspapers Group Bulgaria" which belonged to the German WAZ Media Group. The group published the most sold dailies "24 hours" ("24 chasa") and "Work" ("Trud"), the weekly newspapers "168 hours" and other newspapers and magazines. In December 2010, WAZ sold its Bulgarian company to the Media Group Bulgaria - Holding Ltd.

Another important role on the press market plays the "New Bulgarian Media Group Holding" JSC. It publishes inter alia the dailies "Monitor", "Telegraph" and the weekly "Politic". Of some importance is also the Bulgarian Economedica Group. It publishes newspapers and magazines dedicated mainly to readers who are interested in business, such as the daily Dnevnik and the weekly Capital.



**Table 12 BG: Main publishing companies**

Publishing Companies	Ownership Structure	Main Titles	Readership*
Media Group Bulgaria – Holding Ltd.	Lubomir Pavlov (43 %) Ognyan Donev (40 %) BG Printmedia Ltd. (17 %)	24 chasa Trud 168 hours	18.9 % 17.1% 5.4 %
New Bulgarian Media Group Holding JSC	Balkan Media Company JSC	Telegraph Monitor Politic	17.9 % 2.5 % -
Economedia JSC	Teodor Zahov (49 %) through T3 Media Ltd. Ivo Prokopiev (51 %) through Agency for Investor Information Ltd.	Dnevnik Capital	1.0 % 1.5 %

\* Readership second half of 2011, + 18 years. Source: Alpha Research, available at: [http://alpharesearch.bg/bg/marketingovi\\_izsledvania/danni\\_i\\_publikacii/chitatelska\\_auditoria.html](http://alpharesearch.bg/bg/marketingovi_izsledvania/danni_i_publikacii/chitatelska_auditoria.html)

#### 2.2.3.2.4. *Online media (non-linear audiovisual (media) services; websites)*

Since 2010, when the new provision regarding the registration of providers of non-linear services entered into force, 14 providers have been registered by the CEM.<sup>34</sup> Unfortunately, there is no data about the usage of these services.

In connection with the usage of the internet according to data of Alpha Research Agency for the second half of 2011, 48 % of the population up to 18 years use the internet.<sup>35</sup> After the checking of email, surfing for fun, looking for a specific information, the reading of on-line editions of newspapers and looking for news published only on-line is on a fourth place of all activities (29 % of the population).

<sup>34</sup> The list is available at: [www.cem.bg/public\\_reg.php?action=5](http://www.cem.bg/public_reg.php?action=5).

<sup>35</sup> Available at: [http://alpharesearch.bg/bg/marketingovi\\_izsledvania/danni\\_i\\_publikacii/internet.html](http://alpharesearch.bg/bg/marketingovi_izsledvania/danni_i_publikacii/internet.html).

**Table 13 BG: Main internet content providers**

Companies	Ownership Structure	Name*	Reach**
Dir.BG JSC	Dir.BG Holding	dir.bg	34.71 %
bTV Media Group JSC	CME Bulgaria BV	btv.bg	29.02 %
Investor BG JSC	public traded company	start.bg dnes.bg investor.bg	22.17 % 14.66 % 4.59 %
Sportal BG JSC	Stilian Shishkov (60 %) Dimitur Marin (40 %)	sportal.bg hotnews.bg novini.bg	18.85 % 16.85 % 11.99 %
Signal Plus Ltd.	Darik Radio JSC	dariknews.bg	13.99 %
Media Group Bulgaria - Holding Ltd.	Lubomir Pavlov (43 %) Ognyan Donev (40 %) BG Printmedia Ltd. (17 %)	24chasa.bg trud.bg	13.21 % 9.58 %
Economedia JSC	Teodor Zahov (49 %) through T3 Media Ltd. Ivo Prokopiev (51 %) through Agency for Investor Information Ltd.	dnevnik.bg capital.bg	12.77 % 5.92 %

\* December 2011. Source: gemiusAudience, available at: [//www.audience.bg/pages/display/reach](http://www.audience.bg/pages/display/reach).

\*\* The percentage of visitors (real users) who generated at least one page view on the monitored web site within the given time period to the total number of internet users within a given time period.

#### 2.2.3.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers

According to the last CRC report (end of 2010), Bulgaria has 433 registered cable network operators, but the number of the operators which really provide these services is 340.<sup>36</sup> The main players in the big cities are Blizoo Media and Broadband SJC (a merger of Cabletel and Evrocom), Evrotursat TV SJC, M Sat SJC, Skat Ltd. There are two main satellite network operators, Bulsatcom SJC and Vivacom (the new brand name of the former telecommunication monopolist BTC). IPTV is becoming more popular, as of the end of 2010 there were 25 operators. One of the more important is Vestitel BG SJC which belongs to the gas distributing company, the Overgas Holding SJC. The company cleverly linked the gas pipeline network with the expansion of the IPTV-network.

The most relevant internet service providers are the Vivacom, Blizoo, Easy Lan, Nexcom, Net is Sat, Orbitel, SpectrumNet, Trance Telecom, Digital Systems, Max Telecom. The total number of the registered operators is 589.

<sup>36</sup> Available at: [http://www.crc.bg/files/\\_bg/II\\_072010\\_atlastfinal.pdf](http://www.crc.bg/files/_bg/II_072010_atlastfinal.pdf).

**Table 14 BG: Main Cable/Satellite network operators and IPTV providers**

Main Cable/Satellite network operators IPTV providers	Ownership Structure	Subscription (in thousand) *	Market share**
<b>Cable</b> Blizoo Media and Broadband SJC	Bultel Cable Bulgaria SJC	1,231.1	54 %
<b>Satellite</b> Vivacom	Bulgarian telecommunication company SJC	450	31.3 %
<b>IPTV</b> Vestitel	Overgas Holding SJC	7,2	0.1 %

\* The subscriber number is given per market segment (cable, satellite, IPTV) not per provider. Applicable data of the subscription of the main providers is missing. Source: Year Report CRC 2010, available at: [http://www.crc.bg/files/\\_bg/II\\_072010\\_atlastfinal.pdf](http://www.crc.bg/files/_bg/II_072010_atlastfinal.pdf).

\*\* The market share data is given per market segment not per provider. Applicable data of the market shares of the main providers is missing. Source: Year Report CRC 2010, available at: [http://www.crc.bg/files/\\_bg/II\\_072010\\_atlastfinal.pdf](http://www.crc.bg/files/_bg/II_072010_atlastfinal.pdf).

#### 2.2.3.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)

The table below outlines the Audience/Readership/Usage share and the share of advertising revenue within the media sector:

**Table 15 BG: Share of advertising revenue within the media sector**

Media	Audience/Readership/ Usage share	Advertising market shares ***
Television	67.3 %*	65 %
Press	29.1 %*	16 %
Radio	43.8 %*	8 %
Outdoor	-	7 %
Internet	48 %**	4 %

\* The audience (TV and radio) and readership data as of 2009. Unfortunately there is no actual data. Source: Open Society Institute.

\*\* Internet users as of the second half of 2011, Source: Alpha Research Bulgaria.

\*\*\* Data as of 2010, Source: Piero 97/TV Plan TNS.

### 2.2.3.3. Conclusion and Recommendations

The freedom of expression, the freedom of the media and the freedom of information are guaranteed in the Bulgarian Constitution, Legislation and in the Code of Conduct concerning the media. However, there are some legal regulations which weaken these guarantees. This applies in particular to the inadequate protection of information sources (Art. 15 LRT), **the unbalanced rules for election advertising in public programmes and the restriction for the transmission of parliamentary sessions to public broadcasters.**

Furtheron, the current legislation does not provide sufficient guarantees for CEM and CRC members, as far as these concern the independence from political powers or economic interests, mainly due to the fact that they are directly appointed/elected by state institutions without a special legal provision for their nomination. It could be considered as a positive input on their independence, if the number of institutions having the right to nominate the members would be expanded, preferably by organisations and institutions of civil society, and if only the parliament would have the right to elect the members by a qualified majority instead of the simple majority foreseen at present.

At the beginning of the summer 2010 a working group has been established by the Council of Ministers. It had to **prepare a draft for the new Law on radio and television until the End of November 2010.** The major issue of the new Law was the reform of the public broadcasters. But until today there is no such draft and no public information about any results of or its continued existence. Apparently the existing law satisfies the major political interests. According to current reports, there are amendments in discussion which concern the merger of the two public broadcasters, BNR and BNT, but do not consider their structural and financial strengthening. Obviously there are also no considerations with regard to an enforcement of the independence of the media authorities (CEM, CRC) from governmental influence. A restructuring of the CEM would help to improve the structural independence of BNT and BNR. In regard to the financial strengthening of the public broadcasters the future law should moreover include rules on how to determine their financial needs and on an independent commission examining them on legally prescribed remits and their implementation by programmes. The budget should then be included into the State budget for the financing of BNR and BNT.

Furthermore, the fact is remarkable that Bulgaria has no specific media concentration law and that the regulations for ownership transparency are incomplete and inconsistent. Although there is the legal duty to disclose the economically-benefiting natural person behind a print media publishing company ("real owner"), this obligation is neither fulfilled by all concerned nor enforced consistently by the authorities. Moreover, this regulation ignores the whole electronic media market and its importance for the formation of opinions. According to the statement of the chairman of the Commission for Protection of the Competition (CPC), given in an interview for "mediapool.bg" on 10 February 2012, the Commission " ... has no power to examine who is behind the straw man and therefore it reviews only the obvious form of ownership of the companies".<sup>37</sup> Therefore, it is advisable that the legislator strengthens the Commission's powers in this respect. If Bulgaria adopts special rules and regulations on media concentration, a special department at the CPC could efficiently review these cases, because it has the expert knowledge, experience and a large databank.

The Bulgarian legal framework with regard to the digitalisation shows no sufficient system but gives the impression of an at least partially case-related regulation with some inconsistencies in terms of European Union law. Therefore, the European Commission has

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<sup>37</sup> Available at <http://www.mediapool.bg>.

already taken initial steps of an infringement procedure. In question is inter alia the Bulgarian provision that an operator of a digital multiplex may not be a broadcaster at the same time, wherefore the ORF was excluded from the application procedure of 2009. On the other hand, the strict enforcement of this incompatibility regulation is highly questionable if the permits for the digital "Stage One" are given to an offshore company (NURTS), which is naturally not accessible to full transparency. Beyond, the Bulgarian must-carry rules for the digital spectrum seem to be questionable for it concerns their ability to ensure pluralism. Because in consequence of their application essentially only two families of channels dominate the digital capacity. Also for the remaining capacity spectrum no sufficient criteria for plurality have been established yet. Finally, it is already clear that Bulgaria can not comply with the European timelines for the digitalisation, even after it revised its digitalisation plan.

It remains that Bulgaria needs to review its media legislation, especially with regard to the implication of digitalisation. But also the legal standards concerning pluralism, transparency and the fundamental freedom of the media such as the freedom of expression, need to be reviewed and further developed.

The experience of recent amendments to the media laws show that important changes were always adopted immediately before parliamentary elections. Following this rule, an amendment can not be expected until 2013. Whether it will meet the requirements described remains to be seen.

## CYPRUS

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### 2.2.4. Cyprus

Cyprus joined the European Union in May 2004 as a divided country. The jurisdiction of the Republic of Cyprus extends to the whole island, but it was accepted that the *acquis communautaire/unioinaire* fully applies to the territory under the Republic's government effective control, until the island is re-united. The information provided in the present report refers to the institutional framework of the Republic of Cyprus and the media operating under effective authority of its government.

#### 2.2.4.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.4.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

Freedom of expression is guaranteed under article 19 of the Constitution.

Article 19 of the Constitution provides for "the right to freedom of speech and expression in any form" and its component rights, the "formalities, conditions, restrictions and penalties" that govern its exercise, the case of eventual seizure of newspapers and other printed matter by the authorities and the authority of the Republic to require "licensing of sound and vision broadcasting or cinema services".

"Article 19.

1. Every person has the right to freedom of speech and expression in any form.
2. This right includes freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers.
3. The exercise of the rights provided in paragraphs 1 and 2 of this Article may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.
4. Seizure of newspapers or other printed matter is not allowed without the written permission of the Attorney-General of the Republic, which must be confirmed by the decision of a competent court within a period not exceeding seventy-two hours, failing which the seizure shall be lifted.
5. Nothing in this Article contained shall prevent the Republic from requiring the licensing of sound and vision broadcasting or cinema enterprises."

One may notice that the requirement for any constraint to freedom of expression to be 'necessary in a democratic society' is missing from the above definition. It is also noteworthy that the Attorney General, who is also the legal advisor of the government, is

the authority that initiates seizure of a newspaper or printed matter, and not the court, which nevertheless can intervene on the issue within seventy-two hours.

Article 18 of the Constitution guarantees freedom of thought, conscience and religion, stipulating that "all religions are equal before the Law"; it also makes provision for the effective exercise and profession of faith and religion.

Article 20 provides for the "right to freedom of peaceful assembly" and the "right to freedom of association, including the right to form and to join trade unions for the protection of own interests".

- Safeguards on regulatory authorities

The Constitution of the Republic of Cyprus contains no provisions regarding regulatory authorities.

- Safeguards on "universal service"

Article 171 provides for the broadcasting of sound and vision programmes according to specific quotas in Greek and Turkish languages (for the Greek and the Turkish communities).

#### *2.2.4.1.2. Media order (de lege lata and de facto)*

- "Market Entry"
  - Licensing schemes; remit psm; notification for print publications

The broadcasting law, *Ο περί Ραδιοφωνικών και Τηλεοπτικών Σταθμών Νόμος* [Law on Radio and Television Stations] L. 7(I)/1998 that incorporates fundamental provisions of the European Union AVMS Directive, voted in 2010 and 2011, provides in article 14 that broadcasting licences are granted to serve the public interest. Among the powers/prerogatives of the regulator established by the law, the Radio and Television Authority (art. 3(2)), are the following:

- To "ensure the editorial and creative independence of the employees of the audiovisual media services provider and to avert/disallow interferences, interventions and influencing their editorial and creative work";
- To "oversee the real ownership situation of the AVMS providers aiming at ensuring their independence, as well as excluding any tendencies, actions or attempts for concentrations, oligopolies or monopolies" in the media.

Editorial and creative independence are also among the criteria for assessing an application for a license, along with the capacity of the applicants to ensure pluralism and maximum access in their programmes (art. 22.(1)(d)).

The law makes provision for ensuring broad coverage of broadcasting services, requiring a free-to-air or AVMS provider to cover at least 75% of the population in order to get an 'island-wide' licence. It is noteworthy that 67.4% of the population lives in urban areas, and the above obligation might exclude most remote communities from access to television broadcasting.



Article 26 of the Law on Radio and Television Stations provides for the obligation of radio and television organisations to provide programmes characterised by fairness, completeness, pluralism and maximum access of the public and its agents, respect for the dignity, reputation and the private life of individuals and respect for democratic ideals and human rights. In the same article there is special reference to news and current affairs programmes, required to feature fairness and pluralism.

There is no online media-specific legislation, except for Video On Demand, and the operations of cable and satellite audiovisual services remain also unregulated. This poses among other a serious problem of fair competition, where cable and IP TV providers are subject to no rules with regard to content or rights on content.

The Office of the Commissioner of Electronic Communications and Postal Regulation decides on technical and operational aspects, while the Competition Commission examines competition. The issue of regulating cable and satellite was raised in the course of discussions for the adoption of the AVMS Directive and the introduction of digital television, but no decision was taken. In a recent case, CYTA was granted a licence for IP television CYTAVISION CINEMA and CYTAVISION SPORTS without having the required by the law ownership structure. The Authority gave the company a three months deadline to settle the matter.

The Corporation's obligations as public service broadcaster were set in regulations voted in 2003,<sup>1</sup> which provide for specific quota for information, culture and entertainment programmes. Thus, the broadcaster's public service remit is limited to a "balanced set of services", meaning at least 40% of television programming dedicated to information and 10% to cultural programmes, and a maximum of 50% of entertainment programmes. The respective quota for radio services are 25%, 5% and 70%. Regulations 4, 5 and 6 list the type of programmes that fall under each of the above categories.

The Press Law (*ο Περί Τύπου Νόμος*) L. 145/1989 sets no prerequisites for the publication of a newspaper or a magazine in the Republic other than the registration of the title with the Minister of the Interior.<sup>2</sup> With regard to ownership the law requires that the owner(s) of the publication be named on the registration form, or following a change in ownership, with their details; no details are asked to be communicated with respect to shareholding (if any) and no restrictions exist in relation to ownership concentrations, mergers or other changes.

- Media pluralism/ownership; competition law aspects

Ownership in the press sector is completely free of any rules or constraints. The only requirement of the law with respect to publishing a newspaper or a magazine (defined according to periodicity) is to register the title and name of the person (legal or natural) that owns it. Changes in ownership have to be reported by the new owner(s). The details of the owner(s) and the name of the person responsible under the law – in case a company is the owner - should be published on every issue on a page of the newspaper or magazine (Press Law, articles 9, 11, 13).

In the case of the electronic media, following the incorporation of provisions of the AVMS Directive into Cyprus law, its coverage is no more radio or television stations alone but radio and television organisations and AVMS providers.

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<sup>1</sup> Normative Administrative Acts, KDP 616/2003, Official Gazette, 25.7.2003.

<sup>2</sup> The procedure goes through the Press and Information Office, the government's publicity services.

Ownership issues are thoroughly examined during the licensing procedure. Information about shareholders, shares, and funding sources (loans etc) must be provided in the application, including a declaration under oath by every shareholder as to shares owned and kinship relations. Several provisions in article 19 of the law on Radio Television Stations L.7(I)/1998 aim at limiting both horizontal and vertical ownership concentrations in the media sector. The main objectives are to:

- Limit direct or indirect interests/control in a licensee's share capital to a ceiling of 25%, except in the case of a radio organisation with local coverage, where the ceiling is 40%, and a radio organisation with small local coverage, where no ceiling is required;
- Apply the ceiling to both legal and natural persons, including relatives up to second degree or husband and wife and to companies linked as affiliated or else;
- Further breaking down to a ceiling of 10% shareholding in companies that hold shares in a licensee;
- Limit participation in decision making bodies of the licensed organisation and companies holding shares in its capital, in a way that the same persons do not participate in more than one media;
- Ensure that no license is transferred to persons other than those that were granted it;
- Ensure transparency in shareholding, where *if company B holds shares in a company A, where company A is a shareholder in a Licensed company L, then company B can have only natural persons as shareholders, and;*
- Ensure that no changes in shareholding, decision making officials or the memorandum of association of the licensee take place without the Authority's prior approval.

The only exception in requiring the Authority's prior approval for transfers of shares is for broadcasting organisations listed in the stock market; the Authority's approval is required only in cases where the transfer results in one's shares go beyond or below a threshold of 5% of the licensee's share capital.

No one can have more than a television license and no one can have more than a radio license (article 18) which means that a person can own one radio and one television organisation. Networking between channels is prohibited.

Foreign, meaning non-EU, ownership is possible only to a ceiling of 5% per person, with a maximum foreign ownership set to 25%. In both cases the approval of the council of ministers is required.

With regard to cross media ownership, a company cannot be granted a licence for radio or television if its shareholders hold shares of more than 5% in a publishing house, newspaper or magazine or more than 5% in a radio or in a television organisation with national coverage.

Similarly, no company is granted a radio organisation licence if it owns or controls in any way more than 5% shares in a publishing house, newspaper or magazine or more than 5% in a television organisation with national coverage. A television license is not granted

to a company whose shareholders own or control in any way more than 5% in a publishing house, or newspaper or a magazine.

One of the main problems is to ascertain the beneficial owners of shares, which prompted the Authority to take measures, such as interviews with the interested persons and other, before proceeding to granting a licence.

With no provision made for the media sector in the relevant laws, it is up to the Commission for the Protection of Competition to examine a case with regard to the general competition and mergers rules. A prominent case in this respect emerged in 2004, when the Commission found that exclusivity rights granted by *Κυπριακή Ομοσπονδία Ποδοσφαίρου* [Cyprus Football Federation – KOP) to pay-TV channel LTV for television transmission of football matches breached the competition laws. The Commission consequently granted the two partners individual exemption. This meant for LTV continuing to have exclusivity rights on football transmissions until 2011. Recourse to the Supreme Court by ANTENNA television channel and CYTA, provider of IP TV MiVision led to the Court cancelling the Commission's decision in 2007 and giving football clubs the right to individually negotiate the rights for televised transmission of their football matches. The market of sports television rights is now fully open to competition with more players, albeit with viewers needing a multiplicity of subscriptions in order to watch sports.<sup>3</sup>

The Competition Commission has little to do on the general issue of company mergers; given that no change in licensed companies/organisations can take place without prior approval by the Radio Television Authority, it is likely that no such issue can come before the Commission; it has to be resolved in compliance with the Law on Radio and Television Stations 7(I)/1998. The Competition Commission, however, can have a role on agreements of cooperation/alliance with others, in particular on content and exclusive rights. Thus, among others, in February 2012 it started an investigation on an agreement offering CYTA exclusive rights on the programme of NOVA Greece; the case was forwarded to them by the Commissioner of Electronic Communications and Postal Regulation because "*the law does not give the Commissioner authority to examine issues of content or exclusive television rights*".<sup>4</sup>

In sum, the operation of cable and satellite services providers in a legal vacuum allows them to compete with broadcasters from a privileged position; offering tens of different channels, these operators offer also internet services and telephony along with cellular telephony. They have a clear advantage over the broadcasters.

- Legal framework for psm; ability to fulfill their tasks

The law governing the operation of the public broadcaster (RIK) is *Ο περί Ραδιοφωνικού Ιδρύματος Κύπρου Νόμος* (The Cyprus Broadcasting Corporation Law), which incorporates in Cap. 300A also the main provisions of the AVMS Directive. According to Article 16A, voted with the amending Law on Cyprus Broadcasting Corporation L. 116(I)/2003, RIK was designated as the provider of public broadcasting services, while in art. 16B the Radio Television Authority was named as the quality supervisory body that would report yearly on RIK's fulfilment of its mission.

<sup>3</sup> See, Christophorou C. 'Cyprus' in Blackshaw, I. et al. (eds), *TV Rights and Sport, Legal Aspects*, TMC Asser Press, Hague, 2009: 299-308, and [merlin.obs.coe.int/iris/2011/9/article10.en.html](http://merlin.obs.coe.int/iris/2011/9/article10.en.html).

<sup>4</sup> CYTA is the Telecommunications Authority, which has not yet been privatised and keeps a dominant position in the market of telecommunications, offering also Internet services and IP television. See, [http://www.ocecpr.org.cy/media/documents/Announcements/ElectronicCom/EC\\_Announc\\_Demosieuma\\_P\\_hilefterou\\_Gr\\_30-01-2012\\_PM.doc](http://www.ocecpr.org.cy/media/documents/Announcements/ElectronicCom/EC_Announc_Demosieuma_P_hilefterou_Gr_30-01-2012_PM.doc).

The public service broadcaster RIK is funded through an annual state grant, while at the same time it is allowed to have advertising and undertake other commercial activities. State grants replaced the old system of a special fee paid by each household, indexed later on electricity bills. Income from the State grant and advertising in recent years was as follows:

**Table 16 CY: State grant and income from advertising**

Revenue of the public service broadcaster RIK						
Income	2006	2007	2008	2009	2010	2011
State Subsidy	25,279,575	25,893,558	30,886,007	31,914,610	43,137,050	40,000,000
Advertising	4,064,195	4,796,283	5,862,580	5,121,518	4,577,276	n.a.

Source: Annual reports of the Cyprus Broadcasting Corporation.

- The role and functioning of regulatory authorities in these respects

The law on Radio and Television Stations 7(I)/1998 provides for extensive powers to the Cyprus Radio Television Authority in all aspects and in a way to ensure its independence and efficient exercise of its powers. Its jurisdiction extends also to some degree to the public broadcaster, the Cyprus Broadcasting Corporation, even though it is governed by a different law and a body of governors. The Authority oversees in particular issues of content, in particular those provisions incorporating the AVMS Directive, and the fulfilment of the Corporation's remit as a public service body. However, with the amending Law<sup>5</sup> transposing the AVMSD, supervision on content causing feelings of hatred based on race or other, and the need for protection of minors was omitted from the Authority's powers.

The powers invested in the Authority with regard to commercial providers, as well as to the public service broadcaster, are extensive and all its decisions are executable irrespective of any recourse to the courts. Judicial review exercised by the Supreme Court is the only means through which the Authority's decisions can be cancelled. The Authority can also refer a case to a court asking the issuance of an order or a prohibition, including a provisional order so that an end is put to a breach.

Delays in the examination and decision-making is the main backdrop with regard to the regulator's performance that may affect efficient enforcement of the law.

In the case of the governing body of the public broadcaster RIK, the chairman and members are appointed by the council of ministers for three years. The law sets no incompatibility with holding an office in a political party; the chairman of the present board of governors is member of the central committee of a political party and several members of the board hold high positions in political parties. This, and incidents of interference/pressures by political forces and politicians pose a problem as to the potential of the board to enforce its authority and to achieving real independence of the public broadcaster.

<sup>5</sup> Law on Cyprus Broadcasting Corporation, L. 117(I)/2010, Official Gazette, 10.12.2010, p.1019.

- “Pursuit of Core Activity”
  - Ordinary law safeguards for journalistic activity

The only legal instrument that warrants the right to access to information, albeit by media only, and the obligation of authorities to offer access to requested information is the Press Law (ο Περί Τύπου Νόμος) L. 145/1989; article 7 provides for the right of journalists to seek, receive and impart information, restricted on grounds of state security, public order, protection of individual rights and other.

The definition of “journalist” in the law is broad as to cover all media professionals, both Cypriots and aliens, not only those in printed media or with editorial tasks alone.

In contradiction to the above, a provision in the law on Public Service (*Ο περί Δημόσιας Υπηρεσίας Νόμος*) L. 1/1990 stipulates that all kind of information a public employee comes across in the exercise of his/her duties must be treated as confidential; it can be communicated to third parties only following authorisation by the competent authority, i.e. the minister as specified in the law.

This often raises complaints on behalf of media professionals, while at the same time it is used by some officials as a way to expressly 'punish' media showing thus their discontent for their stance.

In the same law, art. 9 provides for the right not to disclose one's sources of information, except following decision by courts or a criminal investigator related to a criminal case and for reasons of a superior public interest.

Libel and defamation was decriminalised in 2003 and is now a civil law issue;<sup>6</sup> however media professionals express grave concerns over provisions allowing court orders (provisionally) prohibiting publication on a subject.<sup>7</sup> Libel cases against media is a fairly frequent phenomenon.

In addition to the above, the Law on the Retention of Telecommunications Data for the Investigation into Criminal Offences, L.183(I)2007, was found by the Supreme Court to be in breach of art. 17 of the Constitution on secrecy of communication and also go beyond the scope and goals of the Directive 2006/24/EC on data retention.<sup>8</sup> The Court did not take into account the sixth amendment of the Constitution voted in the meantime (June 2010) that allowed interference with the right to secrecy of communication in specific cases.

In May 2010, the police proceeded to the seizure of computers for personal and professional use of a young lawyer in the framework of an investigation of threats published in a blog suspected to be managed by him. It appears that seizure of computers in the framework of police investigations for suspected offences constitutes a regular practice, which raises concerns for interference with the right to secrecy of communication.

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<sup>6</sup> See [www.apostoloulaw.com/pdf\\_Defamation\\_Article.pdf](http://www.apostoloulaw.com/pdf_Defamation_Article.pdf); for more details see [www.osce.org/fom/41958](http://www.osce.org/fom/41958), pp. 45-47.

<sup>7</sup> See *Phileleftheros* newspaper, 21/02/2009, p. 3, where legal experts, politicians and others express their views following a similar order against the newspaper.

<sup>8</sup> See <http://merlin.obs.coe.int/iris/2011/4/article14.en.html>.

- Specific positive content obligations

The law contains no provision on specific positive content obligations.

- Funding schemes for specifically desired content

No funding schemes exist for specially desired content.

- Political advertising and/or broadcasting time

In accordance with article 45(1) of the law on Radio and Television Stations 7(I)/1998, which stipulates that various social agents, such as political parties and candidates to official offices, trade unions and others must enjoy fair treatment by broadcasters, regulations voted in April 2006<sup>9</sup> set the parameters that would define fairness (proportionality, presence in parliament and overall organisation). A new amendment of the law, in 2009, extended these provisions to cover elections to the European Parliament. Following Supreme Court decisions in October 2002 and September 2005, declaring a regulation banning political advertising as *ultra vires* of the law, amendments of the broadcasting laws were voted in January 2003 and April 2006 allowing political advertising and setting the parameters (time ceiling) for its screening on commercial and the public broadcaster.<sup>10</sup> The latter offers also free airtime to parties and candidates for presenting their electoral programme.

In their daily schedule, all broadcasters include current affairs programmes, with access mostly if not almost exclusively offered to political parties and the government.<sup>11</sup>

- Codes of conduct and their organisational framing

Article 3 of the Press Law L. 145/1989 provided for the establishment of a Press Council that would ensure the freedoms and independence of the Press, would defend its rights and ensure respect for professional ethics, according to codes of conduct it would issue. The short-lived Press Council never had an efficient operation due to the refusal of media professionals to accept the inclusion in the Council of members nominated by political parties; this was considered as political interference with media freedoms.

Large parts of the Law, therefore, remain inoperative since the first years of its implementation; the functions assigned to these bodies by the Law are exercised by the authorities.

Regulation 20(2) of the Regulations on Radio and Television Stations, KDP 10/2000 requires from the broadcasters the setting-up of internal ethics commissions, responsible for maintaining a high standard of programmes, organise seminars on ethical issues for their personnel and report to the Authority at least three times per year. It is not known to what extent this is enforced.

Media professionals, namely the Union of Journalists, the Association of Publishers and the owners of broadcasting media, established in 1997 their own self-regulatory body, the Cyprus Media Complaints Commission [*Επιτροπή Δημοσιογραφικής Δεοντολογίας* –

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<sup>9</sup> Normative Administrative Acts, KDP. 193/2006, Official Gazette, 28.4.2006.

<sup>10</sup> Amending laws, L.24(I)/2003, Official gazette 31.01.2003, L.85(I)2006 on Radio and Television Stations and L.83(I)/2006 on Radio Broadcasting Corporation, Official Gazette, 20.04.2006.

<sup>11</sup> On the quality of newspapers and television coverage of politics and the Cyprus Issue, see, Christophorou, Christophoros; Sanem Sahin & Synthia Pavlou, 2010. *Media Narratives, Politics and the Cyprus Problem*, PRIO Report 1. Nicosia ISBN: 978-82-7288-323-1, online at <http://www.prio.no/upload/Media%20Narratives,%20Politics%20and%20the%20Cyprus%20Problem.pdf>.



CMCC] and their Code of Journalistic Ethics [*Κώδικας Δημοσιογραφικής Δεοντολογίας*].<sup>12</sup> RIK, the public broadcaster, joined them later. In respect of the code of ethics, the law on broadcasting L.7(I)/1998 provided that the Radio Television Authority would examine cases of journalistic ethics only after a request by the CMCC. Following the incorporation of the Code as Appendix VIII of the Regulations (Normative Administrative Acts KDP 10/2000) on Radio Television Stations, in 2000, the Radio Television Authority examined various cases related to breaches of the Code. The court decision pointed at the requirements of the Law with re to the examination of issues pertaining to the Code of Ethics forcing the Authority to abide by the ruling. In any case the CMCC and the Union of Journalists have repeatedly made it clear that they do not wish state authorities to get involved in media ethical issues. During 2011, some parliamentarians and the Radio Television Authority promoted the idea of amending the law in order to enable the Authority to examine breaches related to the Code of Conduct. This has not materialised so far.

The Code includes the basic rules and principles related to the exercise of the profession, the seeking of information, respect for the truth, the rights of children, of persons in grief, and other issues.

The CMCC which is chaired by a former judge and minister, includes nine persons representing media professionals and three non media personalities; it has so far issued a number of decisions following complaints by people or initiated by the Commission, but its only weapon other than its moral authority, is the obligation of the concerned media to publish its verdict. This is not always respected. No regular activity report is published by CMCC.

Fifteen years after the Code was signed, activities such as public or media internal seminars for educating journalists in professional standards set in the Code, have almost never taken place; under these conditions, one may wonder about the exact number of media professionals that are aware of the existence of the Code and its content.

- The role and functioning of regulatory authorities in these respects

The Authority's chairman, who is the only member of the regulator to serve as a full-time executive, and the members of the Authority are nominated by the council of ministers for a term of office of six years. The chairman's appointment can be renewed only once; his post as well as those of the members are incompatible with having direct or indirect interests in an AVMS provider/organisation or RIK (the public broadcaster), or holding a post or an office in a political party. No provision is made for the case of having interests in other businesses of the media/audiovisual sector.

The Authority's activity focuses almost exclusively on monitoring and imposing sanctions, drastically limiting its regulatory remit. Efficiency of its work is affected by long delays in decision making, due to lengthy procedures of examination of cases imposed by law and the very large number of cases to examine. One may also note that media experience and expertise outside the public broadcaster started developing only after the 1990s.

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<sup>12</sup> [http://www.cmcc.org.cy/code\\_pradice2.html](http://www.cmcc.org.cy/code_pradice2.html).



- Distribution Aspects
  - Access to frequencies

The management of the spectrum lies with the authority of the Department of Electronic Communications of the Ministry of Communications and Works. The attribution of frequencies is done with the granting of the broadcasting licence on the basis of a plan that is designed by the DEC in cooperation with the Radio Television Authority. When frequencies are available, interested parties are invited by the Radio Television Authority to submit an application, which is evaluated in accordance to specific criteria set in the Law on Radio Television Stations L. 7(I)/1998 and Regulations. Pluralism, the skills and qualifications of the personnel, the quality of the installations and equipment and other considerations are taken into account.

The public service broadcaster manages its own frequencies and it is not subject to the above system.

- Access to distribution networks and control of actual conditions

The contracts and the terms for carrying the channels' programmes had to comply with a framework set by the Office of the Commissioner for Electronic Communications and Postal Regulation (OCECPR).

With regard to the distribution of newspapers and magazines, art. 16 of the Press Law L.145/1989 stipulates that this can be done either by the publisher or by a press distribution agency. Press distribution agencies and sub-agencies are required to have a licence from the Minister of the Interior, granted following the advice of the Press Authority. However this Authority has almost never functioned.

Articles 20 to 22 of the Law stipulate that press distributor agencies, sub-agencies, kiosks and newspaper distributors have the obligation to distribute without discrimination newspapers and magazines; article 23 provides that offenders or any one obstructing the free circulation of newspapers is liable to a fine up to 8,500 Euros.

- Must-carry/must-offer rules for electronic media

Following the switch-over to digital television, the only commercial platform operator, Velister Ltd, has the obligation to carry the signal of all licensed TV (and radio) channels on the basis of contracts signed with them.

- Role of platform operators

According to statements by the licensee (see <http://www.velister.com.cy>) its network would cover more than 95% of the population.

- The role and functioning of regulatory authorities in these respects

The Radio Television Authority is granting frequencies with the broadcasting licence on the basis of a distribution scheme designed by the Department of Electronic Communications of the Ministry of Communications and Works and a frequencies plan they designed together. The two bodies are in close cooperation as the DEC is responsible for monitoring and verifying compliance with technical issues, connected with equipment standards and specifications, installations and others. Decisions and sanctions can only be taken by the Authority.

With regard to networks, the main tasks lie with the authority of the OCECPR who regulates and sets the parameters of operation of the networks and terms and conditions that govern the relations between broadcasters and network operator. A close cooperation between the above three authorities is required, each one being responsible for specific areas.

The basic terms and conditions, and level of fees set in the agreements are determined in a general framework decided by the Commissioner of Electronic Communications and Postal Regulation (OCECPR).

- Access to Information
  - Transparency of media ownership situations

Article 20 of the Law on Radio and Television Stations L. 7(I)/1998 requires the publication in two dailies of the names of persons that own more than 5% of a licensee's share capital, in January every year or one month following a change in shareholding.

The Radio and Television Authority is required by the Law L. 7(I)/1998 to draft a report on pluralism and ownership every three years and submit it to the Council of Ministers and to the Parliament. The report includes the number of shareholders in each licensee, but crucial data, such as names and size of shares, are missing. This does not allow full transparency and the public to know who really owns or controls the media. Such an information can be requested from the Registrar of Companies as defined in the Company Law Ch. 113, upon payment of an access fee.

The case of the media ownership data is indicative of paradoxical approaches and passivity: while detailed data on shares and shareholders are by law deposited to the Radio Television Authority, while broadcasters shall and do publish the names of shareholders having more than 5% of their capital, this information does not appear in the report on pluralism submitted by the Authority to the Council of Ministers and to the House of Representatives. The fact that this information is missing from all reports submitted to this day might mean that it has never been requested.

- Accountability of public service media

The public service broadcaster RIK is supervised by the Radio Television Authority with regard to content and its PSB remit. The Authority's annual report is sent to the Minister of Interior. The finances of the broadcaster and in particular with respect to what falls under the chapter 'public grants' are audited by the Auditor General of the Republic. The Auditor's comments and observations are published in his annual report, submitted to the President of the Republic that shall laid it to the House of Representatives.

The House of Representatives exercises also control through the vote of the budget of the PSB.

- Freedom of information laws

On the general issue of citizens' right to access to information, a study conducted in 2011 revealed a variety of problems. One of the recommendations of the study is for authorities to set a clear legal framework, because *"In the absence of a clearly defined*

*legal framework, public officials from both sides of the island are reluctant to publish information or respond to requests for fear of sanctions from superiors.*<sup>13</sup>

- Accessibility of products/services and distribution networks

The law contains no access restrictions or satellite installation obstacles for the citizens and stipulates no fee to be paid to the state.

No exemptions are provided to broadcasting license fee and no subsidies exist for subscription to print media or other. However, media equipment (presses, broadcasting material, journalist material, computers, cars etc) are purchased tax-free.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

Decisions and actions by public bodies except decisions by the Council of Ministers can be the object of a complaint to the Ombudsman. However, decisions on such complaints, circumstantial as they might be, even though useful cannot remedy for the many difficulties encounter by citizens in search of information held by public bodies /authorities.

- Participation in media operators/(self-)regulatory bodies

There is no tradition of viewers' and listeners' councils participating in bodies of media operators. The only bodies in which private persons or representatives participate are the Advisory Committee of the Radio Television Authority and the Cyprus Media Complaints Commission, the self regulatory body of media professionals. The Advisory Committee of the RTA has never been fully constituted – even functioning yet, due to gaps or vagueness of the Law 7(I)/1998. With regard to the CCMC, which is/should be composed by nine members representing the media professionals and owners and three private persons, no public record is available to confirm or indicate whether private individuals are participating.

#### 2.2.4.2. Main Players in the Media Landscape

As already noted, the report will cover the state of regulation and media in the areas under the effective control of the government of the Republic of Cyprus.

The expansion of cable and satellite as from 2004 and the switch-over to digital in July 2011 are the milestones that brought significant changes to the audiovisual media landscape. On the other hand, we are witnessing tendencies for the development of media conglomerates; vertical media ownership has expanded, while the importance attributed by media owners to Internet opportunities has grown.

The main media organisations are the following:

- DIAS Publishing company owns or is affiliated to *Sigma* and *Sigma Sports 1 & 2* television channels, *Radio Proto*, *Super FM*, *Sport & Star FM* radio channels, Newspapers *Simerini* (daily) and *City Free Press*, more than a dozen weekly, monthly and specialised magazines, and one news and one business magazine internet portals.

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<sup>13</sup> [http://www.accessinfocypus.eu/images/access-info/final\\_report/](http://www.accessinfocypus.eu/images/access-info/final_report/).

- Phileleftheros Public Company, owns or is affiliated with, Newspapers *O Phileleftheros* (daily) and *Cyprus Weekly* (English language weekly).
- *Sfera* and *Kiss FM* radio channels, More than a dozen weekly, monthly and specialised magazines, News, sports and general interest Internet portals, and *Proteas* printers.
- *Arktinos Publishers Ltd*, owns or is affiliated with, Newspaper *Politis*, (daily), 2-3 magazines, and 107.6 FM radio channel.
- Alfamedia Services Ltd owns or is affiliated with *Alitheia* (daily), and *SuperSport FM* and *Dromos* radio channels.

#### 2.2.4.2.1. Radio

Radio has presented little change in recent years, with the attachment/affiliation of some channels to newspaper organisations being the most important. The public service broadcaster *Ραδιοφωνικό Ίδρυμα Κύπρου* [Cyprus Broadcasting Corporation – RIK] created in 2006 its 4<sup>th</sup> Programme, bringing their total radio channels to four. There are also ten commercial channels with nation-wide coverage, among which a couple of music and one sports channel.<sup>14</sup> In the absence of any official audit services, one should be cautious with regard to ratings and audience data. However, the channels RIK Trito and radio *Proto* have the higher share among news and current affairs stations, while music channels *Super FM* and *Sfera* are the thematic most popular channels, attracting mostly young audiences.

In addition to the above, another 36 local and 6 with limited local coverage radio stations operate in the small market of the Republic and a highly competitive environment. Thus, most of these stations have very low ratings and income and they offer mostly or only music.

#### 2.2.4.2.2. Television

The digital switch-over of 1 July 2011 modified the television landscape; no local coverage licences were attributed, which led to the disappearance of those who could not afford switching-over to digital. Thus all but one of the seven local channels and one pay-TV channel, ALPHA, terminated their programmes. Some saw new opportunities, so new channels were created by already existing or new organisations; *MADcy*, *NRG* and *MusicTV* enriched existing programmes with their thematic, mainly music, content; *Capital TV* turned from a local to a national coverage channel, while audiovisual media services networks and *LTV* pay-TV broadcaster created more or own channels for specialised programmes (sports and cinema).

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Draft\_Report\_and\_Recommendations\_for\_Consultation\_24\_Feb\_2011\_web.pdf.  
<sup>14</sup> Data from <http://www.crta.org.cy/default.asp?id=255>.

**Table 17 CY: Selective television yearly audience share since the previous report**

Channel	2005 %	2006 %	2007 %	2010 %	2011 %	30 Jan. - 5 Feb. 2012 %
RIK1	13.8	15.9	13.1	13.4	13.2	13.8
RIK2	6.1	6.9	5.3	6.3	3.8	2.2
MEGA	17.6	17.8	15.5	14.3	16.6	14.9
ANT1	19.7	18.5	22.0	20.7	17.4	15.5
SIGMA	23.5	21.3	18.8	21.3	20.8	20.7
PlusTV	--	--	1.6	4.1	3.8	3.7
ERT (Greece)	3.2	3.0	3.0	2.2	1.8	1.2
TOTAL viewership	<b>83.9</b>	<b>83.4</b>	<b>79.3</b>	<b>82.3</b>	<b>77.4</b>	<b>73.0</b>
Pay TV	In OthersCY	In OthersCY	In OthersCY	n.a.	2.8*	1.8
OthersCY	14.0	15.3	16.4	n.a.	8.9*	11.4
Rest (DVD+Others)	2.2	1.2	4.2	n.a.	14.0*	14.8
Viewers/Population	<b>66.2</b>	<b>66.8</b>	<b>68.1</b>	<b>65.9</b>	<b>59.7</b>	<b>n.a</b>

\* For December 2011

Compiled from data provided by AGB /Nielsen Cyprus

Two licences for the creation of digital networks were granted, to the public broadcaster RIK (Cyprus Broadcasting Corporation) and to *Velister Ltd*. The public broadcaster can use its license only for transmission of broadcasting content; RIK transmits the programme of its two channels, RIK1 and RIK2, of the public Greek broadcaster *ERT* and *Euronews*. The private *Velister Ltd* was created by the private broadcasters and the networks *Primetel* and *Cablenet*. It won a multiple round auction for obtaining a licence, in 2010, against *CYTA* (Cyprus Telecommunications Authority) and Greek company *LRG Enterprises Ltd* by offering 12 times the reserved price of 850,000 Euros. It carries the programmes of nine open-to-air channels and of pay-TV LTV, which offers a variety of channels. Licenses were also granted to *CytaVision* and *Primetel* networks for specialised channels.

In the new environment, the first results show that the overall ratings of the big broadcasters are declining to the benefit of newcomers and the AVMS networks who increase their subscriptions. The figures for 2011 provide averages for the pre- and post-digital world; the data for January 2012 showed the groups of *pay-TV*, *OthersCY* and *Rest* to reach 25-30% with *MadCY* getting a good share in the group *OthersCY*. *SIGMA* remained on top of the competition in 2011, with slight lower ratings, but *MEGA*, owned by the Church, run by *Teletypos*, the owners of *MEGA* Greece, was the only channel with net increase of more than two points.

Soap operas produced locally or originating in Greece are mostly among the top 25 every week.

### 2.2.4.2.3. *Press and Publishing*

The main features of the press and publishing sector since 2004 are the following:

- The increasing interest of newspapers publishers for radio and the Internet and the multiplication of magazines published or affiliated to newspapers (see above, the introduction to this section);
- The continued expansion of specialised newspapers and magazines, along with the shrinking of dailies;
- The multiplication of publications in languages other than Greek and English, addressing in particular groups coming from EU countries and Russia.

The number of dailies was reduced in 2010 to five in Greek and one in English language; daily *Μάχη* [Machi - Battle] turned to weekly, replacing its sibling *Θάρρος* [Tharros - Courage). Other changes, in the group of weeklies, were the publication of a Sunday Cyprus edition of Athens' *Καθημερινή* [Kathimerini -Daily], as of 2 November 2008 and the acquisition of the largest English language newspaper *Cyprus Weekly*<sup>15</sup> by the publishers of *Φιλελεύθερος* [Phileleftheros - Liberal), the largest Greek language daily.

Many specialised magazines are published in the Republic or have a Cyprus edition of their publication in Greece.

No circulation audit bureau has ever operated in Cyprus, which makes difficult to ascertain the exact circulation figures of newspapers and magazines, in particular those of subscriptions, distributed for free or bought by air transport- or other companies. The two main distribution agencies are *Kronos* and *Hellenic Press Agency*, affiliated with the English language daily *Cyprus Mail*, the oldest of the existing newspapers. They disclose no data to the public.

According to a readership survey covering summer 2011,<sup>16</sup> only 25.9% on average of the population over 13 years old read at least one newspaper in September 2011 during weekdays, 49.7% on Saturdays and 43.3% on Sundays. To these figures, one should add Internet reading<sup>17</sup> which was 12.7% (weekdays), 6.0% (Saturdays) and 4.2% (Sundays). Compared to September 2010, daily hard copy readership declined by three points.

First in circulation figures and readership remains by far *Phileleftheros*, with 16.2%, jumping to 35% on Saturdays and 24.2% on Sundays. It is followed by *Politis* and *Simerini* with 6.5% and 5.3%, which increase on weekends up to 8-10.7%. *Χαρavyή* [Charavgi - Dawn], the only party newspaper<sup>18</sup> – mouthpiece of Communist party AKEL (32.7% in May 2011) was read by 4.4%.

### 2.2.4.2.4. *Online media (non-linear audiovisual (media) services; websites)*

Network AVMS services developed after 2004 with *CYTA*, the public telecommunications provider, leading the way with *MyVision*, renamed later *CytaVision*. *NOVA* Cyprus, along with *Multichoice* were allied to *Lumiere TV (LTV)* offering terrestrial and satellite pay-TV up to 30 June 2011, when their contract of cooperation came to an end.

<sup>15</sup> Published every Friday, more than 15,000 copies.

<sup>16</sup> Published by *Gnora Communication Consultants*, [www.gnora.com](http://www.gnora.com).

<sup>17</sup> All dailies provided for free a pdf copy of their hard copy edition.

<sup>18</sup> Reference in the 2004 report to "many newspapers controlled by parties" is not true.

**Table 18 CY: Websites and company establishment/network operation**

CytaVision (miVision)	www.cytavision.com.cy	2004	2004
Cablenet	www.cablenet.com.cy	2003	2006
Primetel	www.primetel.com.cy	2003	2006
Velister Ltd (digital platform)	www.velister.com.cy	2009	2009

Data compiled by Christophoros Christophorou (2012)

**Table 19 CY: List of Cyprus media and websites**

Daily newspapers	Website	Owner	Founded
Philelefttheros	www.philenews.com	Philelefttheros Public Company Ltd	1955
Politis	www.politis-news.com	Arktinos Publishers	1999
Simerini	www.simerini.com	Dias Publishers	1976
Alithia	www.alithia.com.cy	Alfamedia Services Ltd	1952
Haravgi	www.haravgi.com.cy	Telegraphos Ltd	1956
Cyprus Mail (EN)	www.cyprus-mail.com	Cyprus Mail Ltd	1945
Weeklies			
Mahi	www.maxhnews.com	Atrotos Ltd	1960
Kathimerini	www.kathimerini.com.cy	Kathimerini Ltd (Eidikes Ekdoseis & Kathimerines Ekdoseis A.E. Greece)	2008
Cyprus Weekly (EN)	www.incyprus.com.cy	Philelefttheros Public Company Ltd	1979
Television			
RIK	www.cybc.com.cy	RIK (Public Law Company)	1953
ANT1	www.ant1.com.cy	Antenna Ltd	1993
Sigma	www.sigmatv.com	Dias Publishers	1995
Mega	www.megatv.com (Greece)	Mega & Logos Pliroforiaki Company	1992
TvPlus	n.a.	n.a	2006
LTV	www.ltv.com.cy	Lumiere TV Public Company	1993
Extra	www.extratv.com.cy	K.K.New Extra Ltd	1994
Capital	http://www.capital-tv.com	n.a.	2001
Energy (NRG)	www.nrg.com.cy	NRG TV Ltd	2011
Music TV		n.a	2011
MadCy	www.madtv.com.cy	Eidikes Ekdoseis MusicBox Entertainment LTD	2011

Source:

[http://www.moi.gov.cy/moi/pio/pio.nsf/mass\\_media\\_gr/mass\\_media\\_gr?OpenDocument](http://www.moi.gov.cy/moi/pio/pio.nsf/mass_media_gr/mass_media_gr?OpenDocument), accessed 10 June 2012.

#### 2.2.4.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers

There are in all three network services providers, *CYTA*, *Primetel* and *Cablenet*.

*Primetel* started offering *NOVA*'s services through its network until January 2012, when *CYTA* signed an agreement for exclusive rights on *NOVA*'s content of programmes.



**Table 20 CY: Network services providers offer the following:**

Provider	Telephony	Cellular (GSM)	Internet	IPTV	CableTV
CYTA	YES	Yes	YES	CytaVision	--
Primetel	YES	Yes	YES	PrimeHome	--
Cablenet	YES	--	YES	--	CableView

Compiled from information on the Service providers' websites.

CYTA continues to dominate the telecommunications sector with 92% for PSTN analogue telephony and 84% for broadband Internet connections.<sup>19</sup> It occupies also the largest part of the IPTV sector with 88.8%, with the rest 11.2% going to *Primetel*. The providers' share of 'triple service' broadband subscriptions (Internet, Telephony and IPTV-Cable TV), in June 2011 was *CYTA*: 58.9%, *Primetel*: 16.8% and *Cablenet*: 24.3%. According to the observatory of the OCECPR, three out of four new subscribers were choosing *Cablenet*.

The number of households connected to broadband networks passed from 33,799 in 2005 to 147,276 in 2008 and 186,650 in 2011, which is 66.4% of the total.

**2.2.4.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)**

In the audiovisual media services sector, the television public declined from 68.1% in 2007 to 59.7% in 2011, while the share of broadcasters with national coverage shrunk from 83.9% in 2005 to 77.4% in 2011. This can be attributed to the development of cable and IP TV services and the fact that some local broadcasters expanded their coverage to national after the digital switch-over. In 2012 there were clear signs that the overall share of those providers would reach almost 30% viewership.<sup>20</sup>

As shown in table below, television received 74.2% of the advertising expenditure in 2011, with its share clearly up from 68,9% in 2008. The sums shown are nominative (gross), based on the price-lists of advertising space and time in the media and advertisements published. The global economic crisis has also hit the advertising industry and the media, which meant a decline of expenditure/income respectively. Television was hit much less than the printed media, which appear to have lost 13% of their 2010 advertising income. However, in the absence of official audit bodies, one should be cautious both with numbers provided below and the validity of price-lists as a basis for estimating expenditure; it is clear that in times of crisis prices negotiated between the advertising sector parties can be over-discounted.

<sup>19</sup> All data in this section refer to the second quarter of 2011 and come from reports of the Office of the Commissioner for Electronic Communications and Postal Regulation. Accessed online on 10 February 2012, at: [http://www.ocecpr.org.cy/media/documents/General/EC\\_Doc\\_RevisedofTelecomBulletin2Q2011Broadband\\_GR\\_PK.doc](http://www.ocecpr.org.cy/media/documents/General/EC_Doc_RevisedofTelecomBulletin2Q2011Broadband_GR_PK.doc).

<sup>20</sup> Data provided by AGB and report in weekly *Καθημερινή*, 15.01.2012.

**Table 21 CY: Distribution of advertising expenditure in the media sector**

Nominative expenses of the advertising industry media								
TELEVISION - PRESS – RADIO 2008 -2011								
	2011		2010		2009		2008	
TV	299,730,200	74.2%	305,528,955	72.6%	277,874,049	70.8%	240,681,677	68.9%
Press	61,120,948	15.1%	70,205,971	16.7%	69,871,930	17.8%	68,195,095	19.5%
Radio	43,074,553	10.7%	45,159,102	10.7%	44,801,105	11.4%	40,519,887	11.6%
TOTAL (All)	403,925,701	100.00%	420,894,029	100.00%	392,547,085	100.00%	349,396,658	100.00%

Source Matrixmedia, online at [www.inbusiness.com.cy](http://www.inbusiness.com.cy) (accessed 10 April 2012).

The income from advertising is not proportional, as successful broadcasters receive a higher share compared to their audience share, while for others the situation is inverted: their advertising income is proportionally much smaller than their audience ratings. According to AGB-Nielsen, advertising revenue shared by the major open-to-air channels was as follows:

**Table 22 CY: Advertising income – Share of major broadcasters**

Broadcaster	2011
RIK1	6.7%
RIK2	1.5%
ANT1	25.1%
Sigma	38.7%
Mega	22.7%
TVPlus	5.4%

Source: AGB/Nielsen.

#### 2.2.4.3. Conclusion and Recommendations

Overall, the regulatory framework and media landscape warrant pluralism and freedom of expression with a plurality of media and pluralism of access within individual media. Constitutional provisions and the laws on public and commercial AVMS, along with the Press law offer the required guarantees. In specific sectors, an independent regulator with extensive powers, strict control on issues of ownership and ensuring editorial independence are the prominent features in commercial media; plurality of access is also warranted in all AVMS. Secrecy of sources and access by journalists to sources are also warranted in the Press law. However, there are in practice various constraints and issues of concern.

Main issues of concern and recommendations to remedy the situation are the following:

- The constitutional powers of the Attorney General, advisor of the executive, to seize newspapers or printed matter constitutes a threat to freedom of expression; the powers offered to courts to intervene within 72 hours may not offer sufficient remedy for such a censorship act. An amendment of the Constitution may be the answer to such threat, in a way that any censorship powers need a court decision.

- Following the sixth amendment of the Constitution in June 2010 and practices leading to interference with secrecy of communication and seizure of computers or access to the content of communication by police raise concerns of abuse and violation of fundamental rights. A law is needed that will enforce the provisions of the Constitution in order, among other, to make it clear that, in the absence of specific court order, the authorities can interfere only with the external characteristics of communication and not with the content.
- With regard to ownership, there is need for establishing transparency through the Press law for printed media; the Radio Television Authority should disclose ownership and shareholding information for the audiovisual media; the clear need for transparency so that every citizen is aware who owns and ultimately controls the media, as a major requirement for evaluating information they disseminate, can be met either by a decision by the Authority to make this kind of information public or through a specific provision in the relevant law.
- The media landscape and the public can benefit more from the regulator's extensive powers with substantial activity in regulatory issues which is missing and from speeding up decision making procedures for cases of breach of the laws. This is a matter depending solely on the Radio Television Authority's will to assume its regulatory role.
- The composition of the governing body of the public broadcaster RIK and the inclusion of party officials pose a real problem of authority; it is not easy for the board of directors to prove their independence from party/political influences and respond to the requirements of the public service broadcaster. The law must exclude party officials from the governing body and warrant the Corporation's real independence. Outside political interference and the lack of internal systematic monitoring or quality control within the institution, are also issues that have to be addressed in order to enable it to fully respond to its obligations. The failure to vote in time and cuts in the public service broadcaster's budget by opposition parties, on claims of not fair treatment of parties and other arguments underlines the dangers of political interference with RIK's and media affairs. Ensuring a really independent governing body and quality control can curtail any attempts against the independence of the Corporation by opposition parties.
- The definition of the public service broadcaster obligations in terms of simply programme quota must change and additional quality criteria must be established in order to better ensure a public service remit.

On general issues, media must extent access beyond political parties and allow the expression of a larger plurality of ideas in society ensuring in this way a broader role for the media. This opening should extent to the choice by media of those to whom access is offered and to media's policy to act as advocates of certain groups' opinions and ideas. Public dialogue should go beyond positions on the Cyprus Problem, to allow discussion of social and other issues. While the law warrants the above, the above should better be promulgated through proactive measures than law enforcement.

Connected to the latter issue are frequent criticisms by politicians and parties and legal measures taken against media or persons for libel and defamation; we observe an increase of court cases in recent years, in particular by state officials and politicians.

Self-regulation in the form of the Media Complaints Commission, an independent body that acts with reference to a Code of Ethics, is a positive example. However, its composition must include more people from the civil society, while powers for enforcement and sanctions should be part of its arsenal. Along with the above, regular reporting on its activities could strengthen its efficiency and authority.

There is a general need for all sides, authorities, social and political actors and the media, for fully understanding the importance of the role of media in a democratic society and respect for both freedom of expression and freedom of the media. Pressures or interference with media work and lack of tolerance should stop, while on the other hand, a systematic effort by media for training to raise the standards of awareness and the quality of their work is urgent.<sup>21</sup>

Opening airwaves and the media in general to more voices is also necessary, given, in particular, the fact that civil society in Cyprus and NGOs are weak.

*The courts of the Republic* interpret the laws with reference to the case-law of the European Court of Justice, the European Court of Human Rights and they eventually remedy for gaps in the Republic's law or conflicts with the clauses of the European Convention. However, the enjoyment of this kind of rights and freedoms must be self-evident and unhindered; no one must wait to ascertain and enjoy one's rights through years-long procedures before the courts.

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<sup>21</sup> At the time of finalising the report (June 2012), a draft law was sent to the House of Representatives by the government setting the conditions under which journalists should disclose their sources. This caused an outcry and the draft bill was withdrawn.

## CZECH REPUBLIC

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### 2.2.5. Czech Republic

#### 2.2.5.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.5.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The starting point is the right to freedom of expression and the right to information under Article 17 of the Declaration of Human Rights and Fundamental Freedoms – which is an integral part of the Czech Constitution: “Everyone has the right to express his views in speech, writing, printing, painting or otherwise, as well as the freedom to seek, receive and impart information and ideas regardless of frontiers”. Specific safeguards and rights for the media are not anchored in the Constitution.

The Czech Constitutional Court has heard a complaint from a broadcaster about a fine imposed on it for broadcasting a “Big Brother”-type reality show. The Broadcasting Council had decided that the broadcaster should pay a fine of CZK 200,000 for violating Article 32 of Law no. 231/2001, which prohibits broadcasters from broadcasting TV programmes that endanger the physical, spiritual or moral development of children, between 6 a.m. and 10 p.m. Some parts of the programme had contained scenes that harmed human dignity and interpersonal relations, as well as vulgar and bad language. After appeals against the Broadcasting Council’s decision had been rejected by the Prague Municipal Court and the Supreme Administrative Court, the broadcaster lodged an appeal with the Constitutional Court because it thought the decisions of the Broadcasting Council and the courts had infringed its fundamental rights. The Constitutional Court agreed with the administrative courts’ interpretation of the law. It also explained that the appellant had not been prosecuted for broadcasting the show, but because of the timing of the broadcast. The fact that the appellant disagreed with the courts’ conclusions did not mean that the complaint about infringement of the Constitution was well-founded and, in any case, did not represent a violation of its fundamental rights. Since the decisions of the courts could not be described as arbitrary, they did not infringe the appellant’s fundamental rights. The Constitutional Court therefore rejected the complaint.

On 25 November 2010, the Constitutional Court of the Czech Republic ruled on a case concerning freedom of expression in caricatures and noted that the freedom of expression was not limitless and that drawings showing naked politicians carrying out sex acts exceeded the admissible limit of satire and exaggeration. This decision represented victory for a former Czech minister in a legal dispute with the Czech magazine *Reflex*. The magazine’s publisher, Ringier, therefore lost its appeal to the Constitutional Court, in which it had claimed that it had suffered damage as a result of the courts’ order that it should apologise for the aforementioned caricatures. It had argued that its freedom of expression and artistic freedom had been violated. The dispute over the caricatures lasted nine years. In May 2001, a caricature had been published in the satirical comic strip *Green Raoul*, showing the then minister naked, engaging in sex acts with colleagues. The minister sued the magazine for damaging his reputation as a citizen and a minister and exceeding the limits of freedom of speech. The municipal court in Prague, the appeal court and the Supreme Court all decided that the magazine’s publisher should apologise. They rejected the defence’s argument that political satire and exaggeration of this kind were acceptable. The Supreme Court in Prague ruled that the images bordered

on pornography and seriously infringed the common rules of decency. The Senate of the Constitutional Court upheld the courts' arguments and rejected the magazine publisher's claims. The judges confirmed that, although politicians had to endure a high level of criticism, freedom of expression was not totally limitless. Even caricatures, which could go further than other works, had to respect certain boundaries in relation to the freedom of expression.

- Safeguards on regulatory authorities

The Czech Constitution does not hold any provisions relating to the status, remit and/or powers to be attributed to the supervisory authorities in the broadcasting and electronic communications sectors.

- Safeguards on "universal service"

Aspects of "universal service" in terms of either content to be offered by the/specific media or with regard to technical coverage and reachability of networks and services necessary for accessing information (via the media) are not dealt with by the Czech Constitution. Neither have the Constitutional Court or other jurisdictions adjudicated on this subject matter, e.g. in view of, and by interpreting, Art. 17 of the Declaration of Fundamental Rights and Freedoms.

#### 2.2.5.1.2. *Media order (de lege lata and de facto)*

- "Market Entry"

The competencies of the two main regulators of the broadcasting market, the Council for Radio and Television Broadcasting (hereinafter: Council) and the Czech Telecommunication Office (CTO), are enshrined in the Broadcasting Act<sup>1</sup> and the Electronic Communications Act.<sup>2</sup> The former regulates broadcast content and the latter deals mainly with managing the frequency spectrum. The Council is an administrative office, which performs state administration of radio and television broadcasting, retransmission and audiovisual media services on demand. It oversees the maintenance and development of a plurality of programming and information on radio and television broadcasting and retransmission, ensures the independence of its content, and performs other tasks stipulated by law and special regulations. The Council grants a license to operate radio and television broadcasts, performs registration of retransmission of radio and television broadcasts and holds files of operators of audiovisual media services on demand. It also monitors the content of these services and gives the penalties for breaking the law. The Council consists of 13 members, appointed and dismissed by the Prime Minister on a proposal from the Chamber of Deputies for a term of 6 years. The tasks associated with professional technical support activities are provided by the Office of the Council.

The CTO performs the regulation of electronic communications (infrastructure). The Authority is the administrator of the frequency spectrum. It determines the allocation of frequencies to operators of electronic communications in the field of radio and television broadcasting. It collaborates with the Council in the allocation of frequencies to operators of radio and television broadcasting and maintains a database of these frequencies and passes them to the Council.

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<sup>1</sup> Act No. 231/2001 on Radio and Television Broadcasting Operation and on amending other laws, *Sbírka zákonů*, 4 June 2001, further amended *inter alia* by Acts No. 274/2003, 341/2004, 501/2004, 626/2004, 82/2005, 127/2005, 348/2005, 235/2006, 160/2007, 296/2007, 304/2007, 47/2010.

<sup>2</sup> Act No. 127/2005 on Electronic Communications, *Sbírka zákonů*, 22 February 2005.

- Licensing schemes; remit psm; notification for print publications

The amendments by Acts No. 235/2006 Coll and No. 304/2007 Coll. to the Broadcasting Act brought major changes in the area of digital licensing, stripping the Council of decision-making power. According to the new provisions, the licensing tender and application procedures administered by the Council were dropped and replaced by a short application procedure almost identical with the application for the registration of cable and satellite broadcasters. Any party interested in airing digitally, whether via cable, satellite or terrestrially, will only be required to apply for a licence from the regulator. The Council will no longer organise contests for licences, instead receiving individual applications with information about the applicant's financial, organisational and technical readiness to start broadcasting, and an agreement with a cable or satellite provider to host its programme. The Council is obliged to interview the applicant within 30 days and can reject the application only if he or she is late in paying state taxes, has been imprisoned, or has already had a licence withdrawn for violating legal provisions on programming. In other words, the Council will have to grant licences to any party with the necessary financing and an agreement with a network operator. The amended legislation is a breakthrough that will liberalise the TV market in an unprecedented way and strengthen pluralism in broadcasting. The legislation marked the end of the "beauty contest era" in broadcasting, when the Council decided by itself who would be able to broadcast and who would not. The terrestrial frequency spectrum would continue to be limited, but there will be much more space on it. In total, the country will have up to seven nation-wide digital multiplexes able to host 70 individual channels. As now on cable and satellite, there will be virtually no limit to the number of programmes. On the other hand, the State will be able to withdraw licences in cases of breaches of legislation. There have been no changes in the Council's monitoring of compliance with licence conditions.

- Media pluralism/ownership; competition law aspects

An application for a license to broadcast must include information regarding the ownership structure of the applicant. If such a legal person is a joint-stock company, a precondition for obtaining a licence is that its shares are registered shares. Without the consent of the Council it is not possible to change the amount of capital, the manner of distribution of voting rights, the contribution of individual members (including the content specifications and financial evaluation of in-kind contributions), and a list of partners or shareholders. The Broadcasting Act contains provisions related to restrictions on media concentration; restrictions on the number of licenses of one operator and both the analogue and the digital broadcasting at national and local and regional level. Mergers and the mutual influence of operators of radio and television broadcasts are limited. The major ownership disputes have been settled and the ownership structures in broadcasting media are now more transparent than they were before. The bulk of the capital in the media, including broadcasting, is foreign. The 2006 amendments to the Broadcasting Act introduced provisions preventing cross-ownership between the operator of an electronic communications network (such as digital multiplexes or cable TV) and the holder of a broadcasting licence. More changes have been made by the Law No. 196/2009 Coll. These provisions were added to the Article 21 of the Broadcasting Law No. 231/2001 Coll.:

"(7) A licensed television broadcaster, which is a legal person, or a member within such a legal person, may transfer to third parties a share in the licensed television broadcaster company with prior consent of the Council. The consent may only be withheld if the plurality of information under Articles 55 and 56 would be limited.



The persons who were members in the legal person as of the date of issuance of the decision to grant the licence shall remain holders of at least 66% of the stock or 66% of the voting rights for the period of 5 years from the date on which the licence was granted.

- (8) With a prior consent of the Council, a legal person or a natural person who is a member of more than one legal person – licensed broadcaster – with a 100% ownership interest may transfer these legal persons, or some of them, into a single successor company by merger or amalgamation, the successor company becoming either a public limited company or a limited liability company.
- (9) A natural person who is a licensed broadcaster or a rebroadcaster may request that the licence or registration, which was awarded to it, be transferred to a legal person. The Council will grant the request only in the case that the natural person has a 100% ownership interest in such a legal person.
- (10) With a prior consent of the Council, a licensed radio broadcaster may retransmit the programme of another licensed broadcaster, including the identification of such a programme, provided that this does not lead to a change in the basic programme specification. A licensed broadcaster may not retransmit the programme or programme parts of a statutory broadcaster.”

In pursuance of the latest changes of legislation, it is worth to be mentioned that the Broadcasting Council approved the merger of several radio stations so that their number decreased.

- **Legal framework for psm**; ability to fulfill their tasks

Czech Television (ČT) and Czech Radio (ČRo) are operators of public service television and radio broadcasts. Czech Television provides a public service by creating and distributing television programmes or other multimedia content and services throughout the Czech Republic. Czech Radio is tasked with the production and broadcasting of radio programmes. ČT and ČRo were founded by separate laws that establish their personality and independence of the state. These laws defined the tasks of public services and the organization of these institutions.

**The head of each of the two institutions is the General Director, who is elected by the Council of ČT and by the Council of ČRo. The respective councils are elected by the Chamber of Deputies on a proposal from interest groups. The council is the authority which should secure the public exercises its right to control ČT and ČRo. They approve and control the budgets, oversee the fulfilment of the public service, and approve development plans.**

According to the Law on the Czech TV (Nr. 483/1991 Coll), the remit is defined more precisely in Article 2 as follows:(1) Czech Television shall provide public service by creating and distributing television programmes and prospectively also other multimedia content and supplemental services in the entire territory of the Czech Republic (hereinafter referred to as “public service in the television broadcasting area”).

- (2) The main tasks of public service in the television broadcasting area include, without being limited to:
  - a) provision of objective, verified and generally balanced and comprehensive information as may be needed for opinions to be freely formed,

- b) contributing to legal awareness among the citizens of the Czech Republic,
- c) creating and disseminating programmes and providing a well-balanced offer of programme units for all groups of population with respect to the freedom of their faith and conviction, culture, ethnic or national origin, national identity, social origin, age or gender so that the programme units reflect the diversity of opinions and political, religious and philosophical orientations and artistic trends, with a view to promoting mutual understanding and tolerance and supporting coherence of the plurality society.

Both broadcasters are financed primarily from radio and television fees paid by holders of radio and television receivers. Furthermore, both institutions broadcast a limited range of business communications and provide some additional business services. ČT also generates income from advertising and sponsorship, selling services and rights, teleshopping and programme production. Advertising on public television programmes remained only on ČT2 and ČT4. The proceeds from advertising on ČT2 are transferred to the State Fund of Culture, the means generated by advertisements broadcast on television are used by ČT4 to produce and broadcast programmes with sports themes. A special provision in the Electronic Communications Act tasked ČT to lead the process of digitisation, reserving Multiplex A for its exclusive use. ČT launched digital terrestrial broadcasting on Multiplex A, known also as the Public Service Multiplex, in all regions of the country. The latest amendments to the Czech Television Act entitled the broadcaster to operate at least two more TV channels on top of its two nationwide analogue channels, ČT1 and ČT2. ČT launched an all-news channel, ČT24, which airs digitally over terrestrial networks and via satellite, cable and internet. Then it launched ČT4 Sport, which is aired digitally, and via satellite and cable.

ČT was allowed to continue to broadcast commercials during the digital transition, in order to preserve some balance on the TV market. The extra income covered the development of terrestrial digital television broadcasting, digitisation of the station's archives and the development of Czech cinematography. The public service broadcaster ČT has distinguished itself more clearly as an alternative to commercial TV. It has continued to make a difference compared with its commercial peers, which are geared mostly to providing low-brow entertainment and blockbusters. There have been no major changes in ČT's output over recent years. It has continued its strategy of airing more elitist and cultural programming on its second channel, which targets a smaller, more high-brow audience. However, the first channel, which attracts a much bigger audience, also broadcasts a significant amount of public service programming. Drama and news occupy the largest proportion of the schedule, followed by documentaries, reportage and current affairs. The station does not specify in its reports the amount of programming devoted to minorities. The specific obligations on public service broadcasters, as defined mainly in the Czech Television Act and in the Czech Radio Act, have not changed over the past years. Commercial broadcasters continue to have no specific public service obligations imposed by legislation, such as requirements to air regional or minority programming. The amendments to the Czech Television Act did not change the governance of Czech public service broadcasting. MPs still control the appointment of Council members. Politicians still believe that Council membership should reflect the distribution of power in Parliament.

- The role and functioning of regulatory authorities in these respects

The Broadcasting Council does not control the fulfilling of the public service obligations, so that there is no control mechanism.

- “Pursuit of Core Activity”
  - Ordinary law safeguards for journalistic activity

Protection of the journalistic information source and content is regulated by the Broadcasting Act and by the Press Act<sup>3</sup>:

Any natural person or legal person who/which took part in obtaining or processing the information made public or to be made public in radio or television broadcasting or by the press shall have the right to deny disclosure of the origin of such information or the content thereof to the court or any other State authority or public administration authority. Any natural person or legal person who/which took part in obtaining or processing the information made public or to be made public in radio or television broadcasting shall have the right to deny submission or delivery, to a court or a State authority or public administration authority, of any items from which the origin or content of such information might be derived. The obligations laid down in a special legal regulation and requiring avoidance of any favouritism for offenders and to prevent or report criminal offence shall remain unaffected by the rights referred to above, and so shall remain, in relation to such obligations laid down in specific legislation, any obligations as may be prescribed in the penal proceedings.

By its decision of 30 October 2003, the High Court of Prague restricted the possibility of broadcasting a court hearing live. The decision was taken on the occasion of an appeal by five persons accused for the preparation of murdering a journalist who published several articles on a corruption case affecting the ministerial level. In the Czech Republic, live coverage or recordings by the media in courtrooms are allowed in principle. The coverage must be expressly permitted by the competent judicial authorities. Such reporting should be authorised only where it does not involve a serious risk of undue influence on victims, witnesses, parties to criminal proceedings or the judges. In the relevant case, a TV-studio was set up in the court building, from where lawyers and experts could comment on the proceedings. Inside the courtroom three cameras were installed and the fourth was placed in the entrance hall. Czech TV planned to invite guests into the studio to comment on the circumstances of the case and the personality of the defendants. The main accused approved the live reporting, but did not approve the commentary on the procedure. At the very beginning of the hearing, the magistrate of the Court ruled that the live transmission should be allowed. However, the solicitors of two other defendants did not approve the live transmission of the trial and asked that the question of broadcasting should be decided by the whole court and not by a magistrate only. The President of the Court pronounced the Court's decision that the right to a fair trial was - in this case - more important than the public's right to information. In the context of criminal proceedings, particularly those involving juries or lay judges, judicial authorities and police services should refrain from publicly providing information that involves a risk of substantial prejudice to the fairness of the proceedings. Respect for the principle of presumption of innocence is an integral part of the right to a fair trial. Accordingly, opinions and information relating to ongoing criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused. Where the defendants are able to show that the provision of information is highly likely to result, or has resulted, in a breach of the right to a fair trial, they have an effective legal remedy. The trial continued without live transmission. At the end, Czech TV was allowed to broadcast live only the public pronouncement of the judgment.

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<sup>3</sup> Tiskový zákon (Press Law) Nr. 46/2000 Coll.

- Specific positive content obligations

According to the Law No. 483/1991 Coll. (Law on the Czech TV), some specific content obligations are contained in Article 2 as follows:

"d) developing the cultural identity among the citizens of the Czech Republic, including members of national or ethnic minorities,

e) producing and broadcasting news and political/public programme units, documentaries, art, drama, sports, entertainment and educational programming, and programmes for minors."

- Funding schemes for specifically desired content

Some quality books and magazines are subsidised.

- **Political advertising and/or broadcasting time**

The Broadcasting Law states in Art. 48 as follows:

"(1) Broadcasters are not allowed to broadcast:

(e) political parties' and movements' commercial communications and those of independent candidates standing for the posts of deputies, senators or members of a municipal or local council or council of a higher-level self-government unit, unless otherwise provided in specific legislation,"

For elections to the Chamber of Deputies the political advertising is allowed during the period beginning 16 days and ending 48 hours before the election day. The candidates or the political parties, political movements and coalitions whose candidate list has been registered in the Czech Radio earmarked a total of 14 hours and also the Czech Television, a total of 14 hours, within their broadcast areas provided free airtime, divided equally to the candidate, the political parties, political movements and/or coalitions. The broadcasting time will be determined by lot. The candidates, the political parties, the political movements and coalitions have each full responsibility for the content of the political messages transmitted.

- Codes of conduct and their organisational framing

No changes in this sector worth to be mentioned since our last country report in 2004.

- The role and functioning of regulatory authorities in these respects

The Broadcasting Act provides in its Article 5:

"The Broadcasting Council shall:

x) cooperate within the range of its competence with Czech legal persons whose activities include self-regulation in any of the fields to which this Act or specific legislation apply, such self-regulation involving active participation of broadcasters, rebroadcasters or on-demand audiovisual media service providers (hereinafter referred to as "self-regulatory bodies"), provided that such cooperation is requested in writing by such a self-regulatory body, especially in developing effective self-regulatory systems and in implementing measures supporting media literacy; publish a list of the cooperating

self-regulatory bodies (hereinafter referred to as "list of self-regulatory bodies"), using methods that facilitate remote access, etc."

- Distribution Aspects
  - Access to frequencies

Article 4 of the Law on Czech TV recognises the special situation of the public service broadcaster in respect of access to frequencies:

"(2) The State body responsible for the administration of the frequency spectrum on the basis of a specific legal regulation shall co-operate with the Council for Radio and Television Broadcasting to reserve for Czech Television the radio frequencies that enable the operation of broadcasting within the range specified in Articles 3(1)(a) and 3(1)(b)."

Besides, the regulation governing the granting of rights of use of frequencies reserved for broadcasting services are laid out in licensing chapter.

- Access to distribution networks and control of actual conditions

Access to distribution services (radio, television, press) is generally free. For digital TV broadcasting there are sufficient capacities and therefore the procedure for obtaining a licence is of a merely formal nature. Only radio broadcasting in FM radio frequency bands remains submitted to a licence procedure with contest.

- Must-carry/must-offer rules for electronic media

The Council determines programmes and the services directly related thereto to be mandatory distributed in the public interest over electronic communications networks for radio and television broadcasting ("must-carry obligations"), review whether the mandatory distribution of such programmes is still necessary and submit to the CTO binding opinions in respect of the imposition or lifting of such mandatory distribution under specific legislation. When assessing whether there is public interest or whether public interest continues, the Council must in particular take into account the proportion of public interest programme units and own-produced programme units, the multimodal access to programme units that are broadcast for the hard of hearing and the visually impaired (sound descriptions, Czech sign language, subtitles with indication of the non-verbal part of the story, easy navigation) and the suitability of the broadcasters' programme for immediate notification.

- Access to Information
  - Transparency of media ownership situations

All the information regarding the owners of the broadcasters and their shares can be found in the Commercial register.

- **Accountability of public service media**

The Television (ČT) Council and the Radio (ČRo) Council are responsible to submit their annual activity reports to the Chamber of Deputies.

## - Freedom of information laws

The Law Nr. 106/1999 Coll., on Free Access to Information regulates the conditions of free access to information and provides the basic conditions of their provision. Obligation to provide information has all the **scope of the public authorities, regional authorities and public institutions managing public funds**. The information can be asked for by any natural or legal person. The Act provides, inter alia, the application requirements, the provision of information, limits to the right to information, the procedure for submitting and processing of written requests, appeals, payment of costs.

In a decision of 10 July 2006 on an application's admissibility, the European Court of Human Rights (ECtHR) has, for the first time, applied Article 10 of the Convention in a case where a request for access to administrative documents was refused by the authorities. The case concerns a refusal to grant an ecological NGO access to documents and plans regarding a nuclear power station in Temelin, Czech Republic. Although the Court is of the opinion that there has not been a breach of Article 10, it explicitly recognised that the refusal by the Czech authorities is to be considered as an interference with the right to receive information as guaranteed by Article 10 of the Convention. Hence, the refusal must meet the conditions set out in Article 10 para. 2. In the case of **Matky v. Czech Republic**, the Court refers to its traditional case law, emphasising that the freedom to receive information "aims largely at forbidding a State to prevent a person from receiving information which others would like to have or can consent to provide". The Court is also of the opinion that it is difficult to derive from Article 10 ECHR a general right to have access to administrative documents. The Court, however, recognises that the refusal to grant access to administrative documents, *in casu* relating to a nuclear power station, is to be considered as an interference in the applicant's right to receive information. Because the Czech authorities have reasoned in a pertinent and sufficient manner the refusal to grant access to the requested documents, the Court is of the opinion that there has been no breach of Article 10 para. 2 of the Convention in this case. The refusal was justified in the interest of protecting the rights of others (industrial secrets), national security (risk of terrorist attacks) and public health. The Court also emphasised that the request to have access to essentially technical information about the nuclear power station did not reflect a matter of public interest. For these reasons, it was obvious that there had not been an infringement of Article 10 ECHR, thus, the Court declared the application inadmissible.

The Ombudsman of the Czech Republic had asked the Constitutional Court to rule on the compatibility with the Constitution of the Decree implementing the **Secrecy Act**. It was claimed that the Decree would not be consistent with the constitutional law principles of legal certainty and the predictability of state action. The protection of classified information is organised on two levels in the Czech Republic: general regulations are set out in the Secrecy Act, which defines matters that should be kept secret as "matters which, if known to the public, could jeopardise the interests of the Czech Republic or interests which the Czech Republic is obliged to protect". In order to implement the Act, the government has to issue a Decree listing matters that must be kept secret. A list of 18 such matters was appended to the Decree that was subsequently issued. Of these, 17 refer to actual files, while the final one covers **"sensitive economic and security information linked to international relations"**. In the Ombudsman's view, such a general provision is open to abuse and arbitrariness on the part of the authorities, particularly in relation to the transmission of information to the media. The list of secret matters should be worded in precise terms. However, the Constitutional Court dismissed the Ombudsman's application on the grounds that if all secret matters had to be worded in

precise terms, the objectives of the Act could not be met.<sup>4</sup> Then, secret information might instead have to be revealed. Predictability and legal certainty, however, should not be considered absolute objectives. The Constitution also protects the legitimate interests of the Czech Republic, and the legislator had to take all of these elements into account. Furthermore, citizens already had sufficient legal protection against any abuse and arbitrariness in the way these provisions were applied.

- Accessibility of products/services and distribution networks

There are no obstacles to the access to products and services.

## 2.2.5.2. Main Players in the Media Landscape

### 2.2.5.2.1. *Radio*

**Table 23 CZ: Largest radio channels, weekly rating (WR) and daily rating (DR)**

Programme	Broadcaster	WR 2011	DR
Radio Impuls	Lagardere	2059	976
Evropa 2	Lagardere	1837	872
Frekvence 1	Lagardere	1813	897
Radio Blaník	MMS	1252	667
ČRo 1	Public CRo	1243	692

<http://www.radiotv.cz/poslechovost/>

<sup>4</sup> Ruling of the Constitutional Court of the Czech Republic, 23 February 2004, No. Pl. ÚS 31/03.



**Table 24 CZ: Terrestrial broadcasters**

2005	2007	2008	2009	2010	<i>Indicator</i>
70	79	76	78	57	<i>Radio broadcasting operators</i>
1	1	1	1	1	<i>By law (public)</i>
1	1	1	1	1	<i>With nationwide coverage</i>
69	78	75	77	6	<i>Based on licence</i>
7	7	7	7	7	<i>With nationwide coverage</i>
83	94	99	98	104	<i>Radio stations</i>
15	15	15	15	15	<i>Public</i>
68	79	84	83	89	<i>Private</i>
16	16	16	16	16	<i>With nationwide coverage</i>
4	4	4	4	4	<i>Public</i>
2	2	12	12	2	<i>Private</i>
67	78	83	82	88	<i>Without nationwide coverage</i>
11	11	11	11	11	<i>Public</i>
56	67	72	71	77	<i>Private</i>
1	1	1	1	1	<i>Radio stations having other target audience than Czech nationals</i>
1	1	1	1	1	<i>Public</i>

Source: Czech Statistical Office

All the broadcasters are operating terrestrially, some of them on the internet, or on cable too. Satellite broadcasting is an exemption. Terrestrial broadcasting is most important.

2.2.5.2.2. *Television***Table 25 CZ: Audience Share of TV (2010) %**

Station	%
TV Nova	32.9
CT 1	17.3
Prima TV 1	6.7
CT 2	5.7
CT 24	3.4
Nova Cinema	3.2
Prima Cool	2.4

Source: ATO - Association of TV Organizations

2.2.5.2.3. *Press and Publishing***Table 26 CZ: Daily press**

Title	No. of readers	No. of copies sold
Blesk	1 404 000	346 962
Mladá fronta DNES	791 000	221 223
Právo	415 000	121 014
Aha!	259 000	88 214
Sport	251 000	50 929
Lidové noviny	219 000	42 974
Hospodářské noviny	196 000	41 511

[http://www.reklamavnovinach.cz/naklady\\_deniku](http://www.reklamavnovinach.cz/naklady_deniku)

Blesk and Aha! are tabloids. There are slowly descendent trends in number of readers and sold copies.

2.2.5.2.4. *Online media (non-linear audiovisual (media) services; websites)***Table 27 CZ: Internet population**

Size of the internet population in the ČR	6 291 356
All visitors	7 999 529
visitors from the ČR	6 146 655
Number of visits	8 046 057 973
Number of visits from the ČR	7 530 179 597

[http://www.netmonitor.cz/sites/default/files/vvnetmon/2011\\_12\\_netmonitor\\_offline\\_report.xls](http://www.netmonitor.cz/sites/default/files/vvnetmon/2011_12_netmonitor_offline_report.xls)

**Table 28 CZ: Raking of the websites**

Portal	Number of visitors December 2011
Seznam.CZ	5 394 894
Centrum.cz	1 223 434
Idnes.cz	1 051 563
<b>News</b>	
Novinky.cz	3 494 457
Idnes.cz	1 498 734
Centrum.cz	1 115 583
<b>TV</b>	
Stream.cz	2 749 965
Ceskatelevize.cz	1 437 435
Nova.cz	847 386
Iprima.cz	795 231

This is from the website of the Association for Internet Publicity, which contains information about Internet attendance.

*2.2.5.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers*

In the Czech Republic there are about 100 cable broadcasting operators with more than 100 participants. Most of them are small enterprises broadcasting in a small city. The greatest players are UPC Czech Republic, Karneval, T- Mobile, Telephonica O2, Nej TV, a.s..

*2.2.5.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

The advertising industry has desperately needed more competition for years. The arrival of digitisation has shaken the dominant position enjoyed for years by TV Nova, which has grown used to imposing its own rules and tariffs on advertisers. MPs decided to help commercial broadcasters by reducing advertising on ČT and increasing the licence fee.

High demand for advertising slots has increased the price of advertising. This trend has been exacerbated by the overall fall in viewing time, which observers trace to a complex of reasons, including the lifestyle changes due to economic growth. At the same time, Czechs are dissatisfied with the limited TV offer, which also explains the scarcity of advertising space. The most attractive advertising slots, in prime time, are sold far in advance. The situation is worsened by the harsh limits on advertising on ČT and the low penetration of satellite and cable TV. Eager for a decrease in prices and to reach younger audiences, advertisers are increasingly drawn to other forms of communications and media such as the internet. The entrance of the new digital players is not expected to dent the pre-eminence of TV Nova and Prima TV in the short term. However, as the digital newcomers' footprint increases over the coming years, they are naturally expected to break the current quasi-monopoly in commercial.

**Table 29 CZ: Advertising revenues in Czech Crowns (26 CZK = 1 Euro)**

	January till November 2010	January till November 2011
<b>Television</b>	23,149,134.692	26,325,516.148
<b>Press</b>	19,904,502.503	17,884,428.640
<b>Internet (display)</b>	885,042.347	3,718,785.699
<b>Outdoor</b>	2,562,973.515	2,933,055.362
<b>Radio</b>	1,189,068.208	1,043,315.816
<b>Shops</b>	236,114.646	211,987.588
<b>Cinema</b>	207,492.102	155,156.800

Source: Czech Statistical Office

### 2.2.5.3. Conclusion and Recommendations

After a decade of legal wrangling, digitisation is finally finished. The positive side of the delays was that the unsuccessful applicants for digital licences, frustrated advertisers and broadcast media professionals, including journalists, instigated a fairly productive debate on digitisation, which reached the general public through the media themselves, including a number of news servers specialising in digitisation and new technologies. These heated discussions also led to legal changes that contributed to unblocking the digitisation process and opening the market to new players. More digital channels appeared during digital switchover in between 2008 and 2012.

The Government and Parliament should push forward legislative changes to increase the independence, sanctioning power and effectiveness of the Council turning it into a regulator that would be able to monitor the rapid changes in the broadcasting markets. The Council should, for example, be entitled to adopt by-laws for the sector. The Government and Parliament should ensure that the newly adopted, liberal licensing system will not endanger diversity and standards in the broadcasting markets. Yet, with a new procedure that makes licensing appear more like a mere formality, the Czech Republic has one of the most liberal licensing systems in Europe. It has yet to be seen how this will shape the media market and whether this system will bring more diversity. A lot of the regulation has been left to the market. The newly-adopted licensing system resembles the licensing of satellite and cable broadcasting. The change is likely to intensify competition in the broadcast market, which is something that advertisers have wanted to see happen for a long time.

The Government and Parliament should adopt legislative changes to guarantee the independence of the public service broadcaster. The Government should initiate changes in legislation to increase the TV and radio licence fee regularly and in line with the rate of inflation or the retail price index.

## DENMARK

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### 2.2.6. Denmark

#### 2.2.6.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.6.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The freedom of speech provision in section 77 of the Constitution<sup>1</sup> goes as follows: 'Any person shall be entitled to publish his thoughts in printing, in writing, and in speech, provided that he may be held liable in a court of justice. Censorship and other preventive measures shall never again be introduced.' The provision has been in force since the first Constitution of 5 June 1849, except that the word 'in writing, and in speech' was added in 1953 (as a minor part of a larger change).

The second subsection clearly prohibits censorship. Thus, legislation or other arrangement requiring approval before publication of expressions would clearly be unconstitutional. However, the ban on 'preventive measures' has not precluded preliminary measures such as interim injunctions or even seizures of pamphlets etc. by the police.<sup>2</sup> The first subsection makes it clear that any sanction towards unlawful expressions must be decided by the courts, i.e., the judiciary, and not the executive or the legislature for that matter.

For many years a distinction between 'formal' and 'substantive' freedom of speech prevailed. Formal freedom relates to formalities, such as prior acceptance, and substantive freedom relates to the content of the expressions. Section 77 fully protects the formal aspect, prohibiting prior procedures, but not the substantial aspect, leaving it for the legislature to decide subsequent sanctions for expressions. Thus, in principle any kind of expression can be sanctioned subsequently according to a parliamentary act. It is solely a political decision, not a legal decision. As a consequence, section 77 cannot play any part in e.g. libel, slander and privacy cases, which for many years were solved solely with reference to the statutes and their interpretation, not to the constitutional protection of freedom of speech.

The distinction between formal and substantive freedom of speech was generally accepted until the mid-1970s, where the courts (and the Parliamentary Ombudsman) started to include freedom of expression considerations when dealing with cases involving debate of public issues, not merely looking narrowly at the statute in question. Contemporary case law indicates firstly that section 77 of the Constitution (still) does not play any direct part in such cases (as the provision has never been explicitly mentioned), and secondly that the courts do take freedom of speech aspects into consideration when interpreting the statutes and deciding concrete cases.<sup>3</sup>

From around 1990 the courts start to take judgments from the ECtHR into consideration. This is before the ECHR was incorporated into Danish statutory law (which happened in 1992<sup>4</sup>), but after the first conviction of Denmark before the ECtHR (*Hauschildt v. Denmark*, 24 May 1989.). From this time on it has been impossible to isolate European

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<sup>1</sup> Act No 169/1953.

<sup>2</sup> U 1949.922 H.

<sup>3</sup> See inter alia U 77.872 V, U 80.1037 H and U 87.726 H.

<sup>4</sup> Cf. Consolidated Act 750/1998 with later amendments.

human rights from Danish national law, and section 77 of the Constitution still plays no part in the protection of freedom of speech, except for the works written by constitutional scholars.

There are no provisions in the Constitution relating directly to broadcasting issues or protection of the press or the media at large.

- Freedom to receive and to access information

There are no constitutional provisions relating to access to information from the executive.

#### 2.2.6.1.2. *Media order (de lege lata and de facto)*

- "Market Entry"
  - Licensing schemes; remit psm; notification for print publications

With regard to broadcasting, section 1 of the Broadcasting Act<sup>5</sup> provides the public service<sup>6</sup> undertakings Denmark's Radio (DR), the regional TV2 stations and the nationwide TV2 with a statutory right to provide programme services. An administrative license is thus unnecessary. Provision of programme services for other enterprises than the public service undertakings requires either a permission from or registration with the Radio and Television Board<sup>7</sup>.

The statutory right applies only to the public service activities. Programme services which fall outside of the public service activities require a permission or registration. A permission is only required if the programme services require access to scarce spectrum resources. Where permissions are required they are issued subject to a public tender. In other cases only a registration is required. Hence, providers of e.g. cable or satellite radio and TV as well as online services need only to be registered.

No notification requirements for print publications exist.

- Media pluralism/ownership; competition law aspects

There is no general regulation on media ownership under Danish law. Hence, no general ownership restrictions exist with respect to changes in ownership, neither *within* a specific media sector (television, radio, print, Internet, etc.) nor *between* different media sectors (cross ownership). There are no restrictions in *foreign* undertakings ownership in Danish media undertakings either.

This means that changes in the ownership of media undertakings are in general only subject to the general merger control rules in section 12 of the Danish Competition Act.<sup>8</sup> Pursuant hereto the merger control rules apply to mergers where *i)* the aggregate annual turnover in Denmark of all undertakings involved is more than DKK 900 million and the aggregate annual turnover in Denmark of each of at least two of the undertakings concerned is more than DKK 100 million; or *ii)* the aggregate annual turnover in Denmark of at least one of the undertakings involved is more than DKK 3.8 billion and

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<sup>5</sup> Consolidated Act No 988/2011.

<sup>6</sup> The Broadcasting Act section 10 stipulates that the public service institutions in their programme planning shall aim at 'quality, versatility and diversity'.

<sup>7</sup> Ibid, section 45.

<sup>8</sup> Consolidated Act No 972/2010.

the aggregate annual world-wide turnover of at least one of the other undertakings concerned is more than DKK 3.8 billion.

Mergers covered by the threshold rules must be notified to the Competition Council before the merger can be carried out. If the merger is assessed to create or strengthen a dominant position as a result of which effective competition would be significantly impeded, the Council can prohibit the merger. If the Council approves a merger, the Council may attach conditions and obligations to the approval.

The merger control rules, however, are primarily concerned with a transaction's effect on competition in the relevant market, not concerns regarding media pluralism or other media political or societal considerations.

The absence of general media ownership rules – and the reliance on general competition law – does not mean that considerations regarding media pluralism do not exist under Danish law. Several provisions scattered around in various acts and other regulatory measures intend to safeguard media pluralism. Considerations regarding media pluralism follow *inter alia* from the Act on Radio Frequencies<sup>9</sup> section 14(2), according to which the IT and Telecoms Agency, when issuing a frequency license, can impose conditions which restrict the supply of certain services if such restrictions are found to be necessary in fulfilling a common aim, including the promotion of media pluralism.

- Legal framework for psm; ability to fulfill their tasks

The public service institutions' (DR, TV2/Denmark and the regional TV2 companies) organisation, funding and tasks are regulated in the Broadcasting Act. Their obligations apply to both activities on radio and TV and online media. DR and the regional TV2 companies are financed via the public service license. TV2/Denmark is financed via advertisements and subscription fees. In general, the public service media are able to fulfill their tasks and perform well. The Radio and Television Board (an independent authority under the Ministry of Culture) oversees that the public service media fulfill their tasks.

- The role and functioning of regulatory authorities in these respects

See above regarding the Competition Council and the Radio and Television Board.

- "Pursuit of Core Activity"

- Ordinary law safeguards for journalistic activity

Limitations in freedom of speech are largely regulated by criminal law. The Penal Code<sup>10</sup> has provisions dealing with e.g. intrusion of privacy, dissemination of private information, defamation, libel, hate speech and blasphemy. These provisions also apply to the media. However, when dealing with cases involving the media the courts take into consideration the "information aspect" and weigh the opposing interests, on the one hand the interest to society of the information disseminated to the public, and on the other hand the public interest behind the provision limiting the freedom of information in the specific case. Moreover, the circle of persons who can be held liable when a media is violating the provisions of the Penal Code is regulated under the Media Liability Act.

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<sup>9</sup> Act No 475/2009.

<sup>10</sup> Consolidated Act No 1062/2011.



Journalists who work for a media covered by the Media Liability Act are entitled to protect their sources by exceptions to the duty of giving evidence in court, cf. the Administration of Justice Act<sup>11</sup> section 172, and protection against seizure, search and edition (the obligation to hand over documents to the court), cf. the Administration of Justice Act sections 804 and 807.<sup>12</sup> The protection also includes due considerations as to the importance of the protection of sources, not primarily as a privilege for journalists, but as a prerequisite for a free flow of information.

The Media Liability Act<sup>13</sup> applies to three groups, cf. section 1: (1) domestic periodicals; (2) DR and TV 2 and other stations with sending permissions (either authorization or registration); and (3) any other printed or electronic material (including online services) with news reporting characteristics. In order to be covered by the Media Liability Act, the last group must report itself to the Press Council, cf. section 8.

The Media Liability Act instigates a very special liability regime in order to protect the free flow of information. Roughly, the main idea is that there are two principal actors, the *wrongdoer*, i.e., the one who has actually made a racist remark or written a defaming statement, and the *editor* who may have done nothing except being the editor. As a point of departure, nobody else can be held liable, even though they have participated one way or the other. Thus, the speaker who reads out an unlawful statement, the newspaper vendors and the signal carriers are not liable even though they may have contributed to the unlawful act by disseminating unlawful expressions. Explicitly publishers or other owners of media are (with a few exceptions) not liable for the content of the media. Generally, the editor is liable for any anonymous content; i.e., not only anonymous articles or letters to the editor (which in practice are never anonymous), but also headlines etc.

Being included in the Media Liability Act is not only relevant for liability issues, but for a range of other questions:

The Press Council (see further below, 'codes of conduct'), which gives opinions in relation to ethics of journalism, has only authority to deal with media under the Act. Media that are not covered do not have to bother with the Press Council – but may have to face court proceedings as the alternative.

There is a special right for reply under the Media Liability Act under sections 36 to 40. Only media under the Act have this obligation.

The rules in the Administration of Justice Act regarding protection of sources, restrictions in search, seizure and obligations to produce documents etc. in court are all connected to the status as media under the Media Liability Act.

The media have special rights in relation to court cases. If the court is considering meetings in camera, any present media reporter has the right to protest, and if the court in fact does decide to proceed in camera, the media can appeal this decision – provided that the media comes under the Media Liability Act.

The media have special rights in relation to access to court material. The special rights are contingent on being covered by the Media Liability Act.

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<sup>11</sup> Consolidated Act No 1063/2011.

<sup>12</sup> Cf. U 2002.2503 H, U 2000.1005 Ø and 2009.75 Ø.

<sup>13</sup> Consolidated Act No 85/1998.

- Specific positive content obligations

Generally there are in the legislation no specific positive content obligations, but it is worth mentioning that the radio station Nova FM is obligated to have news and public affairs programmes.

- Funding schemes for specifically desired content

The daily newspapers are subsidized by the Danish state primarily in two ways: they receive direct support for the distribution costs and indirect support due to an exemption from paying Value Added Tax (VAT). All together, the business in 2007 received Danish Kroner (DKK) 1.3 billion (approximately EUR 175,000,000) on that account. Magazines do not qualify for the state subsidy measures (neither the distribution support nor the VAT exemption).

- Political advertising and/or broadcasting time

In relation to advertisements for political parties and views section 76 of the Broadcasting Act stipulates that advertisements for political parties, political movements and elected members or candidates for political assemblies are not allowed on television. Further, advertisements for political views and messages are not allowed on television during the period from the date on which an election for a political assembly or a referendum is called until the election or the referendum has been held. If the date of the election or the referendum is announced more than three months before it is held, the advertisement-free period comes into force three months before the election or referendum is held.

- Codes of conduct and their organisational framing

According to the Media Liability Act, section 34, the content and conduct of the mass media shall be in conformity with ethics of journalism. The legal norm "*ethics of journalism*" is based on set of Guiding Rules.<sup>14</sup> The Guiding Rules are, as the name indicates, not binding as a statute, but only guiding. However, the Press Council, who supervises section 34, often – and apparently increasingly in recent years – cites a guiding rule if applicable. Ethics of journalism, however, covers a larger area than the Guiding Rules, and the Press Council has set up its own case 'law' without backing in the rules, especially as regards the use of hidden camera.

The Press Council is funded by public means. It consists of 8 members appointed by the Minister of Justice and representing legal expertise, editors, journalists and members representing "the public opinion". The Press Council can only: (1) make decisions as to whether the media has acted in accordance with the ethics of journalism; (2) require the media to publish the decision; and (3) direct the media to bring a reply (as for this right, see Chapter 4 above). The Council cannot impose fines, require compensation to be made, let alone punish the media, and it cannot make decisions as to whether the Penal Code or any other law has been violated, all of which are a matter for the courts. All it can do is to express its views and require the media to publish it. A media that does not publish the view of the Press Council or publish an ordered reply is liable to punishment, a situation dealt with by the public prosecutor and the court. A media that does not follow the content of the decisions from the Press Council only faces the hassle of publishing the view by the Council that the media is violating ethics of journalism.

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<sup>14</sup> An English version of the rules can be found on the Press Council's web page [www.pressnaevnet.dk](http://www.pressnaevnet.dk).

The Guiding Rules states, *inter alia*, that the media is obliged to bring correct information. When a person is seriously criticized in the media the person must be given the opportunity to provide his view. Information which can violate a person's privacy must be avoided, unless there is a clear public interest which requires publication. To avoid that the media infringe the presumption of innocence and the right to privacy, there are also rules concerning court reporting, including that the name and identity of the convicted as a rule may not be released until after the judgment, unless it is a case of a clear public interest. Use of hidden camera is as a point of departure to be avoided, unless the information cannot be obtained by other means and is of public relevance.

- The role and functioning of regulatory authorities in these respects

As mentioned in the chapters above, specific provisions regarding the role and functioning of the regulatory authorities are described in the applicable Codes and Acts.

- Distribution Aspects
  - Access to frequencies

In general, media distribution aspects are regulated under the telecoms regulation, notably the Act on Electronic Communications Networks and Services<sup>15</sup> and the Act on Radio Frequencies<sup>16</sup> (implementing the relevant EU telecoms regulation).

As a main rule access to establish electronic communications networks or provide electronic communications services do not require authorization from a public authority, save where the access is depending on the use of scarce radio frequencies. This means that media undertakings that do not provide audiovisual media services or other content services themselves, but only distribute media services provided by third party, such as operators of cable or satellite television networks under Danish jurisdiction, are neither required to obtain a programme license pursuant to the Broadcasting Act, nor required to obtain an authorization under the telecoms regulation. Hence, they are free to establish an electronic communication network of any kind and offer to content providers (broadcasters and others) to distribute their content services to the end users. Only if radio frequencies are needed, a license is required under the Radio Frequency Act.

The use of radio frequencies – being a scarce public resource – is subject to a license provided by the Business Agency, according to section 6(1) of the Frequency Act. A frequency license is required regardless of what kind of communications service is being transmitted via the frequency. Thus, the use of radio frequencies for broadcasting purposes also requires a license pursuant to the Frequency Act. However, if a broadcaster has obtained permission under the Broadcasting Act which requires possession of a radio frequency, a frequency license under the Frequency Act will automatically be issued.

The allocation of available frequencies is based on a 'first come, first served' principle, see section 7. However, if the number of applicants exceeds the number of spare frequencies, the licenses are awarded subject to an auction (based solely on the price offers) or a public tender (based on a number of criteria). Previously, a specific frequency was reserved for specific services (e.g., mobile communication, data broadband services, etc.). In conformity with the developments in the underlying EC regulation, the Business Agency can now decide that a certain frequency is not subject to any restrictions with

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<sup>15</sup> Act No 169/2011.

<sup>16</sup> Act No 475/2009 on Radio Frequencies.

regard to choice of service. Likewise, allocated radio frequencies could previously only be assigned with consent of the IT and Telecom Agency. Now, frequencies can be transferred without consent, however, provided that the transfer does not unduly restrict competition on the relevant market. The IT and Telecom Agency and the Competition Council oversee the effect on competition resulting from a license transfer.

- Access to distribution networks and control of actual conditions

In accordance with Article 18 of the Framework Directive the Danish Act on Electronic Communications Networks and Services section 48 set forth rules on third party's right to access to "bottlenecks" related to digital television in the form of application protocol interfaces (API) and electronic programme guides (EPG). The rules are supervised by the Business Agency. Apart from this, the general rules in the Competition Act apply.

There are no rules regarding circulation instruments for the press, except that the printed press receives state subsidy for their distribution systems.

- Must-carry/must-offer rules for electronic media

The Broadcasting Act section 6(1) contains the 'must-carry' rules, according to which the owners of communal aerial installations are required to ensure that the public service channels from DR (DR1 and DR2, the Children's channel and the Cultural channel) and TV2 as well as the regional TV2 stations are distributed in the network. The purpose of the must-carry obligations is to ensure that the part of the population which receives radio and television programmes via cable-based networks has access to the public service channels. The Ministry of Culture supervises the must-carry rules.

- Role of platform operators

The switch from analogue terrestrial to digital terrestrial television (DTT) was effected on 1 November 2009, from which date the analogue signal was cancelled and replaced with the digital. The Swedish company 'Boxer' has, subject to a public tender (conducted by the Radio and Television Board), been appointed as gatekeeper on the new platform, i.e. is the exclusive administrator of the available frequencies (save the frequencies which are by statute allotted to the public service broadcasters or other purposes, e.g., mobile television). Pursuant to the DTT rules set forth in the Broadcasting Act, access to the DTT platform is based on a commercial agreement on market terms between the content provider and the gatekeeper.

- The role and functioning of regulatory authorities in these respects

See above regarding the Business Agency, the Ministry of Culture and the Radio and Television Board.

- Access to Information

- Transparency of media ownership situations

The law foresees no special rules on transparency.

- Accountability of public service media

The public service media are obligated to enter into a public service contract with the Minister of Culture, and to prepare annual reports to the Minister on the fulfilment of the objectives set forth in the contract.

- Freedom of information laws

Access to information contained in public documents and files are regulated by the Freedom of Information Act.<sup>17</sup> According to section 1 of the, the scope of the Act is very broad, as it applies to 'all activity exercised by the public administration'. The Act does not apply to the courts or legislators. Documents relating to criminal justice or the drafting of bills before they are introduced in the Danish Parliament (Folketinget) are exempted. Authorities who orally receive information of importance to a pending case have an obligation to prepare a written note of the information, see section 6(1).

The main rule of the Act is section 4(1), which provides 'everyone' with a right to demand documents that are subject to administrative case work or procedure. The right is primarily used by journalists, but also private individuals and organizations make use of the Act. The notion of 'documents' is interpreted widely, encompassing not only physical documents (papers) but also electronic documents, tapes, microfilm, etc. It is, however, a requirement according to section 4(3) that a person demanding access is able – at least broadly – to identify the documents or case he/she wants to examine.<sup>18</sup>

Besides the right according to section 4(1) to demand access to documents in general, section 4(2) provides a person whose personal information is included in a document within a public authority with the right to access to that information. The right pursuant to section 4(2) in the Freedom of Information Act is supplemented by a similar right according to the Data Processing Act<sup>19</sup> Chapter 9.

Chapter 3 of the Act (sections 7–14) contains a number of exceptions to the main rule of access in section 4(1). For instance, due to considerations to the administrative decision-making process, section 7 exempts internal documents, e.g., recommendations from civil servants to ministers and minutes of proceedings. Records, documents and minutes of the Council of State and meetings between ministers, correspondence between authorities and outside experts in drafting laws or for use in court proceedings or deliberations on possible legal proceedings, as well as material gathered for public statistics or scientific research are also exempted in their entirety according to section 10.

However, notwithstanding sections 7 and 10 information in such documents which regards factual circumstances is subject to access in accordance with the main rule in section 4(1), see section 11. Hence, such information must be extracted from the relevant documents which are exempted from access.

Access to information can also be restricted to the extent it is deemed necessary subject to considerations relating to the security of the state and defence of the realm, protection of foreign policy, law enforcement, taxation and public financial interests, see section 13.

The authorities are obliged to consider in each case whether access to a wider extent than stipulated can be provided. The Parliamentary Ombudsman, who supervises and

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<sup>17</sup> Act No 572/85.

<sup>18</sup> See e.g. the Parliamentary Ombudsman's case 2001-0619-501 and case 1996–2735-401.

controls the legality of the public administration's decisions and activities, has stated that this obligation is considerably strong with regard to the press' requests for access to information.

Pursuant to section 15(2), an authority's decision on access to information can be brought before the authority which is competent to handle complaints regarding the substance matter of the case from which the request on access is derived. Pursuant to section 16, authorities must respond as soon as possible to requests, and if the response takes longer than ten days they must inform the requestor of why the response is delayed and when an answer is expected. In practice, it happens very often that the response takes a lot longer than ten days, and information on when an answer can be expected is often insufficient, making it difficult for notably journalists to obtain access in due time.

Decisions regarding access to documents can also be brought before the Parliamentary Ombudsman, cf. the Ombudsman Act.<sup>20</sup>

Besides access to documents, access to information in the public sector can be achieved via access to meetings held in public authorities. As opposed to documents there are no general rules on the public's (including the press) access to meetings in the public sector. In the absence of such general rules the starting point is that unless an express rule authorizes access to specific meetings held in the public sector, no right to such access exists. Court hearings are open unless decided otherwise by a statute or according to a statute, section 28a of the Administration of Justice Act. When delivering judgments and passing sentences, the court is always open, cf. section 28a.

- Accessibility of products/services and distribution networks

To the knowledge of the author of this report, there are no relevant schemes to be reported upon in the above regards.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

The Ombudsman controls all parts of the administration on behalf of the Parliament. He/she is, however, independent of Parliament in the discharge of his/her functions. Any person can lodge a complaint with the Ombudsman against a public authority. The Ombudsman can also start its own investigations. The Ombudsman decides for himself/herself whether he/she wants to investigate a case or not. Thus, as opposed to the courts the Ombudsman is not forced to take up a case.

The Ombudsman has no power to impose formal sanctions. Hence, he/she cannot alter or repeal an authority's decision on access to information, or order public authorities to act. According to section 22 he/she can only review decisions and issue his/her opinions and recommendations, e.g., that requested documents be released or that the authority justify its decisions better. His/her recommendations are, however, generally followed by the administration.

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<sup>19</sup> Act No 429/2000, implementing Directive 95/46/EC on the Processing of Personal Data.

<sup>20</sup> Act No. 473/1996.

- Participation in media operators/(self-)regulatory bodies

As mentioned above, the Press Council consist of inter alia two members of "the public".

#### 2.2.6.2. Main Players in the Media Landscape

##### 2.2.6.2.1 *Radio*

A large number of radio channels, Danish as well as foreign, are available to Danish listeners via terrestrial networks, cable, satellite or the Internet. However, the Danes almost exclusively listen to Danish-produced radio.

Besides DR's 3 nationwide public service radio channels there is a 4<sup>th</sup> nationwide channel with public service obligations which previously belonged to DR. However, in order to create more competition on public service radio the channel was in 2011 subject to a public tender allotted to a new station, Radio24/7.<sup>21</sup> Further, there are two partly nationwide FM radio channels, which subject to public tender are allotted to the commercial stations Nova FM (owned 80% by SBS Broadcasting and 20% by TV2) and Radio 100 FM (owned by Talpa Radio International). In addition to the nationwide channels, there are approximately three hundred local radio stations, commercial or non-commercial. The non-commercial stations can apply for state funding based on the amount of air-time.

##### 2.2.6.2.2 *Television*

Until the launch of TV2 in 1988, Danmark Radio (DR) had a monopoly to broadcast nationwide television on the Danish territory. A few channels from our neighbouring countries Sweden and Germany could also be viewed locally in nearby places in Denmark due to the surplus of signals which crossed the Danish border from the transmitters placed close to the Danish border.

Both DR and TV2 are state-owned public service enterprises. As opposed to DR, which is financed by public service licenses<sup>22</sup> (and is not permitted to sell television advertisements), TV2 is solely financed by sale of television advertisements and other commercial funds. Today, DR also runs the channels DR2, the news channel DR Update, a HD (high definition) channel, a children's channel and a cultural channel. TV2 also runs the channels TV2 News, TV2 Charlie, TV2 Zulu, TV2 Film and – in cooperation with Viasat – TV2 Sport. Only the 'mother' channel, TV2, is subject to public service obligations.

Despite the availability of many foreign television channels, the Danes still prefer the channels from DR and TV2.

There are also a large number of local or regional stations in Denmark, either commercial or non-commercial, which are distributed on cable networks or in 'windows' on the digital terrestrial network. None of these holds a market share of any significance.

##### 2.2.6.2.3 *Press and Publishing*

The many new digital media and changes in media habits in general have resulted in a decrease of more than 30% of the total number of newspapers sold annually compared to 1995. Today, there are less than forty different newspapers left, most of which are local newspapers dealing mainly with local news. Only about ten are nationwide, daily

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<sup>21</sup> Owned jointly by Berlingske Media A/S and the advertising agency People Group A/S.

<sup>22</sup> DR receives about EUR 400 million annually in public service license fees.



newspapers covering a broad spectrum of subjects (news, sports, art/culture, business, etc.).

Printed magazines are sold in subscriptions or in single copies and are published weekly, monthly or quarterly. They normally cover a more narrow scope than newspapers and are thus targeted at a more limited segment of people. There are more than hundred different magazines in Denmark.

#### *2.2.6.2.4 Online media (non-linear audiovisual (media) services; websites)*

All significant Danish media providers, both within print and audiovisual media services (radio, television, video, music, etc.), have established a website on the Internet as a supplement to their main distribution platform.

#### *2.2.6.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers*

The cable network operators YouSee (a subsidiary of the incumbent telecom provider TDC) and Stofa (owned by the Swedish equity company Ratos) cover large parts of the country. Yousee and Stofa are not themselves programme service providers, but only distribute programmes provided by other broadcasters. In addition, there are several hundred communal aerial installations in Denmark which provide cable based radio and TV to people in local areas.

The main distributors of satellite television are Viasat (a MTG company) and Canal Digital (owned by the Norwegian telecom provider Telenor). Besides distributing other providers' channels, Viasat and Canal Digital also distribute their own channels. As with cable distribution, the channels are either transmitted directly to the households or to communal aerial installations.

Besides, cable or satellite television is also distributed via the new digital terrestrial network which by 1 November 2009 replaced the analogue terrestrial network. Subject to a public tender, the Swedish company Boxer has obtained the right to administer the distribution of channels on the digital terrestrial platform, apart from a number of frequencies which by statute are allotted directly to the Danish public service broadcasters or reserved for, inter alia, mobile television.

Finally, a growing number of households – but still a very small part of the total households – receives television via the Internet or other IP-based platforms such as fibre networks.

As mentioned, YouSee is a subsidiary of the ISP TDC. No other ISP's are providing radio and TV programmes to the public.

#### *2.2.6.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

DR dominates the Danish radio market with a market share of almost 70%. Most of the remaining 30% market share is held by Radio 24/7 the various commercial stations, with Radio 100 FM as the runner-up.

The channels from DR and TV2 have a market share of more than two-thirds of the total television viewing. The last third is divided between a number of foreign enterprises, with the channels from the UK-established Viasat (TV3 and TV3+) and SBS Broadcasting (primarily the channels Kanal 4 and Kanal 5) as the dominating ones.

The main players of the ten nationwide, daily newspapers are *Berlingske* (owned by Berlingske Media A/S, which is owned by the British controlled Mecom Group PLC), *Jyllands-Posten* (owned by the joint venture JP/Politikens Hus A/S), *Politiken* (likewise owned by JP/Politikens Hus A/S) and the two tabloids *BT* and *Ekstra Bladet* (owned by Berlingske Media A/S and JP/Politikens Hus A/S, respectively).

In the printed magazines sector, the Danish market is dominated by magazines published by the Danish media undertakings *Aller* and *Egmont*, together with the Swedish *Bonnier*. The total revenue from sale of magazines has, by and large, been constant in recent years, however, with fluctuations among the various kinds of magazines.

The most popular newspapers' websites as well as the public service broadcasters DR's and TV2's websites are among the most visited by Danish Internet users.

YouSee and Stofa are the biggest competing cable network operators, while Viasat (a MTG company) and Canal Digital are the dominant distributors of satellite television to Danish viewers.

The competition on advertising has been very intense among Danish newspapers. In 2005 the Danish newspapers had a share of 27 percent (421 million Euro), and in 2008 it was down to 19 percent (367 million Euro). This only adds to the fragile financial situation among all papers losing advertising, mainly to the Internet<sup>23</sup>.

#### 2.2.6.3. Conclusion and Recommendations

In conclusion, the citizen's fundamental right to be fully and objectively informed is generally well insured in Denmark. Although the Constitution itself serves a rather limited protection of the media's right to expression and information, such protection follows from Denmark's implementation of the ECHR as well as case law and legal tradition. Danish media law and regulation generally constitutes a framework which on the one hand secures the media's protection of sources, access to court proceedings and public documents etc., and on the other hand protects the citizen's against the media's violation of privacy, defamation, use of undocumented information etc. The legal framework regarding market entry is rather liberal and conforms with the underlying EU regulation. The absence of media ownership rules in Denmark makes it possible for media companies, national as well as foreign, to expand both vertically and horizontally in the media value chain. For the time being this has not resulted in concentrations to the detriment of competition and media plurality in the Danish media market, but it is an issue which should be monitored closely in future.

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<sup>23</sup> [http://www.ejc.net/media\\_landscape/article/denmark/](http://www.ejc.net/media_landscape/article/denmark/).

## ESTONIA

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### 2.2.7. Estonia

#### 2.2.7.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.7.1.1. *Human rights/Fundamental freedoms*

Human rights and fundamental freedoms are set forth in the Estonian Constitution<sup>1</sup> and can be restricted by law only if such possibility is specifically set forth in the constitution.

- Freedom of expression/Freedom of the media

The freedom of expression – everyone’s right to freely circulate ideas, opinions, persuasions, and other information by word, print, picture and other means – is enshrined in Art. 45 of the Estonian Constitution, as already quoted in the study of 2004 titled “Information of the citizens in the EU.”

- Specific safeguards and rights for the media

The Estonian Constitution does not contain any specific safeguards and rights for the media.

- Freedom to receive and to access information

The freedom of information – everyone’s right to freely receive information circulated for general use, as well as certain information on the work of state and local government or personal information held by state and local government – is guaranteed in Art. 44 of the Estonian Constitution as already quoted in the study of 2004 titled “Information of the citizens in the EU.”

- Specific rights for the citizens

Art. 44 of the Estonian Constitution provides that Estonian citizens may request information, and to the extent and in accordance with procedures determined by law, all state and local government authorities and their officials are obliged to provide information on their work, with the exception of information which is forbidden by law to be divulged, and information which is intended for internal use only. Furthermore, Estonian citizens have the right to become acquainted with information about themselves held by state and local government authorities and in state and local government archives, in accordance with procedures determined by law. This right may be restricted by law in order to protect the rights and liberties of other persons, and the secrecy of children's ancestry, as well as to prevent a crime, or in the interests of apprehending a criminal or to clarify the truth for a court case.

Unless otherwise determined by law, the same rights exist equally for Estonian citizens and citizens of other states and stateless persons who are present in Estonia.

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<sup>1</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X0000K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=p%F5hiseadus>.

- Safeguards on regulatory authorities

No such safeguards have been specifically mentioned in Estonian law.

- Safeguards on “universal service”

Universal service is regulated in Estonian law only in the context of electronic communications law.

#### 2.2.7.1.2. *Media order (de lege lata and de facto)*

The written press is not specifically regulated in Estonian legal acts and relies on self-regulation and general laws, while the requirements of the provision of media services such as radio and television services have been laid out in the Media Services Act<sup>2</sup> that was adopted on 16 December 2010 and that came into force on 16 January 2011. Before the adoption of the Media Services Act, the same principles were contained in the Broadcasting Act that became invalid as of the enforcement of the Media Services Act.

- “Market Entry”
  - Licensing schemes; remit psm; notification for print publications

To enter the market, the media service providers require a media service license.

According to Art. 32 of the Media Services Act television or radio service can only be provided on the basis of an activity licence for provision of television or radio service that is issued to a natural or legal person on the following conditions: its programme service complies with the requirements provided for in the Media Services Act; its activities do not cause violation of contractual obligations taken by the Republic of Estonia; it is not by means of the governing effect over management connected to the undertaking that has been granted the activity licence for provision of television and radio service which may result in substantially damaging the competition in the media services market, particularly through creation or reinforcement of the dominant position in the market.

The Media Services Act sets forth the following types of activity license: activity license for provision of free access television service (Art. 33), for provision of conditional access television services (Art. 34), provision of radio service (Art. 35), provision of satellite television service (Art. 36) and for temporary provision of television and radio service (Art. 37). Applications for activity license are filed with the Ministry of Culture and reviewed and evaluated by an Advisory Committee of up to 11 members, which include the representatives of agencies related to media services and experts (Art. 39 and Art. 41).

According to Art. 43 Sect. 1 of the Media Services Act, for the issuance of an activity licence for the provision of free access television and radio service, a competition is organised and the license is issued to the applicant who has made the best bid in the selection procedure. Art. 43 Sect. 2 of the Media Services Act sets forth the criteria for selecting the best bidder, these include among others:

- the diversity of the intended programme service and distinction from other programme services of the same kind;

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<sup>2</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=xxxxxx01&keel=en&pg=1&ptyyp=RT&tyyp=X&query=meedia>.

- proportion of own production in the programme service;
- target audience;
- proportion of verbal and news broadcasts in the programme service;
- business plan;
- the former activities of the applicant in the provision of media services;
- the economic situation of the applicant and sustainability in the provision of the service.

According to Art. 47 of the Media Services Act, on-demand audiovisual media service can be provided by a media service provider that has been entered in the Register of Economic Activities, whereas such service provider may provide only on demand services. The relevant application for registration is submitted to the Ministry of Culture and the information of the application is entered into the Register of Economic Activities in the procedure provided for by the Register of Economic Activities Act<sup>3</sup>.

National Broadcasting is a legal person in public law founded by the Estonian National Broadcasting Act and it does not require any activity license or registration for its activities.

The objective of National Broadcasting is to assist in the performance of the functions of the Estonian state provided by the Constitution of the Republic of Estonia (Art. 4). For such purposes, National Broadcasting creates programme services, produce and mediate programmes and organise other activities which, separately or as a set:

- support the development of the Estonian language and culture;
- enhance the guarantees of the permanence of the Estonian state and nation, and draw attention to the circumstances which may endanger the permanence of the Estonian state and nation;
- assist in the increase of the social cohesion of the Estonian society;
- assist in the increase of the economic wellbeing and competitive ability of Estonia;
- assist in the promotion of the democratic system of government;
- explain the need for the economical use and sustainable development of the natural environment;
- enhance the family-based model of society;
- assist in the audio-visual recording of Estonian history and culture;
- guarantee the availability of the information needed by each person for his or her self-realisation.

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<sup>3</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X80016K2&keel=en&pg=1&ptyyp=RT&tyyp=X&query=majandustegevuse>.

In order to achieve the above goals, National Broadcasting performs the following public functions (Art. 5):

- produce at least two television programme services and four twenty-four-hour radio programme services; the programme services must be available to the public by public means. As far as possible, the original programmes offered by the television programme services shall be made available, to the maximum extent, to persons with hearing disabilities;
- make available, to a reasonable extent, the programme services and the programmes' archive through electronic networks;
- produce other media services with the permission of the National Broadcasting Council, and distribute the products related to them;
- record events and works of significant importance to the Estonian national culture or history, and guarantee the preservation of the recordings;
- guarantee, under the conditions provided by law, the accessibility of its audio-visual records. The records are used for profit-making activities pursuant to the procedure provided by the National Broadcasting Council;
- distribute the programmes and media services introducing Estonian culture and society all over the world;
- intermediate the best works of the world culture;
- transmit programmes which, within the limits of the possibilities of National Broadcasting, meet the information needs of all sections of the population, including minorities;
- maintain and develop the professional creative and technical level of National Broadcasting;
- guarantee the operational transmission of adequate information in situations which pose a danger to the population or the state;
- reflect, to the maximum possible extent, the events which take place in Estonia in its news programmes and other programmes.

The programme services and media services have to:

- meet the objectives of National Broadcasting and serve the public interest;
- be diverse and deal with the topics of social life in a balanced manner;
- promote communication between the members of the society and social groups, the social cohesion of the society, and reflect different opinions and beliefs.

The news programmes of National Broadcasting have to be diverse, balanced, independent and appropriate. Before transmitting the news, the information on which they are based has to be verified with reasonable diligence. Fact and commentary have to be clearly differentiated in a news broadcast.

Launching of print publications in the market does not require any license, registration or notification.

- Media pluralism/ownership; competition law aspects

There are no specific provisions in the Competition Act<sup>4</sup> with regard to the media and thus the general competition rules on concentrated parties and mergers also apply to the media sector.

The Competition Act sets forth the criteria for determining when a concentration is subject to control in Estonia. A concentration is subject to control by the Competition Authority if, during the previous financial year, the aggregate turnover in Estonia of the parties to the concentration exceeded 6.391.200 EUR and the aggregate turnover in Estonia of each of at least two parties to the concentration exceeded 1.917.350 EUR (Art. 21 Sect. 1 of the Competition Act). A concentration is not controlled by the Competition Authority if the concentration is subject to control pursuant to Council Regulation 139/2004/EC on the control of concentrations between undertakings (OJ L 24, 29.01.2004, pp. 1–22), unless the European Commission appoints, pursuant to Article 9 of such Regulation, the Competition Authority as the authority competent to exercise control over the concentration (Art. 21 Sect. 2 of the Competition Act). According to Art. 22 Sect 3 of the Competition Act, the Competition Authority shall prohibit a concentration if it is likely to significantly restrict competition in the goods market above all, by creating or strengthening a dominant position.

According to Art. 13 Sect. 1 of the Competition Act, an undertaking in a dominant position is an undertaking or several undertakings operating in the same market whose position enables it/them to operate in the market to an appreciable extent independently of competitors, suppliers and buyers. Dominant position is presumed if an undertaking or accounts for at least 40 per cent of the turnover in the market or several undertakings operating in the same market if it/they account for at least 40 per cent of the turnover in the market. Art. 16 prohibits the abuse of dominant position.

There are no restrictions on foreign ownership of the media services providers or print media.

- Legal framework for psm; ability to fulfill their tasks

The legal status, objective, functions, financing, and organisation of management and activities of Estonian National Broadcasting are set forth in the Estonian National Broadcasting Act.<sup>5</sup> According to Art. 7 of the Estonian National Broadcasting Act, the financing of the National Broadcasting is based on its revenue comprised of the following:

- the annual appropriation from the state budget;
- income from the sale of the transmission and distribution rights of its own programmes and media services;
- income from the grant for use for profit-making activities of the materials from its archives;

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<sup>4</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X50066K7&keel=en&pg=1&ptyyp=RT&tyyp=X&query=konkurentsi>.

<sup>5</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XX10025&keel=en&pg=1&ptyyp=RT&tyyp=X&query=ringh%E4%E4lingu+seadus>.



- income from the sale of the property of National Broadcasting;
- gifts and donations which are not deemed to be support received from sponsorship;
- interest and other financial income;
- income from the sale of the products and services of National Broadcasting which is not in conflict with the objectives of National Broadcasting;
- financing for projects intended for specific purposes;
- other income from the activity of National Broadcasting which is not in conflict with the objectives of National Broadcasting and which has been approved by the National Broadcasting Council.

The budget is prepared by the management board of the National Broadcasting before the beginning of the next financial year or not later than within two weeks after the approval of the state budget by the Parliament. The budget sets out all the income, expenditure and financing transactions for the next financial year and is prepared using the accrual method, and a cash flow plan for the financial year and the next four years shall be appended to it.

The budget of the National Broadcasting is approved by the National Broadcasting Council. Until the budget has been approved, the expenditure of National Broadcasting for one calendar month cannot exceed the total expenses during the same calendar month of the previous year.

During a financial year, the National Broadcasting Council may pass a supplementary budget of National Broadcasting in order to correspondingly increase or decrease the revenue and expenditure of National Broadcasting in a balanced manner.

The National Broadcasting Council approves the procedure for registration and disclosure of the donations and support for projects intended for specific purposes which are granted to National Broadcasting. If such disclosure takes place via the programme services of National Broadcasting, the information concerning the supporters and donors of a project include only the name of the supporter or donor.

According to Art. 8 of the Estonian National Broadcasting Act, the National Broadcasting possesses, uses and disposes of its assets for performance of its functions pursuant to the procedures established on the basis of the Estonian National Broadcasting Act.

National Broadcasting has no right to:

- be the founder of a company or non-profit association, or a shareholder of a company;
- guarantee, with its assets, the liabilities of other persons;
- secure its obligations with all of their immovable or movable property or with a part thereof which exceeds 50 per cent of the book value of all of the immovable or movable property;
- transfer their assets free of charge or for a charge less than the usual value of the assets, to grant sponsorships or other financial donations, or give loans.

National Broadcasting is prohibited from assuming obligations if, as the result of the transaction, the planned repayments and interest payments during even one year exceed 20 % of the annual income of National Broadcasting.

The term for performance of the obligations assumed by National Broadcasting cannot exceed twenty five years.

According to Art 9 of the Estonian National Broadcasting Act, each financial year, the management board of the National Broadcasting prepares a development plan that must cover the following financial year and the three financial years following that year. The development plan sets forth the goals for development of the National Broadcasting for each corresponding financial year, the tasks for reaching such goals and the reasoning behind it, and a budgetary strategy for reaching the development goals. Among other, the development plan sets forth the structure of the programme service to be transmitted during the financial year and the considerations for its creation, a justification of how the structure of the chosen programme services helps to perform the functions of National Broadcasting, the objectives and reasons for developing the media services, co-operation with international organisations and the principles for using the budget planned for the financial year in order to reach the goals and perform the duties that have been set. The management board of National Broadcasting submits the draft of the development plan to the National Broadcasting Council for approval not later than eleven months before the beginning of the relevant financial year. The National Broadcasting Council approves the development plan not later than by 1 March each year. If the development plan is not approved by the prescribed date, the development plan prepared during the preceding year is deemed to be the development plan for the next year.

Together with the draft of a development plan, the National Broadcasting Council receives also an impact analysis which provides a reasoned assessment of the performance of the development goals set forth in the development plan and the conformity of the activity of National Broadcasting to the law. The impact analysis is an annex to the development plan of the next financial year (Art. 12 of the Estonian National Broadcasting Act).

In order to receive support from the state budget for the performance of the functions of the National Broadcasting as set out in the law, a contract under public law is concluded between National Broadcasting and the Ministry of Culture (Art. 10 of the Estonian National Broadcasting Act). The management board of the National Broadcasting submits the draft of the contract which has been approved by the National Broadcasting Council to the Ministry of Culture not later than by 15 February of the current year. Simultaneously with approving the national budgetary strategy, the Government of the Republic authorises the Minister of Culture to conclude the contract. The contract is signed by the Ministry of Culture and the chairman of the management board of National Broadcasting. If the amount of support allocated from the state budget provided by the contract changes after approval of the national budgetary strategy and after the approval of the state budget, or it is altered by a supplementary budget or amendment to the state budget, the corresponding amendments are made to the contract under the terms and pursuant to the procedure prescribed by the contract.

National Broadcasting is independent in the production and transmission of its programmes, programme services and other media services, and is guided exclusively by the requirements of law (Art. 3 of the Estonian National Broadcasting Act).

National Broadcasting cannot transmit advertising and teleshopping and cannot receive support from sponsorship. The National Broadcasting Council may permit the transmission of advertising or sponsor information in the programmes or media services of National Broadcasting as an exception, if:

- it relates to the broadcasting rights of an international major event acquired via the EBU (European Broadcasting Union), or
  - it relates to the broadcasting rights of a cultural or sports event of significant public interest.
- The role and functioning of regulatory authorities in these respects

According to Art. 54 of the Media Services Act, the Ministry of Culture has the authority of the state supervision over the compliance of media service providers with the Media Services Act.

According to Art 13 of the Estonian National Broadcasting Act, the National Broadcasting Council (hereinafter Council) is the highest directing body of National Broadcasting that plans the activities of National Broadcasting, organises the management of National Broadcasting and supervises the activities of the management board.

According to Art. 14 of the Estonian National Broadcasting Act, the Council consists of members of the Parliament and of acknowledged experts in the field of activity of National Broadcasting. On the proposal of the Parliament's Cultural Affairs Committee, the Parliament appoints one representative from each faction of the Parliament until the date of termination of the authority of the composition of the Parliament (upon termination of the authority of the composition of the Parliament, the Council members who are members of the Parliament stay with the Council until the entry into force of the decision to appoint members of the new composition of the Parliament to the Council) and four experts from among the acknowledged experts in the field of activity of National Broadcasting whose term of office lasts for five years.

The Council has exclusive competence to:

- approve of and supervise over the execution of the budget of National Broadcasting;
- approve of the internal audit rules and the work schedule of the internal auditor of National Broadcasting;
- approve of the procedure for use and disposal of assets of National Broadcasting;
- approve of the interim report on execution of the budget and the audited annual account of National Broadcasting;
- determine the structure of National Broadcasting;
- increase the number of programme services of National Broadcasting;
- exercise supervision over performance of the objectives and functions of National Broadcasting.

According to Art. 34 of the Estonian National Broadcasting Act, the State Audit Office exercises economic control over the activity of National Broadcasting pursuant to the State Audit Office Act, the Technical Supervisory Board exercises control over compliance of the National Broadcasting with the Electronic Communications Act, the Ministry of Culture exercises supervision over adherence to the requirements provided in the Media Services Act and Estonian National Broadcasting Act, whereas the Ministry of Culture has the right to involve experts in the exercise of supervision.

- “Pursuit of Core Activity”
  - Ordinary law safeguards for journalistic activity

Art. 13 of the Media Services Act sets forth the right of a media service provider to determine the contents and positioning of its broadcasts and programmes within the limits of the media services license held by it. Transmission of a broadcast or a part thereof may be prohibited by court in matters being reviewed by it on the grounds and following the procedures set forth under the law.

Art. 15 of the Media Services Act sets forth the principles of protecting sources. The person processing information for journalistic purposes is entitled not to disclose information that may reveal the source and can disclose such information only upon the prior consent of the source. No consent for disclosure is needed if the source has knowingly provided false information. The same applies to persons who due to their professional duties become aware of the information that may reveal the source of the person processing the information for journalistic purposes. The law further prohibits any direct or indirect influencing of such persons with the purpose to identify the source of information. Information enabling to reveal the source however has to be disclosed on the terms and conditions set forth in the Criminal Proceedings Act<sup>6</sup>.

According to the amendments made into the Criminal Proceedings Act in the end of 2010, the person processing information for journalistic purposes (this include media and written press journalists both) has the right to refuse as a witness in criminal proceedings to disclose information which may reveal the identity of the source of such information, except in case the collection of evidence in other way is excluded or materially difficult and the subject of the criminal proceedings is a crime which is punishable with at least up to eight years of imprisonment, there is dominant public interest in the testimony and the person is obliged to testify on the grounds of a ruling of a preliminary investigation judge or court issued at the request of the prosecutor’s office. There is no right to refuse from testifying when testimony is requested by the suspect or the accused. The same applies with regard to persons who in the course of performing his or her duties become involved with circumstances enabling to identify the identity of the source of person processing information on journalistic purposes. If the court finds that refusal to testify is not related to professional activities, the relevant persons might still be obliged to testify.

Searches can be conducted at the premises of the person processing information on journalistic purposes only upon the ruling of a preliminary investigation judge or court.

Similar rules for refusing to testify are now set forth also in the Code of Civil Procedure<sup>7</sup>.

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<sup>6</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X60027K6&keel=en&pg=1&ptyyp=RT&tyyp=X&query=kriminaalmenetluse>.

<sup>7</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsiviilkohtu>.

The said amendments faced resistance and strong criticism from journalists. In March 2010 six major Estonian dailies left some pages blank in protest against the said amendments as these were found to compel journalists to reveal their sources and seen as a restriction on press freedom that could lead to imprisonment especially in the field of investigative journalism.

The right to privacy is enshrined in Art. 26 of the Estonian Constitution: "Everyone has the right to the inviolability of private and family life".

Art. 11 of the Personal Data Protection Act<sup>8</sup> allows processing of personal data for journalistic purposes and disclosing these in media without the consent of the data subject if there is dominant public interest in it and if it is in compliance with the principles of journalism ethics. Disclosure of data cannot excessively harm the interests of the data subjects. If data is being disclosed in accordance with the aforementioned principle, the data subject has no right to demand that disclosing of data is stopped. If no dominant public interest can be identified, then data can be disclosed upon the consent of the data subject and in such case the data subject may demand at any time that disclosure is stopped, unless the continuing disclosure does not harm the data subject's rights excessively. It is not possible to demand stopping of disclosure with regard to such data carriers over which the person who disclosed the data has no control when the request for stopping is submitted.

Protection of one's reputation against defamation is set forth in Art. 17 of the Estonian Constitution:

According to Art. 131 of the Law of Obligations Act, in the case of an obligation to compensate for damage caused by defamation or by violation of any other personality right, the obligated person has to compensate the aggrieved person for the expenses caused to the person and for damage arising from a decrease in income or deterioration of the future economic potential of the aggrieved person. Art. 134 Sect. 2 of the Law of Obligations Act sets forth that in the case of an obligation to compensate for damage arising from violation of personality rights, including defamation of a person, the aggrieved person has to be paid a reasonable amount of money as compensation for moral damage. The gravity and scope of the violation and the conduct and attitude of the person who caused damage to the aggrieved person after the violation has to be taken into account for the purposes of determining the compensation for moral damage (Art. 134 Sect. 5). In addition the court may, upon determining the compensation for moral damage for defamation of a person, inter alia by passing undue judgement or by disclosure of incorrect information, for unjustified use of the name or image of the person, or for breaching the inviolability of the private life or other similar personality rights of the person, take into consideration the need to exert influence upon the person who caused the damage to avoid causing further damage, taking into account the financial situation of the person who caused the damage (Art. 134 Sect. 6). The concept of so-called "preventive damages" based on the financial situation of the person who caused the damage is new in Estonian law and was introduced only in the end of 2010.

So far the issue of moral damage has been problematic. The courts tend to adjudicate moral damage only in relation to bodily injuries and judgments related to moral damage arising out of defamation are scarce, the biggest issue remaining how to assess the amount of moral damage.

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<sup>8</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXXX041K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=isikuandmete>.

Pursuant to Art. 1055 Sect. 1 of the Law of Obligations Act if unlawful damage is caused continually or a threat is made that unlawful damage will be caused, the victim or the person who is threatened has the right to demand that behavior which causes damage be terminated or the making of threats with such behavior be refrained from. In the case of violation of inviolability of personal life or any other personality rights, it may be demanded, *inter alia*, that the tortfeasor be prohibited to approach other persons (restraining order), the use of housing or communication be regulated or other similar measures be applied. The right to demand that behavior which causes damage be terminated does not apply if it is reasonable to expect that such behavior can be tolerated in human co-existence or due to significant public interest. In such case, the victim has the right to make a claim for compensation for unlawfully caused damage (Art. 1055 Sect. 2).

A **notice-and-take-down** policy has been introduced to anonymous comment sections online, a forced outcome of some corresponding court rulings. Internet companies have tried to decline their liability for the content of the anonymous comments readers may add to editorial news items. Media sites do not produce this content — rather, it is user-generated— and some websites do not pre-review user-generated content at all. The *notice-and-take-down* policy relies on readers to report “bad” comments, which consequently shall be removed from the website by the editorial board.<sup>9</sup>

Art. 20 of the Media Services Act entitles any private individual or legal entity, regardless of citizenship or location, whose legal rights, especially reputation, has been harmed as a result of presenting incorrect facts in the course of provision of media services, to object or request taking of other equal measures allowed under the law. The media service provider has to ensure the possibility to object or take other equal measures without presenting any undue deadlines or terms and conditions. In order to object, one has to send his or her request in writing to the media service provider within 20 days as of the transmission of the broadcast that caused the need for objection. The objection has to be transmitted in the same programme free of charge within 20 days as of the receiving the request for objection. A request for objecting may be rejected if the objection is ungrounded and if the request constitutes a punishable act or if satisfaction of the request would bring along civil liability for the media service provider or if it violates the generally acknowledged moral norms.

Everyone has the right to file objections against statements made in a programme of National Broadcasting within thirty days after the programme was broadcast. An objection is to be first reviewed by the executive producer of the programme against which the objection was filed, and the executive producer decides on broadcasting the objection. If the executive producer decides not to broadcast the objection, he or she informs the ethics adviser of the National Broadcaster thereof and submits the objection together with his or her explanation to the management board of the National Broadcaster for making a decision. For deciding on the broadcasting of the objection, the ethics adviser submits a reasoned opinion to the management board. The National Broadcasting shall broadcast the objection or make a decision not to broadcast the objection without delay but not later than within thirty days after receiving the application for broadcasting the objection.

- Specific positive content obligations

According to Art. 8 of the Media Services Act, a television and radio service provider reserves *inter alia* that at least five percent of the daily transmission time of the

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<sup>9</sup> [http://www.ejc.net/media\\_landscape/article/estonia/](http://www.ejc.net/media_landscape/article/estonia/).



programme service on at least six days a week for transmitting self-produced news programmes, except in the programme service of National Holidays. A self-produced news programme is also deemed to be such a news programme that includes the news produced by at least two different news producers.

Each year the television service provider has to submit to the Ministry of Culture the data on meeting the above requirement.

- Funding schemes for specifically desired content

According to Media Services Act, news and current affairs programmes shall not be sponsored. There are no funding schemes for specifically desired content.

- **Political advertising and/or broadcasting time**

The programmes of National Broadcasting have to be politically balanced. In particular, the political balance requirement must be adhered to during the period of active election propaganda in the elections of the President of the Republic, the Riigikogu, the European Parliament and local government councils. For such purpose, National Broadcasting gives equal opportunities to all the candidates participating in the elections of the President of the Republic, to all the political parties and independent candidates participating in the elections of the Riigikogu and the European Parliament and, taking account of the large number of election coalitions and independent candidates in the elections of local governments, creates opportunities for as many powers as possible who participate in the elections and have an integral programme to adequately present their viewpoints. Similarly to the elections of local governments, equal opportunities have to be created in the event of referendums. The rules for reflecting elections in the programme services of National Broadcasting are approved by the National Broadcasting Council and such rules are disclosed not later than within a week after the date of announcement of the elections.

Art. 14 of the Media Services Act requires the media service providers, who allocate during the active election rallies of elections to European Parliament, Estonian Parliament, councils of local governments broadcasting time for a party or a political movement to present their opinions, to offer an equal presentation opportunity without any undue delay also to another party or political movement upon their written request.

- Codes of conduct and their organisational framing

There are still two main self-regulation bodies – the Council of the Public Word<sup>10</sup> and the Press Council<sup>11</sup> - as described in the study of 2004. These two bodies do not recognize each other, but use the same Code of Ethics, which is followed both by electronic media and written media journalists. The principles set forth in the Code of Ethics have remained the same since 2004. The majority of mainstream media organizations (including online media and TV broadcasters) only recognize the press council that is affiliated with the Estonian Newspaper Association. The original press council works jointly with the Journalists' Union, still finding cooperation with some media outlets and channels<sup>12</sup>.

Art. 22 of the Media Services Act allows persons active in the sphere of media services to create on their own initiative a system the participants in which voluntarily determine

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<sup>10</sup> <http://www.asn.org.ee/>.

<sup>11</sup> <http://www.eall.ee/pressinoukogu/index.html>.



common recommendations and rules establishing standards as an operation manual with the purpose of regulating the activities taking place in the sphere of media services and establish the limits of good and bad practises for the participants. Such self regulating associations also determine voluntarily the procedure of adhering to the established rules and the liability for breach thereof.

Complaints can be also filed with the Council of the Public Word<sup>13</sup> and the Press Council<sup>14</sup>.

The Press Council accepts a complaint about an article not older than three months and rejects a complaint in case the identity of the person filing a complaint cannot be ascertained, if there already is a pending court procedure in the same issue or in case the complaint is not related to good journalistic practices<sup>15</sup>.

The Council of the Public Word accepts a complaint about an article or broadcast not older than six months. On its own initiative, the council may review also complaints regarding older materials. The complaint is not processed if:

- the case is already pending in court or investigative body (an exception can be made at the request of such court or investigative body);
- the case is not in the competence of the Council of the Public Word;
- it is evident from the materials of the case or complaint that the matter is a legal dispute;
- the object of the complaint is not evident;
- the contents of the complaint is explicit or derogatory or slanderous;
- the complaint has not been translated into Estonian (an exception can be made if the person filing the complaint is a citizen of a foreign country and in a language easily understandable for the members of the council);
- the complaint is anonymous<sup>16</sup>.

- The role and functioning of regulatory authorities in these respects

The relevant supervisory functions are carried out by the Ministry of Culture.

According to Art. 38 of the Estonian National Broadcasting Act, the National Broadcasting has to record all programmes that are broadcast, whereas such recordings of programmes have to be preserved at least for thirty days after the time of their broadcasting. After the expiry of the said term, deliberation whether the recording has to be preserved for a specified term or without a specified term will take place by a committee formed by the management board of the National Broadcasting, which committee, based on the guidelines concorded with the National Archives and approved by the National Broadcasting Council, will deliberate the preservation of the recording of programmes. If an objection is submitted concerning the content of a programme or the

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<sup>12</sup> [http://www.ejc.net/media\\_landscape/article/estonia/](http://www.ejc.net/media_landscape/article/estonia/).

<sup>13</sup> <http://www.asn.org.ee/>.

<sup>14</sup> <http://www.eall.ee/pressinoukogu/index.html>.

<sup>15</sup> [http://www.eall.ee/pressinoukogu/kuidas\\_esitada\\_kaebust.html](http://www.eall.ee/pressinoukogu/kuidas_esitada_kaebust.html).

<sup>16</sup> <http://www.asn.org.ee/kodukord.html>.

content of a programme is contested before the expiry of the said term of preservation the recording of the programme is preserved until the objection has been broadcast in the programme service of National Broadcasting or until the dispute is brought to a final conclusion.

According to Art. 39 of the Estonian National Broadcasting Act, everyone has the right to examine the recording of a programme within the above referred term of preservation. Where necessary, the National Broadcasting issues a copy of the programme to the applicant. The applicant bears the costs of making the copy.

According to Art. 32 Sect 1 of the Personal Data Protection Act, the supervision of the compliance with the principles of the Personal Data Protection Act is exercised by the Estonian Personal Data Protection Inspectorate.

According to Art. 22 and 23 of the Personal Data Protection Act, a data subject has a right of recourse to the Data Protection Inspectorate or a court if the data subject finds that his or her rights are violated in the processing of personal data. If the rights of a data subject have been violated upon processing of personal data, the data subject has the right to demand compensation for the damage caused to him or her: on the basis and pursuant to the procedure provided by the State Liability Act<sup>17</sup> if the rights were violated in the process of performance of a public duty, or on the basis and pursuant to the procedure provided by the Law of Obligations Act<sup>18</sup> if the rights were violated in a private law relationship.

- Distribution Aspects

Requirements related to access to frequencies and distribution networks and must carry rules for electronic media are set forth in the Electronic Communications Act<sup>19</sup>.

- Access to frequencies

Radio frequencies are regulated in Chapter 3 of the Electronic Communications Act. The manner, regime and purpose of using radio frequencies is determined in the Estonian radio frequency allocation plan. The preparation of the Estonian radio frequency allocation plan shall be based on the principles of neutrality of electronic communications services and technological neutrality, which observance may be derogated from only for the purposes of service quality, maximization of radio frequency sharing and efficient use of radio frequencies. The Estonian radio frequency allocation plan, among other things, determines the radio frequency bands for the introduction of new technologies together with restrictions on new and existing users, self-planned frequency bands and radio frequency bands the right of use of which is granted by way of public competition or the right of use of which can be transferred. As a rule the use of radio frequencies is permitted on the basis of a frequency authorization issued by the Technical Surveillance Authority.

Upon grant of the right to use a radio frequency band by way of public competition, the Minister of Economic Affairs and Communications may determine a one-off authorisation charge of up to 1,597,000 EUR and a deposit for participation in the competition. The

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<sup>17</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X40075K2&keel=en&pg=1&ptyyp=RT&tyyp=X&query=riigivastutuse>.

<sup>18</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30085K4&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F5la%F5igusseadus>.

<sup>19</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90001K4&keel=en&pg=1&ptyyp=RT&tyyp=X&query=elektroonilise+side>.

one-off authorisation charge is determined as a fixed charge or, in the case of an auction, as a starting price. The deposit must be equal to all participants in the public competition and must not exceed the one-off authorisation charge taken for the right to use a radio frequency band. The deposit is returned after the winner of the competition is ascertained. In 2010 the Minister of Economy and Communications issued a regulation laying down the procedures for holding a public competition for granting frequency permits for provision of the service of transmitting television broadcasts and programmes in the frequency band 470–790 MHz<sup>20</sup>.

The right to use radio frequencies may not be transferred or granted for use on the basis of a contract for use in the case of a frequency authorization, whereby the right to use radio frequencies in the broadcasting network is granted.

- Access to distribution networks and control of actual conditions

Art. 67 of the Electronic Communications Act obliges a communications undertaking which provides conditional access systems to ensure that the conditional access systems allow the technical conduct of cost-oriented cross-checks of services provided by other communications undertakings by means of conditional access systems. If the access of a provider of television or radio services to the potential viewers and listeners depends on the conditional access services, a communications undertaking which provides services of conditional access to the provider of television and radio services is required to: provide to the provider of television or radio services on a fair, reasonable and non-discriminatory basis, technical services, which allow the viewers or listeners equipped with decoding devices to receive the digitally transmitted services of the provider of television or radio services; keep separate accounts of its activities as a provider of conditional access services.

- Must-carry/must-offer rules for electronic media

Art. 90 of the Electronic Communications Act sets forth the obligation of the communications undertaking which provides cable distribution services to guarantee the continuous retransmission of the following programmes: television programmes of the Estonian public provider of media services; television programmes transmitted by a provider of television services with unrestricted access that are received in the cable network area at a signal intensity compatible with the technical requirements and for the transmission of which the provider of television services requires no charge.

The above programmes have to be transmitted as a single package based on a subscription contract entered into between the communications undertaking which provides cable distribution services and the end-user. The programmes not specified above are transmitted based on an agreement between the communications undertaking and the end-user. A communications undertaking must ensure the end-user with the possibility to view the programmes offered by way of cable distribution services to the full extent of the duration of the broadcasting time, unless the contracting parties agree otherwise.

In May 2012 the private broadcasters TV3 and Kanal 2 raised an issue over leaving the free access television scheme because it was not clear from the above referred Art. 90 of the Electronic Communications Act whether they can charge fees from the cable distribution service providers for retransmission of their programmes or not, and both

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<sup>20</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90001K4&keel=en&pg=1&ptyyp=RT&tyyp=X&query=elektroonilise+side> (not available in English).

concerned parties interpret the provision proceeding from own business interests. As a result the Economic Affairs Committee of the Parliament initiated amendments to the said provision that would clearly provide for such right in order to enable the private broadcasters to receive reasonable compensation for the significant costs they incur in connection with the production of their programmes. The relevant amendment law has currently passed second reading in the Parliament and is envisaged to be adopted by autumn. The cable distribution service providers have however questioned this move, because it might raise prices of their services to end-users.

- Role of platform operators

Art 90<sup>1</sup> of the Electronic Communications Act sets forth the obligation of a provider of multiplexing services to ensure, at the request of a public provider of media services, the transmission of television programmes of the latter. A public provider of media services must give the provider of multiplexing services an advance written notice of its wish for transmission of its television programmes at least six months prior to the commencement of transmission. A provider of multiplexing services who transmits television programmes of the public provider of media services and the holder of an activity licence for the provision of television services with unrestricted access may change the transmission parameters such that the reception of television programmes is guaranteed in conformity with the established requirements.

- The role and functioning of regulatory authorities in these respects

Radio frequencies are managed by the Ministry of Economic Affairs and Communications and the Technical Surveillance Authority.

Supervision over compliance with the Electronic Communications Act is exercised by the Ministry of Economic Affairs and Communications and the Technical Surveillance Authority (granting of authorizations and technical aspects) and the Competition Authority (market related issues). In aspects concerning end-users as consumers, supervision is also exercised by the Consumer Protection Board.

- **Access to Information**

- Transparency of media ownership situations

All media undertakings have to be also registered in the Estonian Commercial Register and depending on the type of undertaking their shares have to be or may be registered in Estonian Central Register of Securities, which registers both are public and accessible to everyone.

- **Accountability of public service media**

The report on execution of the budget and the audited annual account is published on the website of National Broadcasting not later than by the end of the month of their preparation.

A development plan approved by the National Broadcasting Council is forwarded to the Ministry of Finance through the Ministry of Culture. A development plan is published on the website of National Broadcasting.

The contract under public law concluded between National Broadcasting and the Ministry of Culture in order to is published on the web pages of the Ministry of Culture and National Broadcasting within one week after the date of signing of the contract.

The National Broadcasting Council submits a written and an oral report on its activities to the Parliament's Cultural Affairs Committee once a year.

In order to fulfil its tasks, the Council has the right to examine all documents of National Broadcasting and to check the accuracy of the accounting of National Broadcasting, the existence of assets of National Broadcasting and the conformity of the activities of National Broadcasting with the law. The members of the Council may demand copies of reports and documents unless the Council decides otherwise. The Council has the right to obtain information concerning the activities of National Broadcasting from the management board and to demand an activity report and preparation of a balance sheet from the management board.

According to Art. 23 of the Estonian National Broadcasting Act, the management board of National Broadcasting is the management body who represents and manages National Broadcasting. While doing so, the management board is guided by the budget, development plan and strategic documents approved by the Council. The management board presents the Council with an overview of the economic activities and economic situation of National Broadcasting at least once every three months and gives immediately notice of any material deterioration in the economic condition of National Broadcasting or of any other material circumstances related to the economic activities of National Broadcasting.

After the end of the financial year, the management board of the National Broadcasting prepares the annual report and activity report pursuant to the procedure provided by law. The reports are submitted to the Council of the National Broadcasting for approval within four months after the end of the financial year. Prior to submitting the annual report to the Council for approval, the management board submits the annual accounts to the auditor for audit. The audited and approved annual report and activity report of National Broadcasting are published in the *Riigi Teataja Lisa* (Annex to State Gazette) and the website of National Broadcasting (Art. 32 and 33 of the Estonian National Broadcasting Act).

#### - Freedom of information laws

As referred to in the constitution, the extent and procedures of access to information are determined by the law. Such law is the Public Information Act<sup>21</sup> that is in force since 1 January 2001. Although the said legal act has since then over the years undergone some amendments, the main principles of access to information have remained essentially the same as described in the study of 2004. The Public Information Act contains a specific obligation of state and local government agencies to communicate information concerning events and facts that they possess and in respect of which public interest can be presumed to providers of media services or the printed press for disclosure (Art. 30 Sect. 4). In addition, the holder of information is obliged to immediately disclose any information concerning any threats to life, health, private property or environment by choosing the fastest and most appropriate way to avoid danger and mitigate its potential consequences (Art. 30 Sect. 3).

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<sup>21</sup> <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X40095K5&keel=en&pg=1&ptyyp=RT&tyyp=X&query=avaliku+teabe>.

According to the Public Information Act, state supervision over holders of information during compliance with requests for information and the disclosure of information is exercised by the Estonian Data Protection Inspectorate, who may initiate supervision proceedings on the basis of a challenge or on its own initiative (Art. 45 Sect. 1 and 2). A person whose rights are violated may file a challenge with the Estonian Data Protection Inspectorate or initiate an action with an administrative court either personally or through a representative (Art. 46).

- Accessibility of products/services and distribution networks

According to Art. 23 of the Media Services Act, an audiovisual media service provider has to make its service accessible to people with a visual or hearing disability using for this purpose, among others, supplying the programme with subtitles, sign language translation, separate audio channels, teletext and other ancillary services that enable people with a visual or hearing disability to use the provided service.

In Estonia there is no TV or radio license fee for end-users and no specific right to install reception devices or any aid schemes to purchase such. In general there are no obstacles to purchase and install reception devices in so far as these conform with the requirements and do not create radio interferences.

There is no state subsidy system for the printed press or private broadcasting in Estonia.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

According to Art. 31 of the Estonian National Broadcasting Act, the National Broadcasting has an ethics adviser who monitors the conformity of the operation of National Broadcasting to the professional ethics and good practices of journalism, reviews the objections and challenges submitted against the content of a programme or programme service of National Broadcasting and monitors the balance of the programme service. The management board of the National Broadcasting appoints the ethics adviser with the consent of the Council of the National Broadcasting.

The ethics adviser reports on his or her activities to the Council of the National Broadcasting twice a year and makes proposals on the elimination of deficiencies and prevention of errors to the management board and the Council of the National Broadcasting as and when necessary.

The decisions and proposals of the ethics adviser made to the management board of the National Broadcasting are advisory in nature but the board is required to provide reasons for non-compliance with such decisions and proposals.

- Participation in media operators/(self-)regulatory bodies

According to Art. 29 of the Estonian National Broadcasting Act there is a public advisory board at the National Broadcasting that has the task to advise the management board of the National Broadcasting in matters related to the content of programmes and other media products, and the structure of programme services of the National Broadcasting and the preparation of the draft development plan of National Broadcasting. The public advisory board has nine to fifteen members who are appointed by the decision of the Council of the National Broadcasting on proposal of the management board of the National Broadcasting for a period of up to five years. Appointment of the members of

the public advisory board is based on the representation of the interested groups and walks of life of the society.

No such participation or bodies exist in private media operators.

#### 2.2.7.2. Main Players in the Media Landscape

As described in the study of 2004 Estonian media market is small and there is a division between language groups – Estonian and Russian – who have their own media consumption patterns. Due to the smallness of the market a certain degree of concentration occurs.

##### 2.2.7.2.1. Radio

According to the chart of activity licenses available from the webpage of the Ministry of Culture<sup>22</sup> there are 29 private radio programmes - 8 nationwide (all in Estonian language), 20 regional (13 in Estonian and 7 in Russian language) and 1 international (in Russian language). There are 18 private radio broadcasters. Among the biggest are Taevaraadio AS (Sky Media Group owned by a group of Estonian businessmen) operating 6 programmes (2 nationwide and 4 regional) and AS Trio LSL (Trio LSL Radio Group owned by an Irish media company Communicorp Group Ltd., AS Eesti Meedia (Scibstedt) and a private person) operating 6 programmes (3 nationwide and 3 regional, two are operated through subsidiaries), followed by Tartu Pereraadio Ühing (a Christian station) operating 3 programmes (1 nationwide, 1 regional and 1 international) and AS Mediainvest (owned by Modern Times Group) operating 2 programmes (1 nationwide and 1 regional). Other private radio broadcasters each operate one programme (1 nationwide and the rest regional).

The National Broadcasting operates 5 public radio programmes (1 in Russian and 4 in Estonian; 4 nationwide and 1 regional)<sup>23</sup>.

**Table 30 EE: Main radio operators**

Sky Media Group	Radio Sky Plus, Radio Mania, Raadio 3, Russkoje Radio, Sky Radio, Russkoje Radio
Trio LSL Group	Raadio Kuku, Raadio Uuno, Raadio Elmar, Spin FM, DFM, Radio 100 FM Narodnoje Radio
Tartu Pereraadio Ühing	Pereraadio, Semeinoje Radio, Radio Eli
Modern Times Group	Star FM, Power Hit Radio
National Broadcasting	Vikerraadio, Klassikaraadio, Raadio 2, Raadio 4, Raadio Tallinn

Programmes of the public radio air across nationwide coverage areas delineated by law while private stations are limited to semi-national coverage areas provided by 'regional' licenses. All radio stations broadcast terrestrially; most of them have a parallel stream running on the Internet. Digital radio has not been implemented and probably shall not be in the probable future.<sup>24</sup>

<sup>22</sup> <http://www.kul.ee/index.php?path=0x2x60x86>.

<sup>23</sup> [http://www.err.ee/files/ERR\\_struktuur\\_01.01.2012.pdf](http://www.err.ee/files/ERR_struktuur_01.01.2012.pdf).

<sup>24</sup> [http://www.ejc.net/media\\_landscape/article/estonia/](http://www.ejc.net/media_landscape/article/estonia/).



According to the survey of TNS Emor in the summer of 2010 the average Estonian listens to radio 4 hours and 1 minute per day. Estonians are more eager radio-listeners (4 hours 12 minutes) than non-Estonians (3 hours and 38 minutes).

**Table 31 EE: Radio stations (Estonian-speaking) audience share/week**

<b>TOP 10 Estonian language radio stations in June-July 2010</b>			
<b>Listeners per week</b>			
<b>No</b>	<b>Station</b>	<b>Listeners</b>	<b>Listeners (%)</b>
1	Vikerraadio	320 000	29.7
2	Sky Plus	308 000	28.6
3	Raadio Elmar	274 000	25.4
4	Star FM	219 000	20.3
5	Raadio Uuno	140 000	13.0
6	Raadio Kuku	116 000	10.8
7	Raadio 2	114 000	10.5
8	Raadio 3	112 000	10.4
9	Power Hit Radio	106 000	9.8
10	Klassikaraadio	55 000	5.1

**Table 32 EE: Radio stations (Russian-speaking) audience share/week**

<b>TOP 5 Russian language radio stations in June-July 2010 (Listeners per week)</b>			
<b>No</b>	<b>Station</b>	<b>Listeners</b>	<b>Listeners (%)</b>
1	Raadio 4	188 000	17.5
2	Ruskoje Radio	186 000	17.2
3	Sky Raadio	158 000	14.7
4	Narodnoje Radio/100FM	111 000	10.3
5	Euro FM	38 000	3.6

#### 2.2.7.2.2. Television

According to the chart of activity licenses available from the webpage of the Ministry of Culture<sup>25</sup> there are 2 private nationwide free access television channels and 10 private nationwide conditional access television channels. There are 9 private TV broadcasters. The biggest are AS Kanal 2 (owned by Schibsted) operating 3 channels (1 free access channel and 2 conditional access channels) and AS TV 3 (owned by Modern Times Group) operating 2 channels (1 free access channel and 1 conditional access channel). The rest of the private TV broadcasters each operate one conditional access channel.

The National Broadcasting operates 2 nationwide channels.

<sup>25</sup> <http://www.kul.ee/index.php?path=0x2x60x86>.

**Table 33 EE: Main television companies**

AS Kanal 2 (Schibsted)	Kanal 2, Kanal 11, Kanal 12
AS TV 3 (Modern Times Group)	TV 3, TV 6
National Broadcasting	ETV, ETV2

According to TNS Emor, the economic crisis influenced the Estonian media market hard in 2009 and in the 1<sup>st</sup> quarter of 2010. The TV advertising revenues decreased in 2009 by 31% compared to 2008 and by an additional 12% in the 1<sup>st</sup> quarter of 2010. Four channels ceased transmission in 2009: Neljas, Elion TV, Kalev Sport (also known as TV4) and MTV Estonia. In 2009 a new channel TV 14 was launched (which however does not exist anymore) and in May 2010 local channel Tallinn TV.

According to TNS Emor in March 2012 the average resident watched TV for 4 hours and 10 minutes per day. Non-Estonians appeared to be more eager TV watchers (4 hours and 34 minutes) than Estonians (3 hours and 59 minutes). Estonians watched ETV (24.4%), Kanal 2 (23.0%) and TV3 (17.9%) and non-Estonians PBK (23.7%), NTV Mir (12.5%) and RTR Planeta (9.0%) (none of these are Estonian licensed channels).<sup>26</sup> Thus, Estonians prefer domestic programmes while Russian speakers like those broadcast from Russia. Channels from the Russian Federation (as well as other pan-European satellite channels) can be watched on cable networks<sup>27</sup>.

**Table 34 EE: Daily audience share in percent from total viewing time**

Channel	III	XI	XII	I	II	III
	2011			2012		
ETV	17,5	14,6	15,2	16,1	18,1	16,7
Kanal 2	15,8	17,2	15,8	14,3	14,2	15,8
TV3	11,4	12,8	13,4	12	11,1	12,3
Kanal 11	2	2	1,9	2	1,7	1,5
PBK	10,7	10,6	10	8,6	8,8	8,7
RTR Planeta	3,8	3,6	2,7	3,7	3,2	3,3
Video watching	2,2	2,4	2,9	2,8	2,5	2,5
NTV Mir	4,5	4,4	4,3	4,5	5	5,2
Seitse	0,2	0,2	0,2	0,2	0,2	0,3
TV6	1,9	2	1,7	2,2	2,4	2,4
ETV 2	2,5	2,9	2,9	3,2	2,7	2,6
3+	2,7	3,2	3	3,1	3,1	2,6
Ren TV Estonia	2,7	1,9	2	2,2	2,3	2,3
Fox Crime	0,9	0,8	0,8	0,8	1	0,9
Fox Life	0,8	1	0,9	0,9	1	1
National Geographic	0,4	0,2	0,3	0,3	0,3	0,3
Sony Entertainment TV	0,6	0,6	0,6	0,6		
Kanal 12		1,1	1,3	1,2	1,3	1,2
Tallinna TV		0,2	0,4	0,4	0,3	0,3
CTC			0,4	0,4	0,5	0,5
Other channels	19,4	18,2	19,4	20,5	20,3	19,7

<sup>26</sup> <http://www.emor.ee/teleauditooriumi-ulevaade-martsikuus-2012/>.

<sup>27</sup> [http://www.ejc.net/media\\_landscape/article/estonia/](http://www.ejc.net/media_landscape/article/estonia/).

2.2.7.2.3. *Press and Publishing*

Although the market is small, there is a great variety of newspapers and magazines - about 70 different newspapers (40 of which are members of the Estonian Newspaper Association), among which are 6 large dailies and 10 larger weeklies, over 20 local newspapers and up to 80 magazines<sup>28</sup>.

According to TSN Emor's survey in early spring 2012<sup>29</sup>, there are 99 newspapers and magazines in total on the Estonian market. At least one of them is read by 572 000 people or 81.3% of the Estonians in the age group of 15-74. As an average Estonian reads 3 different newspapers and 2.8 magazines.<sup>30</sup>

There are five daily newspapers and a number of weekly papers and regional newspapers. The biggest publishers of newspapers are Bonnier Group, Schibsted and Ekspress Group:

**Table 35 EE: Newspaper publishers and titles**

Bonnier Group	Äripäev, Delovõje Vedomosti
Schibsted (via Eesti Meedia AS)	Postimees, Õhtuleht (50%), 5 regional newspapers
Ekspress Group (via AS Eesti Ajalehed)	Eesti Ekspress, Eesti Päevaleht, Maaleht, Õhtuleht (50 %)

According to the statistics available from the Estonian Newspapers' Association the Estonian newspaper industry sales and advertising revenues in 2010 were the following (based on the data of its 41 member papers):

**Table 36 EE: The Estonian newspaper industry sales and advertising revenues in 2010**

	Sales revenues (000 EEK)	Advertising revenue (000 EEK)	Advertising revenue shares
National dailies (Eesti Päevaleht, Postimees, Õhtuleht, Äripäev, Russian language Postimees)	429 000	145 000	34%
Regional papers (including 22 papers)	135 000	58 000	43%
National weeklies (Eesti Ekspress, Maaleht, MK-Estonia, Eesti Kirik, Õpetajate Leht, Delovõje Vedomosti, Den za Dnjom, Komsoml'skaja Pravda P-E, Vestnik ZOZ)	140 000	62 000	44%
Free papers	15 000	13 000	87%
Total (all newspapers)	719 000	278 000	39%

<sup>28</sup> [http://www.asn.org.ee/english/legal\\_background.html](http://www.asn.org.ee/english/legal_background.html).

<sup>29</sup> <http://www.emor.ee/99-trukimeedia-valjaannet-varakevadel-2012/>.

<sup>30</sup> <http://www.emor.ee/eestlased-loevad-ligi-6-erinevat-valjaannet-void-veerand-neist-on-tellitud/>.

According to the statistics available from the Estonian Newspapers' Association, in March 2012 the average number of printed copies of member newspapers (based on information of printing houses, in thousands, in alphabetic order):

**Table 37 EE: The average number of printed copies of newspapers**

NATIONAL DAILIES		REGIONAL PAPERS		NATIONAL WEEKLIES		FREE PAPERS	
Eesti Päevaleht	27,1	Elva Postipoiss	1,5	Delovóje Vedomosti	4,2	Severnoje Poberežje Ekstra	65,8
Postimees	58,2	Harju Elu	3,8	Den za Dnjom	12,3	Sillamjaeski Vestnik	3,0
Postimees (venekeelne)	10,3	Hiiu Leht	2,8	Eesti Ekspress	30,4	Tallinna Linnaleht	32,5
Õhtuleht	54,0	Hiiu Nädal	1,0	Eesti Kirik	2,1	Tallinna Linnaleht vene keeles	27,0
Äripäev	11,8	Järva Teataja	4,3	Komsomolskaja Pravda Baltia	11,0	Tartu Ekspress	20,0
		Lääne Elu	3,7	Maaleht	43,9	Tartu-Pärnu Linnaleht	25,5
		Meie Maa	7,3	MK-Estonia	12,3		
		Narva	11,0	Vestnik ZOZ	13,0		
		(Nädaline) Raplamaa Sõnumid	3,0	Õpetajate Leht	2,9		
		Põhjarannik/Sev.Poberezhje	6,6				
		Pärnu Postimees	13,0				
		Saarte Hääl	4,6				
		Sakala	9,2				
		Sõnumitooja	1,8				
		Valgamaalane	2,9				
		Vali Uudised	2,0				
		Virumaa Teataja	6,8				
		Viru Prospekt	5,3				
		Vooremaa	2,5				
		Võrumaa Teataja	4,1				

According to TSN Emor the most read newspapers are dailies Postimees and Õhtuleht with respectively 194,000 and 143,000 readers and the weekly Maaleht with 125,000 readers<sup>31</sup>.

#### 2.2.7.2.4. *Online media (non-linear audiovisual (media) services; websites)*

As of the end of 2011 71% of households have Internet connection in Estonia (in 2006 – 46%).<sup>32</sup> Thus the rate of computerization and Internet penetration in Estonia is comparatively high.

The biggest, thriving and influential news portal is Delfi.ee, operated by the Ekspress Group. This portal produces along with references to other media sources some original content (including video and podcast) with the emphasis on headlines and the opportunity to comment on the news. Comment sections have invoked several debates

<sup>31</sup> <http://www.emor.ee/99-trukimeedia-valjaannet-varakevadel-2012/>.

<sup>32</sup> <http://uudised.err.ee/?06241093>.

and court cases about the liability of the media owner for the comments left by the visitors. Delfi.ee runs also a portal in the Russian language. The company has affiliations with other Baltic states and Ukraine<sup>33</sup>.

Most Estonian-language newspapers have free online versions, the contents of the two versions are somewhat different. The National Broadcasting also runs an online news portal that often serves as an agency source for radio stations, as does the Baltic News Service and dailies' online versions. The National Broadcasting, as well as Kanal 2 and TV 3, make available their television programmes on demand. Most terrestrial radio programmes can be listened online and the National Broadcasting, Radio Kuku (a talk station run by the Trio LSL Group) and some other radio stations make their talk programmes available as on-demand archives<sup>34</sup>.

#### 2.2.7.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers

According to the Annual Report of the Estonian Competition Board of 2010<sup>35</sup> there were 15 cable network service (incl. IPTV service) on the market. The biggest were Starman, STV ja Elion. Compared to 2009 the number of end-users increased by 5.3% (by approx. 17,000 end-users). Availability of IPTV service has been mostly expanded by Elion.

#### 2.2.7.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)

According to TSN Emor in 2011<sup>36</sup> the turnover of media advertising market was 72.24 million EUR. The overall increase of turnover when compared to 2010 was 9.4%. Most of the increase can be attributed to internet and outdoor media advertising (respectively 16% and 15%), but also magazine, radio and television advertising turnover increased more than average. The smallest increase was in newspaper sector (4%).

**Table 38 EE: Estonian media advertising market shares in 2011**

Newspapers	19,76	27,3%	4,3%
Magazines	4,62	6,4%	11,1%
Television	22,86	31,7%	8,5%
Radio	7,16	9,9%	10,7%
Outdoor media	6,62	9,2%	15,2%
Internet	11,22	15,5%	16,0%
Total	72,24	100,0%	9,4%

#### 2.2.7.3. Conclusion and Recommendations

From the legislative point of view, Estonia offers a rather liberal environment for the media. There is no universal "media law," which would set forth similar principles for both print media and broadcasters. While private broadcasters and National Broadcasting is regulated by specific laws, print media issues are covered by general laws and self-regulation, which sometimes results in "gray" unregulated areas. At the moment there does not appear to be any initiatives to introduce print media regulation or a universal "media law." However, in light of the increased awareness of privacy issues by the readers, as well as the developments of technology, it would be recommendable to

<sup>33</sup> [http://www.ejc.net/media\\_landscape/article/estonia/](http://www.ejc.net/media_landscape/article/estonia/).

<sup>34</sup> [http://www.ejc.net/media\\_landscape/article/estonia/](http://www.ejc.net/media_landscape/article/estonia/).

<sup>35</sup> [http://www.konkurentsiamet.ee/public/Aastaraamat/AASTARAAMAT\\_2010.pdf](http://www.konkurentsiamet.ee/public/Aastaraamat/AASTARAAMAT_2010.pdf).

<sup>36</sup> [http://www.emor.ee/eesti-meediareklaamiturg-kasvas-ligi-9/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed:%20TnsEmorMeediauringud%20\(TNS%20Emor:%20Meediauringud\)&utm\\_content=FeedBurner](http://www.emor.ee/eesti-meediareklaamiturg-kasvas-ligi-9/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:%20TnsEmorMeediauringud%20(TNS%20Emor:%20Meediauringud)&utm_content=FeedBurner).

initiate also regulation of print media, specifically in matters concerning professional ethics and observance of the Code of Ethics of journalists to all print media, including tabloids.

There also remains in focal point the issue of concentration, the inevitability of which could be explained by the smallness of the market and lack of investment and other resources, as well as economic downturn period. Although the Media Services Act sets forth that activity license is not issued in case this would result in cross media ownership, the situation where cross media ownership emerges during the validity period of the license is not regulated. Therefore further concentrations are possible. In order to prevent cross-media ownership, it would be recommendable to address in legislation also the issue of emerging of cross-media ownership during the license validity period. Since print media is not regulated at all, but concentration occurs also in this sphere, it would be recommendable to address also print media cross-ownership situations.

With recent court cases, the issue of who is responsible for user created online content has emerged. Also, the public debates heavily on when publication of personal data is in public interest and when a person becomes a public figure. The latter is largely due to a recent ruling of a court of first instance adjudicating a compensation of moral damage in the amount of 10,000 EUR from a tabloid Kroonika to a popular song contest TV show participant. In light of the said court ruling, a lot more court cases like this are likely to be initiated. The mentioned court case has also raised a question whether tabloids are bound by the Code of Ethics of journalists.

Another recently emerged issue is the alleged breach of the National Broadcasting of its prohibition to transmit advertising. Namely, the private TV broadcasters have complained to the Council of Broadcasting (the highest body of the National Broadcasting) that the National Broadcasting interprets the rules on allowed advertising too widely and thus attempts to take a share of advertising revenues that would otherwise go the private TV broadcasters. Thus, the future may see a change of regulation of the allowed advertising by the National Broadcasting.



## FINLAND

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### 2.2.8. Finland

#### 2.2.8.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.8.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The Constitution of Finland includes Section 12 entitled "Freedom of expression and right of access to information" (in force since 2000, paragraph 1 quoted in the national report of 2004).<sup>1</sup>

- Specific safeguards and rights for the media

The Constitution contains no specific safeguards and rights for the media. These are, however, included in the Act on the Exercise of Freedom of Expression in the Mass Media (460/2003, quoted in the national report of 2004).<sup>2</sup>

- Freedom to receive and to access information
  - Specific rights for the citizens

The openness of government activities was established in the Constitution as paragraph 2 of above-mentioned Section 12 (quoted in the national report of 2004).

- Safeguards on regulatory authorities

The Constitution contains no specific provisions on regulatory authorities regarding media and communication. These are established as part of State administration, mainly under the Ministry of Transport and Communications, including the Finnish Regulatory Authority (FICORA).<sup>3</sup>

- Safeguards on "universal service"

The Constitution contains no specific provisions on universal service in media and communication.

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<sup>1</sup> <http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>.

<sup>2</sup> <http://www.finlex.fi/en/laki/kaannokset/2003/en20030460.pdf>.

<sup>3</sup> [http://www.lvm.fi/web/en/communications\\_policy](http://www.lvm.fi/web/en/communications_policy).

#### 2.2.8.1.2. *Media order (de lege lata and de facto)*

- “Market Entry”
  - Licensing schemes; remit psm; notification for print publications

Commercial broadcasters are granted operating licences from the Government for a maximum period of 10 years. This is done on the basis of the Act on Television and Radio Operations (744/1998).<sup>4</sup>

Online services do not need licences but can be operated as extensions of periodic publications, broadcasters or other legal persons. An online service, called in the above-mentioned Act on the Exercise of Freedom of Expression in Mass Media (460/2003) “network publication”, is defined as “a set of network messages, arranged into a coherent whole comparable to a periodical, from material produced or processed by the publisher, and intended to be issued regularly”. Network publications are required to designate a responsible editor, like all periodical publishers and broadcasters. There is no obligation to name a responsible editor for websites maintained by private individuals, nor portals and chat groups; however, these are subject to the Penal Code and the Tort Liability Act.

The remit of public service media is defined in the Act on Yleisradio Oy (1380/1993)<sup>5</sup>, the Finnish Broadcasting Company known also as YLE. Section 7 of the Act, slightly revised in 2012, reads as follows:

“The company shall be responsible for the provision of versatile and comprehensive television and radio programming with the related additional and extra services for all citizens under equal conditions. These and other content services relating to public service may be provided in general telecommunications networks on national and regional levels.

The public service programming shall in particular:

- 1) support democracy and everyone’s opportunity to participate by providing a wide variety of information, opinions and debates as well as opportunities to interact;
- 2) produce, create, develop and preserve Finnish culture, art and inspiring entertainment;
- 3) take educational and equality aspects into consideration in the programmes, provide an opportunity to learn and study, give focus on programming for children and adolescents, and offer devotional programmes;
- 4) treat in its broadcasting Finnish-speaking and Swedish-speaking citizens on equal grounds and produce services in the Sámi, Romany, and sign languages as well as, where applicable, in the languages of other language groups in the country;
- 5) support tolerance and multiculturalism and provide programming for minority and special groups;
- 6) promote cultural interaction and provide programming directed abroad; and

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<sup>4</sup> <http://www.finlex.fi/en/laki/kaannokset/1998/en19980744.pdf>.

<sup>5</sup> <http://www.finlex.fi/en/laki/kaannokset/1993/en19931380.pdf>.

- 7) broadcast official announcements, for which further provision shall be issued by decree, and make provision for television and radio broadcasting in exceptional circumstances.”

Print publications do not need licences but if issued regularly as periodicals they need to designate a responsible editor.

- Media pluralism/ownership; competition law aspects

There are no anti-concentration rules for the media and the general competition rules are expected to govern also the media field. Relevant legislation is provided by the Communications Market Act (393/2003)<sup>6</sup>, as described in the 2004 study.

- Legal framework for psm; ability to fulfill their tasks

The main framework is provided by the Act on Yleisradio Oy. The supreme body of the Finnish Broadcasting Company (YLE) is the Administrative Council, appointed by Parliament, which decides the economic and operational guidelines and oversees and supervises how the tasks involving public service programme activities are carried out. The Administrative Council also appoints the board of directors and decides on issues concerning considerable restriction or expansion of the activities.

YLE's programme service output is planned in an extensive and detailed process. The plans are brought to the central management to be analysed as a whole and, where necessary, revised. The proposition is then brought to the Executive Board by the Director General to be approved on an overall strategic level as the basis for the planning of operations. The Board decides the budget for the following year.

- The role and functioning of regulatory authorities in these respects

There have been no essential changes since the national report of 2004.

The licences granted by the Government for television and radio operations are monitored by FICORA, which is responsible for the compliance with the licence terms.

- “Pursuit of Core Activity”
  - Ordinary law safeguards for journalistic activity

Finland joined the European Convention on Human Rights (ECHR) in 1989 and had to bring national legislation into line with its spirit. The existing legislation concerning protection of the freedom of expression was regarded adequate and did not need alterations. However, the implementation of the principles of human rights in Finnish court practice has been problematic.

Finnish courts interpret the issues of freedom of expression more narrowly, applying the reduced level of privacy protection only to high-ranking public persons. For instance, private people as participants of public incidents do not belong to this category, even if the information about them would be important for the public and the public interest could be predicted.

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<sup>6</sup> <http://www.finlex.fi/en/laki/kaannokset/2003/en20030393.pdf>.

In Finnish society and culture, privacy is highly valued and violation of somebody's privacy by the media is a sensitive issue. It has been a general baseline in Finnish courts that private information should not be published without the approval of the person concerned. When judging cases where the freedom of speech and right for privacy are in conflict, the courts emphasise the legality of issues published and do not sufficiently consider the public importance aspect. It is relatively safe to pronounce sentence when the essential elements of the offence have been identified and ignore the freedom of speech and public interest arguments. Hence the problems with keeping Finnish court practice in line with the ECHR principles. During the past decade (2000-2011) the ECtHR has issued 24 Finnish judgments (12 of them during 2010-2011) related to freedom of expression, nine of them concerning the media. In seven cases out of nine, Finland was convicted for favouring protection of privacy and dignity at the expense of the freedom of expression.

In 2010, the Ministry of Justice commissioned an expert study comparing legislation and court practice concerning the freedom of speech, protection of personal privacy and dignity in Finland, Sweden, Norway and The Netherlands. According to the report, Finnish legislation is not more restrictive than the legislation in the compared countries. After analysing the freedom of speech related convictions, the report concluded that the laws could have helped to solve the cases in favour of the freedom of speech. The problem, however, is the interpretation of the laws by Finnish courts that tend to rely too much on precedent and do not give sufficient consideration to the practices and interpretations of the ECtHR. The report also emphasises that the precedents used by the courts too often come from the 1970s, when the interpretation of the freedom of speech was much narrower and the precedents of the ECtHR had yet to occur. According to the judge of the ECtHR from Finland, *Päivi Hirvelä*, Finnish judges trust that the balance between the freedom of expression and personal privacy has been sufficiently deliberated during the national legislation process. In several Finnish cases, reasons to interference in media freedom have been significant but not sufficient according to the ECtHR. The aspect of the freedom of expression has often been completely missed out in the courts' reasoning even when the social importance of the case has been obvious and it should have been taken into consideration.

For achieving better harmonisation with the principles of the ECHR, the Supreme Court of Finland has started to justify its rulings more carefully and to deliberate the freedom of speech aspect more properly. For example, the practice of regarding highly critical value-laden expressions intended for raising public discussion, as expressions that require factual proof, is gradually changing in favour of the freedom of expression.

A specific right to reply and right to correction is established in the Act on the Exercise of Freedom of Expression in Mass Media (460/2003).

- Specific positive content obligations

The above-quoted remit of public service broadcasting includes several provisions, notably regarding languages, which serve as positive content obligations. In its broadcasting YLE must treat Finnish-speaking and Swedish-speaking citizens equally and produce services in the Sámi, Romany, and sign languages as well as, where applicable, in the languages of other language groups in the country.

- Funding schemes for specifically desired content

No funding schemes exist for specifically desired content. In a broader context, the funding on public service broadcasting, to be reformed from the beginning of 2013 by an

"YLE tax",<sup>7</sup> can be seen as a general funding scheme for fulfilling the public service remit as determined by law. Similarly, financial support of the Finnish Film Foundation can be seen as a general funding scheme for film and independent television programme production for all companies.

- Political advertising and/or broadcasting time

Political advertising before elections is permitted and widely used in the press as well as commercial radio and television services. The public service broadcaster YLE does not have advertising but a lot of programmes during election campaigns, with an obligation to treat different parties and candidates impartially and equally. Commercial broadcasters have also election programmes apart from political advertising.

- Codes of conduct and their organisational framing

The Council for Mass Media (CMM)<sup>8</sup> deems not only the media-produced content but also the consumer-produced content to be subject to journalistic self-regulation, and clearly distinguishes between editorial and non-editorial content. The respective amendment to the Guidelines of Journalists came into force in the beginning of 2011. The Guidelines stipulate that certain fundamental principles concern public discussions even if they do not contain editorial material and regardless of whether they are moderated before or after publishing. The Guidelines oblige the news media organisations to impede publication of the materials that violate personal privacy or offend human integrity and to immediately remove them if they appear on their web sites. The main purpose of the new amendment is to confirm trustfulness and responsibility of the media regardless of their format and publishing platform. Leaving consumer-produced content outside the publisher's responsibility may undermine the principle of media responsibility, according to the CMM. Websites produced for children and youngsters should be supervised with a special care.

Pressure on the CMM comes sometimes from inside the media. For example, in a case in 2011, a number of newspaper editors-in-chief criticized the CMM for dismissing a complaint concerning a YLE broadcast. Their concern appeared to be that the decision, favourable to the media, could have damaged the trustworthiness of the CMM among the public. As a result of this case and accompanying criticism, amendments were made to the Guidelines for Journalists: if an anonymous source has been used in a story of high public interest and societal importance, and causing negative publicity, the news organisations supposed to demonstrate how the reliability of the source has been verified.<sup>9</sup>

- The role and functioning of regulatory authorities in these respects

FICORA monitors advertising, sponsorship and product placement in television and radio operations and it also handles customer complaints made in the framework of the Act on Television and Radio Operations.

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<sup>7</sup> <http://www.lvm.fi/web/en/topical/pressreleases/-/view/1280788>.

<sup>8</sup> [http://www.jsn.fi/en/Council\\_for\\_Mass\\_Media/the-council-for-mass-media-in-finland/](http://www.jsn.fi/en/Council_for_Mass_Media/the-council-for-mass-media-in-finland/).

<sup>9</sup> [http://www.jsn.fi/en/complain\\_instructions/](http://www.jsn.fi/en/complain_instructions/), section 14.

- Distribution Aspects
  - Access to frequencies

Frequencies are allocated by the Government in accordance with the needs defined. This is done through a frequency allocation plan issued as a decree. The legal basis is the following:

Telecommunications radio networks and digital television and (sound) radio distribution networks are both regulated by the Communications Market Act (393/2003).

As far as digital broadcasting is concerned, there are separate network operating licences and programme operating licences. The network operating licences are regulated by this Act, and the programme operating licences by the Act on Television and Radio Operations (744/1998).

The holders of network operating licences are obliged to provide the distribution capacity needed by the Finnish Broadcasting Company (YLE) and the holders of programme operating licences.

The Act on Radio Frequencies and Telecommunications Equipment (1015/2001)<sup>10</sup> is intended to promote efficient, interference-free and non-discriminatory use of the spectrum. Based on this Act the Government issues decrees whereby specific frequencies are allocated to analogue and digital television and radio networks and mobile telecommunications networks (GSM, UMTS, DVB-H).

- Access to distribution networks and control of actual conditions

The Act of Television and Radio Operations (744/1998) sets out in Section 10 the conditions for granting a licence to "aim at promoting freedom of speech as well as safeguarding the diversity of the provision of programmes as well as the needs of special groups of the public".

- Must-carry/must-offer rules for electronic media

This is governed in Section 134 of the Communications Market Act (393/2003) as follows:

- 1) A telecommunications operator providing a network service in a cable television network has an obligation to transmit the following in the network without charge:
  - public service television and radio programmes that are receivable in the municipality in which the network is located;
  - ancillary and supplementary services related to these programmes;
  - freely receivable television and radio programmes that are in the public interest and broadcast by virtue of a national programming licence, and that shall be accompanied by an audio-subtitling and subtitling service;

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<sup>10</sup> <http://www.finlex.fi/en/laki/kaannokset/2001/en20011015.pdf>.

- freely receivable material supplied for a particular item in a programme referred to in paragraph 3, advertisements included in the programmes, and ancillary and supplementary services related to the programmes.
- 2) The transmission obligation referred to in subsection 1 above also applies to a telecommunications operator providing a network service in a cable television network, using other than traditional cable television technology in the transmission of programming, provided that the reception of the programming is possible with conventional reception equipment.
  - 3) However, a telecommunications operator has no transmission obligation if the cable television network capacity is for the operator's use in its television or radio operations or if it is necessary for this purpose in order to meet a reasonable future need of the operator. In fulfilling its transmission obligation, a telecommunications operator need not make any improvements in network capacity that would require significant financial investments.
  - 4) The programmes and associated services referred to in subsection 1 shall be provided to users free of charge. However, a telecommunications operator providing a network service in a cable television network may require users to pay a reasonable fee for maintenance of the network.
  - 5) The programmes and services referred to in subsection 1 above shall be provided to users unmodified and simultaneously with the original broadcast.

- Role of platform operators

Cable and satellite operations are not subject to special laws beyond general regulation of enterprise and technical conditions. Multiplex operators are granted a licence by the Government for terrestrial mass communication with terms determined by the Communications Market Act (393/2003).

- The role and functioning of regulatory authorities in these respects

FICORA monitors the licence holders and, if needed, takes steps to enforcement and sanctions in accordance with the law.

- Access to Information

- Transparency of media ownership situations

The ownership situation of all media companies is transparent in principle, but there is no central database easily accessible. Major media companies listed in Helsinki stock exchange have their ownership details filed there, while other media companies can be found in the Finnish Trade Register, an open register covering all businesses. Television and radio companies have also their ownership situation documented in licence applications which are under public domain.

- Accountability of public service media

The Act on Yleisradio Oy requires YLE to submit a report to the Finnish Communications Regulatory Authority (FICORA) on the public service broadcasting provided during the previous calendar year. FICORA shall issue a statement to Government about the report



by the end of September. These reports do not aim to measure the qualitative performance but rather the legality of YLE's public service operations.

In relation to the Finnish Broadcasting Company (YLE), the Administrative Council (AC) is ultimately accountable to Parliament: submitting a report every second year on the implementation of the public service and on the fulfilment of its own supervisory obligations. This report can be seen as a qualitative evaluation of public service broadcasting. On the basis of this report there is a discussion in Parliament. According to recent amendments to the Act on Yleisradio Oy, coming into force in 2013, the public service function of YLE will be better secured. The AC will be required to evaluate in advance the public service nature and possible market impact of significant new YLE services and products. An official in the Parliament's Transport and Communications Committee will prepare and present the pre-evaluation to AC. Reports to Parliament will from this date be submitted annually.

- Freedom of information laws

Finland, among the other Nordic countries, has a long tradition of guaranteeing public accessibility to official documents by legislation. The national FOIA, Act on Openness of Government Activities (621/1999)<sup>11</sup>, sets the principle that official documents shall be in the public domain unless there is a specific reason for withholding them. The transparency of government regards activities of authorities and not only documents they possess. Therefore, authorities have certain informing requirements. The intention of the Act is to promote openness and good practice on information management in government, and provide private individuals and corporations with an opportunity to monitor the exercise of public authority and the use of public resources, to freely form an opinion, to influence the exercise of public authority and protect their rights and interests.

The application of the Act is very broad: in addition to public authorities it also applies to private bodies that exercise public authority: in addition to general authorities as state administrative and municipal authorities, state agencies and institutions, the Act applies also to corporations, institutions, foundations and private individuals appointed for the performance of a public task on the basis of the Act. The public right to access refers to the information of official documents regardless of their form. The document may be in a paper or electronic format, a micro film, a register entry or a collection of entries, a voice recording, etc. The Act applies to both documents in the possession of an authority and to documents prepared by an authority or delivered to an authority.

According to the Act, access to documents is the main principle, while secrecy is an exception. Access may thus not be restricted without a lawful reason, or more than necessary for the interest that is being protected. The Finnish FOIA consists of 32 categories of secret documents that are exempted from release according to a variety of potential harm tests depending on the type of information. Documents are kept secret for 25 years unless otherwise provided by the law, with the exception of personal information which must be kept secret for 50 years after the death of the individual. If the release would "obviously cause significant harm to the interests protected", the Government can extend the classification for another thirty years.

Access is limited to non-official documents which may not be archived, such as private notes and documents of the internal activity of an authority. Documents which contain information on decision-making must be stored. Preparatory documents are to be

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<sup>11</sup> <http://www.finlex.fi/en/laki/kaannokset/1999/en19990621.pdf>.

entered into the public domain at the time of any decisions, if not earlier. If a document contains only partially secret information, access must be granted to the public part of it, by covering the parts to be kept secret in a document. If necessary, an authority possessing the document is required to make this kind of distinction. Information seekers are not required to provide reasons for their request or to verify their identity unless they are requesting personal or otherwise secret information. Responses to requests must be made within 14 days. In cases where the information requested is withheld, authorities are required to give written refusals containing the reasons for the refusal and including guidelines to appeal. Appeal to a decision made by an authority is usually made to an administrative court.

In addition to answering document requests, authorities are under the obligation to promote access and to assist those requesting information to find it without knowing its location. Moreover, they are required to produce and disseminate information on their services and practices, as well as on the social conditions and developments in their field of competence. Authorities are obliged to produce sets of data on request. Computer systems must be planned to ensure easy access to information. Releasing the information requested need not be free of charge. Authorities have the right to charge reasonable printing expenses (cost prices) of the paper documents delivered to information seekers.

However, in spite of legislative possibilities, several technical and other kinds of restrictions have been found for the access of information. Problems partly arise from inconsistent legal interpretations of public and non-public issues, partly from the negative attitudes of the authorities providing information requested and partly from uninformed journalists and hectic journalism practices not giving time to apply for documents or to complain if they are not turned over. The amount of information requested may be too vast or the documents may only be partially public, and separating the public part from the secret would be too difficult. Moreover, according to the authorities, they do not have enough time to look for the information, or the format of the information is problematic for access or the archives are not organised enough to find the information requested. When authorities are uncertain whether the information is public or not, they usually refuse to provide access, just to be on the safe side

- Accessibility of products/services and distribution networks

Based on the earlier National Broadband Strategy of the Ministry of Transport and Communications, initiatives were taken to declare the Internet connection of minimum 1 Mbits/s as a universal service obligation (USO) in Finland. The provision was adopted as official Government policy in 2008.

The USO in broadband connections would certainly mean a major leap forward for Finland. However, there is also a major problem: Finland's geographic area is large, and the population is small (ca. 5.5 million inhabitants). To build up a high-speed network that would reach every corner of the country would be extremely expensive and commercially risky. To resolve this dilemma, and counter to the Ministry's previous broadband strategy, which was based on the virtuosity of the market, the Ministry now has had to bow to the necessity of State aid: "The Finnish state will contribute to the financing of the Broadband Programme. Public aid will cover 67 per cent of the investments at most, with the Government contribution amounting to a maximum of 33 per cent. Public funding is used when the target levels of the Broadband Programme cannot be achieved on commercial terms."

Since the Internet has opened unrestricted opportunities for all kinds of content and content producers, there is a requirement to prevent dissemination of harmful content and establish principles of responsibility of online service providers. Gradually, legislation concerning the content of web sites is being developed in Finland. In the Act on the Exercise of Freedom of Expression in Mass Media (460/2003), the responsibility of Internet service providers is limited to technical and distributional matters, such as deleting illegal material after a court decision and revealing technical identification information during criminal investigation.

In 2011, new amendments to the Penal Code came into force, which specify the responsibility of web-operators (administrators) for the content of their sites. Particularly, the amendments concern racist and hate speech and dissemination of child pornography. The operators can be sued according to the article of hostile ethnic agitation of the Penal Code (39/1889) if they are unwilling to remove the illegal material in their websites even if they are pointed out of its problematic character. Making child pornographic material intentionally available can bring about punishment according to the article that concerns dissemination of sexually obscene pictures.

Regarding public subsidies, no essential changes have been made since the 2004 report, apart from the above-mentioned reform of financing public service broadcasting by the "YLE tax" from 2013 on and a VAT reform concerning the printed press. The VAT reform removed from newspapers and magazines their decades-old exemption not to pay VAT on subscriptions – subscriptions being among Finns the main form of paying for the press (paying for individual issues has always included VAT). A 9% VAT was added to subscriptions from the beginning of 2012, increasing the state tax revenues by an estimated amount of 90 million euros per year, but raising the cost of press subscriptions by the same amount as no publishers were prepared to cover the added expense from other sources. Higher subscription costs will obviously somewhat reduce the press consumption, which has already suffered from declining readership during the past few years.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

Complaints about media performance can be lodged, in addition to the above-mentioned Council for Mass Media, to ombudsmen who are responsible for specific areas such as consumers, equality, children, and data protection. A couple of newspapers introduced their own readers' ombudsmen, but they did not prove sustainable.

The public should be provided with an opportunity to notify about inappropriate contents and to get a confirmation that their notification has been received.

- Participation in media operators/(self-)regulatory bodies

Apart from the self-regulatory body, the Council for Mass Media, there are no established platforms of media audiences for systematic feedback and participation. Similarly, an association of listeners and viewers was established for mobilising media criticism and audience participation of television and radio programmes in the early 2000s, but also this initiative dried out after a couple of years.

### 2.2.8.2. Main Players in the Media Landscape

The overall picture of Finland's media landscape remains the same as in the 2004 report, but essential changes have occurred in details including ownership.

Table 39 presents an overview with a list of top twelve media companies, based on their financial volume measured in annual turnover. It shows the situation in 2010, with changes from the previous year and pointing out different media sectors where each company is operating in 2011.

**Table 39 FI: Top twelve media companies by turnover 2010**

		Turnover		Media activities 2011					
		€ million 2010	Change % 2009-10	Newspapers	Magazines	Books	Radio	TV	Cable TV
1	Sanoma Oyj	2 761	0	x	x	x	x	x	(x)
2	Yleisradio Oy	398	3				x	x	
3	Alma Media Oyj	311	1	x	x				(x)
4	Otava Oy	223	0		x	x			
5	MTV Oy*	214 *	11				x	x	
6	TS-Yhtymä Oy	213	-4	x		x	x	x	
7	Edita Oy	110	-1		x	x			
8	Keskisuomalainen Oyj	102	4	x					
9	A-lehdet Oy	91	-2		x				
10	Pohjois-Karjalan Kirjapaino Oyj	85	2	x					
11	Talentum Oyj	81	21		x	x			
12	Suomen Lehtiyhtymä Oy	67	-1	x	x				
Media activities in parentheses indicate minority shares in the sector.									
* In addition to MTV Oy, MTV Media group is composed of Subtv Oy with net revenue € 48 million, and Suomen Uutisradio Oy with net revenue € 14 million									
Source: Statistics Finland based on company annual reports and other company data									

By far the largest by turnover is Sanoma company, but over half of its economic activities are based outside Finland including Belgium, the Netherlands, Russia and Central and East European countries. Finland accounts for 47% or 1,300 million € of the company's net sales – three times the second largest turnover of the public service broadcaster YLE. Since the national report of 2004, Sanoma has sold its book publishing branch WSOY (deleting this acronym from its corporate name) to the Swedish Bonnier, which for its part has acquired full ownership of Finland's main commercial TV company MTV. In 2004 MTV was part of the Alma Media company, also including several newspapers circulated throughout Finland, and Bonnier held 33% of its shares. In 2005 a new deal was done whereby Alma sold its shares in MTV to Bonnier, leaving Alma a purely print media company in Finnish ownership. Bonnier's various media holdings in Finland add up to 375 million €, making it the third largest player in Finnish media market. Yet this is only 12% of the total turnover of Bonnier – the largest media company in Scandinavia. Measured in overall turnover, Sanoma is the second largest Scandinavian media company.

The total monetary volume of the Finnish media market in 2010 was 4,291 million €. This corresponds to 2.4% of Finland's Gross National Product – a share which has consistently diminished since 1990 when it reached 3.1%. Print media accounted for 64% of the total in 2010, while electronic media represented 29% and the rest 7% being occupied by cinema, video and sound recordings. The print media sector has been decreasing since 1980 when its share was 80%, while electronic media sector has been growing respectively.

### 2.2.8.2.1. Radio

As in 2004, Finland's radio landscape is dominated by the public service broadcaster YLE, with its four nationwide radio channels in Finnish and two in the official minority language Swedish. One of each language channels is divided at certain hours to local broadcasts, providing altogether 26 regional windows. The public service channels capture slightly over half of the total listening time, while the private, predominantly commercial radio stations count together nearly half of total audience. Finns listen to radio on the average about three hours a day, but much of this time is exposure with little concentration.

Table 40 lists the largest private radio networks. All except the last one are national by their reach, while there are nearly 50 channels of regional or local character, five of them community-owned.

**Table 40 FI: Largest private radio channels and networks 2010**

	Established	Coverage % of population	Market share % of listening	Owner	Nationality
Radio Nova	1997	99	11	Bonnier (74%), MTG (26%)	Sweden
SBS-Iskelmäradiot	2001	92	7	SBS Broadcasting & al.	Germany
SuomiPOP	2000	87	5	Communicorp Group	Ireland
Radio Rock	2007	85	5	Sanoma	Finland
NRJ	1995	87	4	NRJ	France
The Voice	2007	99	3	SBS Broadcasting	Germany
Radio Aalto	2007	73	1	Sanoma	Finland
Groove FM	1999	62	1	Communicorp Group	Ireland
Rondo Classic	2010	68	..	Classicus	Finland
Radio Dei	1997	78	..	Kristillinen Media	Finland
Radio Sputnik	1999	28	..	Radio Satellite Finland	Russia

Sources: Statistics Finland based on Ministry of Transport and Communications, Finnpanel and RadioMedia

### 2.2.8.2.2. Television

The overall landscape of television in Finland remains otherwise the same as in 2004, with three major companies providing several channels, except that since 2007 digitalisation has multiplied the number of free channels up to around 20 and pay-TV channels up to around 30.

Table 41 shows that the public service broadcaster YLE has four terrestrially distributed channels freely available throughout the country, one of them in Swedish language, while the commercial broadcasters MTV Media and Nelonen Media offer each three open channels plus several pay-TV channels.

The YLE channels occupy 45% of the total viewing time, the MTV channels 30%, the Nelonen channels 15%, and the remaining 10% is divided among smaller Finnish companies and a number of foreign channels. One of the small commercial channels is Suomi TV, which changed ownership in early 2012 from a Canadian company to Fox International – the first entry of Rupert Murdoch's media empire to Finland.

Television viewing among Finns is on the average about three hours a day – less than in most other comparable countries, although Finland had for several years more television channels and programme supply than for example other Scandinavian countries.

**Table 41 FI: Top 3 TV companies in Finland and their channels 2011**

Company (Owner)	Channel	Financing	Penetration (%)	Distribution	Year established
<i>Public service</i>					
<b>YLE</b>	YLE TV1	Lic.	100	T/C/S	1958
(State)	YLE TV2	Lic.	100	T/C/S	1956/1965
	YLE Teema	Lic.	100	T/C/S	2001
	FST5	Lic.	100	T/C/S	2001
<i>The largest private TV groups</i>					
<b>MTV Media</b>	MTV3	Comm.	100	T/C/S	1957
(Bonnier)	Sub	Comm.	100	T/C/S	2001
	AVA	Comm.	-	C	2008
	MTV3 Max	Sub. & Comm.	100	T/C/S	2001/2006
	MTV3 Juniori	Sub. & Comm.	100	T/C/S	2006
	MTV3 Leffa	Sub. & Comm.	100	T/C/S	2006
	MTV3 Fakta	Sub. & Comm.	95	T/C/S	2007
	MTV3 Komedia	Sub. & Comm.	-	C	2011
	MTV3 Sarja	Sub. & Comm.	-	C	2008
	MTV3 Scifi	Sub. & Comm.	-	C	2008
	Canal+ (4 - 12 channels)	Sub.	90	T/C/S	2004
<b>Nelonen Media</b>	Nelonen	Comm.	100	T/C/S	1997
(Sanoma)	JIM	Comm.	100	T/C/S	2001/2007
	Liv	Comm.	95	T/C/S	2009
	KinoTV	Sub.	95	T/C/S	2007
	Nelonen Pro1	Sub. & Comm.	90	T/C/S	2001
	Nelonen Pro2	Sub. & Comm.	78	T/C/S	2007
	Nelonen Perhe	Sub. & Comm.	95	T/C	2011
	Nelonen Maailma	Sub. & Comm.	95	T/C	2011
<b>Financing:</b> Lic = Licence fees, Comm = Commercials, Sub = Subscription fees					
<b>Penetration:</b> Technical penetration in terrestrial networks.					
<b>Distribution:</b> T = Terrestrial, C = Cable, S = Satellite					
<i>Sources: Statistics Finland based on Ministry of Transport and Communications, www.digitv.fi and company webpages</i>					

### 2.2.8.2.3. Press and Publishing

Despite the trend of decreasing financial share of print media sector, it is still dominant and Finland profiles in international statistics as an exceptionally strong press country. Finns read newspapers and magazines on the average for about one hour a day – not only in print copies but increasingly on the screen through the Internet, especially among the younger generation. Actually the most essential change in Finland's press sector since the 2004 report is the growing role of electronic distribution and online media. Yet print media companies in the production end, and individual readers at the receiving end, remain more or less unchanged.

Table 42 presents top ten newspaper publishers with the number and circulation of their titles in 2010. The total number of dailies (published 4–7 times a week) is 49 and their total circulation exceeds 2 million – nearly 500 copies per thousand inhabitants, which gives Finland the third place in the world after Japan and Norway. Of the dailies 41 were published in Finnish and eight in Swedish, the latter representing 5% of the total circulation – roughly the same as the share of Swedish-speaking population of the country. In addition to dailies there are about 150 non-daily newspapers (published 1–3 times a week), mostly local by character, but their total circulation is only 30% of total newspaper press.

**Table 42 FI: Top ten newspaper publishers according to circulation 2010**

Publisher	Titles	Dailies	Circulation (thousands)	Share of total circulation (%)	Major owner
Sanoma Oyj	5	5	615	21,3	Erkko family (ca 40%)
Alma Media Oyj	25	10	555	19,2	Ilkka-Yhtymä Oyj (30%)
Keskisuomalainen Oyj	20	4	244	8,4	No major owner
TS-yhtymä Oy	9	2	174	6,0	Ketonen family
Ilkka-Yhtymä Oyj	7	2	104	3,6	No major owner
Viestilehdet Oy	1	0	83	2,9	
Länsi-Savo Oy	11	2	82	2,8	
Kaleva Oy	1	1	78	2,7	
Pohjois-Karjalan Kirjapaino Oyj	7	1	77	2,7	
Suomen Lehtiyhtymä Oy	6	4	76	2,6	
<b>Top 10</b>	<b>92</b>	<b>31</b>	<b>2 088</b>	<b>68,1</b>	
<b>All newspapers</b>	<b>194</b>	<b>49</b>	<b>2 886</b>	<b>100</b>	

Sources: Statistics Finland based on Finnish Audit Bureau of Circulations and Finnish Newspapers Association

While Finland's newspaper press is quite abundant, it is relatively concentrated. There are few towns where more than one daily newspaper is published, and the traditional variety of politically-affiliated newspapers has practically disappeared outside the capital Helsinki. Two leading publishers occupy over half of the total daily newspaper circulation in the country: Sanoma 31% and Alma Media 23% (in 2010).

Table 43 presents the largest periodical press publishers of consumer magazines. The first three are in Finnish ownership, representing about two thirds of the total circulation, while the rest have significant foreign owners. Consumer magazines of general interest in popular social issues (women, fashion, cars, travel, etc.) constitute 38% of the total volume of periodical press (measured in copies distributed in 2010), the rest being magazines of various associations and professional interests (46%), customer magazines published by cooperatives, banks, municipalities, etc. (14%), and culture & opinion magazines (2%).

The total number of periodical press in Finland, counting all published at least four times a year, is as high as 3,000.

**Table 43 FI: Largest publishers of consumer magazines by volume and titles 2010**

Publisher	2010		No. of titles	Major owner
	Million copies	%		
Sanoma Finland Magazines	49,6	33,0	50	Sanoma Oyj (Erkko family ca 40 %)
Otavamedia	34,0	22,6	30	Otava Oy (Reenpää family & Otava Book Foundation)
A-lehdet	18,3	12,2	12	Lyytikäinen family
Aller Media	13,6	9,1	6	Aller holding A/S (Aller family)
Bonnier Publications	3,2	2,2	10	Bonnier AB (Bonnie family)
Forma Publishing Group	3,2	2,1	5	
Valitut Palat-Reader's Digest	2,5	1,7	2	



Egmont Kustannus	2,4	1,6	55		
Other	23,3	15,5			
<b>Total</b>	<b>150,2</b>	<b>100</b>			

Source: Statistics Finland/Media statistics

#### 2.2.8.2.4. Online media (non-linear audiovisual (media) services; websites)

This is the fastest growing part of Finland's media landscape. Internet as infrastructure has expanded so that in the 2010s it reaches over 80% of the households, while in 2004 it covered less than 50%. In 2010 three out of four Finns used Internet practically on a daily basis, 86% at home and 49% in work place.

Table 44 presents the top twelve online media based on the frequency of their use in 2011. By far the mostly used online media are the web versions of Finland's two afternoon papers (tabloid by format and partly by content), followed by the websites of the leading commercial television company, the leading daily newspaper and the public service broadcaster. Ten of the twelve online media are extensions of respective newspapers or television news services, while two are online only.

All Finnish daily newspapers (49 in 2010) have also a web-based version, increasingly behind a subscription wall. Also most of the non-daily newspapers are online. Of the periodical press, about 250 titles display themselves online.

**Table 44 FI: Top twelve Finnish WWW media pages 2011**

	Browsers/ week	Sessions /week	Sessions/ browser	Publisher	Type of media	Ranking among websites
Iltalehti	2.442.074	17.224.652	5,5	Alma Media	Newspaper	1
Ilta-Sanomat	2.237.153	13.388.412	4,8	Sanoma	Newspaper	2
MTV3	1.862.770	9.918.915	4,6	MTV Media/Bonnier	Television	3
Helsingin Sanomat	1.399.413	7.091.797	3,6	Sanoma	Newspaper	4
YLE	1.251.891	5.902.962	3,6	Yleisradio	PBS TV and radio	5
Taloussanomat	683.664	2.100.630	2,5	Sanoma	Web-only business newspaper	10
Kauppalehti	546.072	2.460.004	3,5	Alma Media	Newspaper	12
Sub.fi	439.335	1.882.803	4,0	MTV Media/Bonnier	Television	18
Nelonen.fi	392.855	846.845	2,0	Sanoma	Television	20
Kaksplus	308.374	549.147	1,7	Sanoma	Magazine	22
Aamulehti	296.554	953.070	2,5	Alma Media	Newspaper	23
Uusi Suomi	278.138	896.277	2,6	Kustannusosake yhtiö Uusi Suomi	Web-only newspaper	25

Source: <http://www.gallupweb.com/tnsmatrix/site.aspx>

### 2.2.8.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers

Table 45 presents the largest cable television operators in 2010, most of them telephone companies.

**Table 45 FI: Main cable TV network operators including IPTV 2010**

	Share of connections	
	%	
DNA	41	
Elisa	18	
Sonera	15	
Finnet-liitto	16	
Turun Kaapelitelevisio	6	
Others	4	
Total	100	
<b>Total number of connections</b>	<b>1 432 000</b>	

Source: Finnish Federation for Communications and Teleinformatics FiCom

### 2.2.8.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)

Table 46 shows how three out of four Finns are daily exposed to each of the main news media of press, radio and television. Internet as a new distribution channel is increasingly used to read newspapers and also to listen to radio and view television. This explains part of the declining trend of newspaper reach since the mid-1990s – research methods have not managed to specify various types of Internet use.

**Table 46 FI: Daily reach of main media 1992-2010, % of population over 12 years**

	1992	1994	1996	1998	2000	2002	2004	2006	2008	2010
<b>Newspapers</b>	89	87	87	91	86	87	82	81	78	75
<b>Radio</b>	83	85	82	81	81	83	80	79	78	78
<b>Television</b>	69	72	72	71	77	78	75	75	73	74
<b>Internet</b>	..	..	5	14	26	36	46	56	66	72

Source: TNS Gallup

The total daily time which people were exposed to various media in Finland was on the average eight and a half hours in 2011. It is divided between different media as follows, in minutes: Television 152, Internet 126, Radio 103, Newspapers 34, Books 33, Sound recordings 33, Magazines 21, and Video recordings 11. Internet comes here as the second with two hours of average use per day, but it is not a separate medium like the others as a substantial part of its use is made up of following other media, especially newspapers.

As far as advertising is concerned, it constitutes one third of all media revenues, 1,347 million € in 2010.

Table 47 presents the shares of media advertising in different media sectors, counted in expenditures. Print media occupies 58% of the media advertising total, leaving 20% for

television and 15% for online media which has rapidly grown to be four times bigger than the share of commercial radio. Although advertising is nowadays less important a source of income for the press than it used to be in 2004, it still constitutes around one half of the income of newspaper companies and about one fourth of the consumer magazine companies.

**Table 47 FI: Shares of media advertising by sector in 2010**

	%
Dailies (7-4 times a week)	31,7
Non-dailies	4,4
Newspapers total	36,1
Urban and pick-up papers	5,4
<b><i>Newspapers and free papers total</i></b>	<b>41,5</b>
Consumer magazines	6,0
Trade & business magazines	4,0
Customer magazines	1,4
<b><i>Magazines &amp; periodicals total</i></b>	<b>11,4</b>
Printed directories	5,1
<b><i>Print media total</i></b>	<b>58,1</b>
Television	19,8
Radio	3,9
Cinema	0,2
Display and classified web advertising	7,4
Electronic directories and SEM	7,9
Web advertising total	15,3
<b><i>Electronic media advertising total</i></b>	<b>39,2</b>
Outdoor/Transport	2,9
<b><i>Mass media advertising total</i></b>	<b>100</b>

Sources: Finnish Advertising Council, TNS Gallup Group (Announcements, notices, column advertisements and public offices are not included in press advertising.)

#### 2.2.8.2. Conclusion and Recommendations

Finland stands at the top in international comparisons of democracy and press freedom as shown by surveys such as World Audit<sup>12</sup> and Freedom House<sup>13</sup>. Also, the factual map of Finland's media landscape looks quite impressive, with an exceptionally abundant supply of media channels and products.

However, a qualitative look at the content of media production and consumption gives rise to critical reflection especially regarding the role of media in democratic process. Despite media abundance, Finnish citizens are exposed to fairly uniform and hegemonic media culture, which is far from the ideals of freedom and versatility suggested by theories of democracy. The problem is to a large extent based on market liberalism, which - while facilitating formal competition and multiplicity - has failed to ensure pluralism in the social, cultural and political spheres. The problem should not only be seen in the private commercial sector but also in the public service broadcasting which

<sup>12</sup> <http://www.worldaudit.org/press.htm>.

<sup>13</sup> <http://www.freedomhouse.org/report/freedom-press/freedom-press-2012>.

has not fully materialized its potential for serving the citizens and democracy. Moreover, part of the problem is rooted in the citizens themselves, who have not exerted notable resistance to the commercially dominated media culture.

In this respect it is encouraging that the current Government of Finland is considering to bringing the concept of public interest as a touchstone of future communication policies.

Here are some recommendations which arise from the Finnish situation with a view to ensuring media diversity and pluralism:

First, the concentration of the media market should be addressed by legislation and more systematic media policies, including neglected community radios.

Second, state subsidies should be provided to online newspapers and small circulation dailies which have proved not to be commercially sustainable.

Third, the concepts of public service media and Internet neutrality should be carefully defined within the changing media landscape.

The following are some specific recommendations based on the Finnish experience in a European research project.<sup>14</sup>

*Media ownership:* Public information about ownership of media companies should be stored in an easily accessible central database on the Internet. This information is an important part of the transparency of the business, helping the public to evaluate media's engagements.

*Court practices:* More precise account of the European Convention on Human Rights as a fundamental right in exercising the freedom of expression. Courts should simultaneously assess citizens' right to information and the significance of the matter in a socially important public discussion.

*Access to information:* Training of authorities to answer requests by the public and to understand the importance of their public role in serving citizens' needs for information through the media. Databases should be redesigned for easy access to digital information.

*Journalists' autonomy:* Journalists should have more personal freedom in developing and realizing their own stories. The scale and viewpoints of a story should be based on the importance of the issue explored by journalist's own research and not on editorial meetings without prior knowledge.

*Journalism education:* Education of journalists should increase their ability to think independently and assess critically their own information gathering and content production. Training runs the risk of concentrating too much on media companies' immediate interests including applications of new technologies.

In addition, it is important to maintain throughout Europe media statistics, which covers all media sectors and different aspects from ownership to media use. Statistics Finland serves as a good example in the area of culture and media.<sup>15</sup>

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<sup>14</sup> <http://www.mediadem.eliamep.gr/>.

<sup>15</sup> [http://www.stat.fi/til/klt\\_en.html](http://www.stat.fi/til/klt_en.html).

## FRANCE

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### 2.2.9. France

#### 2.2.9.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.9.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

Article 34 of the French Constitution, as amended by the reform of 23 July 2008<sup>1</sup>, states as follows: "The law establishes the rules on (...) freedom, pluralism and media independence." Therefore, it is the responsibility of the legislator to lay down the rules concerning both freedom of communication which follows from Article 11 of the 1789 Declaration and pluralism and independence of the media which are of constitutional value.<sup>2</sup>

- Freedom to receive and to access information

The public's right to information is not expressly embraced by the constitutional jurisprudence. However, the aspect of freedom of communication arises from the interpretation by the Constitutional Council and the purpose that has been assigned to it by the Council: allow viewers, listeners and readers to exercise their free choice. See for example a recent decision: "The free communication of thoughts and opinions, as guaranteed by Article 11 of the Declaration of 1789, would not be effective if the users of audiovisual media do not have programmes, both in the private and in the public sector, that guarantee the expression of different trends while respecting the need for honest information. Ultimately, the aim is to realize that listeners and viewers, who are among the essential recipients of the freedom proclaimed in Article 11, are able to exercise their free choice without neither private interests nor the government being in the position to substitute it with their own decisions."<sup>3</sup>

In the absence of formal hierarchy between fundamental rights and freedoms, it is the responsibility of the legislator under the control of the constitutional court to conciliate. Freedom of communication is no exception to this rule. It must be reconciled with other rights and constitutional freedoms, including property rights, and some limits must be imposed upon it. The decisions of the Constitutional Council on the Hadopi laws I and II illustrate the reconciliation between copyright and related rights (covered by the law of property) and right of free internet access (component of freedom of communication) made by the legislator. The Council controls the proportionality of the object pursued by the Hadopi laws (the fight against illegal download of music, films and audiovisual works) and the limitation of constitutional rights (in this case, freedom of access to internet).

The Act on the criminal protection of literary and artistic property on the internet of 28 October 2009, called Hadopi II,<sup>4</sup> sets up a so-called "flexible response" or "three strikes

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<sup>1</sup> Constitutional Law No. 2008-724 of 23 July 2008 to modernize the institutions of the Fifth Republic, OJ of 24 July 2008, p. 11890.

<sup>2</sup> Constitutional Council, Decision No. 2009-577 DC of 3 March 2009, OJ of 7 March 2009, p. 4336.

<sup>3</sup> Constitutional Council decision No. 2009-577 DC, 3 March 2009, OJ of 7 March 2009, p. 4336; law on audiovisual communication the new public service television, cons. 2, Rec. p. 64.

<sup>4</sup> Act No. 2009-1311 of 28 October 2009 on the criminal protection of literary and artistic property on the internet, OJ 29 October 2009, p. 18, 290.

procedure” meaning a new system of penalties based on the suspension of the internet. This Act is following the Act No. 2009-669 of 12 June 2009 encouraging the dissemination and protection of creation on the internet (Hadopi I) which the Constitutional Council has partially censored. Freedom of communication under Article 11 of the Declaration of Human and Civil Rights of 1789 involves “the freedom to access these communications by the public online.”<sup>5</sup> With this decision the Constitutional Council recognizes the freedom of internet access as a component of freedom of communication. Therefore an administrative authority, in this case the commission to protect the rights of the high authority for the dissemination of works and protection of rights on the internet,<sup>6</sup> cannot impose sanctions which would restrict or prevent access to the internet by holders of subscription in order to protect copyright holders.

The “Environmental Charta” of 2004<sup>7</sup> completes the preamble of the Constitution. It conferred constitutional status to the right of environmental information through its Article 7 which provides that “everyone has the right (...) to access information relating to the environment held by public authorities and to participate in the development of public decisions affecting the environment.” Local authorities and their associations, as well as state and public institutions, have to ensure this right to information. It includes the right of access to administrative documents and the right to be informed by public authorities and it is a prerequisite for the right of participation of the public in the development of decisions affecting the environment.

However, the public authority has the right to reject a request for information relating to the environment where the consultation or communication violates certain interests<sup>8</sup> including those covered by Article 6 of the Act of 17 July 1978 introducing various measures to improve relations between the administration and the public.<sup>9</sup> Finally, the documents in preparation are generally not accessible.

- Safeguards on regulatory authorities

The Constitution of the French Republic does not provide for any special protection for the status, mandate and powers of regulatory authorities in the fields of audiovisual and electronic communications.

- Safeguards on “universal service”

The Constitution of the French Republic does not provide any special protection for the universal services.

#### 2.2.9.1.2. *Media order (de lege lata and de facto)*

- “Market Entry”
  - Licensing schemes; remit psm; notification for print publications

Since 2004, the legal framework for the audiovisual sector has substantially changed after a series of legislative amendments. However, the main Act, the Act No. 86-1067 of

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<sup>5</sup> Constitutional Council decision No. 2009-580 DC, 10 June 2009, OJ 13 June 2009, p. 9675.

<sup>6</sup> Haute autorité pour la diffusion des oeuvres et la protection des droits sur internet (HADOPI).

<sup>7</sup> Constitutional Law No. 2005-205 of 1 March 2005 on the Charta of the Environment, OJ of 2 March 2005, p. 3697.

<sup>8</sup> Art. L. 124-4 of the Environmental Code.

<sup>9</sup> Act No. 78-753 of 17 July 1978 introducing various measures to improve relations between the administration and the public and various administrative, social and fiscal provisions, OJ of 18 July 1978, p. 2851 (last amended by Law No. 2011-525 of 17 May 2011).

30 September 1986 on freedom of communication (hereinafter 1986 Act), is still in force.<sup>10</sup> Since November 2011 (date corresponding to the complete cessation of analogue terrestrial broadcast) digital terrestrial television (DTT) is the only terrestrial broadcasting network for audiovisual programmes in France. The law "on the modernization of audiovisual broadcasting and the future of television" (2007) and the law on "the fight against the digital divide" (2009) determined when and how the analogue signal is turned off.<sup>11</sup> Private services which are broadcast by digital terrestrial signal are subject to an authorization scheme issued by the "Conseil supérieur de l'Audiovisuel"<sup>12</sup> (CSA) after an invitation to tender.

The legal framework for digital broadcasting has also been adapted in view of the development of mobile television ("télévision mobile personnelle", TMP) which is seen as a "method of broadcasting television services for mobile devices over the air using spectrum resources mainly dedicated to this purpose and high definition television." The TMP is seen as a category of DTT services like high definition services.<sup>13</sup> The legal system applicable to DTT can be used for TMP with certain specifics on how to finance the service and programme formats. For now, services are selected by the CSA after the invitation to tender which is open to producers of services (Article 30-1 of the 1986 Act as amended by the Act of 5 March 2007). In order to grant authorization, the CSA takes into account the engagements in volume and the description of the candidate concerning the production and distribution of the programmes, especially whether there are European and French audiovisual and cinematographic works, as well as whether the candidate supplies programmes (especially news) in formats best suited for mobile devices. It also takes into account its commitments concerning territorial coverage, the quality of the reception for mobile devices, particularly inside a building, and the largest conditions of commercialisation of the service for the public. The current legislation does not provide for a general right to information. However, Article 20-2 of the 1986 Act as amended establishes the principle of access to "major events" for viewers and thus claims to guarantee the right of citizens to receive information of general interest.

Section 29 of the 1986 Act provides that the CSA is inviting for tender for geographic areas and categories of services which it has previously determined and thereby establishes the main regulatory power available to the CSA in the radio sector. The CSA uses the option given to it by the law to issue invitations to tender for service categories by combining different criteria: commercial or not, local or not, general or thematic, independent or not. To grant permission the CSA takes into account in particular "the interest of each project for the public with regard to the priority requirements which are safeguarding pluralism of socio cultural expressions, the diversity of operators and the need to avoid abuse of a dominant position as well as restraints of trade." The Council ensures "that a sufficient part of the frequency resources is allocated to the services which are produced by an association and which are carrying out a mission of close social communication meaning the promotion of exchanges between the different social and cultural groups, favouring the expression of various socio-cultural trends, supporting local development, the protection of the environment and the fight against social exclusion."

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<sup>10</sup> Act No. 86-1067 of 30 September 1986 on freedom of communication, OJ 1 October 1986, p. 11755 (last amended by the Act No. 2012-158 of 1 February 2012).

<sup>11</sup> Act No. 2007-309 of 5 March 2007 on the modernization of audiovisual broadcasting and the future of television, OJ 7 March 2007, p. 4347 (last amended by the Act No. 2009-1572 of 17 March 2009); Act no. 2009-1572 of 17 December 2009 on the fight against the digital divide, OJ 18 December 2009, p. 21825.

<sup>12</sup> Higher Audiovisual Council.

<sup>13</sup> Government report on the application of the last paragraph of V of Article 30-1 of the Act No. 86-1067 of 30 September 1986 on freedom of communication, October 2009.



Radio control is always based on five categories of radio (A to E). However, the new wording of Article 42-3 of the Act of 30 September 1986, as amended by the Act of 9 July 2004 on electronic communication and audiovisual communication services, gives the CSA the possibility to authorise a change of ownership along with a change of category without recourse to the procedure invitation to tender, if necessary.

The Act of 17 January 1989 established the radio technical committees, which are responsible for examining applications for authorization and for observing the compliance with their obligations by their holders. Unfortunately, the act did not confer the necessary power for this task to the committees what gives them a mere advisory role.

There are other broadcast networks (cable, satellite, DSL ...). The CSA has also jurisdiction with regard to Web TV and Web Radio. The regulation is based on the approval by the CSA (Art. 33-1).

The conventions are applicable to all radio and television services independent of their method or medium of broadcast provided that they are within French jurisdiction. However, since the Act of 9 July 2004<sup>14</sup> this is no longer true for services which broadcast without using frequencies allocated by the CSA and whose annual budget is less than 75,000 Euro for radio services and 150,000 Euro for television services (prior declaration system). Furthermore, services, that repeat simultaneously and completely a public channel or radio, or a channel or radio beneficiary of an authorisation, are not subject to the convention anymore and need no approval (except the repeat has the effect that the reach of a local television increases to more than 10 Million inhabitants).

The audiovisual media services on demand<sup>15</sup> (like catch-up TV and TV on demand) are included in the new definition of audiovisual communication (Section 2 of the 1986 Act as amended).<sup>16</sup> Nevertheless, certain provisions of the 1986 Act have been adapted, including those relating to the protection of minors, the use of the French language, advertisement and promotion of European and French audiovisual and cinematographic works.<sup>17</sup> Catch-up TV is not subject to the invitation to tender. In contrast, video on demand by downloading may be authorized on DTT only after a procedure of invitation to tender.

The Act of 12 June 2009 promoting the dissemination and protection of creation on the internet<sup>18</sup> supplemented Article 1 of the Act No. 86-897 of 1 August 1986 reforming the legal system of the press<sup>19</sup> in order to establish a specific legal and economic system for all online news services regardless of whether they concern websites linked to a product of the printing press or independent news sites called "pure players". The decree of 29

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<sup>14</sup> Act No. 2004-669 of 9 July 2004 on electronic communication and audiovisual communication services, OJ 10 July 2004, p. 12483 (last amended by the Act No. 2008-776 of 4 August 2008).

<sup>15</sup> Services de médias audiovisuels à la demande – SMAD.

<sup>16</sup> The Act No. 2009-258 of 5 March 2009 on audiovisual communication and the new public service television (OJ 7 March 2009, p. 4321) transposes the directive 2007/65/EC of the European Parliament and Council of 11 December 2007 (known as "audiovisual media service" or "AVMSD") into French law. The Articles 61 to 66 of the Act of 5 March 2009 change in particular the dispositions of chapter V of title II of the Act of 30 September 1986 on the determination of television services within the scope of the law.

<sup>17</sup> See also decree No. 2010-1379 of 12 November 2010 on audiovisual media services on demand, OJ du 14 November 2010, p. 20315.

<sup>18</sup> Articles 27 and 28 of the Act No. 2009-669 of 12 June 2009 promoting the dissemination and the protection of creation on the internet, OJ 13 June 2009, p. 9666 (last amended by the Act No. 2009-1311 of 21 October 2009). "Online press service means any online communication service to the public published professionally by a natural or legal person who has control of its editorial content consisting of the production and the supply to the public of a original content which is of public interest, regularly renewed, containing the latest news, edited journalistic and which is not a promotional tool or influenced by the industry or business."

<sup>19</sup> Act No. 86-897 of 1 August 1986 reforming the legal system of the press, OJ of 2 August 1986, p. 9529 (last amended by the Act No. 2011-525 of 17 May 2011).

October 2009<sup>20</sup> specifies how to recognize an online press service in order to enjoy the benefits attached to it (like the exemption of territorial economic contribution, access to the benefit of the investment allowance, aid funds to the development of online news services). The Joint Committee of publications and news agencies (la Commission paritaire des publications et agences de presse - CPPAP) is responsible for the recognition of online news services. The main criteria are the editorial control by the individual publisher; the production and supply of original content which is renewed regularly; the journalistic dealing with news; the exclusion of promotional tools or commercial communication.

- Media pluralism/ownership; competition law aspects

In his report of the commission of 2005,<sup>21</sup> *Alain Lancelot* recognized that there is no apparent increase in concentration in France besides from some special cases. Nonetheless, he asked for substantial reforms. Even though only little legislative changes have been made, a number of improvements have been made to support the introduction of DTT. The new version of Article 39 I of the Act of 20 September 1986 provides that one natural or legal person cannot own directly or indirectly more than 49 % of the share capital or voting rights of a company holding an authorization for a national television service which is broadcast by DTT and whose annual average audience using an electronic communication network exceeds 8% of the total audience of television service.<sup>22</sup> Raising the threshold of 2.5% to 8% should permit to maintain the temporary exemption from the rule for new DTT channels. A similar threshold for audience applies in order to limit ownership of one person, holding an authorization for a national television service terrestrially broadcast, to 33% of the capital or voting rights of a local channel (Article 39 III).

The provisions concerning accumulation of permission of televisions are laid down in Article 41 of the Act of 9 July 2004 and state that one person can have a maximum number of seven authorizations for national DTT services. The accumulation of permissions for local DTT services is possible provided that the population in the areas served by all of these services does not exceed 12 million. Finally, a person holding a license to operate a local television service by terrestrial radio in digital mode in a specific area cannot become entitled to a new authorization for a similar service broadcast in digital mode in the same area.

Concerning services operated by terrestrial radio in analogue mode, the same natural or legal person is only entitled to have multiple networks if the population in the areas served by the networks does not exceed 150 million inhabitants. In view of the dissemination of radio services in digital mode, the Act of 9 July 2004 added a new criterion for the accumulation of analogue and digital permissions. No one can hold one or several authorizations for a radio service where the potential terrestrial audience exceeds 20% of all public or licensed terrestrial radio services (Article 41.)

In order to prevent damage to the national pluralism in digital mode the provisions on concentration called "multi-media" (Article 41-1-1) state that no license may be issued to a person who would find itself in more than two of the following situations:

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<sup>20</sup> Decree No. 2009-1340 of 29 October 2009 issued for purposes of Article 1 of the Act No. 86-897 of 1 August 1986 reforming the legal system of the press, OJ of 30 October 2009, p. 18671.

<sup>21</sup> "The problems of concentration in the media sector," Alain Lancelot, in January 2005, Prime Minister, French Documentation.

<sup>22</sup> This threshold arises from the Act No. 2008-776 of 4 August 2008 on the modernization of the economy, OJ 5 August 2008, p. 12471.

- Holding one or more licenses for television services broadcast by terrestrial radio in digital mode allowing the servicing of areas with a population of four million inhabitants;
- Holding one or more licenses for radio services allowing the servicing of areas with a population of thirty million people;
- Publishing or controlling one or more daily print media containing political and general news which represent 20 % of the total circulation of similar daily print media on the national territory assessed over the last twelve months preceding the date on which the application has been presented.

In addition (article 42-2-1), no permission other than national may be issued for a specific geographical area to a person who would find itself in more than two of the following situations:

- Holding one or more licenses for digital television services, whether national or not, terrestrially broadcast in the area;
- Holding one or more licenses for radio services, whether national or not, where the potential audience in the area exceeds 10 % of the cumulative potential audience of similar, public or licensed, services in the same area
- Publishing or controlling one or more daily print media containing political and general news whether national or not distributed in this area.

Finally, the specificity of personal mobile television ("télévision mobile personnelle" - TMP) was taken into account: An operator cannot hold more than 20% of the total potential audience of all TMP services terrestrially broadcast, both public and private (article 41).<sup>23</sup>

The role of the CSA in the control of concentration is mainly related to its tasks pertaining to broadcast licenses. Article 41-4 of the amended Act of 30 September 1986 specifies the relation that should exist between the CSA and the Competition Authority as the audiovisual sector is also subject to the general rules on merger control. The Competition Authority was created by the Act No. 2008-776 of 2008 on modernization of the economy<sup>24</sup> replacing the Competition Council, and was provided with new powers. Now, the Authority controls concentrations, replacing the Minister of Economy. In addition, it is now able to conduct its own investigations and has the ability to take the initiative with regard to notice on any competition matter and to make recommendations to the Minister responsible for the sector to improve effective competition in the market. The CSA must be consulted by the Competition Authority where a merger concerning directly or indirectly a publisher or distributor of radio and television is subject to scrutiny and where it detects anti-competitive practices in the field of radio, television and audiovisual media services on demand.

In March 2010, the CSA approved the acquisition of the entire share capital of the AB group by the corporation TF1 which had the purpose of controlling 80% of "Télé Monte Carlo" (TMC) and 10% of NT1 (publisher of general television services broadcast by terrestrial radio in digital mode). The CSA issued a favourable opinion to the various proposed transactions to the Competition Authority in September 2009. It was however

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<sup>23</sup> This follows from Act No. 2007-309 of 5 March 2007 on the modernization of audiovisual broadcasting and television of the future.

<sup>24</sup> Act No. 2008-776 of 4 August 2008 on modernization of the economy, OJ of 5 August 2008, p. 12471 (last amended by the Act no. 2011-1978 of 28 December 2011).

subject to reservations to ensure competition between the channels of digital terrestrial television, particularly in the fields of advertising and the acquisition of broadcasting rights of sports events. The Competition Authority approved the acquisition but imposed substantial commitments to the TF1 group.

The Council of State dismissed the action for annulment of M6 against the decision of the CSA of 23 March 2010 in its decision of 30 December 2010.<sup>25</sup> It considered in particular that the relevant operation did not compromise the maintenance of a sufficient diversity of operators as in 2003, "when TMC and NT1 got their license, five other channels, four of which were held by new operators, were present on the free digital terrestrial television besides the public or commercial incumbent channels which were also broadcast through analogue cable, nine other channels, including four held by incumbents and five by independent operators, will be present after the transaction at issue, in addition to the public or commercial incumbent channels." That same day, the Council of State also dismissed the action for annulment of the decision of the Competition Authority ruling that the effects on competition of the transaction were "not of such importance that the prohibition is the only available proportionate measure" and that the transaction could be authorized given the commitments made by the parties.<sup>26</sup>

- Legal framework for psm; ability to fulfill their tasks

The Act of 5 March 2009 on audiovisual communication and the new public television service<sup>27</sup> also initiated major reforms in the public audiovisual sector. The act achieves the transformation of the France Télévisions group into a single national programme company (Article 44 of the 1986 Act as amended). The audiovisual services published by France 2, France 3, France 4, France 5 and RFO are now published directly by the holding company France Télévisions. The reform also introduced duties and responsibilities solely for France Télévisions which reinforced its mission of public interest and its specificity.

Until 1982, the managers of public companies in the audiovisual industry had always been appointed by the executive power. The Act No. 82-652 of 29 July 1982<sup>28</sup> made an additional guarantee for the exercise of freedom of communication by entrusting an independent administrative authority with the task of appointing the president of public broadcasting companies. The Act of 5 March 2009 (Article 13) is thus considered as a step backwards, as it places the state - in this case the President of the Republic - in the centre of the appointment procedure of the presidents of national programme companies, instead of the regulatory authority. However, according to the Constitutional Court the law "does not deprive the constitutional requirements for audiovisual communication of legal guarantees".<sup>29</sup> Firstly, these appointments are subject to the opinion of the parliamentary committees with veto power three-fifths of the votes cast in the two commissions. Secondly, the assent of the CSA is necessary.

To affirm the identity of public service broadcasting, the law also provides the procedures for phasing out advertising on France Télévisions from 5 January 2009 (Article 53 of the Act of 30 September 1986). However, there will be a total suppression of advertising on public channels only from 1 January 2016 on. The Act thus reforms the financing of

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<sup>25</sup> Council of State, 30 December 2010, Société Métropole télévision, No. 338273.

<sup>26</sup> Council of State, 30 December 2010, Société Métropole télévision, No. 338197.

<sup>27</sup> Act No. 2009-258 of 5 March 2009 on audiovisual communication and the new public television service (1), OJ of 7 March 2009 p. 4321 (last amended by Order No. 2009-901 of 24 July 2009).

<sup>28</sup> Act No. 82-652 of 29 July 1982 on audiovisual communication, OJ 30 July 1982 p. 2431 (last amended by Order No. 2009-901 of 24 July 2009).

<sup>29</sup> Constitutional Council decision No. 2009-577 DC, 3 March 2009, OJ 7 March 2009, p. 4336. cons. 5 to 8 and 10. Similar guarantees accompany the dismissal of the presidents of national program companies by reasoned decree of the President of the Republic.

public television. The license fee is renamed "contribution to public broadcasting" and remains the main source of financing of the company France Télévisions. Two new taxes are designed to offset the removal of advertising revenue. One is imposed on advertising on private television channels, the other on services provided by telecom operators.<sup>30</sup> On 20 July 2010, the European Commission approved the annual funding mechanism of France Télévisions as complying with European Union rules on State aid. This mechanism provides for the allocation of some of the resources of the contribution to public broadcasting and a budget subsidy.

Furthermore, the Act of 1 August 2000<sup>31</sup> introduced provisions on tasks, structures and resources of public sector organizations, designed to assert the identity of the public sector. The general tasks of the public sector are laid down in article 43-11 and are mainly focused on the concepts of pluralism, programme quality and innovation. Pluralism is broadly defined and includes both cultural and linguistic pluralism and pluralism of information and genres. Respect for human rights and democratic principles or the access of deaf and hearing impaired to programmes are also covered. Several acts extended these tasks, like the Act of 5 March 2009 which clarified that national programme companies are also involved in programmes of "education, environment, protection and sustainable development." The tasks also include the promotion of regional languages in the same way as the French language. According to the Act No. 2006-396 of 31 March 2006 for equal opportunities the national programme companies "implement measures to promote social cohesion, cultural diversity and the fight against discrimination and propose a programme that reflects the diversity of French society." "They provide a mission for information on health and sexuality," according to Act No. 2010-121 of 8 February 2010 which aims at including incest committed against minors in the French penal code and at improving the detection and the care for victims of incest. Finally, Act No. 2010-769 of 9 July 2010 on violence specifically to women, on violence within couples and the impact they have on children introduced "the fight against discrimination, gender bias, violence against women, violence within the couple and equality between men and women" in Article 43-11.

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

In the audiovisual sector, the Act of 5 March 2009 supplemented Article 44 of the 1986 Act by a chapter VI, which states that "any journalist of a national programme company has the right to refuse any pressure, to refuse to disclose its sources, to refuse to sign a programme or a part of it the form or content of which has been modified without his knowledge or against his will. He cannot be compelled to accept any act contrary to his personal professional conviction."

The Act No. 2010-1 of 4 January 2010 on the confidentiality of journalists' sources (Article 56-2 of the Code of Criminal Procedure) enhanced the procedural safeguards with regard to house searches at journalists', drawing heavily on the regulation on house searches conducted in the office or home of lawyers. The protection is extended to the premises of news agencies, journalists' homes, where the investigations carried out are related to their profession, or company cars. Searches can only be performed by a judge if they are conducted on the premises of a media company, of an audiovisual communication enterprise, of a communication company to the public who is online, of a

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<sup>30</sup> Article 302 KG and 302 KH of the French Tax Code.

<sup>31</sup> Act No. 2000-719 of 1 August 2000 amending Act No. 86-1067 of 30 September 1986 on freedom of communication, OJ 2 August 2000, p. 11903.

news agency, in cars of these companies or agencies or at the home of a journalist, where the investigations are related to his work. The judge "indicates the nature of the offense or offenses at issue in the investigations and the reasons justifying the search and the subject thereof". The judge ensures that the investigations respect the free exercise of the journalistic profession, that they do not violate the confidentiality of sources in breach of Article 2 of the Act of 29 July 1881 on freedom of the press and that they do not hinder or do not result in undue delay in the dissemination of information. The act also established a procedure for objecting to the seizure of documents that could identify one of the sources. Where appropriate, the judge of freedoms and detention, after hearing the judge and the journalist, decides either that the document has to be returned immediately if he considers that there is no need to seize it or that the seal is removed and the report is attached to the case file. Moreover, a journalist who is sued for defamation can no longer be prosecuted for concealing if he puts forward in his defence documents covered by the secrecy of investigation or any other professional secrecy that is capable of establishing its good faith or the correctness of the defamatory facts (Article 35 of the Act of 29 July 1881 on freedom of the press as amended).

The Act of 4 January 2010<sup>32</sup> enshrines the general principle of confidentiality of journalists' sources in the Act of 29 July 1881 on freedom of the press.<sup>33</sup> The confidentiality of sources can only "directly or indirectly" be undermined if an overriding public interest justifies it and if the measures are strictly necessary and proportionate to the legitimate aim pursued". However, this impairment cannot consist in any way in an obligation to reveal sources for the journalist.

Concerning criminal proceedings, the Act extends the right of the journalist as a witness to protect his sources. That is to say not only in the context of an appraisal process but also when he is summoned as a witness in the criminal court.

Despite the passing of the Act of 4 January 2010, the fight for the protection of sources is not over which is demonstrated by the following case, known as "fadettes du Monde". After the publication of an article reporting on investigations written by two journalists in the newspaper "Le Monde" the prosecutor in Nanterre received a complaint for violation of professional secrecy and therefore ordered a preliminary investigation, notably by enabling police officers to obtain the identification of the phone numbers of the correspondents of the authors of the article through requisitions from telephone operators. In its decision of 6 December 2011, the Supreme Court affirmed the decision of the Court of Appeal of Bordeaux by saying that "the infringement of the confidentiality of journalists' sources was not justified by the existence of an overriding public interest and that the measure was not strictly necessary and proportionate to the legitimate aim pursued (...)".<sup>34</sup>

Under the agreement that distributors of the service sign with the CSA, they agree to a duty of honesty regarding information. The CSA is responsible for ensuring compliance with the commitments entered into and may, "order the publication of a statement, of which it sets the terms and conditions of distribution, in all cases of breach of obligations by publishers of audiovisual communication services."<sup>35</sup> By decision of 9 March 2010 which was strongly discussed by journalists and chairmen of channels, the CSA imposed,

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<sup>32</sup> Act No. 2010-1 of 4 January 2010 on the confidentiality of journalists' sources, OJ of 5 January 2010, p. 272.

<sup>33</sup> Act of 29 July 1881 on freedom of the press, OJ of 30 July 1881, p. 4201 (last amended by legislative decree of 6 May 1931, art. 1).

<sup>34</sup> Cour de cassation, c. crim., 6 December 2011, No 11-83970.

<sup>35</sup> CSA, decision No. 2010-133 of 2 March 2010 ordering the insertion of a statement in the program of Canal + as a sanction, OJ NO 0082 du 8 April 2010, text No 53.



for the first time, the reading of a statement of apology on their antenna to two channels (TF1 and Canal +) because of the lack of thoroughness of their information. TF1 was accused of three violations in this case: dissemination of a photograph of a German killer who was not the one at issue; images of a protest by Muslims showing the opposite of what was announced in the commentary, images of the vote of the Hadopi law in the National Assembly showing a full semicircle while it was half empty. Canal + had broadcast a parody from the internet in a magazine programme, presenting it as a true extract from German television news on the election of the president of a French public institution.

Act No. 2010-769 of 9 July 2010 on violence against women, violence within couples and the impact they have on children gave the right to submit a case to the CSA to associations defending the rights of women (Article 48-1 of the 1986 Act). The CSA can then request publishers and distributors of audiovisual communication services and satellite operators to fulfil their legal and regulatory obligations and those obligations arising from the principles laid down in Articles 1 and 3-1 of the 1986 Act like the respect for human dignity. This possibility is also available to professional organizations and unions representing the sector of audiovisual communication and to the National Council of regional languages and cultures and family associations recognized by the National Union of Family Associations.

- Specific positive content obligations

The Act of 31 March 2006 for equal opportunities<sup>36</sup> enshrined the promotion of diversity undertaken for many years by the CSA. The legislator amended the Act of 1986 (Article 3-1) by giving the regulator the task of ensuring the representation of diversity in the audiovisual media, and of contributing to the promotion of social cohesion and the fight against discrimination.<sup>37</sup> The 2006 Act further requires television channels to reflect diversity in their programming. The Act of 5 March 2009 on audiovisual communication and the new public service television also contains several provisions intended to ensure that the national programme companies take better account of French diversity in both programming and managing their human resources. Since 2004, the France Télévisions group carries out activities in this area (e.g. the project "Equal Pluriel-Média"). In 2007, the CSA established a working group on diversity and then a research institute on diversity (L'Observatoire), which aims at supporting the CSA by guiding its research and by making proposals on all issues relating to diversity in the media. The quantitative and qualitative study of the representation of diversity on television, conducted in 2008 by l'Observatoire, showed that "diversity on television increased by only one point in a decade with regard to TV news, fiction and presenters". In 2009, the CSA commissioned the IFOP company with a semi-annual evaluation of the perception of diversity on TV for at least three years.

- Funding schemes for specifically desired content

Public aid to the press recently underwent a major reform with the publication of the decree of 13 April 2012<sup>38</sup> which is the expected result of the Convention of the press ("Etats généraux de la presse") organized in 2008. It focuses on the governance of the various devices of direct aid to the press. An agreement was signed for a period of three

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<sup>36</sup> Act No. 2006-396 of 31 March 2006 for equal opportunities, OJ of 2 April 2006, p. 4950 (last amended by the Act No. 2011-1977 of 28 December 2011).

<sup>37</sup> On this basis the CSA has taken the decision of 10 November 2009 for furthering the representation of the diversity of French society in the programs of national terrestrial free channels and Canal +.

<sup>38</sup> Decree No 2012-484 of 13 April 2012 on aid reform to the press and strategic funds for the development of the press.



years with the government for companies receiving significant amounts of State aid "to secure the mutual commitments and ensure regular monitoring". Incentives in the form of bonuses may be granted to any of those companies which made a special effort, particularly in terms of compliance with standards, action on environmental issues, vocational training or corporate social responsibility. The decree also provides for a periodic review of the effectiveness and appropriateness of the various aids. The annual maximum amounts allocated and the breakdown by beneficiary are now made public in the interests of transparency.

In respect of aid which intends to promote the pluralistic expression of currents of thoughts and opinions, the fund to support local radio in the audiovisual sector is also worth mentioning (Article 80 of the 1986 Act).<sup>39</sup> It concerns community radio stations whose business resources coming from messages broadcasted on the air having the character of brand advertising or sponsorship are less than 20% of their total turnover (e.g. neighbourhood, community, cultural or school radio stations). This funding includes grants for installation, equipment, operating and grants for radio operation.

- Political advertising and/or broadcasting time

Pursuant to the provisions of Article 13 of the 1986 Act as amended, the CSA "ensures respect for the pluralistic expression of thoughts and opinions in the programmes of radio and television services, especially in programs on general and political news." The mode of assessment of political pluralism is rather quantitative.

The CSA determines how long a politician appears on radio and television by monitoring the programmes. The assessment criteria which was used for a long time was based on the so-called "three-thirds" rule according to which the Government, the parliamentary majority and the opposition shall each have an equal time. In 2000, a new reference system called "relative balance" was substituted to this customary rule. Four categories (Government, parliamentary majority, parliamentary opposition, political parties not represented in Parliament) are then subject of a presentation of speaking time overall and by subject. However, following a decision of the State Council,<sup>40</sup> a new method for ensuring compliance with the principle of political pluralism was adopted on 21 July 2009.<sup>41</sup> The administrative judge held that speeches by the President of the Republic falling within the national political debate should be taken into account. Following this decision, the CSA adopted a new principle of pluralism providing for the taking into account of those speeches of the Head of State which fall under the national political debate according to their content and their context.

The time corresponding to a speech by the President of the Republic as part of the political debate is added to the speaking time of other politicians of the category "majority" (members of the Government, representatives of the parliamentary majority and collaborators of the President).

The rule, which was introduced in 2009, also provides that the parliamentary opposition has at least half of the total time. In addition, the Council insists that the parties not represented in Parliament and the parliamentary formations that belong neither to the majority nor to the opposition continue to have equitable access to the antenna (considering the number of elected and the results of the various elections).

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<sup>39</sup> Decree No. 2006-1067 of 25 August 2006 adopted for the application of Article 80 of the Act No. 86-1067 of 30 September 1986 on freedom of communication, OJ of 26 August 2006, p. 12678.

<sup>40</sup> State Council, 8 April 2009, François Hollande and Didier Mathus, No. 311136.

<sup>41</sup> Deliberation of the CSA of 21 July 2009 on political pluralism.

Thus, each quarter, the CSA will release the speaking time of politicians on the news, on news magazines and on other programmes of the major national television channels, news channels and the main news radio stations to the presidents of the Senate and the National Assembly and to the leaders of political parties represented in Parliament.<sup>42</sup> In addition, the CSA warns broadcasters and ultimately punishes those services that do not respect Article 13 of the 1986 Act.<sup>43</sup>

The prohibition of propaganda in its commercial form ensures not only the control of election expenses, but also the equal treatment of candidates. Article L. 52-1 of the Election Code prohibits the use of any method of commercial advertising through the press or through any audiovisual communication for purposes of election propaganda, during the six months preceding the first day of the month of an election and until the election day. With regard to the audiovisual communication, this provision adds little to Article 14 of the 1986 Act which prohibits advertising programmes of political nature at all times.

- Codes of conduct and their organisational framing

The National Union of Journalists (*le Syndicat national des journalistes - SNJ*) said that, the Charter of the journalist's professional duties in 1918, last amended in 1938, was again revised "to take into account both the emergence of new means of communicating information and the ongoing crisis in the press companies (...)". The modernized version was published in March 2011<sup>44</sup> and is contained in the agreement concluded for more than 2,500 journalists at France Télévisions.

The new version takes into account the emergence of new means of communicating information and the ongoing crisis in the press companies. It specifically affirms "the public's right to complete, free, independent and pluralistic high quality information (...)". The principles and ethical rules in the Charter "oblige every journalist, independent of his position, his responsibility in the publishing chain and the form of press for which he is working".

It says, that the responsibility of the journalist may not "be confused with that of the publisher, nor exempt the latter from his obligations". It also emphasizes the material and moral security, which is the "basis of the independence of the journalist". The Charter also emphasizes the protection of sources and the freedom of opinion and conscience of journalists.

- Distribution Aspects

- Access to frequencies

The authorization of frequency usage remains a major task of the CSA, especially with regard to ensuring external pluralism of the operators. However, the authorization is less relevant for the determination of specific obligations borne by the license holders, to the benefit of other instruments. Throughout the licensing procedure (Article 29, 29-1, 30, 30-1 and 30-2 of the 1986 Act), the CSA has a broad competence in guaranteeing pluralism, especially by ensuring that the authorized services comply with the anti-

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<sup>42</sup> For the second trimester 2011, see for example <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Temps-d-intervention-des-personnalites-politiques-a-la-television-et-a-la-radio-au-premier-semestre-2011>.

<sup>43</sup> For example, on the 19 October 2011, the CSA announced that it had sent a formal notice for non-compliance with these rules to the three news channels iTélé, LCI and BFM-TV, as well as to the radio stations Europe 1 and France Inter.

<sup>44</sup> See on <http://www.snj.fr/spip.php?article1032>.

concentration scheme. This power is limited insofar as the CSA is sharing the definition of the content of the obligations of licensees with the Government which sets out the general obligations imposed on licensees, especially in particularly sensitive areas of advertising and the programme industry. However, the Government is not involved in the procedure for issuing the licenses.

The procedure for issuing licenses for national, regional or local, private television services broadcast by terrestrial means is basically identical to that for private radio stations (see above). The 1986 Act (Article 28-1) sets the simplified procedure for renewal. This procedure allows renewing the license outside a call for application but only twice in addition to the initial license and each time for five years. Only one renewal is possible for television services by terrestrial distribution in digital mode.

The public service channels (like France 2, France 3, France 4, France 5, France Ô, as well as Arte and the parliamentary channel), on the other hand, have a priority right to use the spectrum resource. This is "justified by the public service tasks incumbent upon them." However, the State Council said in a notice that the regulatory authority has a discretion which would justify refusal of the requested access priority "if the granting of it would reduce the available resource for private operators to such an extent that it would undermine pluralism of the programs and opinions in the area concerned."<sup>45</sup>

The signing of an agreement, which contains the definition of the obligations of the broadcaster, prevails now as an instrument of regulation on the authorization.

The Act of 5 March 2007 compensates the loss that the publishers of national television services terrestrially broadcast in analogue mode (Canal +, TF1 and M6) have due to early termination and phasing out of the validity of their licenses.

Two compensations have been defined by the legislator: firstly, the extension of the permission to broadcast terrestrially for a period of five years from the date of the final extinction of analogue broadcasting. Secondly, the allocation of an additional right to broadcast to these same publishers under certain conditions ("compensatory channel" - Article 103 of the 1986 Act.).<sup>46</sup>

Concerning mobile television, the CSA is required to give a part of the radio resource to the dissemination of radio services and audiovisual communication services other than radio and television (such as broadcast data services - Art. 30-7).

Due to the frequencies released by the shutdown of analogue television in October 2011, France was able to launch the mobile broadband.<sup>47</sup> It can thus ensure the development of mobile broadband by releasing additional frequencies, especially by rearranging the frequency bands allocated to electronic communications: first studies estimate a need for additional 450 MHz by 2020. Concerning digital television, all channels of DTT should now switch to high definition. The plan is to develop interactivity and mobility, and to launch at least one 3D channel. To achieve this goal and to optimize the use of frequencies, the

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<sup>45</sup> State Council Notice no. 384 781 of 25 January 2011 on the interpretation of the first paragraph of II of Article 26 of the amended Act of 30 September 1986.

<sup>46</sup> A complaint relating to Article 103 of the 1986 Act gives rise to an action for breach (under the "Telecoms Package") and to a review procedure (compatibility with State aid rules ) before the European Commission.

<sup>47</sup> Mid-2011, there were 66 million mobile subscribers in France, representing a penetration level of the French population of over 101%. The multimedia 3G subscriber base rose meanwhile to 29.3 million in mid-2011.

compression format MPEG 4 will be standardized by 2015 and the broadcasting standard will be DVB-T2 in 2020.

### Access to distribution networks and control of actual conditions

The distribution chain of the press consists of three levels of distribution: The "convey service of the press" that do long-range transports of publications, the 150 "newsagents" who act as wholesalers, finally, more than 29,000 "distributors" who hold the point of sale of the press. France is characterized by a cooperative system of distribution of the press to ensure the impartiality of the entire distribution chain, meaning that any document has to be distributed, regardless of its political viewpoint or its circulation.

Given the economic difficulties faced by the press, the Act of 20 July 2011 on the regulation of the distribution system of the press<sup>48</sup> modernized the regulatory mechanisms of the distribution sector of the press established by the Act of 2 April 1947, known as the "Bichet" Act. The sales figures depend on the development of press distribution on digital media as well as on major industrial imbalances affecting the media sector. The Act revises the composition of the Supreme Council of the convey service of the Press (*Conseil supérieur des messageries de presse - CSMP*), a professional regulatory body, whose role is also strengthened.<sup>49</sup> The Act establishes a control system that is headed by both the CSMP and an independent administrative authority: the authority to regulate the distribution of the press (*l'Autorité de régulation de la distribution de la presse - ARDP*). The latter is responsible, on the one hand, for mediating disputes between the players in the sector and, on the other hand, for giving effect to the regulatory decisions of the CSMP. In March 2010, *Bruno Mettling* noted in his report on the financial recovery of the messaging service Presstalis (former *nouvelles messageries de la presse parisienne- NMPP*), that "the monopolistic tendency that traditionally characterizes level 1 and 2 of the distribution of press, the interpenetration of competition levels between actors in the different parts of the distribution chain and constitutional issues relating to the distribution of the political and general news media and to the access of the readers to the plurality of news supply on the whole territory clearly argue for the creation of a true independent administrative authority, which ensures sectoral economic regulation based on the principles of independence and impartiality together with a body directly involving professionals". The Act of 20 July 2011 organizes the interaction of the sectoral regulators and the Competition Authority.

- Must-carry/must-offer rules for electronic media

The 1986 Act guarantees that public channels are offered (France 2, France 3, France 5, Arte, TV5, France Ô, La Chaîne Parlementaire and for digital offers France 4 – Art. 30-2 of the 1986 Act "must carry").

With regard to personal mobile television (TMP), the Act also requires distributors to comply with must-offer rules concerning their offers made by service providers of personal mobile television which are also broadcast unencrypted on digital terrestrial television (Art. 30-2). Accordingly, it forces these providers to comply with those requests of the distributors that ensure the resumption of services within the offerings of these distributors. However, there are some exceptions.

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<sup>48</sup> Act n° 2011-852 of 20 July 2011 on the regulation of the distribution system of the press, OJ of 21 July 2011, p. 12454.

<sup>49</sup> See in this regard: "Proposals for the reform of the Conseil supérieur des messageries de presse", report of Bruno Lasserre, president of the Competition Authority, 9 July 2009.

Distributors whose offering uses a network that does not use the frequencies allocated by the CSA (cable, satellite, DSL, mobile network, etc.) must make a declaration, except those serving less than one hundred households (Art. 34). They must carry public service channels in their offering (Art. 34-2). Any distributor of services using a network (other than satellite) not using frequencies allocated by the CSA provides its subscribers with "local public services for information on local life" (Art. 34-2 - "must-carry local public channels"). Finally, they must offer free digital terrestrial channels on all media (cable, satellite, DSL - Art. 34-4).

- Role of platform operators

Article 30-2 of the 1986 Act as amended lays down the legal system applicable to distributors of services terrestrially broadcast in digital mode. The Act forces the programme editors who have channels within the same multiplex to come together to designate a common technical operator called "service distributor." All editors on this multiplex, authorized by the CSA, jointly propose a separate company to the regulatory authority within two months to which the CSA will assign the corresponding spectrum resource. Failing agreement between the editors in question, the CSA should initiate a new call for applications. The service distributor is subject to authorization by the CSA which assigns the corresponding spectrum resource. However, the distributor responsible for the marketing function of the supply of programmes is obliged to make only a prior declaration.

- Access to Information

- Transparency of media ownership situations

Act No. 86-897 of 1 August 1986 as amended reforming the legal system of the press lays down an anti-concentration regime and prohibits in Article 3: "to lend ones name to any publishing company, by simulating the acquisition of stock or shares, the acquisition or the lease management of a business or security." Article 4 lays down the nominative nature of shares in the case of corporations. In addition, "any transfer is subject to the approval of the board of directors or the supervisory board."

Article 5 of the Act of 1 August 1986 was supplemented<sup>50</sup> by an obligation for media publications to disclose the composition of their shareholding. The scope of this measure is limited to shareholders who hold at least 10% of the capital in order to be in compliance with the laws on publicly traded companies. In any press publication, the following information must thus be revealed to the readers in every issue (or on the homepage of any online news service): the full name of the owner or principal owner if the publishing company does not have legal personality; if the publishing company has legal personality, its firm name, its registered office, its legal form and the name of its legal representative and of the natural or legal persons holding at least 10% of its capital; the name of the publication director and the editor-in-chief. Finally, article 6 of the Act of 1 August 1986 as amended provides that "any publishing company must bring to the attention of their readers or the users of the online publication or online news service:<sup>51</sup> any assignment or promise of assignment of shares which would result into an assignee having at least one third of the share capital or voting rights; as well as a transfer or promise of transfer of ownership or exploitation of a security on press

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<sup>50</sup> Act No. 2011-525 of 17 May 2011 on the simplification and improvement of the quality of law (Art. 66), OJ of 18 May 2011, p. 8537.

<sup>51</sup> Wording resulting from the Act No. 2011-525 of 17 May 2011 on the simplification and improvement of the quality of the right.

publication or online press service." This must be done within one month after they acquired knowledge of the fact or in the next issue of the publication.

Articles 35 to 38 of the Act of 30 September 1986 provide for similar measures with regard to audiovisual communication (prohibition of lending the name, nominative nature of shares, information on changes in share capital to the CSA).

- Accountability of public service media

The public sector organizations of audiovisual communication annually submit a report to Parliament in order to set out the performance of their duties (Article 43-11 of the 1986 Act).

Contracts on the objectives and resources are concluded between the state as shareholder and France Télévisions, Radio France, the company responsible for audiovisual services outside of France, Arte-France and *l'Institut national de l'audiovisuel* for a period of four or five years. Those contracts contain the specific remit of those various services and should allow clarifying the position in the programming and the development strategy of their tasks. These contracts are laid down in Article 53 of the 1986 Act and are part of an approach that encourages the responsabilisation of channel directors.

The Act No. 2010-769 of 9 July 2010 on violence against women, violence within couples stipulates that the president of France Télévisions annually reports on the activity and work of this Council when it reports on the performance of the contract on the objectives and resources of the company before the committees of the National Assembly and Senate responsible for cultural affairs and Finance.

- Freedom of information laws

The recognition of the right to information is confined to specific areas at the legislative level, such as that of administrative documents (Article 1 of Act No. 78-753 of 17 July 1978 introducing various measures to improve relations between the administration and the public and various administrative, social and fiscal provisions).

Act No. 78-753 of 17 July 1978 (Article 1) provides that every person has the right to obtain disclosure of administrative documents produced or received as part of their public service task by the State, local authorities or by other persons in public law or persons in private law responsible for such a task and that this right exists regardless of "the date, storage place, form and medium" of the documents. However, there are restrictions for documents affecting the interests mentioned in Article 6 of the 1978 Act: national defence secrets, conduct of foreign policy of France, state security, public safety, personal security, secrecy of the deliberations of the Government, currency and public credit, conduct of proceedings before the courts, etc. In addition, documents that contain information on natural persons may be disclosed only to the persons concerned or their representatives to maintain medical confidentiality and the right to privacy. The Commission on Access to Administrative Documents (*La Commission d'accès aux documents administratifs - CADA*) is responsible for ensuring the proper implementation of this right of access.

- Accessibility of products/services and distribution networks

The Government has noted the decision of the Constitutional Council of 10 June 2009 (see above) and reaffirmed its commitment to prevent the plundering of works on the



internet. The prevention of copyright infringements will be achieved by punishing the perpetrators of illegal download. To this end, the Hadopi law II submits the judgment of counterfeiting offenses committed on the internet to specific rules of criminal procedure (judgment by a single judge and simplified procedure). Furthermore, it establishes tort liability (Article L. 335-7 of the Code of Intellectual Property) and liability for misdemeanour (Article L. 335-7-1), which lead to the suspension of internet access. The criminal judge has jurisdiction as was required by the Constitutional Council in its decision of June 2009. Despite the lack of guarantees made under this new law,<sup>52</sup> the Constitutional Council has validated it in general. However, it did not approve of the procedure which allows the judge to decide on the request for damages by penal order because the legislator failed to clarify the rules.<sup>53</sup> The Constitutional Council notably approved the suspension of access to internet for a period not exceeding one year as well as the obligation imposed to the subscriber to pay the subscription fee. It held that "no rule or constitutional principle precludes that an administrative authority participates in the implementation of the execution of the penalty of suspension of internet access".<sup>54</sup>

In accordance with the commitment in the government plan "Digital France 2012", the goal of implementation of digital broadcasting everywhere in France before 30 November 2011 has been achieved. 100% of the French (including those overseas) have switched to digital terrestrial television (DTT) and now have access to 19 free channels in digital quality. The plan "Digital France 2012" was presented in October and included 154 operational measures. The Ministry of Economics assures that 95% of those measures have been achieved or will be achieved.

99% of the population now has access to broadband via DSL.<sup>55</sup> The effort continues in less dense areas of the territory with the national programme "very high speed". To expand access to broadband, the Government launched in December 2009 a label "broadband for all", applicable to affordable offers of broadband access available on the entire territory (maximum: 35 € per month). Four bids using satellite technology and offering data rates of 2 Mbit/s have been labelled. The aim is to implement very-high-speed broadband for fixed<sup>56</sup> and mobile devices for all inhabitants of France. 70% of the population will have very-high-speed broadband in 2020 and 100% in 2025 thanks to the national very-high-speed-broadband programme. The state provides support to public initiative networks carried by local authorities which complement private initiatives initiated within 3 to 5 years ("Guichet public initiative networks" to co-finance neutral and passive deployment projects of open optical fibre, up to 900 million Euro in subsidies).<sup>57</sup>

The decree also creates a strategic fund for the development of the press, which merges the two main aid funds for industrial projects (the aid funds for the modernization of the daily press and the press identified with political and general information established by Decree No. 99-79 of 5 February 1999) and digital projects (the aid funds for the development of online news services created by Decree No. 2009-1379 of 11 November 2009). This new fund is managed by a joint committee and has three sections: industrial

<sup>52</sup> In this sense, D. Rousseau "After Hadopi 1 and 2, Hadopi 3?", *Légipresse*, December 2009, p. 173. "If, indeed, the Hadopi law 2 gives jurisdiction to the judge, as requested by the Council, it does so according to a procedure (the penal order) which deprives litigants of the principles applicable to any sanction with the character of a punishment."

<sup>53</sup> Constitutional Council Decision No. 2009-590 DC, 22 octobre 2009, OJ of 29 October 2009, p. 18292.

<sup>54</sup> The decree No. 2009-1773 of 29 December 2009 established the High Authority for the dissemination of works and the protection of rights on the internet (OJ of 31 December 2009, p. 23348).

<sup>55</sup> End of June 2011, there were 21.5 million subscribers for broadband internet for landline in France. DSL subscriptions amounted to 20.5 million, plus a million subscribers connected through cable networks, radio network or satellite.

<sup>56</sup> Mid-2011, there were 550,000 subscribers to very-high-speed broadband in France.

<sup>57</sup> The deployment of optical fibre has increased from less than 100,000 households in 2007 to 1.3 million households today.



modernization and transformation, digital innovations, winning new readerships. The decree also extends the scope of aid recipients. The Ministry of Culture said that newspaper companies which are editors of at least one daily publication become eligible for the first section of the new fund if they obtained a certificate of the "*commission paritaire des publications et agences de presse*" (CPPAP) (joint committee of press publications and press agencies) and if they provide regular news and commentary of all sports. The free newspapers also become eligible for the first section of the fund for their prints made in a printing press.

The decree of 13 April 2012 finally makes an adjustment of certain devices. A third section is created for the allocation of aid to national dailies with low advertising resources provided for by Decree No. 86-616 of 12 March 1986. It allows preventing that the development of advertising revenue will lead to a brutal suppression of aid. Decree No. 2002-629 of 25 April 2002 on aid for the distribution of the daily press is amended to create a second section which integrates the objectives and recipients of aid for distribution and promotion of French press abroad. Parallel to this, Decree No. 2004-1311 of 20 November 2004 on aid funds for distribution and promotion of the French press abroad is repealed. Decree No. 2010-1088 of 15 September 2010 on the development and modernization of the press in New Caledonia, French Polynesia and the Wallis and Futuna Islands is also amended to allow media companies located in these geographic areas benefiting from the new aid instituted by the decree. The decree also contains provisions for the continuation of aid to the transport of the press.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

The newspaper Le Monde was the first to have a mediator in France (since 1994). Since 1998, public broadcasting also has mediators. In 2002, Radio France followed and, finally, since 2004, the regional daily press got mediators (e.g. *Sud-Ouest* or *L'Est républicain*). This form of mediation differs from the so-called institutional mediation, whose best-known examples are those of the *Défenseur du droit* (Article 71-1 of the French Constitution, organic laws No. 2011-333 and No. 2011-334, ordinary law of 29 March 2011) or the mediator of the cinema (established by Act No. 82-652 of 29 July 1982).

- Participation in media operators/(self-)regulatory bodies

The Act of 1 August 2000 introduced Article 46 in the 1986 Act which provides for the establishment of an advisory board for programs at France Télévisions. Four years after the introduction of this provision, the legislator noticed that it had remained unimplemented and amended the wording with Act No. 2004-669 on electronic communications and audiovisual communication services. Article 46 of the Act of 30 September 1986 as amended by the 2004 Act removed any reference to the drawing of lot among the persons liable to pay the license fee and referred to a decree for the definition of the composition, the tasks and operating procedures of this advisory board which is designed to give voice to the viewers of France Télévisions. However, neither the writing of 2000, nor that of 2004 allowed the effective establishment of this council. The Act of 5 March 2009 imposes an obligation of result to France Télévisions without determining the composition and operating procedures of the advisory council for programmes. Since 2010, France Télévisions compels itself to maintain a regular and direct dialogue with a small group of twenty viewers, who have the possibility to express themselves on public service television and how it performs its tasks. The application

deadline is renewed each year on the website of Club France Télévisions to ensure a geographic, age and socio-professional balance.

However, viewers' associations are not involved in this scheme which confirms the insoluble question of their representativeness. The influence of these institutions, which intend to integrate the public in the media and to force the media to explain their choice to public representatives, is questionable. The intervention of these advisory boards in the field of information is particularly problematic as a prior consultation is difficult in this field.

#### 2.2.9.2. Main Players in the Media Landscape

##### 2.2.9.2.1. Radio

"Radio France" includes five public national radio stations: France Inter, France Musique, France Culture, France Info and France Bleu (43 decentralized stations offer a regional or local program).

The legal framework for digital terrestrial radio is gradually emerging.<sup>58</sup> For now, the CSA has regularly been authorizing experiments in large cities (Paris, Lyon, Nantes and Rouen) since 2009.

Three main commercial groups, RTL, NRJ, and Lagardère active have half of the market share. The RTL group operates four radio stations, with RTL being the radio station with the highest audience share among public and private stations. The group also owns or has shares of many TV channels as a producer of audiovisual programmes (including RTL 9, M6 and W9).

The NRJ Group operates four radio stations in France. The founder *Jean-Paul Baudecroux* controls the company through the NRJ Group. The group also owns a television channel (NRJ12) and the first music channel broadcast via cable, satellite and DSL (NRJ Hit).<sup>59</sup>

The Lagardère group, managed by *Arnaud Lagardère*, operates in nearly 40 countries and has four business lines. La Lagardère Publishing (Hachette Livre is the publishing imprint); Lagardère Active combines the group's activity in the press and audiovisual media area (several magazines, three radio stations, several television channels with youth and music programmes); Lagardère Services is doing all the supply activities; finally Lagardère Unlimited now includes the activities Sports and Entertainment (audiovisual production). Lagardère Publicité is the third largest advertising agency in France.

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<sup>58</sup> Act of 30 September 1986 amended by the Act of 9 July 2004, of 5 March 2007 and of 5 March 2009.

<sup>59</sup> Emmanuelle Machet, country report France, Study on "the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed", The European Institute for the Media, 2004, p. 74 et seq.

**Table 48 FR: Main Radio Companies**

Companies	Ownership Structure	Main Radio Stations	Total Market Share in 2010
Radio France	Public service	France Inter (9.4 %) France Bleu (6.1 %) France Info (3.5 %) France Musiques (0.9 %) France Culture (1.1 %)	22.2 %
RTL Group	Bertelsmann (89,8 %)	RTL (12.7 %) Fun Radio (3.9 %) RTL2 (2.7 %)	19.6 %
NRJ Group	Jean-Paul Baudecroux (75,5 %)	Chérie FM (2.3 %) Nostalgie (4.2 %) NRJ (6.2 %) Rire et Chansons (1.6 %)	14.8 %
Lagardere Active	Lagardère	Europe 1 (7,4 %) Virgin radio (anciennement Europe 2) (2.1 %) RFM (2.8 %)	12.6 %
RMC	Next Radio Tv		7 %
Les Indés Radios : 123 stations			11.4%

\* Source: Audience share- Key figures and Balance sheets- CSA

#### 2.2.9.2.2. Television

The DTT currently has 18 free national channels broadcasting full-time in metropolitan regions (four of them are also broadcast in high definition), 10 pay TV channels (1 of them being broadcast in high definition), 50 local channels. Overseas, the first multiplex contains eight to ten channels depending on local peculiarities.

At the end of 2011, 141 channels were under contract with the CSA and 62 reported (annual budget of less than 150,000 €) for broadcasting on networks not using frequencies allocated by the CSA (cable, satellite, DSL, mobile, internet). At that time, concerning video on demand, France had no less than 55 active platforms available on the internet, IPTV, on portable media player or video game consoles.

Since July 2010, a new national public service channel is broadcast for free on DTT: France Ô. That month the group "France Télévisions" has also launched the website containing catch-up TV "Pluzz".

The channel group "Canal +" (off Canal+ SA) with 23 channels produced by nine different companies (Multithématiques, Jimmy/Comédie, Planète Câble, TPS Star, Canal+ Distribution (Kiosque Sport), Kiosque (Ciné+), Cuisine TV, TPS Sport (Infosport), Sport+) is leading on the pay-TV market. Canal+ plays an essential role in the satellite distribution of free (TNTSat) or commercial (CanalSat or Canal+) digital channels. CanalSat is the largest distributor of satellite digital channels ever since its founding.

**Table 49 FR: National audience share of digital terrestrial television channels of June 2011**

Main TV Stations	Broadcasters	Total Market Share 2011 in %
TF1	TF1 Group	23.3
France 2	France Télévisions	15.2
M6	M6 Group	10.5
France 3	France Télévisions	9.6
TMC	TF1 Group	3.6
France 5	France Télévisions	3.2
W9	Edi TV (M6)	3.1
Canal Plus	Canal+ SA	3.0
NRJ12	NRJ TV	2.6
Direct 8	Bolloré Média	2.4
France 4	France Télévisions	2.1
Gulli	Jeunesse TV (Lagardère-France Télévisions)	2.1
NT1	TF1 Group	2.0
Arte	Arte France	1.6
BFM TV	BFM TV	1.5
Direct Star	Bolloré Média	1.4
ITV	SESI (Canal+)	0.9

Source: Médiamétrie

### 2.2.9.2.3. Press and Publishing

At the end of 2010 there were 16 national dailies, 52 regional, 43 Sunday papers and several regional weeklies being published in France.<sup>60</sup>

The national daily newspaper market is dominated by three main groups.<sup>61</sup>

"Socpresse" (formerly part of the Robert Hersant empire) was owned until 2006 by the Dassault group (87%) and Robert Hersant's granddaughter (*Aude Reuttard*, 13%). "Socpresse" is now wholly owned by the industrialist *Serge Dassault*. It publishes "le Figaro", all its supplements and various specialized titles. However, Socpresse has completely divested from the regional daily press. The magazine "L'Express" and "L'Expansion" were also sold to the Belgian Roularta group.

The Amaury group publishes the dailies *Le Parisien*, *Aujourd'hui en France*, and *l'Equipe* (sports paper) and several sports magazines (France Football, Vélo Magazine). It is also the owner of the sports television channel l'Equipe TV.

The third group is the Le Monde-La vie Group, which publishes the popular daily *Le Monde*. Since the merger with PVC (Publications de La Vie catholique) at the end of last year, the group owns 43 press titles, magazines, books and libraries.<sup>62</sup> Regional dailies (Midi Libre, The Independent and Press-Centre) belong ever since to the Sud-Ouest group. "Monde libre" controls 59.55% share of the group since 2 November 2010 (date of capitalization) and is owned by *Pierre Bergé*, *Xavier Niel* and *Matthieu Pigasse*. Prisa owns 20% of the "Monde libre", the other three shareholders having the remaining 80%. The Lagardère group exercised its right to withdraw and is no longer shareholder of "Le

<sup>60</sup> OJD figures.

<sup>61</sup> Emmanuelle Machet, Country report France, Study on "the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed", The European Institute for the Media, 2003, P. 76 et seq.

<sup>62</sup> Emmanuelle Machet, country report France, Study on "the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed", The European Institute for the Media, 2004, p. 76 et seq.

Monde” but it remains a shareholder of the “Monde interactif” (subsidiary managing the group’s internet activities). At the end of a backup procedure in late December 2011, the owner of “France Soir”, *Alexander Pougachev*, decided to stop the print edition in order to make a free daily which is to 100% digital.

**Table 50 FR: Main publishers of daily newspapers**

Publishing companies	Ownership Structure	Main Titles	Market Share	DFP 2010 (in copies)
Groupe Amaury	Amaury family (75 %) Lagardère Active (25 %)	L'Equipe Le Parisien/Aujourd'hui en France		302,147 169,227
Socpresse	Groupe Industriel Dassault	Le Figaro Paris Turf		316,732 56,452
Le Monde SA	Le Monde libre (Niel/Bergé/Pigasse/Prisa)	Le Monde		286,348
Libération	<i>Edouard de Rothschild (38 %)</i> Carlo Caracciolo (30 %) <i>Personnel</i>	Libération		113,099
Groupe Les Echos	LVMH	Les Echos		115,706
	Valérie Decamp (80 %) Alain Weill (20 %)	La Tribune		68,813
	Alexandre Pougatchev	France Soir		74,531
L'Humanité	Société des lectrices et lecteurs de l'Humanité (20 %) Société Humanité Investissements Pluralisme (Hachette-TF1-Caisse d'Epargne) (20 %) Société des personnels de l'Humanité (10 %) Société des Amis de l'Humanité (10 %)	L'Humanité		48,118
New York Times		Internat. Herald Tribune		19,603

\* Figures : Diffusion France Payée (DFP) 2010, OJD/Stratégies les chiffres clés 2010.

At the regional level, there are many large press groups that also have interests or subsidiaries in radio, advertising and multimedia products. The Ouest France Group publishes the top selling newspaper *Ouest France*, with 2231 regular readers and 47 local editions distributed in Normandy, Brittany and the Loire. It owns about 60 paid local newspaper titles and has interests in free press (50% in 20 minutes France SA). Through its subsidiary Publihebdo, it also owns 58 weekly newspapers. In 2005, the groupe acquired three dailies from Socpresse (Le Courrier de l'ouest, Presse-Océan, Le Maine libre).

Groupe Sud Ouest publishes several newspapers (dailies and weeklies), and magazines. It has a 6% share in the Spanish Group Correo and is also involved in television (TV7 Bordeaux). However, in 2010, the group stopped making business in the field of free advertising.

In France, Lagardère Active is particularly strong in the field of women’s magazines and television journals. In the field of the daily press, Lagardère Active owns several outlets

in the South East of France.<sup>63</sup> In 2010, the group announced the assignment agreement of the business in international magazines and the digital television channel. "Virgin 17" was also sold at the end of May 2010. In 2007, it sold the regional daily "La Provence" to the Hersant group (127317 – DFP 2010).

The group "Est Bourgogne Rhône Alpes" (formerly "Groupe Est Républicain") publishes many regional dailies, and also has interests in advertising, free press, and television (Télé Lyon Métropole et M6 Nancy until it closed). In 2006, after it repurchased Rhône-Alpes from Socpresse, it became the main group of French Regional daily press.

The group Centre France – La Montagne also is active in television (Clermont Première). From 2009 to 2011, the group «Centre France continues to grow by incorporating L'Yonne Républicaine (Auxerre), La République du Centre (Orléans) and L'Echo Républicain (Chartres). Today, the group Centre France distributes more than 400.000 copies per day and has an audience of more than 1.3 million of readers daily.

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<sup>63</sup> Emmanuelle Machet, country report France, Study on "the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed", The European Institute for the Media, 2004, p. 77 et seq.

**Table 51 FR: Main Publishing Companies of regional press**

<b>Publishing companies</b>	<b>Ownership Structure</b>	<b>Main Titles</b>	<b>DFP 2010 (in copies)</b>
Groupe Ouest France	SIPA (Société d'Investissements et de Participations) which is owned by l'Association pour le Soutien des Principes de la Démocratie Humaniste (association loi 1901)	Ouest France La Presse de la Manche Le Courrier de l'ouest Presse Océan Le Maine libre	757,115 24,033 97,627 33,470 45,574
Socpresse	Dassault		
Groupe Sud Ouest	80 % Lemoine family 20 % members of the staff	Sud Ouest La Charente Libre La République des Pyrénées Midi Libre L'indépendant	293,072 36,285 32,269 136,795 59,328
Lagardère Active	Lagardère	Nice-Matin Var-Matin	106,213 72,601
Groupe Rossel	Groupe Rossel - VNI - Crédit agricole	La Voix du Nord	265,173
Groupe NRCO		La Nouvelle République du Centre Ouest	188,381
Centre France – La Montagne	<i>Fondation Varenne</i>	La Montagne Le Populaire du Centre Le Berry Républicain Le Journal du Centre L'Echo républicain	187,836 41,719 35,801 28,781 27,934
Groupe Est Bourgogne Rhône Alpes (EBRA)	Crédit mutuel Famille Lignac Philippe Hersant	L'Est Républicain Dernières Nouvelles d'Alsace Le Progrès-La Tribune Le Dauphine Libéré	154,543 171,663 207,270 231,324

\* Figure : Diffusion France Payée (DFP) 2010, OJD/Stratégies les chiffres clés 2010.

#### 2.2.9.2.4. Online media (non-linear audiovisual (media) services; websites)

**Table 52 FR: Main services of video on demand on the French market**

CanalPlay (group Canal Plus)
Free Home Vidéo (Free)
iTunes (Apple)
24/24 Vidéo d'Orange (Orange)
Club Vidéo de SFR (SFR)
TF1 Vision (group TF1)

Source: Idate, July 2011



**Table 53 FR: Catch-up TV services of the five main channels (ranked by viewing figures)**

TF1	TF1 replay
France 2	Pluzz*
France 3	Pluzz
M6	M6 Replay
Canal Plus	Canal Plus à la demande (réservé aux abonnés)

\* Pluzz also allows reviewing the programs of France 4, France 5 and France Ô.

Source: Idate, July 2011

France Televisions launched Pluzz.fr and Pluzz on “Orange” and on “Free” in July 2010 catching up with the delay in this matter on TF1, M6 and Arte that have such services. This offer allows viewers to review most of the programmes of all channels of France Television (France 2, France 3, France4, France 5, France Ô and the overseas network) for free during usually seven days.

#### 2.2.9.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers

The group AB offers a range of channels via satellite (BIS Televisions) since December 2007.

Orange offers satellite television complementary to its multi-service on DSL since August 2008.

Finally, Fransat (controlled by Eutelsat) broadcasts via satellite free DTT channels since 2009.

Since August 2007, “Numericable” has been the only operator gathering the old networks “France Télécom Câble”, “NC Numericable”, “UPC”, “Noos” and “Est Vidéo Communication” and “thereby completing the concentration of the sector started in the 2000s.”<sup>64</sup> The number of households connected to cable TV is between 3.4 and 3.7 million, of which nearly 1.5 million receive the mere/basic “antenna service” (corresponding to the resumption of terrestrial channels available in the area). The number of broadband internet access via cable has risen sharply since 2004.

DSL TV, which has strongly grown since its launch in 2003, is marketed by main internet service providers in connection with offers called “triple play” which combine high speed internet access, local and national (even international) telephony and television. All the DSL television offers (SFR, Free, Alice, Orange, Darty, Bouygues) involve a basic offering of at least fifty free channels when a multi-service offer is subscribed (including the free DTT channels) and the ability to subscribe to optional channels by unit or channel packages (mostly foreign) composed by the operators. 11.3 million of the 22 million subscribers to internet with high or very high speed (20.5 million by DSL) are coupled with a TV offering.<sup>65</sup> 7.4 million households use the internet (DSL or optical fibre) to watch terrestrial broadcast television (DTT).<sup>66</sup>

<sup>64</sup> Le Guide des chaînes numériques, 9th edition, February 2011.

<sup>65</sup> Source: Observatoire trimestriel des marchés des communications électroniques en France de l’ARCEP – 2nd quarter of 2011.

<sup>66</sup> Source: Médiamétrie, September 2011.

The digital channels are also available on mobile phones in the offerings of mobile operators such as Orange, SFR and Bouygues Télécom. The notion of "connected TV" also includes game consoles (70% of the households have a console that can be connected to the internet), tablets (1.3 million tablets were in French households in 2010) and internet-enabled TV (2.4 million internet-enabled TVs were in France in 2010).<sup>67</sup>

#### 2.2.9.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)

**Table 54 FR: Share of advertising revenue within the media sector 2010**

Media	In billion Euros	Market Share in %
National dailies	0.266	2.5
Regional dailies	0.962	9.0
Magazines	1.215	11.3
Spécialised press	0.400	3.7
Free press	0.719	6.7
Regional weeklies	0.129	1.2
Total publishing	3.691	34.4
Television	3.441	32.1
Outdoor	1.188	11.1
Radio	0.744	6.9
Cinema	0.090	0.8
Internet (Display)	0.540	5.0

Sources: Irep-France Pub 2010.

According to the "*Institut de recherches et d'études publicitaires*" (IREP) in 2011, the advertising market continues at a slower pace the restart that began in 2010. The communication costs of advertisers increased by + 1.9% (against 3.4% in 2010 vs. - 8.6% in 2009) and reached 31.4 billion Euro. Media advertising revenue is stabilizing at + 0.1% (against 3.9% in 2010 vs. -12.6% the previous year) and amounted to 10.7 billion euro. If one excludes the revenues of the free press whose major market player (Comareg) disappeared during the year, the development is then +1.2%.

The mobile (+37.5%), cinema (+16.5%) and internet display (+14%) are the fastest growing media before free press (+5.5%) and TV (+1.6%).

#### 2.2.9.3. Conclusion and Recommendations

"Smart TV", also called "connected TV",<sup>68</sup> challenges the traditional regulations mainly because of its rarity. It also calls into question the regulatory instruments based on territoriality. Services regulated by the CSA co-exist with services from the internet for which the regulatory authority is not competent (in case of services broadcast from other countries and "user generated content" such as YouTube or Dailymotion). This coexistence is so well-working, that the mission of "Smart TV" said in a report to the

<sup>67</sup> Source: Strategy Analytics (December 2010).

<sup>68</sup> See in this regard "The connected TV," CANDILIS Takis, LEVRIER Philippe, MANIGNE Jérémie, ROGARD Martin, TESSIER Marc, TROJETTE Mohammed Adnène, Ministry of Culture and Communication, La Documentation française, September 2011.

Minister of Culture in September 2011, that for the defence of freedom of audiovisual communication it is now "more crucial to ensure the open access to networks than to provide general restrictions on the broadcasting of services." The relevance of the rules of control of concentrations is questioned, especially with regard to the maximum number of authorizations for national television services one person can hold. The Competition Authority thus had to intervene even though the maximum number of channels was complied with (e.g. acquisition of TMC and NT1 by TF1; acquisition of Direct 8 and Direct Star by Canal Plus). The report on "Smart TV" proposes to give "more importance to audience share (real or potential) and market share made on different broadcast media than to the number of controlled channels on the terrestrial network." In addition, the report notes that three sets of rules could be simplified (those organizing and quantifying the programming of cinematographic and audiovisual works on television; those on advertising; those guaranteeing the pluralistic expression of thoughts).

In a statement of 5 December 2011, the president of CSA, *Michel Boyon*, insisted that four principles to which the Council is very committed should be respected. In particular, he expressed the refusal of any reduction in the definition of areas which warrant regulation (child welfare, dignity, consumer protection, pluralism, etc.). Relief from certain rules imposed on the chains would instead concern media chronology, the maximum concentration, or the circulation of works "without prejudicing the interests of creators." The CSA also stresses the obligation to help finance the work for any company deriving income from the exploitation of the work. Finally, the regulatory authority advocates the development of a co-regulation with professionals for audiovisual content circulating on the internet.

The new services call for an individual solution based on freedom of choice of the viewer. The development of these new services enhances access to information primarily on a quantitative level. In this respect, the flexibility of the regulatory authority is reduced to control all programmes broadcast by conventional means parallel to those terrestrially broadcast (cable, satellite, DSL ...). This difficulty is compounded where the programs received by viewers are of foreign origin (is it appropriate to create a European regulatory body?).

The multitude of titles in print or audiovisual services allows the public to make their choice. However, the market structure of the French media mainly remains oligopolistic. Four to five groups stand out in each sector. In this respect, the decision of the Competition Authority concerning the acquisition of TPS by Canal Plus is much anticipated. The operation combined the pay-TV activities of TPS and CanalSat in Canal+ France. It gave complete control of both French satellite platforms to the Canal Plus group and the Vivendi group of which it is a subsidiary. Those satellite platforms include the whole business value chain of the pay TV sector: everything from the control over the content to the access to the viewer. Therefore, the authorization of sole control of TPS and CanalSatellite by the Vivendi group and the Canal Plus group in August 2006 was conditioned by the implementation of some fifty commitments which intend to remedy the monopoly in publishing and marketing of premium channels of the new entity. In September 2011, the Competition Authority found out that the parties had not implemented ten of these commitments including the most significant and decided to withdraw its authorization. The following month, the Vivendi group and the Canal Plus group challenged the decision of the Authority before the State Council and at the same time, they again notified of their takeover, as required by procedure. The decision of the Competition Authority is expected after the ongoing investigation process.

As to public broadcasting, it should be noted that the suppression of advertising laid down in the act of 5 March 2009 did not allow a real shift in the editorial line of France Televisions. Most persons who were interviewed as part of the review of implementation of the act considered that the audience remained a major challenge for the public broadcasting group.<sup>69</sup> This finding is particularly reflected in poor development of qualitative tools. The group's situation also remains fiscally insecure. The new funding model is now largely dependent on a budget allocation negotiated by the State. The proceeds of the tax on advertising on television are also much lower than that planned by the reform. Finally, the legal basis for the tax on telecommunication services is challenged. On 14 March 2011, the European Commission turned to the Court of Justice of the European Union and asked to clarify the compatibility of Article 302 bis KH of the Tax Code with the directive "authorization" of the "Telecom Package".

The audiovisual sector faced another problem: the allocation procedure of the radio resource to mobile television has been a failure for the CSA which decided on 14 February 2012 to withdraw the permissions it had granted for the broadcasting of sixteen television services in April 2010.

Technological change also impacts print media which must also cope with increasing financial difficulties. This was evidenced by the recapitalization plans of the major national dailies in 2010 (Libération and Le Monde). On 30 January 2012, La Tribune, the second French business daily, published its last paper edition. That same day, the Commercial Court of Paris accepted the offer made by the company Hi-Media and the regional press group "France Economies Régions"<sup>70</sup> for the resumption of the daily which was in insolvent restructuring since December. La Tribune, which has already changed owners several times the last few years, will continue as a weekly (with a target circulation of 100,000 copies) while there will be daily news on its website. This is the second national newspaper that disappears after France Soir in December 2011.

In addition to the criticism on the institutional level, the "Hadopi" law has also many enemies among supporters of Free Software. This hostility is especially expressed through the association "April" or the organization of the defence of the rights and freedoms on the Internet "La Quadrature du net". According to its co-founder, *Gerald Sédrati-Dinet*, "it is impossible to effectively control the flow of information by law and technology in the digital age without seriously undermining civil liberties and hamper economic and social development". The collective says that, in addition to its inefficiency, this regime "delays the inevitable debate on recognition of sharing and the establishment of pooled funds controlled by users."

For now, it is clear that the scope of the regime is essentially symbolic.<sup>71</sup> It took nearly a year after the publication of the Act of 28 October 2009 (Hadopi II) to publish the decrees of application defining the offense of "gross negligence".<sup>72</sup> The effectiveness of it

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<sup>69</sup> Rapport d'information n° 572 de MM. David Assouline et Jacques Legendre, fait au nom de la commission pour le contrôle de l'application des lois, Sénat, 30 mai 2012.

<sup>70</sup> France Economie Régions consists of five regional newspapers (Objectif Aquitaine, Objectif News Midi-Pyrénées, Objectif Languedoc-Roussillon, MéridienMag, Acteurs de l'Économie en Rhône-Alpes).

<sup>71</sup> According to Marie-Françoise Marais, president of the Hadopi: in November 2011, there were 736,000 recommendations of first level. The number of recommendations for second level is 62,000. As for the third level, there are 165 cases and "the Commission of rights protection wants to inform about them at all costs." "It convenes the persons and a genuine dialog is taking place again." It depends on the circumstances whether or not it transmits the files.

<sup>72</sup> Decree No. 2010-695 of 25 June 2010 establishing a contravention of gross negligence protecting literary and artistic property on the internet, OJ 26 June 2010, p 11536; decree No. 2010-872 of 26 July 2010 on proceedings before the commission to protect the rights of the High Authority for the dissemination of works and the protection of rights on the internet, OJ of 27 July 2010, p. 13874. Contravention of "gross negligence" is recognized when: the subscriber has failed without good cause to establish a means of

is subject to the development of a legally pertinent offer (41 platforms have applied the label). However, the mechanism of labelling offers<sup>73</sup> is of particular complexity.

"The provisions currently in force do not give any satisfaction," says *Marie-Christine Blandin* in a report dated 20 March 2012 on behalf of the Committee on Culture, Education and Communication of the Senate, entitled "How to reconcile internet freedom and remuneration of creators." "A few years ago, the protagonists of downloading controls and sanctions by the DADVSI Act (copyright and related rights in the information society<sup>74</sup>) have in fact quickly realized the impossibility of its application while consumer advocates joined the ranks of the outraged defenders of civil liberties," says the Senator who also stresses "the excessiveness of the sanctions." The Senator expressed her doubts about a system in which it is the duty of the accused to prove his innocence and in which the proof of innocence consists of providing proof of purchase and installation of firewall devices from a company if these devices are incompatible with the free version of the software."

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security or lack of diligence in the implementation of this means, while (i) he had previously received two recommendations of the Hadopi, the first by electronic mail (email) and the second by email coupled with a letter delivered against signature; and (ii) further acts of infringements were made from his internet connection in the year following the receiving of the second recommendation.

<sup>73</sup> See decree No. 2010-1366 of 10 November 2010 concerning the labeling of the offers of the communication services to the public online and concerning the regulation of technical measures of protection and identification of works and objects protected by copyright, OJ 13 November 2010, p. 20216, on this subject.

<sup>74</sup> *Droit d'auteur et des droits voisins dans la société de l'information*.

## GERMANY

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### 2.2.10. Germany

#### 2.2.10.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.10.1 Human rights/Fundamental freedoms

- Freedom of expression/Freedom of the media

In Germany the constitution (*Grundgesetz*) is the basis for the protection of the freedom of speech, but in addition to this, the jurisdiction of the Federal Constitutional Court<sup>1</sup> plays a considerable role. As mentioned in the study of 2004, the right of expression is enshrined in Art. 5 para 1 s. 1 alt. 1 *Grundgesetz*<sup>2</sup>. Specifically, the expressing, spreading and the contents of opinion are protected in word, writing, picture and any other conceivable form. The negative stamping of freedom of speech is protected, too.

The freedom of press is granted in Art. 5 para 1 s. 2 alt. 1 *Grundgesetz*. The free press shall be protected in its entirety: all behavioural patterns which belong to the production and spreading of a press product are protected. The protection of the confidentiality relationship between press and private informants, including the secrecy of the source of information, also belongs to the freedom of press. The BVerfG has clarified this in its "*Cicero*<sup>3</sup>-decision". It held, that the search of a magazine's editorial desk and the seizure of evidence is an inadmissible violation of the freedom of press, if the investigations have mainly purpose of determining the press informants.

In accordance with this, the BVerfG decided on 10 December 2010, that the basic right enshrined in Art. 5 para 1 s. 2 alt. 2 *Grundgesetz* also protects the institutional independence of broadcasters from the obtaining of information to its dissemination. This includes the confidentiality of editorial work, which prohibited State bodies from gaining insight into the working processes involved in producing reports. Organisational documents containing details of work routines or the identity of editorial staff are also covered by editorial confidentiality. While it was true that the order to search the premises of the local broadcaster FSK for the audio recording and related documents did not infringe the ban on seizure enshrined in Sec. 97 para 5 of the Code of Criminal Procedure (StPO)<sup>4</sup>, the proportionality of the measure was not entirely demonstrated. It was necessary to weigh the actual interest of a criminal investigation against the interference with broadcasting freedom that such a search would create. The effects of such an investigation on the media organisation should be taken into account, since the search of a broadcaster's premises often disrupted the relationship of trust between the broadcaster and its sources, and an unlimited search order had an extremely intimidating effect on the media organisation concerned. The BVerfG also ruled that the taking of photographs and drawings of the premises and the seizure of editorial documents as well

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<sup>1</sup> *Bundesverfassungsgericht*, BVerfG.

<sup>2</sup> *Grundgesetz*, GG, available in English at:  
[http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) .

<sup>3</sup> *Bundesverfassungsgericht*, decision of 27 February 2007 (1 BvR 538/06, 1 BvR 2045/06), available in German at:  
[http://www.bverfg.de/entscheidungen/rs20070227\\_1bvr053806.html](http://www.bverfg.de/entscheidungen/rs20070227_1bvr053806.html) .

<sup>4</sup> *Strafprozessordnung*, StPO, available in English at:  
[http://www.gesetze-im-internet.de/englisch\\_stpo/index.html](http://www.gesetze-im-internet.de/englisch_stpo/index.html).

as the copying of those documents infringed broadcasting freedom, since there was no obvious need for such measures.<sup>5</sup>

In a decision on general principle, the BVerfG strengthened the rights of publishers. It ruled that the right of reply to ambiguous remarks should not be adjudicated if the breach of personality rights is the result of only one possible interpretation of a text. This would infringe the freedom of the media enshrined in Art. 5 para 1 s. 2 *Grundgesetz*. In its reasoning, the Court said that in cases in which one does not know whether there is a hidden meaning laying beneath the obvious one, decisions should have regard to the principles for dealing with ambiguous remarks. The freedom of opinion is violated if a court bases its decision on only one of the possible interpretations without first excluding the other ones, which would not have justified a sanction. If a writer must fear that he will be punished for making remarks even though the meaning of those remarks could be interpreted in a way that would not lead to such a punishment, this could cause a suppression of admissible comments and a form of intimidation that contradicts the basic freedom of communication. Therefore, the Court ruled it was compatible with the Constitution to only grant the right of reply if the hidden remarks that were the basis of the complaint were understood by the reader as the undeniable message of the text.<sup>6</sup>

As stated, in Art. 5 para 1 s. 2 alt. 2 *Grundgesetz*, the freedom of broadcasting finds its manifestation. It guarantees the freedom of all activities which are necessary for broadcasting. The guarantee of the programme freedom shall assure an adequate supply of the population with varied broadcasting offers as a basis of a free opinion-forming process in the democratic community. The concept of broadcasting includes all modern services such as pay-TV and teletext.<sup>7</sup>

In 2007 the BVerfG decided, that the fixing of the licence fees for the period from 2005 to 2008 by the legislative bodies of the German Federal States (*Länder*) violated the freedom to broadcast of the public service broadcasters (PSB). They argued about the fact, that the Minister-President decided not to observe the recommendation of the Commission for the Financial Needs of broadcasters (KEF)<sup>8</sup> to raise the future level of the fees. The Court admitted, that most of the arguments of the *Länder* justified the action taken by their legislative bodies. But it pronounced, that the justifications for the arguments were insufficient and inaccurate. As a consequence of that, the BVerfG declared the laws of the *Länder*, that contained the fixing of the licence fees, to be incompatible with Art. 5 para 1 s. 2 alt. 2 *Grundgesetz*. Within this decision, the BVerfG confirmed its previous jurisdiction about the freedom to broadcast. It emphasised, that the programming autonomy is granted by the freedom to broadcast, too. In the judgement was also confirmed that „the demands put up by the Federal Constitutional Court to protect the freedom of broadcasting are not outdated by the development of communication technology and media markets“. Because of the risk of a one-sided influencing control on the public opinion-forming, the court makes further arrangements to protect journalistic diversity.<sup>9</sup>

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<sup>5</sup> BVerfG, 1 BvR 1739/04, of 10 December 2010, available in German at: [http://www.bundesverfassungsgericht.de/entscheidungen/rk20101210\\_1bvr173904.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20101210_1bvr173904.html); BVerfG, 1 BvR 2020/04 of 10 December 2010, available in German at: [http://www.bundesverfassungsgericht.de/entscheidungen/rk20101210\\_1bvr202004.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20101210_1bvr202004.html).

<sup>6</sup> BVerfG, 1 BvR 967/05, of 19 December 2007, available in German at: [http://www.bundesverfassungsgericht.de/entscheidungen/rk20071219\\_1bvr096705.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20071219_1bvr096705.html).

<sup>7</sup> Ruling of the Federal Constitutional Court, BVerfGE 74, 297 [345].

<sup>8</sup> *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten*, KEF.

<sup>9</sup> Decision of the Federal Constitutional Court, 11 September 2007 (1 BvR 2270/05, 1 BvR 809/06 and 1 BvR 830/06).



In a BVerfG judgement of 12 March 2008<sup>10</sup>, the Rules on the Involvement of Political Parties in Private Broadcasting were set. The BVerfG explained that the legislator, which was obliged under Art. 5 para 1 s. 2 *Grundgesetz* to guarantee freedom of broadcasting, had, on the one hand, creative leeway to regulate the involvement of political parties in private broadcasting, because it is necessary to prevent any form of political influence of broadcasting. It was therefore free to prohibit the involvement of political parties in private broadcasting if they were able to have a determining influence on programme organisation or content. On the other hand, an absolute restraint on the ownership of shares in private broadcasting companies by political parties is not an admissible legislative means of protecting broadcasting freedom, if it is regardless of whether the parties were able to exercise any influence at all on the broadcasting company. The judges determined that there is a need of protecting the relevant legal positions of the parties, broadcasters and broadcasting licence applicants, in the organisation of broadcasting regulations. They further explained that such an absolute restraint is restricting the rights of the parties, to participate in the formation of the political will of the people by exercising the freedom of communication, including freedom to broadcast enshrined in Art. 5 para 1 s. 2 in connection with Art. 21 para 1 s. 1 *Grundgesetz*. However, there is no need of such a strict ban to safeguard the diversity of opinion, since it is not clear whether minority shareholdings that did not provide any determining influence could harm diversity of opinion in broadcasting.<sup>11</sup>

- Freedom to receive and to access information

The freedom of information is enshrined separately in Art 5 para 1 s. 1 alt. 2 *Grundgesetz*. It entails the freedom to inform oneself from generally accessible sources, including the possibility to gain State information which is administered by authorities and publicly available.

A specific aspect of the freedom of the person is enshrined in the "basic right to a guarantee of the confidentiality and integrity of IT-systems" as a particular manifestation of the general personality right enshrined in Art. 2 para 1 *Grundgesetz*. According to a BVerfG judgement of 27 February 2008<sup>12</sup>, computers owned by people who are suspected of committing a criminal offence may only be picked up by using spying software if there is a special need for the protection of extremely important general interests. The court emphasised the importance of the use of IT-systems for the development of the personality and from the risks to the personality associated with that use that there was a considerable need for basic rights to be protected. It stated that an interference with this right might be justified for reasons of prevention as well as prosecution of crimes but the secret infiltration of an IT-system is only allowed if there is actual evidence of a concrete danger to a very important legally protected interest (such as life and limb and individual freedom). In addition, the court called, inter alia, for the secret intrusion into IT-systems to be subject to a judicial order and for precautions to protect the core sphere of private life.

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<sup>10</sup> BVerfG, 2 BvF 4/03, of 12 March 2008, available in German at: [http://www.bundesverfassungsgericht.de/entscheidungen/fs20080312\\_2bvf000403.html](http://www.bundesverfassungsgericht.de/entscheidungen/fs20080312_2bvf000403.html).

<sup>11</sup> BVerfG, (1 BvR 967/05), of 19 December 2007 available in German at: [http://www.bundesverfassungsgericht.de/entscheidungen/rk20071219\\_1bvr096705.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20071219_1bvr096705.html).

<sup>12</sup> BVerfG, 1 BvR 370/07, of 27 February 2008, available in German at: [http://www.bundesverfassungsgericht.de/entscheidungen/rs20080227\\_1bvr037007.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20080227_1bvr037007.html).

- Safeguards on regulatory authorities

There are no explicit specific safeguards on Regulatory Authorities in the German Constitution. However, media regulatory authorities are considered to be encompassed by the freedom of broadcasting as stipulated in Art. 5 GG.

- Safeguards on “universal service”

In the German Constitution, Art. 87f provides a universal service entitlement in the range of telecommunication and postal services. Besides, it is derived from the freedom of broadcasting according to Art. 5 GG, for the part of PSB, that they must ensure a universal coverage both in terms of content and as far as technical distribution (and possibility to receive programmes) are concerned.

#### 2.2.10.1.2. *Media order (de lege lata and de facto)*

- “Market Entry”
  - Licensing schemes; remit psm; notification for print publications

Media legislation in Germany is characterised by the principle of federalism, which means that it is primarily in the remit of the *Länder* and a nation-wide legislation in this area has to be negotiated between these. In the field of broadcasting this has been made by the agreement of a (nation-wide) Interstate Treaty, supplemented by media laws of the *Länder*. In the print sector there is no press legislation on a national level.

Private broadcasters need a license which allows them to operate radio or television programmes. In principle, this applies to national, regional and local broadcasters regardless of whether the particular programme is distributed via satellite, cable or antenna. Notwithstanding this principle, the *Länder* may – within their legal responsibility – allow for simplified licensing procedures (for programmes connected locally or temporally to a certain public event or to a certain institution) or even desist from the licence obligation (programmes aimed to a limited number of housing units or in institutions restricted to one building). The legal requirements for licensing are set up in the Interstate Broadcasting Treaty (RStV)<sup>13</sup> as far as nation-wide programme offers are concerned (see Art. 20 et seq. RStV). For other programmes relevant legislation can be found in the Media Laws of the *Länder* (*Landesmediengesetze*, LMG and the Inter State Media Treaties (*Medienstaatsverträge*) agreed between Berlin and Brandenburg and between Hamburg and Schleswig-Holstein)<sup>14</sup>. Furthermore, it is said that such a license shall not be granted to e.g. political parties or regional administrative bodies<sup>15</sup>.

Radio programmes which are transmitted via Internet only, are not required to have a license, but have to notify the competent *Länder* authority of their service (Art. 20b RStV). In this context it should be noted that Art. 2 para 3 RStV excepts certain offers from the “Broadcasting”-term, these are such that: (1) are offered to fewer than 500 potential users for simultaneous reception in any case; (2) are destined for the immediate reproduction from reception equipment storage media; (3) exclusively serve

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<sup>13</sup> *Rundfunkstaatsvertrag*, RStV, available in English at: [http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze\\_aktuell/13.\\_RStV-englisch.pdf](http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/13._RStV-englisch.pdf).

<sup>14</sup> An overview on the *Landesmediengesetze* is available at: <http://www.die-medienanstalten.de/service/rechtsgrundlagen/landesmediengesetze.html>.

<sup>15</sup> See – as an example – Sec. 13 of the LMG of *Baden-Württemberg*, available in German at: [http://www.lfk.de/fileadmin/media/recht/2011/Lmedieng\\_2011\\_Oktober.pdf](http://www.lfk.de/fileadmin/media/recht/2011/Lmedieng_2011_Oktober.pdf).

personal or family purposes; (4) are not journalistic edited offers; or (5) consist of programmes which are each activated against individual payment.

Art. 54 et seq. RStV contain provisions concerning providers of online services. According to these provisions providers of *telemedia* in the meaning of the law do not require any license or notification. The same is true under Sec. 4 *Telemedia Act* (TMG)<sup>16</sup>. Certain preconditions concerning the content remain unaffected by this freedom (see below).

The remit of public service broadcasting (PSB) is provided for in Art. 11 RStV. This provision determines the general requirements put on PSB in order to fulfil their public tasks<sup>17</sup>. The following provisions deal with other aspects of PSB, as their offers (i.e. radio and television services as well as telemedia under the RStV and the respective LMG), the television services in detail, permitted telemedia and funding. According to Art. 13 RStV PSB in Germany are funded primarily by licence fees, but they also generate income from advertising and product placement. In December 2010 the 15<sup>th</sup> Treaty Amending the Interstate Broadcasting Treaty (RÄStV)<sup>18</sup> was signed by the *Länder* and it will enter into force on 1 January 2013. This agreement will fundamentally change the financing system of PSB. While up to now, the licence fee depends on the ownership of a reception device it will in future be based on the ownership of a home, place of business or non-privately used vehicle (so called "*Haushaltsbeitrag*")<sup>19</sup>. Some of the LMG include provisions on the public remit, too, see for example Sec. 23 of the LMG of *Saarland*<sup>20</sup>. Besides this, there exist legislation concerning the respective broadcasters which describe the public remit and make reference to the RStV<sup>21</sup>.

As mentioned above, there is no press legislation on a national level in Germany, but Press and/or Media Laws adopted by the *Länder*<sup>22</sup>. Although these Laws differ in detail they coincide with each other in the main parts. The press/media laws of the *Länder*, determine that press activities including the establishment of a publishing company or an undertaking of the press industry should not be made conditional of any authorisation.

- Media pluralism/ownership; competition law aspects

Ownership and participation regulations relevant for the media sector in Germany are to be found on different levels.

Under the federal competence the Act Against Restraints of Competition (GWB)<sup>23</sup> contains general, cross-sectoral antitrust provisions. Sec. 30 GWB (Resale Price Maintenance for Newspapers and Magazines) takes out from the general prohibition of agreements restricting competition (under Sec. 1 GWB) the vertical resale price maintenance by which an undertaking producing newspapers or magazines requires the purchasers of these products by legal or economic means to demand certain resale prices

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<sup>16</sup> *Telemediengesetz* (TMG), available in German at: <http://www.gesetze-im-internet.de/tmg/BJNR017910007.html>.

<sup>17</sup> The "public remit" as such is treated in more detail in the chapter below.

<sup>18</sup> 15<sup>th</sup> *Rundfunkänderungsstaatsvertrag*, RÄStV, available in German at: <http://www.rlp.de/ministerpraesident/staatskanzlei/medien>.

<sup>19</sup> "15th Inter-State Broadcasting Agreement Signed" by A. Yliniva-Hoffmann, *IRIS Legal Observations* 2011-2/20.

<sup>20</sup> *Saarländisches Mediengesetz*, available in German at: [http://www.lmsaar.de/die-lms/rechtsgrundlagen/I\\_2\\_SMG.pdf](http://www.lmsaar.de/die-lms/rechtsgrundlagen/I_2_SMG.pdf).

<sup>21</sup> As an example *Bayerisches Rundfunkgesetz*, available in German at: <http://www.br.de/unternehmen/inhalt/organisation/bayerisches-rundfunkgesetz100.html>.

<sup>22</sup> An overview of these Acts is available in German at: [http://www.presserecht.de/index.php?option=com\\_content&task=category&sectionid=4&id=14&Itemid=26](http://www.presserecht.de/index.php?option=com_content&task=category&sectionid=4&id=14&Itemid=26).

<sup>23</sup> *Gesetz gegen Wettbewerbsbeschränkungen*, GWB, available in English at: [http://www.gesetze-im-internet.de/englisch\\_gwb/englisch\\_gwb.html](http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html).

or to impose the same commitment upon their own customers, down to the resale to the final consumer. The control of concentration is governed by Sec. 35 GWB et seq. The threshold as of which the provisions at hand are applicable is to be determined according to the respective turnover of the last business year preceding the planned concentration. With regard to the calculation of the relevant turnover and market shares the GWB foresees that for the publication, production and distribution of newspapers, magazines and parts thereof and for the production, distribution and broadcasting of radio and television programmes and the sale of radio and television advertising time, the twenty-fold amount of the turnover shall be taken into account. This means that concentrations in the media sector are subject to stricter statutory provisions than in other branches of the economy. The idea behind this is to prevent dominant positions in the media and opinion-making markets. At this point it should be mentioned that, in November 2011, the Federal Ministry of Economics and Technology<sup>24</sup> proposed an amendment to the GWB, amongst others to the rules concerning the described threshold and its calculation<sup>25</sup>. According to the proposal the multiplier "twenty" as relevant for the turnover calculation shall be reduced to "eight". In absolute numbers this would mean a rise of the threshold from EUR 25 Mio. to EUR 62,5 Mio. This shall make it easier for press companies to secure their competitiveness and financial fundament by merger. Particularly small and medium-size companies would benefit from this change, but not the big publishers. It is argued that press companies are particularly affected by the technological and economical changes in the media sector – especially due to digitalisation – and should therefore be strengthened. The competent cartel authorities are the *Bundeskartellamt*, the Federal Ministry of Economics and Technology, and the supreme *Länder* authorities<sup>26</sup>. The allocation of responsibilities is regulated in Sec. 48 et seq. GWB.

An important decision in this field was the one concerning the planned merger of the broadcaster *ProSiebenSat.1* and the *Axel Springer AG* (leading German multi-media company) in 2006. The *Bundeskartellamt* prohibited the planned merger due to concerns about competition. *Axel Springer AG's* appeal against this decision was initially rejected by the *Oberlandesgericht Düsseldorf* (*Düsseldorf* Regional Appeal Court) as inadmissible. The *Axel Springer AG* successfully appealed to the *Bundesgerichtshof* (Federal Supreme Court) against this ruling and the matter was referred back to the *Oberlandesgericht Düsseldorf*. The latter rejected the company's request for a declaratory judgement on 3 December 2008 as unfounded, but left its decision open to appeal. The *Bundesgerichtshof* confirmed, on 8 June 2010, the *Oberlandesgericht Düsseldorf's* decision<sup>27</sup>. The companies involved in the planned merger would have formed an oligopoly with a dominant market position and would have represented more than 80% of the German television advertising market. It was therefore likely that this oligopoly would have been strengthened further if the merger had been approved. The merger ban imposed by the *Bundeskartellamt* had therefore been lawful<sup>28</sup>.

<sup>24</sup> *Bundesministerium für Wirtschaft und Technologie*, BMWi, see: <http://www.bmwi.de>.

<sup>25</sup> The Bill "Entwurf des BMWi für ein Aechtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen", available in German at: <http://www.bmwi.de/BMWi/Redaktion/PDF/G/gwb-novelle,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>.

<sup>26</sup> An overview on the competition authorities of the *Länder* is available at: <http://www.bundeskartellamt.de/wDeutsch/service/LKB.php>.

<sup>27</sup> Decision of the *Bundesgerichtshof* of 8 June 2008, KVR 4/07, available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=121d6152e0faa8fa7b5abf5e6f025&nr=42197&pos=0&anz=1>.

<sup>28</sup> "BGH Confirms Ban on Merger between Springer and ProSiebenSat1" by A. Yliniva-Hoffmann, *IRIS Legal Observations* 2010-7/12.

The RStV includes the basic rules concerning public and commercial broadcasters in the dual broadcasting system of the *Länder*, thus, also provisions concerning admissibility of and control over the investment of broadcasters in other companies. Art. 16a et seq. RStV prescribe that PSB are – under certain conditions – allowed to be commercially active, through legally independent subsidiaries and at market conditions. Such activities must be approved by the competent councils of the broadcasting corporations prior to their commencement. The PSB are permitted to take out direct or indirect shareholdings in companies pursuing a commercial or otherwise economic business purpose. A prerequisite is, however, that this shareholding is in pertinent connection to their legal tasks, the respective company is constructed as a legal person and the statute or the articles of association of the company provide for a supervisory board or comparable body. In case of an investment in a company, the broadcasting corporations are required to secure the necessary influence upon the management of the company in an appropriate manner, in particular, an appropriate presentation in supervisory bodies. Further, the PSB have to establish an effective control system regarding their shareholdings. The Director General (*Intendant*) must notify the respective competent supervisory body of the broadcasting corporation regularly of such operations and report annually to the supervisory body on the shareholdings. This report is submitted to the respective competent audit offices and the State Government exercising legal supervision, too. The commercial activities are controlled as well. The PSB must not assume any liability for associated companies pursuing commercial activities.

With regard to commercial broadcasters the RStV stipulates in Art. 25 et seq. how plurality of opinion shall be ensured. This shall happen by creating broadcasting content that provides the major political, ideological and social forces and groups adequate opportunity for expression in the general channels and takes minority views into account, too. Furthermore, the two general channels transmitted nationally with the largest audience reach shall incorporate window services providing up to date, authentic presentations of the political, economic, social and cultural life in the respective State. The editorial independence of the window service provider shall be guaranteed and it shall be granted a separate license.

In addition to that it shall also be prevented that a television broadcaster acquires dominant power of opinion. Such a dominant power of opinion is measured according to annual average audience share (see Sec. 26 para 2 RStV). In the event that a television company has acquired dominant power of opinion, no further services attributable to it may be permitted, nor may the acquisition of further participating interests in broadcasters attributable to it be admitted. Along with this, the State media authority shall together with the Commission on Concentration in the Media (KEK)<sup>29</sup> and involving the television broadcaster elaborate measures in order to reduce audience share or market power of the respective company. If an agreement cannot be found, the State media authorities shall – as last resort – revoke the licenses of as many of the services attributable to the company as may be required to ensure that the undertaking no longer exercises dominant power of opinion. Under Art. 29 RStV the competent State media authority must be notified of any planned change in participating interests or other influences prior to their implementation. Measures the television broadcaster can take in order to ensure plurality are the concession of broadcasting time to independent third parties and the establishment of a programme advisory council, see Art. 30 et seq. RStV.

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<sup>29</sup> *Kommission zur Ermittlung der Konzentration im Medienbereich*, Art. 35 para 2 RStV; information on the KEK are available in English at: <http://www.kek-online.de/cgi-bin/esc/englisch.html>.



Besides this, the media laws of the *Länder* can determine further measures to preserve and promote media diversity<sup>30</sup>.

- Legal framework for psm; ability to fulfill their tasks

The RStV contains in its first part general provisions applying to both public service and commercial broadcasting, as on short news reporting, European productions, advertising principles, consumer protection and the right to information. Art. 11 et seq. RStV include the provisions for public service broadcasting. They refer to the *Länder* broadcasting corporations forming the association of public-service broadcasters in Germany<sup>31</sup>, the second national public-service broadcasting corporation<sup>32</sup> and the national *Deutschlandradio*<sup>33</sup>.

According to these the public remit (Art. 11) is defined as follows:

- (1) *Under their remit, the public-service broadcasting corporations are to act as a medium and factor in the process of the formation of free individual and public opinion through the production and transmission of their offers, thereby serving the democratic, social and cultural needs of society. In their offers, the public-service broadcasting corporations must provide a comprehensive overview of international, European, national and regional events in all major areas of life. [...] Entertainment should also be provided in line with a public-service profile of offers.*
- (2) *The public-service broadcasting corporations in fulfilling their remit shall pay due respect to the principles of objectivity and impartiality in reporting, plurality of opinion and the balance of their offers.*

Subsequently, it is determined which kind of programme PSB generally may offer (radio, television, certain telemedia and print publications with programme-related content) and afterwards itemised which programmes these are in particular.

With regard to the online activities (telemedia) of PSB Art. 11d<sup>34</sup> para 1 RStV determines:

- „(1) The state broadcasting corporations forming the ARD association, the ZDF and Deutschlandradio shall provide telemedia as necessitated from a journalistic or editorial point of view as journalistic edited offers.“*

Hence, this makes clear that offering telemedia is to be seen as a part of the public remit of PSB, as far as these contribute to the shaping of public opinion. In the following paragraphs it is described in more detail which kind of content (programme-related), for which period (e.g. seven-days-catch-up) and for which purposes (especially the participation of all groups of society in the information society) are allowed to be offered. Press-type offers not related to a programme are not permitted in order to avoid competitive advantages of the licence fee financed PSB over the press. With regard to the continuous extension of such offers by the PSB this legal prohibition, however, was in practice not sufficient to avoid conflicts between the both sectors. Furthermore, Art. 11d para 5 prohibits advertising and sponsoring as well as acquired feature films and

<sup>30</sup> See for instance Sec. 23 of the *Landesmediengesetz Rheinland-Pfalz*, available in German at: <http://www.lmk-online.de/service/rechtsgrundlagen/landesmediengesetz/#c2267>.

<sup>31</sup> *Arbeitsgemeinschaft der Landesrundfunkanstalten*, ARD.

<sup>32</sup> *Zweites Deutsches Fernsehen*, ZDF.

<sup>33</sup> *Deutschlandradio*, DRadio.

<sup>34</sup> This was introduced by the 12<sup>th</sup> Agreement Amending the Interstate Broadcasting Agreement (RÄStV); see "12th Broadcasting Agreement Signed" by A. Yliniva-Hoffmann, *IRIS Legal Observations* 2009-2/15.

episodes of television series which have not been commissioned in telemedia. The annex to Art. 11d para 5 RStV includes a negative list of public service telemedia. The PSB shall further concretise the content and direction of their telemedia in so-called telemedia concepts<sup>35</sup>.

A new or modified telemedia can be introduced under certain conditions, only. Due to the potential of conflict that is connected to the permission of licence fee financed online services – particularly with regard to the press – the so called “*Drei-Stufen-Test*” (Art. 11f RStV) was introduced. In accordance with this, the respective PSB has – for a planned new offer or a planned modification of an existing offer – to set out to the competent council that the offer at hand fits the requirements of its public remit. Following to this the council has to examine pursuant to the mentioned test, whether this is the case: In a first step it shall analyse to what degree the offer conforms to the democratic, social and cultural needs of society, which can be seen as a concretion of the „public remit“-condition. After that, the council has to check to what degree the offer contributes to editorial competition in a qualitative manner, taking into consideration the quantity and quality of the existing, freely accessible offers, the impact of the planned offer on the market and its function regarding the formation of opinion in the light of existing comparable offers including those of public service broadcasting. Thus, this second step of the “*Drei-Stufen-Test*” can be considered as the main emphasis of the examination. In a final step it shall be controlled what financial expenditure is required for the offer which means that the cost must not be out of proportion to the journalistic added value.

It should be noted at this point that Art. 54 et seq. RStV provide for further rules concerning all telemedia, not only those of the PSB. These include general provisions, certain obligations for the providers as well as content-related regulation and shall therefore be described in the relevant chapter below.

The funding of PSB (Art. 12 et seq. RStV) has to be adequate and sufficient in order to ensure that PSB are able to fulfil their public tasks. The funding is in the first line based on device-dependent license fees (as to the amendments entering into force on 1 January 2013 with a move to the so called “*Haushaltsabgabe*”, see above). The financial requirements are regularly reviewed and determined by the independent commission assessing the funding requirements of public service broadcasting (KEF) by taking into account the principles of efficiency and economy including the related potentials for rationalisation. The amount of the license fee as well as the calculation of the needs are determined under two other Interstate Treaties<sup>36</sup>.

In addition to these fees PSB are – within limits – permitted to obtain revenues from product placement, advertising and sponsoring but not from teleshopping (Art. 15, 16, 18 RStV).

As described above, PSB are – under certain legal preconditions as provided for in Art. 16a et seq. RStV – also entitled to perform commercial activities through legally independent subsidiaries at market conditions.

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<sup>35</sup> Telemedia concepts of the ARD are available in German at: <http://www.ard.de/intern/onlineangebote/dreistufentest/-/id=1086834/qvxjpw/index.html>;

Telemedia concepts of the ZDF are available in German at:

<http://www.unternehmen.zdf.de/index.php?id=475>; telemedia concept of *DRadio* is available in German at: <http://www.dradio.de/download/107686>.

<sup>36</sup> *Rundfunkgebührenstaatsvertrag*, RGebStV, available in German at: [http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze\\_aktuell/RGebStV\\_10.pdf](http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/RGebStV_10.pdf) ; *Rundfunkfinanzierungsstaatsvertrag*, RFinStV, available in German at: [http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze\\_aktuell/RFinStV\\_11.pdf](http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/RFinStV_11.pdf).



According to Art. 11e RStV PSB shall enact statutes or directives detailing the execution of their respective remit as well as specifying the procedures governing the development of offer-concepts and the procedure governing new or modified telemedia, and are obliged to report regularly on the fulfilment of their respective remit, on the quality and quantity of the existing offers as well as on the focus of the respective planned offers.

Such directives on the different aspects of the execution of the public remit have been established and published by the ARD<sup>37</sup>, ZDF<sup>38</sup> and *DRadio* in accordance with the RStV. Some of the State broadcasting corporations united in the ARD have issued own directives<sup>39</sup>. The ARD has published its last report on the fulfilment of its remit, on the quality and quantity of its telemedia offers and on the planned focus<sup>40</sup>, in December 2010. This report holds out in its future prospects (item 13) an extension of telemedia offers and of the use of mobile terminal devices. The ZDF has published its programme perspectives 2011-2012, which according to the ZDF-statute<sup>41</sup> shall include the duty to report under the RStV<sup>42</sup>. The named ZDF report reveals what is planned in 2011-2012 (online offers are described in item 7) and holds out the prospect of a report on the fulfilment of the obligations for mid-2012. So, too, *DRadio* has published its report on the programme achievements and perspectives of the national radio broadcasting 2011-2012<sup>43</sup>, which in its item 16 comments the past and planned online activities as well as the review of these according to the described "Drei-Stufen-Test".

Supplement to the Interstate Treaties described above there are the ARD-Treaty<sup>44</sup> and – Statute<sup>45</sup> and –Television Treaty<sup>46</sup>, the ZDF-Treaty<sup>47</sup> and –Statute<sup>48</sup> as well as the *DRadio*-Treaty<sup>49</sup>. The Treaties complement the RStV, for instance concerning the collaboration of the State broadcasting corporations within the association of the ARD and the organisation, content and other obligations (ZDF and *DRadio*). The Statutes are the respective founding documents which primarily deal with aspects of internal structure and cooperation and external representation.

<sup>37</sup> *ARD-Leitlinien 11/12*, available in German at: <http://www.ard.de/intern/-/id=2447794/property=download/nid=1886/acfjvv/ARD-Leitlinien1112%2BBericht0910.pdf>.

<sup>38</sup> Overview on the internal regulations concerning the ZDF is available in German at: <http://www.unternehmen.zdf.de/index.php?id=15>.

<sup>39</sup> See as one example the terms of reference of *Rundfunk Berlin-Brandenburg (RBB)*, available in German at: [http://www.rbb-online.de/unternehmen/organisation/grundlagen/die\\_zielvorgaben\\_des.file.pdf](http://www.rbb-online.de/unternehmen/organisation/grundlagen/die_zielvorgaben_des.file.pdf).

<sup>40</sup> *Bericht der ARD über die Erfüllung ihres Auftrags, über die Qualität und Quantität ihrer Telemedienangebote sowie über die geplanten Schwerpunkte*, available in German at: <http://www.ard.de/intern/-/id=2447820/property=download/nid=1886/19tcf8/ARD-Leitlinien-Telemedien1112%2BBericht0910.pdf>.

<sup>41</sup> *Satzung des Zweiten Deutschen Fernsehens*, available in German at: [http://www.unternehmen.zdf.de/uploads/media/Satzung\\_des\\_ZDF\\_Fassung\\_vom\\_\\_9\\_12\\_11.pdf](http://www.unternehmen.zdf.de/uploads/media/Satzung_des_ZDF_Fassung_vom__9_12_11.pdf).

<sup>42</sup> *Programm-Perspektiven 2011-2012 Selbstverpflichtungserklärung*, available in German at: [http://www.unternehmen.zdf.de/fileadmin/files/Download\\_Dokumente/DD\\_Das\\_ZDF/Fernsehrat/ZDF\\_Selbstverpflichtungserkaerung\\_Programmperspektiven\\_2011-2012.pdf](http://www.unternehmen.zdf.de/fileadmin/files/Download_Dokumente/DD_Das_ZDF/Fernsehrat/ZDF_Selbstverpflichtungserkaerung_Programmperspektiven_2011-2012.pdf).

<sup>43</sup> *Bericht über programmliche Leistungen und Perspektiven des nationalen Hörfunks 2010-2012*, available in German at: <http://www.dradio.de/download/128293>.

<sup>44</sup> *ARD-Staatsvertrag*, available in German at: [http://www.ard.de/intern/organisation/-/id=2421034/property=download/nid=8036/20qys9/ARD-Staatsvertrag\\_2009.pdf](http://www.ard.de/intern/organisation/-/id=2421034/property=download/nid=8036/20qys9/ARD-Staatsvertrag_2009.pdf).

<sup>45</sup> *ARD-Satzung*, available in German at: <http://www.ard.de/intern/abc/-/id=2254374/property=download/nid=1643802/3n05n9/ARD-Satzung.pdf>.

<sup>46</sup> *ARD-Fernsehvertrag*, available in German at: [http://www.ard.de/intern/abc/-/id=1659728/property=download/nid=1643802/dvd7ul/Fernsehvertrag\\_2006.pdf](http://www.ard.de/intern/abc/-/id=1659728/property=download/nid=1643802/dvd7ul/Fernsehvertrag_2006.pdf).

<sup>47</sup> *ZDF-Staatsvertrag*, available in German at: [http://www.unternehmen.zdf.de/uploads/media/zdf-staatsvertrag\\_neu.pdf](http://www.unternehmen.zdf.de/uploads/media/zdf-staatsvertrag_neu.pdf).

<sup>48</sup> *ZDF-Satzung*, available in German at: [http://www.unternehmen.zdf.de/uploads/media/5.1.1.4.1\\_u\\_Satzung\\_des\\_ZDF.pdf](http://www.unternehmen.zdf.de/uploads/media/5.1.1.4.1_u_Satzung_des_ZDF.pdf).

<sup>49</sup> *Deutschlandradio-Staatsvertrag*, available in German at: [http://mv.juris.de/mv/gesamt/DLRStVtr\\_MV\\_1994.htm#DLRStVtr\\_MV\\_1994\\_rahmen](http://mv.juris.de/mv/gesamt/DLRStVtr_MV_1994.htm#DLRStVtr_MV_1994_rahmen).

Furthermore the State broadcasting corporations associated in the ARD have issued legal provisions of their own. It should be noted that some of these are State Treaties between two or four *Länder* establishing a joint regional PSB. Since the treatment of all of these would go beyond the scope of this country report, the consideration shall be focussed on the WDR-Law<sup>50</sup>. The reason for this choice is that the WDR is the biggest of the State broadcasters. With regard to telemedia Sec. 3 of the WDR-Law makes a reference to the relevant articles (11d-11f) of the RStV. Sec. 4 et seq. of the WDR-Law determine the public remit, its fulfilment, the issuance of relevant directives and the duty to report as described before. The provisions concerning the content of the services offered shall be object of the relevant chapter below.

- The role and functioning of regulatory authorities in these respects<sup>51</sup>

The regulation of media has to be considered in the context of the constitutional protection under Art. 5 *Grundgesetz*. The freedom from State interference induces that the legislator must not use its room to manoeuvre to influence media in the interest of a certain opinion. Again, it should be stressed that – within the German system of federalism – it is in principle within the responsibility of the *Länder* to implement the relevant laws in this field.

With regard to PSB and the aspects examined above the following applies: The internal supervision on PSB's broadcasting and telemedia services is exercised by the respective Broadcasting Council<sup>52</sup> of each broadcaster regarding those associated in the ARD. The Broadcasting Councils inter alia monitor the compliance with the programme principles. With regard to the ZDF the ZDF-Treaty determines the responsibility of the Television Council<sup>53</sup> for internal supervision. The Television Council can issue guidelines and is empowered to supervise compliance with these guidelines and with the legal provisions contained in the ZDF-Treaty and the RStV. Structure and duties of these councils are regulated in the respective broadcasting laws of the *Länder*, the Interstate Treaties and the ZDF-Treaty. In addition to this, *DasErste*, which is a national programme jointly produced by the broadcasting corporations associated under the roof of the ARD, is advised and monitored by an internal commission, the Advisory Council for Programme<sup>54</sup>. The joint activities of the regional broadcasters under the roof of the ARD are advised upon by the Councils Chairpersons' Conference of the ARD<sup>55</sup> which also coordinates the work of the respective councils of the regional PSB. External supervision is exercised by the respective *Länder*-Governments<sup>56</sup>. Legal supervision on the ZDF is exercised by the *Länder*-Governments on the basis of an alternating two-years period<sup>57</sup>. In order to ensure freedom from state interference as mentioned above, the external supervision is limited to the question of legality of administrative activities. The Advisory Council and the GVK of the ARD are empowered to monitor the programme of *DasErste* ex officio and to act on complaints by viewers. As far as supervision of the single programmes is concerned the monitoring is in the responsibility of the specific board competent for supervising the respective regional PSB who has produced the programme in question. If the Advisory Council and the GVK of the ARD determine an infringement of the relevant

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<sup>50</sup> *Gesetz über den Westdeutschen Rundfunk*, WDR-G, available in German at: [http://www.wdr.de/unternehmen/senderprofil/rechtsgrundlagen/pdf/WDR\\_20100317\\_WDR-Gesetz.pdf](http://www.wdr.de/unternehmen/senderprofil/rechtsgrundlagen/pdf/WDR_20100317_WDR-Gesetz.pdf).

<sup>51</sup> *This section was produced with the valuable support of Peter Matzner, LL.M. Eur.*

<sup>52</sup> *Rundfunkrat*, see Sec. 15 et seq. WDR-G.

<sup>53</sup> *Fernsehrat*, see Sec. 19 et seq. ZDF-Treaty.

<sup>54</sup> *Programmbeirat*, see Art. 11b RStV, Sec. 1, 7 ARD-Treaty and Sec. 2 of the ARD-Television Treaty.

<sup>55</sup> *Gremienvorsitzendenkonferenz der ARD (GVK)*, see Sec. 7 ARD-Treaty; this is not to be confused with the Councils Chairpersons' Conference established under the roof of the State Media Authorities (*Die Medienanstalten*) in respect of the supervision of commercial broadcasters.

<sup>56</sup> See Sec. 54 WDR-G.

<sup>57</sup> See Sec. 31 ZDF-Treaty.

rules they contact the various organs of *DasErste* or the concerned regional broadcasting corporation and are entitled to make public comments. The Television Council monitors the ZDF ex officio and is entitled to act on viewers' complaints. As regards ZDF, the Television Council may under Sec. 20 of the ZDF-Treaty publicly express its criticism about broadcasts of the ZDF.

The members of *DRadio* are according to Sec. 1 *Deutschlandradio-Treaty* the broadcasting corporations associated under the roof of the ARD and the ZDF. Internal supervision is exercised by the Radio Council<sup>58</sup>. The Radio Council monitors *DRadio* ex officio and acts on viewers' complaints (Sec. 15 *Deutschlandradio-Treaty*). Legal supervision is exercised by the *Länder*-Governments on the basis of an alternating two-years period<sup>59</sup>.

Besides this, the competent councils for ARD, ZDF and *DRadio* can require the respective Director-General to publish complaints issued by the councils due to a breach of the legal provisions in the respective services (Art. 19a RStV).

The bodies and organs described in this section are also competent for supervising the respective non-linear audiovisual media services' activities of *DasErste*, the regional PSB associated in the ARD and of the ZDF.

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

The term "journalist" is not protected as occupational title. According to the definition provided by the German Journalists Association (DJV)<sup>60</sup> a journalist is: a person that – in accordance with certain criteria, as journalistic standards and high personal and professional quality – works full-time on the preparation or dissemination of information, opinion and entertainment via the media in words, pictures, sound or a combination of these<sup>61</sup>. Thus, although there are put high requirements on the occupational image of a journalist the pursuance of this vocation shall depend on the individual capacity but not on external demands as to the professional or training qualification. This attitude reflects the intention to save freedom of media and freedom of opinion from restrictions – and correlates with the freedom of registry for publishers (see above). The protection of these freedoms is of major importance which is reflected in the relevant legislation and its implementation.

First, it should be noted that there is no national press law in Germany to provide for a legal framework for journalistic activities. In the 1950s the Federal Ministry of Internal Affairs submitted the draft of a "*Bundespressegesetz*" (National Press Law) which proposed the establishment of a self-monitoring body in the form of a public corporation. This planned State supervision caused indignation of journalists and publishers and was discarded again. As a reaction to this attempt about ten publishers and editors in chief founded the German "*Presserat*<sup>62</sup>" along the lines of the British Press Council. This self-monitoring body will be treated in more detail in the chapter below.

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<sup>58</sup> *Hörfunkrat*, Sec. 20 et seq. *Deutschlandradio-Treaty*.

<sup>59</sup> See Sec. 31 *Deutschlandradio-Treaty*.

<sup>60</sup> *Deutscher Journalisten Verband*, DJV, see: <http://www.djv.de>.

<sup>61</sup> *Berufsbild Journalistin – Journalist*, DJV-publication available in German at: [http://www.djv.de/fileadmin/DJV/Journalismus\\_praktisch/Broschueren\\_und\\_Flyer/Berufsbild\\_2009.pdf](http://www.djv.de/fileadmin/DJV/Journalismus_praktisch/Broschueren_und_Flyer/Berufsbild_2009.pdf) .

<sup>62</sup> See: <http://www.presserat.info>.

Under the press and media laws of the *Länder*<sup>63</sup> the function and duty of the press/media is to procure and distribute information, to comment on an issue, to criticise, to contribute to opinion-making and education.

The press/media are obliged to the liberal and democratic order of the Federal Republic of Germany. The freedom of the press/media shall be subject only to such limitations as permitted by the *Grundgesetz* and in the immediate context of the respective press/media law.

The press/media have certain rights, as the right to information, and besides these also obligations, as for example the obligation to careful investigation, to publishing information, to identify advertising and to concede a right to reply.

To be enabled to fulfil their public tasks media depend on obtaining information. To this end public authorities are – with a few exceptions – obliged to provide information to journalists. This right to information is regulated in the RStV, LMG, LPrG as well as in the respective freedom of information laws.

Art. 9a RStV determines a right to information according to which broadcasters are – subject to certain exemptions due to matters of public interest – entitled to obtain information from authorities. In addition to this some LMG provide for the right to information towards public authorities in favour of broadcasters and telemedia providers<sup>64</sup>. The same applies to the LPrG which foresee the right to access to public authorities' information for the press, again provided with exceptions for certain prevailing public or private interests<sup>65</sup>.

On 1 January 2006 the Federal Act Governing Access to Information held by the Federal Government (IFG)<sup>66</sup> entered into force. According to the IFG everyone is entitled to (comprehensive) official information from the authorities of the Federal Government and from other Federal bodies and institutions insofar as they discharge administrative tasks under public law.

Everyone means every citizen and refers to natural and legal persons – as well as to journalists. The reference in Sec. 1 para 3 IFG, which determines that provisions in other legislation on access to official information shall take precedence does not mean that the right to information as provided in favour of journalists under the LMG/LPrG (see above) would exclude journalists from the scope of application of the IFG. It has explicitly been ruled by court<sup>67</sup> that journalists belong to the beneficiary category of persons under the IFG, too. The precedence as described in Sec. 1 para 3 IFG applies only if and when the other legislation provides comprehensively for a special right to information<sup>68</sup>. Moreover, it would contravene the intention of the LMG/LPrG – i.e. to improve the media's position

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<sup>63</sup> *Landespressegesetze*, LPrG.

<sup>64</sup> See for example Sec. 38a of the *LMG Baden-Württemberg*, available in German at: <http://www.lfm-nrw.de/fileadmin/lfm-nrw/Medienrecht/lmg2009.pdf>.

<sup>65</sup> See for example Sec. 4 *LPrG Nordrhein-Westfalen*, available in German at: [https://recht.nrw.de/lmi/owa/br\\_bes\\_text?anw\\_nr=2&gld\\_nr=2&ugl\\_nr=2250&bes\\_id=4493&menu=1&sg=0&aufgehoben=N&keyword=pressegesetz#det188988](https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=2&gld_nr=2&ugl_nr=2250&bes_id=4493&menu=1&sg=0&aufgehoben=N&keyword=pressegesetz#det188988).

<sup>66</sup> *Gesetz zur Regelung des Zugangs zu Informationen des Bundes, Informationsfreiheitsgesetz*, IFG, available in English at: [http://www.gesetze-im-internet.de/englisch\\_ifg/index.html](http://www.gesetze-im-internet.de/englisch_ifg/index.html).

<sup>67</sup> *Oberverwaltungsgericht* (administrative appeals court) *Nordrhein-Westfalen*, of 26 October 2011 (8 A 2593/10), available in German at: [http://www.justiz.nrw.de/nrwe/ovgs/ovg\\_nrw/j2011/8\\_A\\_2593\\_10urteil20111026.html](http://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2011/8_A_2593_10urteil20111026.html).

<sup>68</sup> An example for this is the Act on the documents of the State Security of the former German Democratic Republic (StUG) which will be described below.

– if journalists would enjoy the privileging provision of the LMG/LPrG but would be excluded from the “*Jedermannsrecht*”<sup>69</sup> under the IFG.

Usually the respective applicant may request a certain form of access to the information. Furthermore, the IFG introduced a reversal of the burden of proof, which means that it is not the applicant who has to prove his or her legitimate interest in the requested information, but it is the authority which has to explain why – in the particular case – the information requested is refused. The protection of special public interests (e.g. international relations or military interests), of the official decision-making process, of personal data and of intellectual property and business or trade secrets can constitute a legal exception to the right to information. The information is to be made accessible to the applicant within one month. Fees and expenses shall be charged for official acts but not for the furnishing of basic items of information. Anyone considering his or her right to access to information to have been violated may appeal to the Federal Commissioner for Freedom of Information<sup>70</sup>. It is permissible to challenge the decision to reject the application by lodging an administrative appeal or bringing an action to compel performance of the requested administrative act.

As compared with the right to information provided for in the LMG and LPrG the IFG expands this right and facilitates its realisation.

Some of the *Länder* have introduced Freedom of Information Acts on regional level, too. These *Länder*-IFG<sup>71</sup> provide for the right to access to information as far as the respective State authorities are concerned.

Journalists are regularly confronted with personal rights aspects when exercising their profession. As press freedom is not guaranteed without any limits, in some cases there has to be a weighting of the respective interests, namely the freedoms protected under Art. 5 *Grundgesetz* and the personal rights affected which are for their part protected by the *Grundgesetz*. The consideration of interests is made with regard to the diligence of the journalist’s work and to the public interest in the topic in question.

The right to one’s own picture and the right in one’s own name are part of the protected personal rights that have to be respected by journalists. If an individual feels his or her rights infringed he or she can claim:

- right of reply as determined by the LPrG or LMG;
- non-disclosure or omission of a certain statement of facts or abusive criticism;
- withdrawal of a statement that has been proven to be wrong;
- completion or correction if a reporting was incomplete or facts were presented wrong;
- damages<sup>72</sup>.

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<sup>69</sup> German term which characterises a certain right as one which can be asserted by any person living in Germany, in distinction from such that can be claimed by German nationals, only.

<sup>70</sup> *Der Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*, see: [http://www.bfdi.bund.de/IFG/Home/homepage\\_node.html](http://www.bfdi.bund.de/IFG/Home/homepage_node.html).

<sup>71</sup> An overview on the existing *Länder*-IFG is available at: [http://www.bfdi.bund.de/IFG/Gesetze/Landesgesetze/Landesgesetze\\_node.html](http://www.bfdi.bund.de/IFG/Gesetze/Landesgesetze/Landesgesetze_node.html).

<sup>72</sup> Claims according to civil law can be based inter alia on the following provisions: Sec. 12, 823, 1004 German Civil Code (*Bürgerliches Gesetzbuch*, *BGB*) available in English at: <http://www.gesetze-im->



The German Criminal Code<sup>73</sup> prohibits journalists inter alia insult and (intentional) defamation<sup>74</sup>. Journalists must not violate privacy under Sec. 201 et seq. StGB (e.g. privacy of the spoken and written word, violation of intimate privacy by taking photographs) or commit offences related to religion or ideology under Sec. 166 et seq. StGB (e.g. defamation of religions, religious and ideological associations). Furthermore, journalists must not in their reporting incite to a war of aggression (Sec. 80a StGB), disseminate propaganda material of unconstitutional organisations (Sec. 86 StGB), publicly incite to crime (Sec. 111 StGB), commit a burglary (Sec. 123 StGB; which is of importance when private locations or events are concerned), incite to hatred (Sec. 130 StGB), attempt to cause the commission of offences by means of publication (Sec. 130a StGB) and to disseminate depictions of violence (Sec. 131 StGB).

Sec. 353b StGB on the breach of official secrets and special duties of confidentiality has – in connection with the provisions on abetting and aiding<sup>75</sup> – gained importance in this context, too. In this combination there have been conducted investigations against journalists, too, sometimes in connection with searches and sequestration in editorial or journalists offices. Although these investigations were directed at the journalists, the aim was – at least also – to reveal the informant. For this very reason this criminally relevant accusation has been subject of fierce criticism by journalists. An important decision in this context was issued in 2007 by the German Constitutional Court in the so called Cicero-case. In this ruling the BVerfG strengthened the freedom of press and the protection of sources by declaring that both investigation measures taken – a search of the editorial offices of the political magazine *Cicero*, and the confiscation of computer data, in September 2005 – were unconstitutional. In this case, the magazine *Cicero* had cited confidential documents of the Federal Criminal Police Office. The responsible public prosecutor's office subsequently launched an investigation into the aiding and abetting of a breach of official secrecy, during which the magazine's editorial offices were searched and documents confiscated. The magazine complained successfully to the Constitutional Court about these measures (see above under the first chapter).

The protection of (confidential) sources is provided for in the German Code of Criminal Procedure (StPO)<sup>76</sup>. Sec. 53 para 1 no. 5 StPO (Right to Refuse Testimony on Professional Grounds) determines, that "individuals who are or have been professionally involved in the preparation, production or dissemination of periodically printed matter, radio broadcasts, film documentaries or in the information and communication services involved in instruction or in the formation of opinion" may refuse to testify before the court concerning the author or contributor of comments and documents, or concerning any other informant or the information communicated to them in their professional capacity including its content. This applies also to the content of materials which they have produced themselves and matters which have received their professional attention. The right to refuse is confined to contributions, documentation, information and materials for the editorial element of the persons' activity, or information and communication services which have been editorially reviewed.

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internet.de/englisch\_bgb/index.html; Sec. 22 Act on the Protection of Copyrights concerning Artistic Works and Photographs (*Kunsturhebergesetz, KUrHG*) available in German at: <http://www.gesetze-im-internet.de/kunsturhg/BJNR000070907.html>; on Art. 1 para 1 and 2 para 1 *Grundgesetz*; and with reference to the relevant criminal law provisions as described below.

<sup>73</sup> *Strafgesetzbuch*, StGB, available in English at: [http://www.gesetze-im-internet.de/englisch\\_stgb/index.html](http://www.gesetze-im-internet.de/englisch_stgb/index.html).

<sup>74</sup> Sec. 185-187 StGB.

<sup>75</sup> Sec. 26 and 27 StGB.

<sup>76</sup> *Strafprozessordnung*, StPO, available in English at: [http://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p0172](http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0172).

As far as the content of materials which they have produced themselves and matters which have received their professional attention are concerned, the right to refuse testimony shall expire if the evidence is required to clear up a felony<sup>77</sup>, or if the object of the investigation is a crime against peace and of endangering the democratic state based on the rule of law, or of treason and of endangering external security<sup>78</sup>, a crime against sexual self-determination<sup>79</sup> or a money-laundering or concealment of unlawfully acquired assets<sup>80</sup>. A prerequisite to this is – as far as the investigation concerns a misdemeanour – that an enquiry into the facts and circumstances or an investigation as to the whereabouts of the accused would otherwise offer no prospect of success or be much more difficult. However, even in the latter described cases testimony may be refused if this would otherwise result in the disclosure of the identity of the author or contributor of comments and documents, or of any other informant, or of the information communicated to him in his professional capacity or of the content of such communication.

The aim of this rule is to protect the relationship of trust between “the media” and their informants. This mutual trust is part of the freedom of expression as protected in Art. 5 para 1 *Grundgesetz*, too. The right to refuse to testify does therefore not primarily aim at the protection of the informant, but of the public interest in a functioning print and audiovisual media. The whistleblower does not have a legal claim to the journalist refusing to testify, nevertheless, the “Journalists Law<sup>81</sup>” requires such behaviour.

Chapter VIII of the StPO (Seizure, Interception of Telecommunications, Computer-assisted Search, Use of Technical Devices, Use of Undercover Investigators and Search) includes relevant provisions, too.

Sec. 97 StPO determines which objects may not be subject to seizure. It says, that the seizure of documents, sound, image and data media, illustrations and other images in the custody of persons referred to in Sec. 53 para 1 no. 5, or of the editorial office, the publishing house, the printing works or the broadcasting company, shall be inadmissible insofar as they are covered by the right of such persons to refuse to testify (see above). This restriction on seizure shall not apply if certain facts substantiate the suspicion that the person entitled to refuse to testify participated in the criminal offence, or in accessoryship after the fact, obstruction of justice or handling stolen goods, or where the objects concerned have been obtained by means of a criminal offence or have been used or are intended for use in perpetrating a criminal offence, or where they emanate from a criminal offence. But in these cases, too, seizure shall only be admissible, however, where it is not disproportionate to the importance of the case having regard to the basic rights arising out of Art. 5 *Grundgesetz*, and the investigation of the factual circumstances or the establishment of the whereabouts of the perpetrator would otherwise offer no prospect of success or be much more difficult. Seizure in the premises of an editorial office, publishing house, printing works or broadcasting company may be ordered only by the court. If during a search objects which indicate the commission of another criminal offence are found on the premises of a person named in Sec. 53 para 1 no. 5 such objects being, covered by the right of the person named to refuse to testify, the object shall only be admissible as evidence in criminal proceedings insofar as the subject of these criminal proceedings is a criminal offence which is punishable by a

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<sup>77</sup> Sec. 12 (1) of the Criminal Code.

<sup>78</sup> Sec. 80a, 85, 87, 88, 95, in conjunction with sections 97b, 97a, 98 to 100a of the Criminal Code.

<sup>79</sup> Sec. 174 to 176 and section 179 of the Criminal Code.

<sup>80</sup> Sec. 261 (1) to (4) of the Criminal Code.

<sup>81</sup> See no. 5 „Professional Secrecy“ of the Press Code of the German Press Council, available in English at: [http://www.presserat.info/uploads/media/Press\\_Code.pdf](http://www.presserat.info/uploads/media/Press_Code.pdf).



minimum sentence of five years' imprisonment and is not a criminal offence pursuant to Sec. 353b StGB.

With regard to investigation measures – as e.g. telecommunications surveillance – directed at persons that have a right to refuse testimony Sec. 160a StPO determines, that if such shall come into operation against journalists or with an effect on journalists there has to be made a weighing of interests in the particular case to decide whether the respective measure will be taken or not. This means that journalists are put in a worse position regarding the protection of their sources and informants as compared to other persons whose profession swears them to secrecy as for instance deputies, clergypersons or criminal attorneys.

In the present context a quite current development in Germany concerning media freedom shall be noted. On 11 May 2012 the *Länder*-Chamber of the German Parliament (*Bundesrat*) adopted<sup>82</sup> a bill strengthening the freedom of the press in criminal law and criminal procedure law<sup>83</sup>, as introduced by the Government Parties on 21 October 2010<sup>84</sup>. Before this, the federal chamber of the German Parliament (*Bundestag*) had agreed with the proposal<sup>85</sup>. The PrStG was submitted to the President and will enter into force after being signed by the President and published in the Federal Law Gazette. The defined goal of the PrStG<sup>86</sup> is to strengthen the position of the members of the media, i.e. persons working in the media field, and their sources. To this end the PrStG foresees amendments to certain provisions of the StGB and of the StPO.

The first amendment concerns Sec. 353b StGB on the breach of official secrets and special duties of confidentiality, which is part of Chapter 30 on offences committed in public office. Sec. 353b refers to the illegal release of confidential and secret information by certain officials and will be supplemented with an additional paragraph 3a according to which individuals under Sec. 53 para 1 no. 5 StPO (see above) may not be punished for aiding and abetting breaches of official secrecy if they merely receive, analyse or publish the secret or the information that is supposed to be kept secret. These activities include the research as well as other measures preparing the publication. Media stakeholders welcomed the aim to back the journalists work by reducing their criminal responsibility, but criticised the approach ad hand as falling too short. The critics argue inter alia that it is not reasonable to exclude from this vindictory rule all abetting activities that lie temporally before the act of disclosure by the official, and hence leave these indictable. Journalistic investigation may take place even before this disclosure, without necessarily being a direct involvement in the offence. Furthermore, it is pointed out that due to the practical difficulties to distinguish between abetment and incitement – particularly in the journalistic field of work – and the consequences that might result from a “wrong” assessment of the situation by the investigating bodies, incitement activities should be included in the new paragraph 3a, too<sup>87</sup>.

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<sup>82</sup> The Protocol of 11 May 2012 is available in German at: [http://www.bundesrat.de/cln\\_117/nn\\_6906/SharedDocs/Downloads/DE/Plenarprotokolle/2012/Plenarprotokoll-896,templateId=raw,property=publicationFile.pdf/Plenarprotokoll-896.pdf](http://www.bundesrat.de/cln_117/nn_6906/SharedDocs/Downloads/DE/Plenarprotokolle/2012/Plenarprotokoll-896,templateId=raw,property=publicationFile.pdf/Plenarprotokoll-896.pdf).

<sup>83</sup> *Gesetz zur Stärkung der Pressefreiheit im Straf- und Strafprozessrecht*, PrStG.

<sup>84</sup> The Bill (BT-Drs. 17/3355) of 21 October 2010 is available in German at: <http://dipbt.bundestag.de/dip21/btd/17/033/1703355.pdf>.

<sup>85</sup> The decision of the *Bundestag* of 29 March 2012 (Drs. 203/12) is available in German at: [http://www.bundesrat.de/cln\\_152/SharedDocs/Drucksachen/2012/0201-300/203-12,templateId=raw,property=publicationFile.pdf/203-12.pdf](http://www.bundesrat.de/cln_152/SharedDocs/Drucksachen/2012/0201-300/203-12,templateId=raw,property=publicationFile.pdf/203-12.pdf).

<sup>86</sup> See on the proposed bill: “Government Adopts Bill Strengthening Press Freedom” by A. Yliniva-Hoffmann, *IRIS Legal Observations* 2010-9/22.

<sup>87</sup> See the common statement of several representatives of broadcasting and print media, available in German at: [http://www.djv.de/fileadmin/DJV/Infothek\\_NEU/Stellungnahme\\_BT-Drs-17-3355-3989.pdf](http://www.djv.de/fileadmin/DJV/Infothek_NEU/Stellungnahme_BT-Drs-17-3355-3989.pdf).

A further change introduced by the PrStG amends Sec. 97 para 5 StPO. According to this individuals under Sec. 53 para 1 no. 5 StPO may only have their property seized if they are *seriously* suspected of an involvement in the respective offence. Previously, any degree of suspicion was sufficient. With regard to this the mentioned statement of stakeholders criticises that this amendment, which has been claimed by media representatives for a long time, is not extended to Sec. 160a para 4 StPO, too. This latter provision concerns investigation measures against persons that have a right to refuse testimony. It is criticised that certain investigation measures – as for example the collection of telecommunication data – may still be adopted against this special category of persons based on a *simple* suspicion of their involvement in the respective offence.

The need for this reform arose following the so-called "*Cicero*-ruling" of the BVerfG (see above). In that case, the magazine "*Cicero*" had cited confidential documents of the Federal Criminal Police Office, following which the responsible public prosecutor's office had launched an investigation, searched the magazine's editorial offices and confiscated documents<sup>88</sup>.

Besides this, there are further provisions that have an impact on journalistic activities – with a view to the increasing significance of security aspects. As a consequence from the global fight against terrorism there has arisen a public debate on an alleged conflict between (press-)freedom and security. These developments affect several aspects of journalistic work, as professional secrecy, the protection of journalistic resources and editorial secrecy through an expansion of police and secret service surveillance competencies.

In this context journalists have criticised the impact of data retention provisions<sup>89</sup>. Having regard to the so called "*Telekom-Affäre*"<sup>90</sup> they pointed to the risk of abuse the retention of data entails. This is aggravated by the fact that the awareness of the retention of communication data could have a chilling effect of potential sources. Although data retention under the EU-Directive does explicitly not provide for the retention of the communication content, solely from the stored communication data conclusions could be drawn with regard to the respective informant or whistleblower. Hence, this could have a significant, detrimental impact on the relationship of trust between the journalist and his/her source of information, on their "safe" communication lines – and ultimately on the acquisition of information in general.

Another investigation measure concerning the activities of journalists is the so called online-search of hard disks. In the beginning of 2009 the Law on the Federal Criminal Police Office (BKAG)<sup>91</sup> entered into force. The BKAG entitles the competent investigation authorities to search information stored on hard disks by either installing a Trojan on the computer when the user is online or by gaining entrance to the home or office of the person to be surveilled in order to install a surveillance software. Legal precondition to the online-search is that there are circumstances which indicate a concrete threat to an

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<sup>88</sup> The Plenary Protocol as well as the common statement of stakeholders include proposals of the opposition parties, too. Since these proposals have not found entrance into the PrStG they are not part of the present work.

<sup>89</sup> In Germany the provisions of the European Data Retention Directive 2006/24/EC were transposed into national law through amendments to the Telecommunications Act (*Telekommunikationsgesetz*, TKG). These provisions were declared unconstitutional by the Federal Constitutional Court and are therefore invalid. The Member State Germany has not implemented effectively Directive 2006/24/EC yet and is thus facing an infringement procedure before the European Court of Justice.

<sup>90</sup> With the intention to reveal internal whistleblowers the *Deutsche Telekom AG* spied out telecommunications data of journalists and members of the supervisory board.

<sup>91</sup> *Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten* (BKAG), available in German at: [http://www.gesetze-im-internet.de/bkag\\_1997/index.html](http://www.gesetze-im-internet.de/bkag_1997/index.html).

important value, as life and limb, freedom of a person, public goods the threat of which endangers the fundament of a State or the existence of human beings. The online search requires a prior judicial order. According to Sec. 20u BKAG (protection of individuals entitled to refuse from testimony) such investigation measures may be taken against journalists, after a consideration of interests as described above concerning Sec. 160a StPO. Journalists demanded to be exempted from the category of persons possibly addressed by such measures, at all.

Besides these legal measures there have also been changes of the accreditation practice. Regarding big – sporting<sup>92</sup> or political<sup>93</sup> or other<sup>94</sup> – events there have developed stricter requirements to journalists in order to be accredited to such. It has become increasingly usual to demand the agreement to so-called *Regelanfragen*, which are “ordinary questions” to Criminal Offices or offices responsible for defending the constitution (*Verfassungsschutz*) prior to the accreditation. In this context it is criticised that this checking of personal data and police or other investigation authorities information lacks a legal basis, interferes with the journalists’ freedoms as guaranteed by the Constitution, puts a great pressure on the journalists and grants police and secret service bodies the discretion to decide who is allowed to report on certain events. Furthermore, data protection rights could be infringed.<sup>95</sup>

Sec. 383 of the Code of Civil Procedure<sup>96</sup> provides for the right to refuse to testify on personal grounds. According to this, persons who collaborate or have collaborated, as professionals, in preparing, making or distributing printed periodicals or radio or television broadcasts, may refuse to testify, if their testimony would concern the person of the author or contributor of articles or broadcasts and documents, or the source thereof, as well as the information they have been given with regard to these persons’ activities, provided that this concerns articles or broadcasts, documents and information published in the editorial part of the periodical or broadcast. Even if such a person does not refuse to testify, his or her examination is not to be aimed at facts and circumstances regarding which it is apparent that no testimony can be made without breaching the confidentiality obligation.

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<sup>92</sup> In 2006, during the Football World Cup in Germany journalists had to agree to such *Regelanfragen* to the police and the *Verfassungsschutz*, because of a higher security risk.

<sup>93</sup> Before the G8-Summit in Heiligendamm in 2007 journalists had to give their consent to a Data Protection Information which meant a check of the respective person by the police, the Federal Criminal Police Office and the National Secret Service; 20 journalists did not receive an accreditation. Some of these journalists felt violated in their rights and took legal action. The Higher Administrative Court of Berlin-Brandenburg judged for example that Art. 5 Grundgesetz does not give a right to accreditation to journalists, but they have a right to a fact-bounded, arbitrary-free decision of the administrative authority concerning their accreditation. The decision of the Oberverwaltungsgericht Berlin-Brandenburg (No. OVG 10 B 1.11) of 22 June 2011 is available in German at:  
<http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/326/bs/10/page/sammlung.psml?doc.hl=1&doc.id=JURE110013177%3Ajuris-r00&documentnumber=1&numberofresults=1&showdoccase=1&doc.part=L&paramfromHL=true>.

<sup>94</sup> In 2006, during the visit of the Pope in Germany, the same accreditation rules applied as during the World Cup.

<sup>95</sup> In order to save the journalists’ rights, the German Journalists Association (DJV) has developed - in cooperation with the ARD, the ZDF, the Bundesverband Deutscher Zeitungsverleger (BDZV), the Verband Deutscher Zeitschriftenverleger e.V. (VDZ), the Deutsche Journalisten-Verband (DJV), the Deutscher Journalistinnen- und Journalisten Union (dju), the Verband Privater Rundfunk und Telemedien (VPRT) and the German Press Council - some basic points and principles concerning the practice of accreditation, available at:  
[http://www.djv.de/fileadmin/DJV/Infothek\\_NEU/Akkreditierungspraxis-Grundsätze.pdf](http://www.djv.de/fileadmin/DJV/Infothek_NEU/Akkreditierungspraxis-Grundsätze.pdf).

<sup>96</sup> *Zivilprozessordnung*, ZPO, available in English at:  
[http://www.gesetze-im-internet.de/englisch\\_zpo/index.html](http://www.gesetze-im-internet.de/englisch_zpo/index.html).

- Specific positive content obligations

In Germany, no specific positive content obligations exist. On broadcasting level, the corresponding legal norms contain certain programming principles which are laid down in rather general terms. For example, according to the RStV, the PSB are obliged to respect and protect human dignity, moral and religious beliefs of the population, life, freedom and the opinions of others in their offers.

The absence of specific content obligations results from the interpretation which the Federal Constitutional Court has given to Art. 5 GG. According to the BVerfG, broadcasters enjoy freedom of programme. Freedom of programme does not mean that the German legislator cannot limit programme contents but he is not allowed to prescribe concrete content standards which results in that the PSB or private broadcasters cannot make use any more of their freedom, but have to implement a specified programme.<sup>97</sup>

- Funding schemes for specifically desired content

In Germany, no such funding schemes exist.

- Political advertising and/or broadcasting time

According to the RStV advertising of political, ideological or religious nature is prohibited, which applies to teleshopping accordingly. Public service announcements transmitted free-of-charge, including charitable appeals, are not considered as advertising.

With regard to (nation-wide) commercial broadcasters the RStV determines the obligation to grant appropriate broadcasting time to political parties participating in elections to the German Parliament, subject to a reimbursement of the costs, if an election list of a party has been accepted for said party in at least one state. Besides this, political parties or other political associations participating in the elections of representatives to the European Parliament shall be granted appropriate broadcasting time, if at least one electoral proposal has been accepted, subject to the reimbursement of costs.

According to the LMG broadcasters providing a state-wide full programme can be obliged to offer adequate broadcasting time to political parties or other political associations participating in elections to the European Parliament, the German Parliament or the respective State Parliament if an election list of the respective party or association has been accepted<sup>98</sup>. The broadcasters are allowed to offer such time also in the course of municipal elections.

The WDR-Gesetz determines such an obligation for the regional PSB, too.

According to the Press Code issued by the German Press Council, reporting during election campaigns must inform accurately, which means also to publish opinions the press does not share.

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<sup>97</sup> Decision of the BVerfG (No. 1 BvR 2270/05, 809/06, 830/06) of 11 September 2007, available in German at: [http://www.bverfg.de/entscheidungen/rs20070911\\_1bvr227005.html](http://www.bverfg.de/entscheidungen/rs20070911_1bvr227005.html).

<sup>98</sup> See for example Sec. 36 LMG-NRW.

- Codes of conduct and their organisational framing

The German Press Council<sup>99</sup> is an organisation of the German publisher's associations and journalists' associations *Bundesverband Deutscher Zeitungsverleger* (BDZV), the *Verband Deutscher Zeitschriftenverleger e.V.* (VDZ), the *Deutsche Journalisten-Verband* (DJV) and the *Deutscher Journalistinnen- und Journalisten Union* (dju). The Press Council was founded in 1956; it has two main organs, namely the *Trägerversammlung* and the plenary sitting. The *Trägerversammlung* consists of eight members, two people of each of the four member associations. It acts for the freedom of press and protects the reputation of the German press. The plenary meeting consists of 30 members, eight members from VDZ and DJU, and additionally seven of BDZV and DJV, respectively. The task of the plenary meeting as a voluntary self-controlling body of the German press is the removal of mismanagement in the press as well as to speak up for the free access to generally accessible sources. Both main organs become active within the scope of the so-called complaint procedures.

The German Press Council has elaborated journalistic principles and has incorporated them in the *Pressekodex* (Press Code). It was first published in 1973 and was renewed for the last time on 3 December 2008.<sup>100</sup> It includes principles the Press Council recommends to take into account as journalist; these are amongst others: truthfulness and preservation of human dignity, professional secrecy and respect for the intimate sphere of individuals, presumption of innocence and the rightful treatment of minors.

If a press enterprise in print media or online media offends against one of these journalistic principles, everybody can direct a complaint to the Press Council. Since 2009 it is possible to do this online. If the complaint is not obviously unsubstantiated, the affected medium is asked for a statement. Afterwards the board of complaint, which meets four times in a year, decides on the case. If the complaint is founded substantiated by the committee, it takes a measure against the medium.

During its meetings the committee decides whether the complaint is substantiated or not. Afterwards it has the possibility to take one of the following measures:

In cases of lower offence against the code, it can give a hint to the concerned editorial team.

A non-official disapproval goes out for a heavier offence against the code. Under Sec. 15 of the complaint order, there is no duty to print disapproval in the affected publication organs. Nevertheless, the complaint recommends such an editorial decision like an expression of fair reporting.

The most severe sanction is the rebuke: public rebukes have to be published by the medium. Non-public rebukes are pronounced in cases of serious offence, if another publication is inappropriate for reasons of victim's protection.

Since 1976 the Federal Republic pays regularly subsidies to the Press Council, without having any influence on it.

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<sup>99</sup> *Presserat*; key facts on the Press Council are available in English at: <http://www.presserat.info/service/english/keyfacts-in-english.html>.

<sup>100</sup> *Pressekodex*; available in English at: [http://www.presserat.info/uploads/media/Press\\_Code.pdf](http://www.presserat.info/uploads/media/Press_Code.pdf).

The ARD has – according to the provisions of the RStV – issued guidelines on several topics, too: in the report<sup>101</sup> that was already mentioned above, the ARD has determined certain guidelines concerning *DasErste* on information, culture, education, entertainment, family and minors, regional competence, integration of people with disabilities or migrants and advertising<sup>102</sup>. Such guidelines also exist with regard to telemedia offers<sup>103</sup>. Programme guidelines are also issued by the regional broadcasters associated in the ARD, themselves<sup>104</sup>.

- The role and functioning of regulatory authorities in these respects

The media authorities of the *Länder* supervise the compliance of the commercial broadcasters with the relevant media regulations. In Germany there exist 14 media authorities, whereas *Berlin* and *Brandenburg* on the one hand and *Hamburg* and *Schleswig-Holstein* on the other hand established joint authorities, respectively. Structure and organisation of these authorities are provided for by the respective LMG.

These 14 authorities have built up a common roof – the Association of State Media Authorities (ALM)<sup>105</sup>. Besides there exist several organs, in charge of different subjects and, thus, supporting the work of the media authorities. These organs are the following:

- Commission on Licensing and Supervision (ZAK)<sup>106</sup> which is responsible for issues related to the licensing and supervision of national broadcasters, platform regulation and the development of digital broadcasting;
- Conference of Directors of the State Media Authorities (DLM)<sup>107</sup> which is responsible for representing the interests of its members concerning broadcasting issues on the national and international levels;
- Conference of Chairpersons of the Decision-Taking Councils (GVK)<sup>108</sup> which under the RStV makes the selection decisions on the designation of wireless transmission capacities to commercial service providers and on the allocation of platform capacities;
- Commission for the Protection of Minors in the Media (KJM)<sup>109</sup> which is responsible for assessing commercial broadcasting and telemedia content with a view to the protection of minors;
- Commission on Concentration in the Media (KEK)<sup>110</sup> which is in charge of monitoring and enforcing compliance with the provisions on plurality in national commercial television.

<sup>101</sup> The report is available in German at: <http://www.daserste.de/service/Leitlinien10-091210-p.pdf>.

<sup>102</sup> *ARD-Werberichtlinien*, available in German at: <http://www.ard.de/intern/abc/-/id=1794740/property=download/nid=1643802/14g8mzr/ARD-Werberichtlinien+f%C3%BCr+Werbung+und+Sponsoring+vom+M%C3%A4rz+2010.pdf>.

<sup>103</sup> The report including the guidelines concerning telemedia is available in German at: <http://www.daserste.de/service/Telemedien10-091210-p.pdf>.

<sup>104</sup> See as an example the *Programmleitlinien des WDR*, available in German at: [http://www.wdr.de/unternehmen/senderprofil/pdf/aufgabe/WDR\\_200812\\_Programmleitlinien.pdf](http://www.wdr.de/unternehmen/senderprofil/pdf/aufgabe/WDR_200812_Programmleitlinien.pdf).

<sup>105</sup> *Arbeitsgemeinschaft der Landesmedienanstalten*, ALM; see: [www.alm.de](http://www.alm.de).

<sup>106</sup> *Kommission für Zulassung und Aufsicht*, ZAK.

<sup>107</sup> *Direktorenkonferenz der Landesmedienanstalten*, DLM.

<sup>108</sup> *Gremienvorsitzendenkonferenz*, GVK.

<sup>109</sup> *Kommission für Jugendmedienschutz*, KJM.

<sup>110</sup> *Kommission zur Ermittlung der Konzentration im Medienbereich*, KEK.



With regard to commercial telemedia services the supervision comes under the competent *Länder*-authority, which can be the respective media authority or a body within the State administration.

- Distribution Aspects
  - Access to frequencies

The decision on the assignment, designation and use of transmission capacities for the distribution of broadcasting services and comparable telemedia (telemedia directed at the general public) is governed by the RStV and the respective *Länder* laws. Besides, the allocation of the respective frequencies is regulated by the Telecommunications Act (TKG)<sup>111</sup>.

Responsible for the allocation of frequencies is the Federal Network Agency (BNetzA)<sup>112</sup>. When it comes to broadcasting, the competence of the *Länder* is concerned. Thus, the BNetzA and the *Länder* have to decide and act in mutual consent (see Sec. 57 TKG). To this end the *Länder* inform the BNetzA about their frequency-needs. On the basis of these and taking into account the aim to ensure general supply with broadcasting, the BNetzA assigns the respective frequencies. For a due organisation and realisation of the frequency policy the BNetzA issues plans<sup>113</sup> and regulations<sup>114</sup> which specify the procedures and conditions. An example for this procedure is the allocation of frequencies for digital terrestrial broadcasting.

With regard to wireless transmission capacities Art. 51 et seq. RStV determine that the *Länder* shall – as far as a nation-wide transmission is concerned all of them, as far as several *Länder* are concerned just these – decide unanimously on their frequency-needs. With regard to ARD, ZDF and DRadio the Prime Ministers of the *Länder* shall decide consensually.

Sec. 10 et seq. LMG-NRW provide for the assignment of transmission capacities on regional level. The provisions stress the importance of ensuring general supply with (public service) broadcasting. Besides this, the allocation of frequencies shall be guided by the principles of programme diversity and the proper fulfilment of the public remit. The capacities shall be allocated for a limited period of time.

- Access to distribution networks and control of actual conditions

As regards the distribution of television services the RStV permits the simultaneous and unaltered retransmission which can be received nationally, or which is operated in Europe legally and in accordance with the provisions of the European Convention on Transfrontier Television. The retransmission of other television services shall be notified

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<sup>111</sup> *Telekommunikationsgesetz*, TKG, available in German at:  
[http://www.gesetze-im-internet.de/tkg\\_2004/BJNR119000004.html](http://www.gesetze-im-internet.de/tkg_2004/BJNR119000004.html).

<sup>112</sup> *Bundesnetzagentur*, BNetzA, information in English available at:  
[http://www.bundesnetzagentur.de/cln\\_1932/EN/Home/home\\_node.html](http://www.bundesnetzagentur.de/cln_1932/EN/Home/home_node.html).

<sup>113</sup> *Frequenznutzungsplan*, available in German at:  
[http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/BNetzA/Sachgebiete/Telekommunikation/Regulierung/Frequenzordnung/Frequenznutzungsplan/Frequenznutzungsplan2011pdf.pdf?\\_\\_blob=publicationFile](http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/BNetzA/Sachgebiete/Telekommunikation/Regulierung/Frequenzordnung/Frequenznutzungsplan/Frequenznutzungsplan2011pdf.pdf?__blob=publicationFile).

<sup>114</sup> *Verwaltungsvorschrift für Frequenzuteilungen für den Rundfunkdienst*, available in German at:  
[http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/BNetzA/Sachgebiete/Telekommunikation/Regulierung/Frequenzordnung/VerwaltungsvorschriftenFuerFrequenzuteilung/VVRuFu\\_VVorschriftFrequZutlgRundfunk01042010pdf.pdf?\\_\\_blob=publicationFile](http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/BNetzA/Sachgebiete/Telekommunikation/Regulierung/Frequenzordnung/VerwaltungsvorschriftenFuerFrequenzuteilung/VVRuFu_VVorschriftFrequZutlgRundfunk01042010pdf.pdf?__blob=publicationFile).



to the responsible media authority, which has to check the legal conformity. Retransmission may be regulated in more detail within the LMG<sup>115</sup>.

Cable allocation for broadcasting is provided for in the respective LMG. Sec. 18 et seq. LMG-NRW rule that analogue cable operators shall – in the first line – supply the subscribers with the legally determined PSB, local radio and collegiate programmes. If the capacity is not sufficient to include all other broadcasting programmes offered the respective media authority shall decide upon which programmes are to be fed in. This decision has to take into account programme, offer and provider diversity and shall be made in agreement with the cable operator and the concerned PSB.

Transmission and retransmission through digital cable networks shall be conducted under the RStV. Digital cable operators that plan to retransmit programmes have to notify the media authority about their intentions at least one month before the start. The regional media authority then controls the legal conformity of the respective enterprise. In the case that the retransmitted programme infringes legal obligations the media authority can issue an objection or even prohibit the retransmission as such.

For the distribution of broadcasting and telemedia the RStV makes arrangements for platforms, Sec. 52 et seq. RStV. Regarding access to platforms the providers of such must ensure diversity of programmes, opinions and offers. To this end providers of broadcasting services and comparable telemedia including electronic programme guides must not be unduly impeded through conditional access systems, application programming interfaces, user surfaces providing the first access to the services, or any other technical specifications in the distribution of their offers, or without justifiable cause be treated differently to comparable providers. The same applies to the structure of fees and tariffs. The use of such access systems or conditions as well as of the tariffs has to be notified to the media authority.

The structure of fees and tariffs for the distribution must not unduly impede providers of broadcasting services and comparable telemedia nor result in their being treated differently to comparable providers without justified cause. The control of the tariffs is in the responsibility of the ZAK and the BNetzA<sup>116</sup>.

The distribution of press products – i.e. marketing, sales and delivery – shall secure the freedoms guaranteed under Art. 5 *Grundgesetz*. There exist different systems for this distribution the predominant of which is the so-called *Presse-Grosso*. In this system a wholesaler is interposed between the publishing houses and the retail sector. According to industry data there are 69 press wholesalers in Germany<sup>117</sup>. The wholesalers are allocated territories and shall treat all publishing houses, publications and retail trades equally. This neutrality shall ensure diversity and freedom of press products offered. Moreover, retail traders and wholesalers have the right to return unsold products to the publishing houses and receive a credit note for these products. Besides this, the publishing houses fix the prices for both the wholesalers and the retail sector. All these characteristics shall ensure an independent, broad and diverse offer of printed products to consumers and, thus, contribute to the protection of press freedom. On 14 February 2012 the District Court of Cologne decided upon the claim of the Bauer Media publishing house against one aspect of the system of *Presse-Grosso*<sup>118</sup>. The claimant did not

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<sup>115</sup> This has been made e.g. in Sec. 23 et seq. LMG-NRW.

<sup>116</sup> Sec. 52d RStV and Sec. 30 et seq. TKG.

<sup>117</sup> *Bundesverband Deutscher Buch-, Zeitungs- und Zeitschriften-Grossisten*, BVPG, Federal Association of German Books-, Newspapers- and Magazines-Wholesalers, available at: <http://www.pressegrasso.de>.

<sup>118</sup> *Landgericht Köln* (Az. 88 O (Kart) 17/11), available in German at: [http://www.justiz.nrw.de/nrwe/lgs/koeln/lg\\_koeln/j2012/88\\_O\\_\\_Kart\\_\\_17\\_11\\_Urteil\\_20120214.html](http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2012/88_O__Kart__17_11_Urteil_20120214.html).

question the system as a whole, but argued that the fact, that the BVPG as a central institution negotiates the trade margins for all its members, violates antitrust rules. The claimant recommended a system of bilateral agreements between the publishing houses and the wholesalers as this would allow for having regard to regional peculiarities. The Court backed this opinion and ruled that the abolition of the central negotiating mandate would not endanger the *Grosso*-system as such but would put an end to the illegal price and conditions cartel of the BVPG. The BVPG appealed the decision and the procedure is still pending. The Association argues that the Court's decision weakens the neutral press distribution system as the central negotiation mandate was a vital centrepiece of the *Grosso*-system, and claimed that there was an urgent need for political action to save this solidary trade system. On 27 April 2012 the Federal Ministry for Economy and Technology held a round-table-meeting on the question of how the *Presse-Grosso* could be safeguarded<sup>119</sup>. The BVPG, publishing houses and deputies from the *Bundestag* participated in the meeting and declared that they – principally – wanted to uphold the *Presse-Grosso* as this guarantees for a diversity of opinions, content and offers. The participants discussed opportunities for action in order to optimise the system and agreed to work further on this before the parliamentary summer break.

- Must-carry/must-offer rules for electronic media

Platform operators have to obey certain obligations when compiling their programme offers in order to secure diversity and freedom of opinion. This is of particular relevance for regional and local programmes. Under the provisions of the RStV the provider has – when allocating platform capacities – to consider the inclusion of certain (nation-wide) PSB or commercial programmes, of regional and local radio/television programmes and of certain digital or telemedia offers. The same applies if the platform operator offers an electronic programme guide (EPG) the access to and presence in which has to be equal.

As to cable and satellite transmission capacities the LMG<sup>120</sup> determine an obligation for the operators to – in the first line – ensure a comprehensive supply of the population with PSB programmes and programme-related services as well as with local radio programmes. Following to this it shall be ensured that PSB are able to fulfil their public remit and that the population is provided – as comprehensively as possible – with commercial programmes.

- Role of platform operators

Along with the advance of digital technologies the scarcity of transmission capacities almost disappeared. Thus, the question is no longer the transmission as such but the conditions of access to distribution networks – and finally to the audience. This access is, today, mostly provided by platform operators that bundle the respective offers.

The RStV differentiates between platforms in open (Internet, UMTS or similar networks) and such in closed networks. To platforms in open networks only Sec. 52a and 52f RStV apply, which means that these do not have to fulfil the same range of regulatory conditions, unless they have a dominant market position. The competent regional media authorities shall determine in statutes and directives the status of the respective platform providers.

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<sup>119</sup> Press release of the Ministry available in German at: <http://www.bmwi.de/BMWi/Navigation/Presse/pressemitteilungen,did=487120.html?view=renderPrint>.

<sup>120</sup> Sec. 10 et seq. and 18 et seq. LMG-NRW.

Platform operators shall notify the competent media authority of their planned activities beforehand. The ZAK then examines which kind of platform is in question and hence, which legal conditions shall apply.

- The role and functioning of regulatory authorities in these respects

The main tasks of the media authorities is – in respect of commercial broadcasters – the licensing and monitoring of private radio and television, the monitoring of non-discrimination and free access to platforms, especially cable networks, and the support of digitisation and broadcasting infrastructure.

Regarding the assignment of frequencies and the consent between or within the *Länder* required in this context, the respective media authorities also play an important part, including representation of the interest of private broadcasters. Furthermore, the media authorities allocate the frequencies, which on their part were allocated to the media authorities, to the respective private broadcasters.

As to the distribution of programmes the media authorities shall support actively the switch-over from analogue to digital transmission as well as the introduction of digital terrestrial transmission<sup>121</sup>.

With regard to platform operators the regional media authority – as the case may be in cooperation with the BNetzA – examines whether the provider observes the legal provisions on the access of broadcasters to the platform. This means both the free and non-discriminatory access of programme providers to the audience and the free and diverse choice of the audience. The media authority furthermore controls the appliance with all legislation concerning the content of the distributed programmes and – in this context – may take measures if these provisions are violated.

The competent regional media authorities control the observance of the must-carryrules by the platform operators. The latter have to notify the authority about their choice of programmes beforehand. If the provider fails to fulfil the programme obligations the media authority shall allocate capacities for broadcasting services.

In addition to this the LMG contain provisions on the allocation of transmission capacities, too<sup>122</sup>. These determine that the provision with PSB programmes and their programme-related services have priority over other offers. Local and regional programmes as well as commercial programmes shall be transmitted as comprehensively as possible.

- Access to Information
  - Transparency of media ownership situations

The provisions on the investment of broadcasters in other companies as well as competition law and reporting duty aspects have been described above. In order to fulfil its task concerning the enforcement of plurality of opinion, the aforementioned Commission on Concentration on the Media (KEK) provides a report of the participating structure in Germany on its website.<sup>123</sup>

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<sup>121</sup> Sec 27, 28 LMG-NRW.

<sup>122</sup> Sec. 10 et seq. LMG-NRW.

<sup>123</sup> Report of the participating interests, available in German at: <http://www.kek-online.de/Inhalte/beteiligung.php>.

With a view to the print sector it should be noted that some of the press laws of the *Länder* provide for media ownership rules, too. Sec. 7a of the *Berliner Pressegesetz* (BlnPrG)<sup>124</sup> prescribes that the publisher of a periodical printed work has to disclose at regular intervals information on the ownership and participation relationships of the publishing company as well as on the legal relationships held to other press or broadcasting companies<sup>125</sup>. The aim of all these rules is particularly to preserve and promote diversity in the media sector.

Besides this, the German Commercial Code provides for the right of free access to the commercial and business registers<sup>126</sup>.

- Accountability of public service media

According to the Interstate Treaty on the Financing of Broadcasting (RFinStV)<sup>127</sup> the regional broadcasting operations associated within the ARD, the ZDF and the DRadio have to report to the *Länder*-Parliaments on their economic and financial situation, soon after the Commission on the Financial Needs of the Broadcasters (KEF)<sup>128</sup> has submitted its report on the financial situation to the *Länder*-Governments<sup>129</sup>. The report of the broadcasters shall include the information relevant for the assessment of the participation in other companies and subsidiaries and representatives of the broadcasters shall be available for parliamentary hearings on the reports.

Besides, according to the RStV, the state broadcasting corporations forming the ARD association, the ZDF and Deutschlandradio shall, commencing on 1 October 2004, publish a report every two years on the fulfilment of their respective remit, on the quality and quantity of the existing offers as well as on the focus of the respective planned offers.

- Freedom of information laws

As described above there exists the IFG<sup>130</sup> on Federal level, along with the (eleven) respective *Länder*-IFG. According to the IFG everyone has a comprehensive right to free access to information held by authorities of the Federal Government or by other Federal bodies and institutions insofar as they discharge administrative tasks under public law. This right does not depend on nationality or the place of residence and can be exercised by natural as well as by legal persons. Usually the application for access to information does not require any statement of grounds, but such may be necessary where personal data, copyrights or business or trade secrets are concerned. Access to the requested information can be provided both orally and in writing, by direct inspection on-site or by making the information available in any other way, e.g. through providing a copy of a file. As a rule the applicant decides on the form of access, and it shall be granted within one month. The application has to be directed to the responsible authority and can be

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<sup>124</sup> *Berliner Pressegesetz*, BlnPrG, available in German at:

<http://gesetze.berlin.de/default.aspx?vpath=bibdata%2Fges%2FBlnPrG%2Fcont%2FBlnPrG.P7a.htm> .

<sup>125</sup> Similar provisions can be found in *Pressegesetz des Landes Brandenburg*, *Hessisches Gesetz über Freiheit und Recht der Presse*, *Landespressegesetz für das Land Mecklenburg-Vorpommern*, *Sächsisches Gesetz über die Presse*, *Pressegesetz Schleswig-Holstein*, *Thüringer Pressegesetz*.

<sup>126</sup> Sec. 9 *Handelsgesetzbuch*, HGB, available in German at:

<http://www.gesetze-im-internet.de/hgb/index.html#BJNR002190897BJNE001304377>.

<sup>127</sup> *Rundfunkfinanzierungsstaatsvertrag*, RFinStV, available in German at:

[http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze\\_aktuell/RFinStV\\_11.pdf](http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/RFinStV_11.pdf).

<sup>128</sup> *Kommission zur Ermittlung des Finanzbedarfs*, KEF.

<sup>129</sup> Sec. 5 and 3 RFinStV.

<sup>130</sup> Federal Act Governing Access to Information held by the Federal Government (Freedom of Information Act), available in English at: [http://www.gesetze-im-internet.de/englisch\\_ifg/index.html](http://www.gesetze-im-internet.de/englisch_ifg/index.html).

made without fulfilment of specific requirements relating to form. The exceptions under which access can be rejected as well as possible legal remedies have been described above.

The function of the Federal Commissioner for Freedom of Information (BFDI)<sup>131</sup> is defined in Sec. 12 IFG: Everyone who considers his or her right to access to information to have been violated may appeal to the BFDI. The BFDI can give advice in the concrete case, can check the request, can ask the respective public body for a statement in the particular case or – if so – to give in the controversy. The BFDI does not have the power to direct with respect to the public authorities. Besides this, the BFDI also advises the Parliament, the Government and the authorities of the Federal Government in questions of freedom of information and makes recommendations. In addition, the BFDI controls the obligated authorities and – in the event of infringements of the right to information – issues objections.

Every two years the BFDI publishes an activity-report on the freedom of information. In the recently published report concerning the years 2010-2011<sup>132</sup>, the BFDI states that the amount of applications under the IFG has increased significantly within the last two years. The report describes in detail cases and areas in which freedom of information became important and where conflicts came up. Conflicts in this field arose inter alia with a view to trade and business secrets, data protection aspects and the question, in how far the IFG is applicable to governmental activities, particularly to the preparatory legislative work.

The report points also to an evaluation of the IFG on behalf of the Parliament (*Bundestag*) the results of which shall be submitted to the Parliamentary home affairs committee in 2012.

Besides, there is a law on the further use of all information held by public authorities<sup>133</sup> and a bylaw on the charges and costs under the IFG<sup>134</sup>.

Special rights to information are provided by numerous other laws<sup>135</sup>.

In this context a ruling of the Federal Administrative Court (BVerwG)<sup>136</sup> should be mentioned. On 3 November 2011, the BVerwG decided that the IFG applies, in principle, to all activities of the federal ministries.

In the case at hand, the plaintiffs required access to certain documents of the Federal Ministry of Justice (BMJ)<sup>137</sup>: firstly, internal submissions to the Minister in connection with the investigation into the possible need to reform the law on parent-child relations and,

<sup>131</sup> *Bundesbeauftragter für den Datenschutz und die Informationsfreiheit, BFDI.*

<sup>132</sup> *Tätigkeitsbericht zur Informationsfreiheit für die Jahre 2010 und 2011*, available in German at: [http://www.bfdi.bund.de/SharedDocs/Publikationen/Taetigkeitsberichte/TB\\_IFG/3TB10\\_11.pdf?\\_\\_blob=publicationFile](http://www.bfdi.bund.de/SharedDocs/Publikationen/Taetigkeitsberichte/TB_IFG/3TB10_11.pdf?__blob=publicationFile).

<sup>133</sup> *Gesetz über die Weiterverwendung von Informationen öffentlicher Stellen, IWG*, available in German at: <http://www.gesetze-im-internet.de/iwg/index.html>.

<sup>134</sup> *Verordnung über die Gebühren und Auslagen nach dem Informationsfreiheitsgesetz, IFGGebV*, available in German at: <http://www.gesetze-im-internet.de/ifggebv/index.html>.

<sup>135</sup> These special provisions in other legislation on access to official information take precedence to the IFG as far as their scope of application reaches, such other information laws are e.g.: the *Gesetz über den Zugang zu digitalen Geodaten, GeoZG*, available in German at: <http://www.gesetze-im-internet.de/geozg/index.html>; the *Umwelteinformationsgesetz, UIG*, available in German at: [http://www.gesetze-im-internet.de/uig\\_2005](http://www.gesetze-im-internet.de/uig_2005); the *Gesetz zur Verbesserung der gesundheitsbezogenen Verbraucherinformation, VIG*, available in German at: <http://www.gesetze-im-internet.de/vig/index.html>; the *Gesetz über die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik, StUG*, available in German at: <http://www.gesetze-im-internet.de/stug>.

<sup>136</sup> *Bundesverwaltungsgericht, BVerwG.*

<sup>137</sup> *Bundesjustizministerium, BMJ.*

secondly, BMJ statements to the Petitions Committee of the *Bundestag* concerning the rehabilitation of the victims of the land reform in the Soviet occupation zone. The lower-instance court had upheld these claims, on the grounds that the IFG was applicable only regarding the exercise of public administration activities, but not of governmental activities.

The BVerwG rejected the appeals lodged against these rulings, stating that the BMJ was a Federal authority obliged to provide access to information under Sec. 1 IFG. The IFG did not distinguish between an authority's governmental and administrative activities; such a differentiation would run counter to the purpose of the Act. The fact that the BMJ's statement had been submitted to the Petitions Committee in accordance with a constitutional obligation was irrelevant. There were no obvious grounds to refuse access to the requested information (Sec. 3 et seq.), including the protection of confidentiality<sup>138</sup>.

There exists further jurisdiction concerning the *Länder-IFG*. Out of these, one case shall be described, concerning the application for information submitted by a journalist to the PSB *Westdeutscher Rundfunk* (WDR).

On 9 February 2012, the *Münster* Administrative Appeals Court (OVG)<sup>139</sup> ruled that the WDR is obliged to provide information to a journalist under the IFG-*Nordrhein-Westfalen*. The journalist requested information about which companies WDR cooperated with and how much money was involved. The journalist suspected that the broadcaster, which is funded by the licence fee, commissioned work from companies that employed members of its own Broadcasting Council. WDR did not dispute the applicability of the IFG-*Nordrhein-Westfalen*, but refused to disclose the information on the grounds that it was not entitled to reveal trade secrets and internal company information. In the court's view, WDR is not obliged to disclose information to the press under the PrG-*Nordrhein-Westfalen*. However, under the IFG-*Nordrhein-Westfalen* in conjunction with the WDR-*Gesetz*, it must provide access to all information which do not allow conclusions to be drawn about editorial secrets and the programming mandate. This guaranteed the basic right to freedom of reporting. Providing access to information did not prevent public service broadcasters from fulfilling their traditional remit and competing with private broadcasters<sup>140</sup>.

This decision complies with the resolution of the Conference of the Commissioners for Freedom of Information in Germany from 24 June 2010 which argues in support of a principal applicability of the IFGs to PSB<sup>141</sup>.

- Accessibility of products/services and distribution networks

Apart from aid in the context of social welfare, State subsidies for the purchase of reception devices – e.g. for digital reception – do not exist. For free-TV there do not incur any further costs, besides the acquisition of equipment. The licence fee remains unaffected.

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<sup>138</sup> The decision of the BVerwG (No. 7 C 3.11 and 7 C 4.11) of 3 November 2011 is available in German at: <http://www.bverwg.de/pdf/2820.pdf>; see also "BVerwG Rules on Scope of Freedom of Information Act" by A. Yliniva-Hoffmann, in *IRIS Legal Observations* 2012-1/18.

<sup>139</sup> *Oberverwaltungsgericht Münster*, (No. 5 A 166/10), available in German at:

[http://www.justiz.nrw.de/nrwe/ovgs/ovg\\_nrw/j2012/5\\_A\\_166\\_10urteil20120209.html](http://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2012/5_A_166_10urteil20120209.html).

<sup>140</sup> "OVG Rules WDR Must Provide Information under NRW Freedom of Information Act" by P. Matzneller in *IRIS Legal Observations* 2012-4/16.

<sup>141</sup> *Entschließung der 20. Konferenz der Informationsfreiheitsbeauftragten in Deutschland "Informationsfreiheit bei öffentlich-rechtlichen Rundfunkanstalten"*, available in German at: [http://www.ida.brandenburg.de/sixcms/detail.php?gsid=bb1.c.216373.de&template=ida\\_entschl](http://www.ida.brandenburg.de/sixcms/detail.php?gsid=bb1.c.216373.de&template=ida_entschl).



The media authority of *Berlin-Brandenburg* (mabb) had established a funding programme in order to support the introduction of digital terrestrial television in its region. According to this programme private broadcasters were subsidised for the use of DVB-T. The European Commission considered this financial support as violation of European State aid rules and prohibited the subsidies. This decision was confirmed by the Court of First Instance (T-21/06) and finally by the European Court of Justice (C-544/09)<sup>142</sup>.

As described above the device-dependent licence fee is still valid. Certain reception devices are exempted from the obligation to pay a fee, e.g. so called second-devices. Furthermore, certain natural persons can be exempted from this obligation, particularly due to their social indigence or special needs.

Newspapers are generally sold at affordable prices and newspaper subscriptions usually offer graduated prices, e.g. specific subscriptions for pupils and students.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

In Germany a completely developed ombudsman's system in the media sector does not exist. But there are trends which point to such a development. In the media business, in which traditionally a large audience is demanded and accordingly a lot of conflict material is given, several of such complaint committees have been established during the last years. Their job consists in mediating between the readers and clients from the advertising industry on the one hand, and the editorial staff and publishing companies on the other hand. In addition to this they shall guarantee an impartial approach with the treatment of issues. They are contact boards for complaints and they strengthen the transparency of the whole editorial work. The "*Berliner Zeitung*" was the first to get an ombudsman. Since 1997 their ombudsman represents the reader's interests against authorities, enterprises and politics. In the meantime, ten of such complaint committees have been established by different German newspapers. Though they are partly called ombudsman, reader's lawyer or reader's representative, they are working in the same way, and act as a „megaphone for the readers“.

The established complaint committees are organised differently in Germany. While the "*Frankfurter Rundschau*", the "Berlin newspaper", the "Westphalia review", the "franc post" and the "*Main Post*" have an internal ombudsman who works in the enterprise, the "Brunswick newspaper" and the WDR chose an external ombudsman who is not working firmly in the enterprise, but does his work at determined times.

Another manifestation of these complaint committees are the reader's advisory boards. These chosen readers meet with the heads of the newspaper editorial staff regularly and represent the reader's interests in open discussions. The most prominent example of these reader's advisory boards is Germany's most popular tabloid "Bild". It has founded its reader's advisory board in 2007 and still works together with it closely.

Besides, in the *Länder* media laws (except *Baden-Württemberg*, *Niedersachsen* and *Thüringen*) complaint procedures are expressly provided. Though they are formulated differently, they contain the same contents. They enable everybody to raise a complaint

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<sup>142</sup> Court decision (C-544/09) of 15 September 2011, available in English at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=114009&pageIndex=0&doclang=EN&m ode=lst&dir=&occ=first&part=1&cid=453276>.



against a private broadcasting programme either to the media authority and/or to the broadcasting operator. So, everybody has the possibility to act in case-of-need.

- Participation in media operators/(self-)regulatory bodies

The Broadcasting Council (in the ZDF: Television Council) is the uppermost supervision committee of the German PSB and is responsible for programme control. It supervises the observance of the legal broadcasting order. In addition to this, the Broadcasting Council shall grant the free access to the programme of the PSB for all different socially relevant groups within the underlying concept of safeguarding variety.

Nevertheless, the Broadcasting Council does not determine about the programme planning, this is a job of the Director-General. The Broadcasting Council just has a counselling function. Important duties of the Broadcasting Councils are the election and choice of the Director-General, the supervision of the legally fixed programme principles, the election of the members of the administrative council and the approval of the household. The legal regulations concerning the broadcasting company councils are determined by the *Länder*.

According to this, the duties and the number of members of the Broadcasting Councils of the broadcasting stations vary in the different *Länder*. The Broadcasting Council consists of members of different social groups and organisations, and is mostly represented by functionaries (e.g., of the trade unions, women's associations, churches). The Broadcasting Council shall depict a cross section of the population. In every *Land*, an own media institution has been established. They serve as regulation authority for the private broadcasters.

## 2.2.10.2. Main Players in the Media Landscape

### 2.2.10.2.1. *Radio*

The radio is a frequently used medium in Germany, it comes right after the television. As already mentioned in the study of 2004, the radio market in Germany follows the federal state structure. Nation-wide broadcasting stations of the PSB as well as of the private broadcasting companies are of less importance. The „long time study mass communication of ARD and ZDF in 2010“ showed that there were 252 private radio stations with 54 national ones among them in Germany in 2010. The share of private broadcasting on the basis of the regional hearing duration sways in the single *Länder*. In 2009, the share of the market of the private broadcasting merely lay at 21.7 % in *Bremen*, while in *Sachsen* it lay at 55.9 %.<sup>143</sup>

While the PSB is financed by license fees, the private broadcasting finances itself by advertising and other commercial revenues exclusively. According to the "media analysis 2012 radio I", a daily average of 52.1 % of the German-speaking population, aged ten years or older, listens at least to one of the PSB radio programmes. In 2011, the public service radio showed a daily range of 50.2% (35.02 Mio.), the private radio a reach of 41.1 % (28.7 Mio.). The whole daily reach of the radio lay at 77.4% in 2011. That corresponds to an average daily listening duration of 185 minutes per person.

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<sup>143</sup> Information available at:  
[http://www.kek-online.de/Inhalte/dlm-band-45\\_vierter\\_konzentrationsbericht.pdf](http://www.kek-online.de/Inhalte/dlm-band-45_vierter_konzentrationsbericht.pdf).

**Table 55 DE: Main Radio Companies**

Major Groups	Ownership Structure (Shares %)	Main Radio Stations (Shares %)
ARD	PSB	Bayern1 NDR 1 SR WDR 4 SWR 4
- Axel Springer AG	Axel Springer Ges. für Publizistik mbH & Co.KG(50.1) Friede Springer (7) others (40.8)	Radio Hamburg (25.0) ANTENNE BAYERN 16.0 HIT RADIO FFH/planet radio/harmony.fm (15.0)
RTL Group	Bertelsmann (90.4) others (9.6)	104,6 RTL (100) RTL Radio – Die größten Oldies (100) Radio Brocken und 89,0 RTL (53.5) Hit-Radio Antenne Niedersachsen (49.9)
Hubert Burda Media Holding	Burda, Prof. Dr. Hubert (59.98) Furtwängler, Elisabeth (19.99) Burda, Jacob (19.99) Burda Betriebsführungsgesellschaft m.b.H. (0.04)	DONAU 3 FM (50) BB Radio (50) Ostseewelle (17.26) Radio Galaxy (10.5)
Madsack Verlagsgesellschaft	Dr. Erich Madsack GmbH (Komplementärin) 0.214 % Sylvia Madsack 20.896 % Ursula Maisel für Familiengesellschaft Koller 11.606 % Deutsche Druck- und Verlagsgesellschaft mbH 23.083 Gebrüder Gerstenberg GmbH & Co. KG 7.255 % 26 more limited partners (36.946 %)	Radio Brocken/89.0 RTL (21,9) Hit-Radio Antenne Niedersachsen (7,7) radio ffN (13,7) RPR1./bigFM (9,7)
Regiocast GmbH & Co. KG	medien holding:nord GmbH Axel Springer AG over 40 individual persons	90elf (100) Radio BOB! (100) RADIO PSR (100) ANTENNE MV (55.97)

Source: Information from company websites, Media-Perspektiven Basisdaten

**Table 56 DE: Market shares of Privates and ARD**

	Market share (%) 10 years and older	Market share (%) 14-49 agers
ARD (public service)	52.9	40.7
Privates	44.5	56.1
Others	2.6	3.2

Source: Media Analyse, ma 2012 Radio I

#### 2.2.10.2.2. Television

The television is still the most popular medium in Germany with an average daily reach of 71 % and 222 minutes of viewing duration per person.

**Table 57 DE: Daily usage of TV**

	Daily usage (in min)			Daily coverage of population (in %)		
	Adolescents and Adults (14y+)	Children (3-13y)	all viewers	Adolescents and Adults (14y+)	Children (3-13y)	all viewers
<b>2007</b>	223	87	208	73	58	72
<b>2008</b>	221	86	207	72	56	70
<b>2009</b>	226	88	212	73	57	71
<b>2010</b>	237	93	223	73	56	71
<b>2011</b>	236	91	222	72	54	71

Source: ARD Annual Report 2010, p. 382; Media-Perspektiven Basisdaten

In Germany a total of 202 nation-wide private television programmes are admitted by mid 2011 including 25 foreign-language programmes. All together are 136 programmes of private broadcasters on air, including a total of 19 full programmes, 12 German-speaking and 7 foreign-language programmes. The remaining 117 programmes are special-interest channels, of which another 14 are foreign-language channels. The number of organised nation-wide television programmes in German language has more than doubled since 2003.

The general usage of public service TV broadcasters in Germany remains nearly constant. From a total of 23 full and special-interest stations of the PSB, the transmission of six special-interest stations (EinsExtra, EinsPlus, Einsfestival, ZDFkultur, ZDFinfo and ZDFneo) is made exclusively in a digital way. On the German nation-wide television, special groupings have developed quite early. These consist of a group of several operators. The German RTL channels, united under the roof of Media Group RTL Germany is Europe's largest media entertainment company with a market share of 26.1 %. The

RTL Group SA with its 45 TV- and 32 radio stations is Europe's largest operator of private advertising-financed television and private radio. On rank two the ProSiebenSat.1 Media AG follows with a market share of 21.3 %.<sup>144</sup>

The total market share of the private TV channel providers in 2011 came to 58.3 %, the share of publicsector operators came to 41.7 %. Fittingly, in 2010 a private TV channel (RTL) achieved the highest viewers' market shares. If one adds up the audience shares of the eight most viewed programmes in Germany, they achieve a share of two thirds of all viewers.

**Table 58 DE: Audience share of selected TV channels of general genre**

TV channel	Audience Share (in %)				
	2007	2008	2009	2010	2011
ARD	13.4	13.4	12.7	13.2	12.5
ZDF	12.9	13.1	12.5	12.7	12.1
RTL Television	12.4	11.7	12.5	13.7	14.1
Sat.1	9.6	10.3	10.4	10.1	10.1
ProSieben	6.5	6.6	6.6	6.3	6.2
VOX	5.7	5.4	5.4	5.6	5.6
kabeleins	3.6	3.6	3.9	3.9	4.0
RTL II	3.9	3.8	3.9	3.8	3.6
Super RTL	2.6	2.4	2.5	2.2	2.2

Source: AGF/GfK-Television Research; Media-Perspektiven Basisdaten

In Germany there are four modes of transmission, cable, satellite, terrestrial (DVB-T) and Internet (DSL-TV). The distribution of the modes of transmission hardly changed during the last five years: Until July, 2011 the cable was still the most far-reaching transmission mode with 50.2 % (19 Mio. TV households), followed by satellite with 44.7 % (17 Mio.), and the terrestrial with 11.8 % (4.4 Mio.). DSL TV increases its reach up to 3 % (1.1 Mio.).<sup>145</sup>

In the field of digitisation of transmission paths, steady growths are to be registered. In contrast to 2010, now 42.5 % of the cable households receive digital TV, in 2010 there were just 37.8 %. Even more clearly this trend appears within the satellite households. There, the digital reception rate is already 86.4 %, in 2010 the figure was 79.1 %. This rate changed again in the end of April 2012, when the analogue satellite television was turned off and satellite reception is only possible in a digital way. Since the switch-over in 2009, the terrestrial television is already entirely digitally (DVB-T).

All together 67.8 % (25.5 Mio.) of the television households already receive digital television (2010: 61.7 %).

<sup>144</sup> Media-Perspektiven Basisdaten 2011.

<sup>145</sup> Digitalisierungsbericht (2011) der Medienanstalten.

### 2.2.10.2.3. *Press and Publishing*

The German newspaper market is the largest in Europe. Newspapers enjoy a high credibility in Germany. Information from the newspaper is awarded a higher substance than those from the Internet or television. Especially at regional level, the newspapers play an essential role. Regional subscription newspapers are Germany's newspaper species with the highest reach and print density with a daily sales figure of 13.9 Mio. copies. For the daily newspapers, a reach of 68.4 % in total is reported for the year 2011. According to this, more than 48 Mio. Germans - that is an average of seven out of ten Germans over 14 years - read a daily newspaper regularly.

351 different titles with a total circulation of over 23.8 Mio. copies are sold per date of publication (IVW: II. Quarter 2011)<sup>146</sup>.

These are broken down into 18.83 Mio. daily newspaper copies, 3.25 Mio. Sunday newspapers and 1.76 Mio. weekly newspapers.

In the daily newspaper market, a few publishing groups achieve high market shares.

Nevertheless, the circulation figures in the range of daily and Sunday newspapers decrease continuously. While in 2004 25.9 Mio. copies were sold, it were only 23.2 Mio. copies in 2009.<sup>147</sup>

Compared to the 2004 study, nothing in the ownership structure of German newspaper publishers has changed. Even today, the people behind the newspapers are known by name. Often they are family members, devoted to an far-reaching family tradition. Thus, the *Axel Springer Verlag AG*, Germany's largest and most important publishing group, is still mostly family owned.

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<sup>146</sup> Information available at:  
[http://www.bdzv.de/markttrends-und-daten/wirtschaftliche-lage/artikel/detail/zur\\_wirtschaftlichen\\_lage\\_der\\_zeitungen\\_in\\_deutschland\\_2011/](http://www.bdzv.de/markttrends-und-daten/wirtschaftliche-lage/artikel/detail/zur_wirtschaftlichen_lage_der_zeitungen_in_deutschland_2011/).

<sup>147</sup> [http://www.kek-online.de/Inhalte/dlm-band-45\\_vierter\\_konzentrationsbericht.pdf](http://www.kek-online.de/Inhalte/dlm-band-45_vierter_konzentrationsbericht.pdf).

**Table 59 DE: Major publishing Companies**

Major Group	Main Titels	Total Market Share
Axel Springer Verlags AG	Bild Die Welt Hamburger Abendblatt Berliner Morgenpost	19.6%
Verlagsgruppe Stuttgarter Zeitung	Stuttgarter Zeitung Märkische Oderzeitung Die Rheinpfalz Südwestpresse	8.6%
Verlagsgruppe WAZ	WAZ Westfälische Rundschau Neue Rheinzeitung Thüringer Allgemeine	5.8%
Verlagsgruppe M. DuMont Schauberg	Kölner Stadtanzeiger/Rundschau Kölner Mitteldeutsche Zeitung Berliner Zeitung Hamburger Morgenpost	5.5%
Verlagsgruppe Ippen (Münchener Zeitungsverlag)	Münchener Merkur Hessisch/Niedersächsische Allgemeine Westfälischer Anzeiger	4.2%
Verlagsgruppe Madsack	Hannoversche Allgemeine Zeitung Märkische Allgemeine Neue Presse	4.0%

Source: Media-Perspektiven Basisdaten information from company websites

**2.2.10.2.4. Online media (non-linear audiovisual (media) services; websites)**

In Germany there is a variety of websites that provide on-demand services. The main TV market players have their own video-on-demand services which offer the opportunity to follow-up viewing.

Art. 11 d (2) No. 4 RStV provides that PSB material of contemporary or cultural history can be provided without limitations in time, whereas generally all the other broadcast programmes have to be deleted from the website within seven days after their first linear broadcast.

In addition to the commercial broadcaster on-demand services, there are a number of other providers that offer their broadcast material via on-demand services against payment of a fee or monthly subscription. There is MSN Movies, Videoload, Alice Videothek and Maxdome (provided by the ProSiebenSat.1 Media AG).

There have been plans of RTL and the ProSiebenSat.1 Media AG to create a channel-overarching online-video platform, but the German competition authority rejected the establishment for reasons of prevailing market power.

**Table 60 DE: Demand of video files**

	Demand of video files (at least occasionally in %)			
	2008	2009	2010	2011
Overall	55	62	65	68
Video platforms	51	52	58	58
Webcasting	14	21	23	29
Simulcasting	12	18	15	21
Video podcasts	7	6	3	4

Source: ARD/ZDF Onlinestudie 2011, [www.ard-zdf-onlinestudie.de/index.php?id=312](http://www.ard-zdf-onlinestudie.de/index.php?id=312)

#### 2.2.10.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers

Currently, 1.26 Mio. of the digitised television households, use the premium cable TV service from *Kabel Deutschland*, 1.6 Mio. have a digital TV subscription of the *Unity Media Group*, *Kabel BW* has over 324,000 pay-TV subscribers and the platform provider *Sky* even has 2.76 Mio. direct subscribers.

In addition to this, Germany has a total of about 1.4 Mio. IPTV subscribers, of which approximately 1.3 Mio. subscribers use the *Entertain* service of *Deutsche Telekom*. *Alice TV* has 79,500 subscribers and *Vodafone* has a total of 25,000 TV IPTV customers (source: company data, state: June 2011).

The *Sky Deutschland Fernsehen GmbH & Co. KG* is represented on both satellite and cable platforms. With a reach of 2.759 Mio. subscribers (as of 30 June 2011) it is the market leader.

There are several cable operators in Germany.<sup>148</sup>

Like mentioned in 2004, *Kabel Deutschland* is still the leading cable operator (Cable Germany Sales & Service GmbH & Co. KG) with a range of 8.745 Mio. connected TV households and 1.264 Mio. premium TV-subscriptions (state: March 2011).

It is followed by *Unitymedia* (Unitymedia NRW GmbH und Unitymedia Hessen GmbH & Co. KG) with a range of approximately 4.5 Mio. basic cable customers, including 1.6 Mio. digital TV subscribers (state: June 2011).

The Platform *Kabel Kiosk* (Eutelsat visAvision GmbH of the satellite operator Eutelsat) has a potential audience of 3.5 Mio. households (state: February 2011).

*Kabel BW* (Kabel Baden-Württemberg GmbH & Co. KG) which was recently acquired by *unitymedia* reaches more than 2.3 Mio. cable subscribers and 324,000 have pay-TV subscribers (state: June 2011).

A similar range is reached by *tele columbus* (Tele Columbus GmbH), which supplies around 2.3 Mio. cable-connected television homes (state: August 2011).

With over 1 Mio. cable-connected television homes, *primacom* (PrimaCom Management GmbH) comes in last (state: August 2011).

<sup>148</sup> [http://www.kek-online.de/Inhalte/jahresbericht\\_10-11.pdf](http://www.kek-online.de/Inhalte/jahresbericht_10-11.pdf).



The HD + (HD PLUS GmbH, a subsidiary of SES ASTRA), with a range of 769,000 households (all households with HD + transmitters can be received) (state: March 2011) and the Music Television via Satellite– Platinum Stage Ltd, whose range is not specified.<sup>149</sup>

The latest television technology IPTV (Internet Protocol TeleVision), which transfers the audiovisual contents via a closed network digitally, is available in Germany. The three providers are:

**Table 61 DE: IPTV providers 2011 in Germany**

Provider	Network	Subscribers
Entertain (Deutsche Telekom AG)	DSL or VDSL	1.3 Mio
Alice TV (Telefónica Germany GmbH & Co. OHG)	- DSL	79,500
Vodafone TV (Vodafone D2 GmbH)	DSL	25.,000

Source: [www.kek-online.de/Inhalte/jahresbericht\\_10-11.pdf](http://www.kek-online.de/Inhalte/jahresbericht_10-11.pdf)

*2.2.10.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

The recently published results of the media analysis (ma) 2012 Radio I (March 2012) show consistently high levels of radio use in Germany. 58.43 Mio. people per day tune in a radio and stay tuned for more than four hours (about 250 minutes). So the daily reach increased up to 79.6 %.

The increase of the reach is even clearer when the younger ones are looked at: The young people between 10 and 19 years achieve a daily reach of 69.9 %, that means an increase by 3.7 % over the last two years (I ma 2010: 67.4 %). The high stability of the classic radio lies in its multi-channel capability. In particular, the mass distribution of smartphones and Tablet PCs ensures that the radio is always present and reaches the people even on the road.

There is a positive development in the range of advertising revenue. In 2010, the radio advertising revenue achieved 692,1 Mio. Euro<sup>150</sup>.

The programme development of the German television market was shaped by the strict cost management of all competitors in 2010, despite of the significant increase of the advertising revenue. Nevertheless, the private TV broadcasters could expand its audience share in 2010 again, this time to 58.3 %. As a consequence thereof, especially the private broadcasters could raise their advertising revenue. While the main broadcasters revenues nearly stay stable, the smaller programme broadcaster could raise their revenue up to 74.6 % in 2010.<sup>151</sup>

The second year in a row, the revenues of the sale of newspapers in Germany were higher than the revenues of advertising and promotion. The traditional rule that two thirds of the revenue come from advertising and one-third from the sale of newspapers is

<sup>149</sup> Information available at: [www.kek-online.de/Inhalte/jahresbericht\\_10-11.pdf](http://www.kek-online.de/Inhalte/jahresbericht_10-11.pdf).

<sup>150</sup> Zentralverband der deutschen Werbewirtschaft, Media Perspektiven Basisdaten 2011.

<sup>151</sup> Media Perspektiven 6/ 2011, Media Perspektiven Basisdaten 2011.

not valid any more since the first major economic and commercial crisis of 2001 to 2003, but the reversal of the figures is a sign of the structural changes within the industry.

**Table 62 DE: Audience statistics**

	2005	2010
Regional dailies (in mio.)	28	23
Television viewing (average min per day)	220	220
Radio listening (average min per day)	221	187

Source: ARD/ZDF Langzeitstudie Massenkommunikation

**Table 63 DE: Revenues in the range of media**

	Revenue 2005	Revenue 2010
Regional dailies (in mio. Euro)	4476.6	3637.8
Television viewing (in mio. Euro)	3929.6	3953.7
Radio listening (in mio. Euro)	663.7	692.1

Source: Zentralverband der deutschen Werbewirtschaft, Media Perspektiven Basisdaten 2011

### 2.2.10.3. Conclusion and Recommendations

The freedom of expression is a very valuable, legally-protected good in Germany, the safeguard of which is also explicitly enshrined in the Grundgesetz (the German constitution).

In addition to this, the rights of the media are guaranteed in particular by the duty of information by the authorities, free admission for press organs, the prohibition of prior censorship and the right to refuse to give evidence in relation to the protection of confidential sources. Especially the freedom of the media in its various forms plays a considerable role in Germany, and is continuously strengthened by the jurisdiction of the Federal Constitutional Court.

The access to information held by public authorities has improved. As can be seen from the development of the legislation in the field of freedom of information: unlike before, the IFG introduced the possibility to receive information irrespective of the proof of a legitimate interest. The right to access to information under the IFG exists without presuppositions and thus makes administration more transparent. Exceptions to the right to access have to be made evident to the applicant. Detrimental to the citizens right to information is, however, the fact that not all *Länder* have issued a regional IFG. Nevertheless, it should be noted that for example in *Bayern*<sup>152</sup> at least the respective municipal statutes provide for certain (local) information rights.

Still, freedom of access to information held by public authorities is not enshrined in the Grundgesetz. Art. 5 (1) Grundgesetz determines the right for every person to inform him-/herself without hindrance from generally accessible sources, but it does not provide for the right that an information source is made available.

<sup>152</sup> See Activity Report 2010-2011 of the BFDI p. 33.

As to the improvement of transparency and democracy in public activities, the right to access to information could be grounded as a positive participation right in the *Grundgesetz*. But also in cases in which third party interests are concerned by an application for information, the applicant's position is still inferior to that of the third party if the latter can refer to constitutional rights, as e.g. business secrets. Business and trade secrets are protected by the exemption clauses of the IFG itself and – besides this – enjoy constitutional protection. Due to this, a weighing of interests (which is not foreseen according to the IFG<sup>153</sup>) would have to go to the disadvantage of freedom of information. Although the protection of business and trade secrets is of great economic importance – as e.g. to the protection against spying out of technical know-how – the information interests – as e.g. considering alleged corruption or the use of public funding – have to get their appropriate attention, too.

With a view to technological development as well as to the changed expectations as well as the ways and means of the citizens to get access to information, public authorities should of their own accord, proactively provide (free) information to the public (fostering of open data and open government)<sup>154</sup>. A legal and nation-wide uniform obligation would be conceivable.

Regarding harmonisation and simplification of freedom of information policy, the IFG, UIG and VIG could be merged, as for instance recommended by the German Conference of the Commissioners for Freedom of Information<sup>155</sup>.

While in the area of television, radio and newspapers the user community has declined continuously in the last few years, the group of Internet users has grown considerably (2000: 23 %, 2010: 67 %).

In the most affected newspaper market, the progressive monopolisation within the means of horizontal concentration is controlled by media merger control limits. Till now, there are no negative impacts on the freedom of expression and journalistic diversity observed by the also increasing diagonal integration (cross-media ownership), which can especially be noticed in the range of daily press and the national television.

Although there is a significant decline in use, the traditional media benefits from the increased importance of the Internet. In particular, this gets clear if one regards the advancing use of radio broadcasting over the Internet, as well as the steadily increasing use of online newspaper subscriptions.

If one distinguishes the average use of the Internet in media and non-media contents, the mass media reaches 28 % of the adults (in the form of newspaper, radio and television) via the Internet. In the young target audience even 57 % use mass media content over the Internet.

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<sup>153</sup> Such a reservation, according to which information rights shall be balanced against business secrets interests, is foreseen in the IFG-*Bremen*.

<sup>154</sup> Sec. 11 of the IFG of *Bremen*, which is considered to be very progressive, provides for such a proactive information policy; BremIFG is available in German at:  
<http://bremen.beck.de/default.aspx?vpath=bibdata\ges\brifg\cont\brifg.htm&mode=all>.

<sup>155</sup> *Konferenz der Informationsfreiheitsbeauftragten in Deutschland*, IFK; statement available at:  
[http://www.vigwirkt.de/fileadmin/sites/default/files/Evaluation/VIG\\_Stellungnahme\\_IFK\\_100902.pdf](http://www.vigwirkt.de/fileadmin/sites/default/files/Evaluation/VIG_Stellungnahme_IFK_100902.pdf).

## GREECE

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### 2.2.11. Greece

#### 2.2.11.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.11.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The Greek Constitution from 1975 guarantees freedom of expression. Article 14 states that every person may express his thoughts orally, in writing and through the press in compliance with the laws of the state.

- Specific safeguards and rights for the media

Article 14 also states that the press is free; censorship, as well as the seizure of newspapers and other publications before or after publication, is prohibited.

- Freedom to receive and to access information

- Specific rights for the citizens

The Greek Constitution (Art. 10(3)) and the Code of Administrative Procedure (Art. 5) stipulate that citizens have the right, upon written request, to access administrative documents held by public authorities. Citizens also have the right to access private documents, insofar as a 'special legitimate interest' can be established. The right of access cannot be exercised if the document at hand concerns the private or family life of others, or if the confidentiality of the document is safeguarded by specific legal provisions. Authorities may deny access to documents that concern the discussions of the Ministerial Council or when access can obstruct investigations of criminal or administrative violations.

Article 14 of the Constitution also guarantees the right to reply to errors published in the press or broadcast.

In balancing between competing rights with regard to the freedom of expression in the media and the freedom of information, national courts apply a number of criteria and principles. Initially, the media must inform the public about issues and aspects that are in the public interest (not merely to satisfy any kind of curiosity of its audience). The notion of 'justified interest' is invoked to assess the content of articles or news that is of interest to the society at large. In such cases, media content that interferes with one's private life or is sharply critical of one's actions may be justified by the need to inform the public on a matter of broad social interest. It is not always straightforward what or whose actions involve 'justified public interest', and Greek courts have not specified consistent criteria to determine this.<sup>1</sup>

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<sup>1</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

- Safeguards on regulatory authorities

In 2001, the Greek National Council of Radio and Television (NCRTV) was recognised by the Constitution, in Art. 15(2), as having an independent status.

- Safeguards on “universal service”

According to the Constitution of 1975, ‘radio and television will be under the direct control of the state’<sup>2</sup>. Although ‘direct control’ did not necessarily mean ‘state monopoly’, the state monopoly was justified on the grounds of the limited frequencies being available, as well as the need to provide full coverage for such a mountainous country with its many islands.

The Greek constitution provides in Article 15 that audio-visual media must ensure quality demanded by the social role of radio and television and the cultural development of the country.

#### 2.2.11.1.2. *Media order (de lege lata and de facto)*

- “Market Entry”
  - Licensing schemes; remit psm; notification for print publications

The basic operational framework of private television and local radio is defined by the Law 2328/1995<sup>3</sup>, in essence the first serious attempt to regulate the commercial broadcasting market effectively.

Law 2644/1998<sup>4</sup> made provision for the supply of broadcasting subscription services and regulated all new pay-TV services regardless of their process (digital or analogue) and means of broadcast (terrestrial, cable or satellite).

In general terms, in order for a natural or legal person to enter the broadcasting market they must obtain a license from the government. A competitive licensing procedure exists only for terrestrial transmission, due to the scarcity of specific frequencies. Yet, anyone applying for a satellite transmission licence must submit an application to the NCRTV. Licences are only granted to limited companies (S.A.), the shares of which should be registered. In an attempt to prohibit the creation of dominant positions, Law 2328/1995 made provisions for limitations of the holding of licenses, but these provisions have now been updated by Law 3592/2007<sup>5</sup>. This new Law provides for a number of issues, among them licensing for analogue television, digital terrestrial television (DTT) and media concentration.

Law 2863/2000<sup>6</sup> provided that the NCRTV is an independent authority and has the sole responsibility for:

- granting, renewing or revoking licenses for radio and TV services;
- practicing control on radio and TV services, both state and private, on whether they adhere to the relevant legislation;

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<sup>2</sup> Alivizatos, 1986; Dagtoglou, 1989.

<sup>3</sup> FEK (Official Gazette) A' 159/1995.

<sup>4</sup> FEK A' 223/1998.

<sup>5</sup> FEK A' 161/2007.

<sup>6</sup> FEK A' 262/2000.

- ensuring political and cultural diversity in mass media in cases where Laws 2328/1995 and 2644/1998 are breached;
- supervising free competition in the mass media industry (together with the Hellenic Competition Commission and National Telecommunications and Post Commission);
- imposing fines and administrative measures;
- examining requests for remedies for personal insults caused by mass media.

Law 1730/1987<sup>7</sup> united public radio and television into a single corporate body titled ERT (*Elliniki Radiofonia Tileorasi* - Hellenic Broadcasting Corporation S.A.). As stipulated by law, the mission of ERT S.A. is the organization, the exploitation and the development of state radio and TV, as well as their contribution to public education and entertainment, as well as the presentation of the activities of the Greek Parliament. It is further provided that state radio and TV should reach diverse social groups and cover a wide range of fields, since their purpose is not to make profits but to promote the public interest.

The law does not foresee any specific requirements for other types of media, so general rules apply to the print media or internet web sites.

- Media pluralism/ownership; competition law aspects

The constitutional basis of media ownership regulation derives from Article 14 (9) of the Greek Constitution, which outlines the obligation for media outlets to register ownership status and information regarding the financing of the outlet. The same article provides for the setting up of laws that would prohibit concentration of media ownership. In effect, *Law 3592/2007* titled '*New Act on Concentration and Licensing of Media Undertakings*' and known as the "*Law of the Basic Shareholder*", was passed by the Greek Parliament in late 2007. Regarding media concentration the 2007 law also updated the strict ownership rules that had been passed with *Law 2328* from 1995. In particular, *Law 2328/1995* stipulated that a natural or legal person could hold only one broadcast licence and only up to 25% of the capital of the company, while ownership of more than one electronic mediums of the same type was prohibited. The same rules applied to relatives of natural persons of up to the fourth degree. Concerning cross-media ownership, a 'two out of three' rule existed, meaning that a single company or individual cannot participate in more than two traditional media categories (TV, radio or newspapers). The participation of non-Europeans in the shareholding of media companies was also limited to 25% of the capital.

However, this strict regulatory framework has not prevented high levels of concentration of media and cross-media ownership, as evidenced by the control of electronic media through powerful publishing interests. For example, *MEGA Channel*, one of the main terrestrial television channels, is owned by Teletypos SA, a company controlled by a consortium of the major newspapers publishers in Greece, like Pegasus Publications SA (owning 26.82%), Lambrakis Press SA (22.11%) and Tegopoulos Publications SA (2.68%). Teletypos SA also have a 40% holding in Multichoice Hellas SA, which operates pay-TV digital satellite service "Nova", a powerful player in the film and sports rights markets.

In light of evidence of concentration of media ownership and cross-media ownership, especially between publishing and television interests, the new law attempts to address

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<sup>7</sup> FEK A' 145/1987.

the dominance of the powerful publishing groups and private broadcasters, by re-emphasizing the provisions made by Law 2328/1995. In particular, *Law 3592/2007* sets limits for the concentration of media ownership in the print media industry. Concerning the press industry, the law provides that a person and his relatives (up to the fourth degree) may own or participate in only:

- a maximum of two daily political newspapers distributed in the main cities of Athens, Piraeus and Thessaloniki;
- one daily financial paper and one daily sport paper circulated in Athens, Piraeus or Thessaloniki;
- two non-daily provincial newspapers issued in different regions;
- one Sunday publication.

Concentration of ownership is also restricted in the broadcasting industry. According to *Law 3592/2007*, a joint stock company can own up to a 100% of a television station and/or one radio station. However, ownership of more than one electronic information media company is prohibited. The "*Law of the Basic Shareholder*" permits the parallel acquisition of shares in more than one media companies under specific qualifications: the prospective owner should not be among the 10 basic shareholders of the company. Further, the prospective owner's market share in both companies should not exceed 35% for the same media category (for example, two TV stations) or 32% for different media (for example, one newspaper and one TV station).

Media owners, partners, main shareholders or management executives may not act in a similar capacity in an enterprise that undertakes public administration.

Thus the scope of application of *Law 3592/2007* covers the horizontal and vertical concentrations between media enterprises that affect the broadcasting and print media markets. Concentrations in other markets that are relevant for the media (i.e. the market of content production, the market of rights acquisition, the market of content distribution or the press printing market) and concentrations that involve media companies operating at different levels of the supply chain (i.e. upstream and downstream markets) are not specifically assessed on the basis of *Law 3592/2007*. This is also the case regarding concentrations between media enterprises and undertakings in other sectors of the economy, concentrations that implicate media enterprises with an online presence only, and the evaluation of the vertical effects that the concentrations coming under the scope of *Law 3592/2007* may produce. All the aforementioned cases fall under the auspices of general competition law, whose main objective is to provide open and fair competition (economic consideration), rather than explicitly safeguarding pluralism and diversity (socio-cultural consideration).

*Law 2644/1998* limits licence holders in order to secure pluralism and to avoid the creation of dominant market positions. For example, an interested party may only participate in one company that provides subscription-based services using the same means of distribution as well as a second company that uses different means of distribution. Furthermore, any natural or legal entity can acquire a maximum of 40% of the total capital of one subscription-based television (or radio) company. For further participation in other media industries (i.e. cross-media ownership), the provisions of *Law 3592/2007* are applied.



- Legal framework for psm; ability to fulfill their tasks

In the case of broadcasting the state not only intervenes but is the active agent. Greek broadcasting was established, as in most European countries, as a state monopoly which remained after the restoration of Parliament. Therefore, the state became the sole agent of the broadcast media. The government manipulation of state TV news output is a suitable example of the dirigist role of the state, since it has traditionally reflected and reinforced government views and policies<sup>8</sup>.

As a result, ministerial censorship was common practice and state control greater than was the case elsewhere. The general pattern of the Greek state broadcasting media was (and still is) that a transfer of political power will be followed by an equivalent change-over in the state media institutions' executives. The outcome, especially in the past, was news and editorial judgments of particular importance in close agreement, if not identical, to the government announcements on a whole range of policies and decisions. Thus, it is not surprising that the responsible posts in state broadcasting have come and gone with great frequency, and when the major political parties, New Democracy (Conservatives) and PASOK (Socialists), come to power they usually adopt a policy they strongly criticised when they were in the Opposition<sup>9</sup>.

ERT is funded by a combination of the licence fee and advertising revenues, but as advertising income has been falling steadily following market liberalisation, the main source of *ERT's* income is in fact the licence fee. However, the annual mandatory licence fee at just over 50 Euro is one of the lowest in Europe and cannot therefore guarantee the broadcaster's financial independence. This creates a severe problem. The licence fee is arguably aimed at protecting *ERT* from financial pressures and competition, so that the broadcaster can be accountable to the public and fulfil its public service remit by offering quality informational, educational and entertainment services. But *ERT* has difficulty to fulfil its public service remit and ensure accountability for as long as it is financially weak. For example, its weak finances prevent it from launching digital and online services, and therefore conveying content via various platforms (digital, online, mobile) to reach all citizens in the information society<sup>10</sup>.

*Law 1730/1987* recognises the administrative and financial independence of public broadcaster *ERT* (Art. 1(3)). However, whenever there has been a change in government this has regularly been followed by shifts in the composition of *ERT's* managing board<sup>11</sup>. This demonstrates that selection has for the most part been based on political criteria and affiliation. The government has regularly exercised the possibility to exert influence on *ERT's* managing board by appointing most of its members. *Law 3878/2010*<sup>12</sup> which brought changes to *ERT's* executive structure did not entail any modifications in this regard. The law provided for the separation of the post of the president and of the managing director but required both to be appointed by a joint decision of the Minister of Finance and the Minister of Culture and Tourism (MCT) (Art.1). Pursuant to *Law 3965/2011*<sup>13</sup>, the MF and the MCT are also responsible for appointing four members of *ERT's* board whereas *ERT* employees elect one board member as their representative.

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<sup>8</sup> Papathanassopoulos, S. (1990) 'Broadcasting, Politics and the State in Socialist Greece', *Media, Culture and Society*, 12 (3), pp. 338-97.

<sup>9</sup> Ibid.

<sup>10</sup> Iosifidis, P. (2010) (ed.) *Reinventing Public Service Communication: European Broadcasters and Beyond* (London: Palgrave Macmillan).

<sup>11</sup> Papathanassopoulos, 2010.

<sup>12</sup> FEK A' 161/2010.

<sup>13</sup> FEK A' 113/2011.

Law 3965/2011<sup>14</sup> provided that all public enterprises in Greece must be governed by 7-member managing boards.<sup>15</sup>

In the era of the dominance of private television such a practice is rather absurd. However, the political affiliation of the executives of the public broadcaster is self-evident as all parties in the Opposition still accuse the government of the day-to-day control of the news output. In this sense, it could be said that public service broadcasting never really existed in Greece. The troubled political history of the country formed a 'state' rather than a 'public' broadcaster. To understand this, one has to note that the license fee is not collected directly from the TV households, but from the very beginning through the electricity bills. In this sense there was never a license fee in a Western European way. By and large, in Greece the public broadcaster was unable to function according to the public service obligations evident in territories like the United Kingdom, Germany and Scandinavia.<sup>16</sup>

Alongside the aforementioned political influences that have impacted on *ERT's* governance, the Greek state broadcaster has also suffered from the austerity measures the government has recently adopted. In a midst of a serious economic crisis facing the country, substantive reductions in labour costs and operational expenses have placed *ERT* under severe strain and could substantially undermine its ability to operate in the public interest. In August 2011, the then government spokesman announced an overwhelming plan for *ERT's* restructuring, including measures such as reducing the number of *ERT* TV and radio channels and placing greater emphasis on the Internet and multimedia services. Whilst one would welcome the government's firm commitment to implement a policy of cutting down and rationalising expenses on a chronically failing company, nevertheless the changes do not address fundamental questions regarding the role of public service media in society and the characteristics that should define them. The intention behind the plan is to convert a 'state' broadcaster into a 'public service' media, but the announced measures do little to reduce undue pressures and influence on *ERT's* operation from the political elite. Meanwhile, excessive emphasis on competition and efficiency may jeopardise the very essence of public service media, that is, the fulfilment of a clear public service remit and the offering of quality informational and educational services that commercial operators are arguably unable to offer.

- The role and functioning of regulatory authorities in these respects

Law 2863/2000<sup>17</sup> established the status of the NCRTV as an independent authority overseeing the broadcasting sector. However, as will be shown below, from its inception, the *NCRTV* was not given full autonomy and its role until today remains mainly consultative.

The NCRTV has the mandate to guarantee that public and private broadcasters comply with domestic and European legislation, and can impose administrative sanctions in case of violations. The Council is responsible for the supervision of broadcast content regulation and is assigned with the task of licensing the radio and television channels transmitted by terrestrial, cable and satellite networks in line with pre-defined criteria. As

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<sup>14</sup> FEK A' 113/2011.

<sup>15</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

<sup>16</sup> Papathanassopoulos, S. (2010) in Iosifidis (ed.) *Reinventing Public Service Communication: European Broadcasters and Beyond* (London: Palgrave Macmillan).

<sup>17</sup> FEK A' 262/2000.

such, the role of the NCRTV remains limited to ensuring compliance with domestic and European Union provisions.

The Council is a seven-member body, consisting of a president, a vice president and five members, all appointed by the Greek Parliament. All seven members are elected by the Conference of Presidents, a cross-party parliamentary body, with a 4/5 majority upon nomination by the governing party. In the search of candidates meeting the 4/5 majority, this procedure has caused significant delays in the renewal of the Council members. This has resulted in the automatic extension of the term of office of the NCRTV's past members, raising serious concerns about the legality of the Council's decisions and independence.

Meanwhile, the limited expertise of the members of the board, combined with their part-time term of employment has devalued the performance of the NCRTV. Other factors inhibiting the effectiveness of the Council are the lack of financial independence, and insufficient personnel and information technology equipment. The NCRTV appears to be unable to establish itself as an authoritative body that effectively regulates the media and supports media freedom. This stems mainly from the behaviour of the dominant political forces, which have been ambivalent with regard to promoting the Council's independence. This is demonstrated in the politicised procedure for the appointment of the members of the NCRTV's board. Another example of the NCRTV's inability to effectively regulate the market relates to media ownership. The Council indeed publishes information on media ownership and shareholding, but does not really engage in a vigorous assessment of their compatibility with the law.<sup>18</sup>

The national Committee of Electronic Means of Communication (*EEHME*) monitors the quality of public and private audiovisual services and reports to the NCRTV.

The *Hellenic Competition Commission (HCC)*, which was set up in 1977, but was only awarded an independent status in 1995, is an authority consisting of eight members and charged with applying competition rules in the media and communications industry (Law 3592/2007). The president and vice-president are selected by the Parliament's Conference of Presidents and are appointed by the Ministry of Development, Competitiveness and Shipping (MDCS), while the remaining six members are directly appointed by the MDCS (Art. 12(3) Law 3959/2011<sup>19</sup>). The *HCC* guarantees the open operation of the market and applies the competition law, the principal source of which is Law 703/1977<sup>20</sup> as amended by Law 3371/2005<sup>21</sup> and Law 3959/2011. Together with the *NCRTV*, the authority is responsible for the implementation of *Law 3592/2007* on the 'Concentration and Licensing of Media Undertakings'.

Similarly to competition authorities operating in other European countries, the *HCC* pursues the view that the public interest is best met through applying market mechanisms to electronic communications. This emphasis on industrial and economic issues makes the authority less keen to focus on socio-cultural issues and values like the editorial independence of the media or freedom of expression. The decisions of the *HCC* largely base their reasoning on economic aspects.

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<sup>18</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

<sup>19</sup> FEK A' 138/2011.

<sup>20</sup> FEK A' 278/1977.

<sup>21</sup> FEK A' 178/2005.

The *National Telecommunications and Post Commission (NTPC)* is an independent administrative authority that regulates, supervises and monitors the electronic communications and postal services market in Greece. The *NTPC* consists of nine members, including the President and two Vice Presidents responsible for the sectors of electronic communications and postal services respectively. According to Law 3371/2005<sup>22</sup>, the President and the Vice Presidents are appointed by the *Council of Ministers*, upon proposal by the *Minister of Transport and Communications* following the opinion of the *Special Permanent Committee on Institutions and Transparency* of the Parliament. The *NTPC's* other six members are appointed by the *Minister of Transport and Communications*. According to Article 12 of Law 3431/2006<sup>23</sup>, the *NTPC* regulates issues related to: the definition of the relevant markets, products or electronic communications services; and the assignment and obligations of operators with significant market power in the above-mentioned markets in accordance with national and EU legislation. *NTPC* also carries out spectrum monitoring. Moreover, the *NTPC* is responsible for the application of *Law 703/1977* on the control of monopolies and oligopolies and the protection of free competition. This law was amended by *Law 3373/2005* to incorporate the EC provision on pre-notification of mergers. It also incorporates *Articles 81 and 82 of the EC Treaty* in accordance with *Council Regulation 1/2003*, in relation to the activities of electronic communication undertakings.<sup>24</sup>

The *NTPC* enjoys financial autonomy and consists of members that demonstrate a high degree of expertise. It is therefore regarded as an effective and influential regulatory body. However, similarly to the *HCC*, its decisions are based on the economic reasoning, neglecting socio-cultural aspects of the media and communication sectors.

- “Pursuit of Core Activity”
  - Ordinary law safeguards for journalistic activity

In general terms, audiovisual media content is subject to state regulation and owners of broadcasting licences should adhere to certain rules, whereas the print media content is largely self-regulated on the basis of a variety of codes of ethics (alongside requirements of general civil and criminal statutory law)<sup>25</sup>. The regulatory and self-regulatory forms of content control also apply to the electronic versions of newspapers and magazines, as well as the online radio and television channels. But there is currently regulatory uncertainty regarding the extent to which news content in blogs should be subject to regulation. The disciplinary councils of the Union of Journalists of Daily Newspapers of Athens and of the Union of Journalists of Daily Newspapers of Macedonia-Thrace investigates alleged breaches of the code mainly on the basis of specific complaints.

In line with their constitutional recognition, the freedom of expression through the media and the right to information are generally accepted as media policy principles. Yet, in practice, they have not been at the core of the formulation of media policy objectives and in regulatory implementation in Greece. References to the freedom of expression and the right to information have been almost absent from media policy documents and elite discourse. What does prevail, instead, in Greek policy debates, is the declared intent to render the media free and independent from the multiple political and economic pressures that have shaped it. In the name of democracy, successive governments have

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<sup>22</sup> FEK A' 178/2005.

<sup>23</sup> FEK A' 885/2006.

<sup>24</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

<sup>25</sup> Iosifidis, 2011.

since the early 1990s – the time when liberation of the broadcasting market occurred - repeatedly expressed their commitment to combating the interweaving of interests between the political and powerful media interests. Courts both at the national and the European level play a crucial role in shaping the law affecting the media through statutory interpretation. Individuals whose respect for their personality, reputation, private/family life, etc. has been violated by the media can make a case to the courts. The Greek Constitution does not prioritise in abstracto any one right over another. Instead, competing rights claims must be balanced vis-à-vis one another ad hoc and in relation to the context of each case at hand. Domestic courts have emerged as increasingly important norm setters in areas that are directly linked to the freedom of expression and the freedom of imparting and receiving information through the media. While they are the central fore where conflicts concerning journalistic freedom are resolved, nonetheless, their decisions are rarely invoked by political decision-makers when they formulate laws and policies.<sup>26</sup>

The European Court of Human Rights (ECtHR) constitutes an alternative platform for journalists and individuals to seek correction for the infringement of their rights. Strasbourg jurisprudence has challenged domestic courts' case law on a number of occasions. However, the ECtHR's rulings have not contributed to broader domestic legal reforms as far as prevention of new violations of Article 10 of the European Convention on Human Rights (ECHR) on freedom of expression and freedom of information is concerned. Similarly, the EU Charter of Fundamental Rights and in particular its provisions on the freedom of expression and media freedom have not had a significant impact on domestic media policy.<sup>27</sup>

- Specific positive content obligations

Concerning the preservation and promotion of socio-cultural objectives, and as provided by the "Law of the Basic Shareholder", the NCRTV may grant licences for commercial TV and radio stations only in cases where the commercial outlets serve the "public interest". In this sense, the commercial stations are required to provide high-quality programmes, objective information and news reports, promote cultural development and diversity.

- Funding schemes for specifically desired content

No such funding schemes exist in Greece.

- Political advertising and/or broadcasting time

Greece allows political advertising, but foresees certain legal restrictions to avoid the discriminatory character of the practice. This includes limits on the maximum election expenditure that is permitted by the law. Political parties in Greece are usually granted free airtime to present their programmes, normally in the format of short advertising spots. As far as the criteria and principles guiding the allocation of free airtime are concerned, in Greece, allocation of free airtime is made on the basis of the principle of "analogic equality" that is in analogy with their performance at the previous elections also taking into account the need for all political parties to inform the public about their political programmes and ideas. In Greece, paid political advertising of political parties is

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<sup>26</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

<sup>27</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

permitted, but there is a permanent and wide-ranging ban on the political advertisement of persons<sup>28</sup>.

As far as the rules regarding political pluralism are concerned, especially during pre-election periods, these are also monitored by the NCRTV. According to these rules, media coverage of political parties is determined on the basis of their parliamentary representation (Arts 1(1) and 3(22) Law 2328/1995). The extent to which these rules promote political pluralism though is questioned: the required exposure of political parties specifically applies to their coverage in the news, disregarding other forms and channels of political information and communication in the media, while in a pre-election period, it is based on the agreement reached by a cross-party committee. Besides, reporting the percentage of news time allotted to each political party, which is contained in the political diversity reports issued by the NCRTV, tells us little about how inclusive and balanced is the airing of the different political views and positions that define public debate. The substantive lines of disagreement may not be defined by political party positions but by the stances of different kinds of political and social actors depending on the issue that is covered<sup>29</sup>.

- Codes of conduct and their organisational framing

Besides the press, self-regulation was also expected to be an important means for defining and respecting a set of principles and rights in news and other programme content in the audiovisual media. As will be shown in detail below, comprehensive media legislation that was introduced in the 1990s provided for the creation of self-regulatory codes of conduct to be adopted by a variety of stakeholders, such as journalists, advertisers and commercial broadcasting.

The NCRTV can draft codes of conduct for advertising and news and entertainment programmes and has from time to time provided politicians with recommendations, which have occasionally been taken into account. On the whole, however, its involvement in the formulation of normative rules has been marginal or non-existent.

Nevertheless, the Code of ethics for journalists and audiovisual programmes was decreed by the NCRTV and published in 1990 as part of a collective contract signed by the Union of Journalists of Daily Newspapers of Athens (ESIEA) and the management of the Greek Public Broadcaster ERT.

The journalists do not accept any advantage, benefit or promise of benefit offered in exchange for the restriction of the independence of their opinion while practicing their function.

The Code of ethics for journalists and audiovisual programmes applies to public broadcasting - national and local - as well as to private radio and television stations and stipulates further that broadcast programmes must be of high quality and promote the national culture; news and factual programmes should be accurate and conform to reality; the Constitution, laws and institutions of the country must be respected; the writing in the programmes and their presentation must carefully conform to the grammatical rules of the Greek language; during the programmes, the rule for both

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<sup>28</sup> See [http://www.rtdh.eu/pdf/20060517\\_epra\\_meeting.pdf](http://www.rtdh.eu/pdf/20060517_epra_meeting.pdf).

<sup>29</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).



presenters and guests is to be well-mannered, especially when the programmes are meant for, or could be watched by, under-age children<sup>30</sup>.

In addition to the above code, a Code of conduct for news and other political programmes for journalists working for broadcast media was ratified by Presidential Decree 77/2003<sup>31</sup> of March 2003. This code of conduct was drawn up in accordance with the procedure set out in Article 3(15) of *Law 2328/1995*.

It applies to all radio and television broadcasts, both free-to-air and subscription services, and aims at the protection of individuals' rights and respect for public order, pluralism and democracy, within the framework of the Greek constitution. The code of conduct regulates specific issues relating to the presentation of news bulletins, reporting on legal proceedings, the protection of the presumption of innocence of the accused, as well as the protection of minors, especially when children or adolescents are involved in criminal acts or accidents. Special concern is demonstrated for the protection of private life and of the rights of individuals who participate in radio and television programmes and talk shows. According to the new rules of conduct for news reports and political programmes, the broadcasting of information acquired through illegal telephone bugging, secret microphones or cameras is forbidden. It is also explicitly stipulated that the broadcasting media are bound to respect and not to transmit aggravating comments regarding the refusal of an individual to participate in a news programme.<sup>32</sup>

News should be presented with due accuracy and impartiality. Events must not be confused with personal views expressed by journalists during a news or political programme. The broadcasting of breaking news must be restricted and take place after careful consideration. Special attention is given to the presentation of violence and the reporting of crimes, criminal techniques and terrorist acts. Such reporting must in no way encourage imitation. Also, it is explicitly laid down that reporters' investigations must not be a substitute for police inquiries and interrogations. During the coverage of protests or party political events it is forbidden to use methods that encourage misleading the audience.<sup>33</sup>

The promotion of the professional interests of journalists employed in newspapers and the electronic media is ensured through the establishment of four regionally organised unions, of which two are the most prominent: the Union of Journalists of Daily Newspapers of Athens (ESIEA) and the Union of Journalists of Daily Newspapers of Macedonia-Thrace (ESIEMTH). The Periodical and Electronic Press Union (ESPIT) represents journalists who work for magazines and the online media. Grouped under the Pan-Hellenic Federation of Journalists' Unions (POESY), the unions' principal aim is to negotiate labour contracts, wages, employment conditions and social security benefits with the state and the employers. The unions are also tasked with supervising journalists' ethical performance, self-regulating journalists' professional behaviour, and protecting the principles of journalistic autonomy and editorial independence. Relevant here is the Code of Conduct of Greek Journalists, decreed by the NCRTV and published in 1990 as part of a collective contract signed by the ESIEA and the management of the Greek

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<sup>30</sup> See International Journalists' Network.

<sup>31</sup> FEK A' 75/2003.

<sup>32</sup> Kostopoulou, M. (2003) Decree No. 77/2003 "Code of conduct for news and other political programmes", Official Journal A, 28 March 2003, published in IRIS legal observations of the European audiovisual observatory, IRIS 2003-7:10/20. Available at: <http://merlin.obs.coe.int/iris/2003/7/article20.en.html>.

<sup>33</sup> Kostopoulou, M. (2003) Decree No. 77/2003 "Code of conduct for news and other political programmes", Official Journal A, 28 March 2003, published in IRIS legal observations of the European audiovisual observatory, IRIS 2003-7:10/20. Available at: <http://merlin.obs.coe.int/iris/2003/7/article20.en.html>.



Public Broadcaster ERT. The rules in the code apply both to public and private broadcasting channels<sup>34</sup>.

The disciplinary councils of the aforementioned unions investigate alleged breaches of the code *ex officio*, and have the power to impose penalties (i.e. reprimands, suspension of membership or expulsion) on journalists found guilty of breaches, such as defamation, distortion of facts or anti-collegial behaviour. It should be noted that it is not mandatory for a journalist to be a member of a professional union, while there are a number of requirements that must be fulfilled before qualifying for entry, such as a minimum of three years of employment as a journalist. As the code and the imposition of penalties apply only to members, self-regulation through the code is limited.<sup>35</sup>

On another issue, the tasks of the journalists are not always clear, despite the drafting of the code of ethics. For example, in Greece it is incompatible for journalists to hold more than one post, especially if the second post is not related to the function of journalism. Specifically, it is not allowed for journalists to be holders of a stake in a media and/or advertising company, or participate in public relations companies, or relate with political offices. However, in practice some journalists do. The *Journalists Union (ESIEA)* is aware of the problem, but has only recently started drafting principles for journalists addressing it. *ESIEA* has initiated negotiations with the relevant Minister. If and when these principles are enforced they will complement the code of ethics.

In the midst of an economic crisis in 2011-2012 Greek journalists working in public broadcaster *ERT AE* went on a prolonged strike as many of them faced short-term contracts, low salaries, and even redundancies as there was wide speculation that *ET1* would close down. In addition, many journalists working in private media felt their jobs insecure and in fact some were made redundant following the closure of commercial television channel *ALTER* in early 2012. There have been reported arrests of leaders of the Greek journalists' trade unions, apparently carried out in direct response to trade union actions. It should be noted though that Greece has ratified the International Labour Organisation (ILO) Convention of 1987 and has committed itself to respect the principles of freedom of association.

- The role and functioning of regulatory authorities in these respects

The development of the aforementioned self or co-regulatory mechanisms – code of ethics of Greek journalists; code of conduct for news and other political programmes - has provided a valuable alternative to governmental regulation. Of course, one could argue that, as the above codes have been elaborated by the regulatory agency *NCRTV*, they cannot be considered as purely self-regulatory mechanisms. Instead, they can be considered as cooperative regulatory measures in the meaning of a combination of non-state regulation and state regulation in such a way that a non-state regulatory system links up with state regulation ('co-regulation').

The Hellenic Data Protection Authority (HDPA), governed by a seven-member plenary, is the independent administrative body which oversees the implementation of regulations referring to the protection of personal data against processing and the privacy of

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<sup>34</sup> The provisions of the Code of ethics for journalists and audiovisual programs in terms of journalists are to be found in <http://www.esiea.gr>.

<sup>35</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

individuals<sup>36</sup>. The HDPa is primarily tasked with the granting of permits for the collection and processing of public figures' sensitive data for journalistic purposes. However, the authority openly refrains from granting such permits, as it considers their provision a repressive measure against the press, which is prohibited by the Constitution<sup>37</sup>. The HDPa is also responsible for examining complaints and issuing decisions on alleged breaches of data protection legislation. In examining such cases, the authority seeks to balance the freedom of expression and the service to the public's interest in information with an individual's right to privacy.<sup>38</sup>

- Distribution Aspects
  - Access to frequencies

Law 2863/2000 provided that the regulatory agency NCRTV has the sole responsibility for granting, renewing or revoking licenses for terrestrial transmission of broadcasting services.

- Access to distribution networks and control of actual conditions

The access to the distribution networks of cable and satellite is not regulated by law. It is a matter of private legal agreements between the operator of the network and the broadcaster. In the majority of such agreements the network operator pays to the broadcaster for the right to distribute his programmes. The circulation instruments for print media are not regulated by law.

- Must-carry/must-offer rules for electronic media

No such rules exist in Greece.

- Role of platform operators

ERT is active as a network operator and according to Law 3592/2007, commercial analogue TV broadcasters are encouraged to collaborate with ERT in forming a single multiplex operator company that will act as the network operator for the whole Greek Digital Terrestrial Platform. Typically, the venture was politicised. One of the main points of contention for opposition parties for this new ERT's digital subsidiary was that in this way ERT Digital would be a mixed public-private company, with the state retaining a 51% stake. The Opposition parties charged that this signalled the gradual beginning of the end of the public nature of the public broadcaster since private investors would participate in its capital.

The private terrestrial broadcasters in Greece accuse the government of giving the 'green light' to the public broadcaster to enter the digital terrestrial landscape and allege that they are left only with promises. In effect, the first Law that deals with the issue of digital TV (independently of platform such as satellite, cable, terrestrial or IPTV) is Law 3592/2007 which makes a clear distinction between platform, or multiplex (network) operator and content provider. The platform or multiplex operator is under a general

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<sup>36</sup> Law 2472/1997, transposing Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23/11/1995, p. 31; see also Law 3471/2006.

<sup>37</sup> see Art. 14(2) of the Greek Constitution and HDPa decisions no 26/2007, para. 11, no. 17/2, para. 18 and no. 63/2010, para. 6.

<sup>38</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

license regime, provided that the undertaking/company is registered by the *National Telecommunications and Post Commission*. The Ministry of Transport and Communications and the Ministry of Press and the Media (renamed Secretariat General of Mass Media) are responsible for establishing the digital frequencies map and plan for the relevant assignments and allotments. The Law makes it possible for licensed television stations to digitally transmit their analogue TV programme using frequencies that are to be allocated for the period up until the digital switchover.

- The role and functioning of regulatory authorities in these respects

Law 3592/2007 deals with the issue of digital TV frequencies allocated to multiplex (network) operators. According to the Law, the responsibilities for the Ministry of Transport and Communications and the Secretariat General of Mass Media are to establish the regulatory framework for the licensing procedure; create the frequency map and establish the technical requirements; and grant the licenses. The two bodies have up to this point created a provisional frequency map where the whole country is being divided into 14 broader service areas.

The granting of terrestrial broadcasting licenses is based on a tender initiated by the *NCRTV*. Candidates are classified based on the following criteria: duration of service; economic viability; number of employees; programming; negative marking; and merging. Following the adoption of Law 3431/2006, the authority is responsible for the provision of general authorisations to operators providing electronic communication networks and/or services. The *NCRTV* can collaborate with *NTPC* on technical matters (allocation of electromagnetic spectrum, digital dividend, etc.) but such collaboration is rare.

Law 3592/2007 does not provide for a special authority (organisation or body) with competence to settle issues relating to the switchover process, nor does it propose a timetable for this process. However, it is widely believed that Greece will be ready for the switchover within 2012-15. This delay is mainly due to the indecision of the private broadcasters especially within the current financial crisis. These private consortia have adapted a 'wait-and-see' policy in case they can be supported by the government at a later stage.

However, according to the same Law, commercial analogue TV broadcasters are encouraged to collaborate with *ERT* in forming a single multiplex operator company that will act as the network operator for the whole Greek Digital Terrestrial Platform. Moreover, the Law provides that 15% of the taxes earmarked for *ERT* go to the new public-private digital company, dubbed *ERT Digital* and allows the *ERT* board to provide material resources to the new company.

- Access to Information

- Transparency of media ownership situations

Article 14 (9) of the Greek Constitution affirms the importance of ensuring transparency and pluralism in information across the media and in the workings of the media industry. The imposition of transparency requirements (for example with regard to media ownership or the media's types of funding) is not linked to media education, thereby undermining the ability of consumer-citizens to make informed choices about the media services they choose and consume.

In the past few years, there have been adopted a number of measures to increase transparency in the operation of the media. The Secretariat General of Mass Media keeps record of the allocation of state subsidies and other support tools aiming at the media, including the amount of public sector advertising that is channelled to specific outlets and the amount of total press distribution and telecommunications subsidies, which are published on its website. Such information, however, is neither always presented in a comprehensive manner nor is it regularly updated.<sup>39</sup> Concerning the electronic media, the *NCRTV* publishes on its website<sup>40</sup> all licensed radio and TV outlets, mentioning the company name, contact details and the scope of the outlet's territorial coverage (national, regional/local). The regulatory agency is also charged with keeping record and shareholder information of media and media-related enterprises (including press undertakings, advertising and media research companies)<sup>41</sup>.

While this information is accessible to the public through the authority's website, there is no data on the degree to which people are actually aware of it or the percentage of the population actually accessing it.<sup>42</sup> Art. 6 of PD 109/2010<sup>43</sup> also contains rules that cater for increased transparency in the audiovisual media sector by mandating audiovisual media service providers to make their company name, address and contact details available through their website or teletext service. Press undertakings are required to list the name(s) of their owner (natural or legal person), publisher and manager in their edition<sup>44</sup>.

- Accountability of public service media

As aforementioned Law 1730/1987 defines the mission of the Greek public broadcaster which is to inform, educate and entertain the Greek nation. ERT's broadcasts must be governed by the principles of objectivity, polyphony, good quality of broadcasts, preservation of quality of the Greek language, promotion and dissemination of Greek culture and traditions. Furthermore, ERT must ensure radio and television coverage and reporting of the activities of the Parliament, of the pre-election campaigns by the political parties, of issues related to local government, and of the activities of other organisms involved in the cultural, social and economic development of the country. The information is handed over to parliament on a yearly basis.

- Freedom of information laws

As aforementioned the Greek Constitution guarantees the right to information. The right for citizens to obtain information from state/municipal institutions is a generally accepted media policy principle, but without any ordinary law fundamentals provided for it yet.

- Accessibility of products/services and distribution networks

The Greek print media have been supported by indirect subsidies, such as distribution subsidies, reduced value added tax, and preferential rates for telecommunication services.

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<sup>39</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

<sup>40</sup> <http://www.esr.gr>.

<sup>41</sup> See Art. 10a Presidential decree (PD) 213/1995 (FEK A' 112/1995) and Art. 10 Law 3310/2005 (FEK A' 30/2005) as amended by Law 3414/2005 (FEK A' 279/2005).

<sup>42</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

<sup>43</sup> Presidential decree 109/2010 transposed the AVMS Directive.

<sup>44</sup> See Art. 3 Law 1178/81, FEK A' 187/1981.

The public broadcaster ERT is obliged to provide media services for all Greek citizens (universal coverage). Analogue broadcasting in Greece will probably be switched-off sometime between 2012-2015. The owners of digital networks (multiplexes) are technically ready for the digital switchover and are already broadcasting some of the programmes digitally. However, not all households are equipped with television sets or decoders capable of receiving digital services.

- “Have a Say on ...”
  - Complaint procedures, “Ombudsmen”

Relevant to the consumer policy and protection is the *Consumer Ombudsman*, which was established with Law 3297/2004<sup>45</sup> and represents an independent agency of extrajudicial dispute resolution in the area of consumer disputes. This agency is supervised by the Minister of Development.

Between the poles of state regulation and self-regulation, a rare instance of co-regulation, is that of the *ethics committees*, which national broadcasting media (both public and private) in Greece are required to establish. Within the existing legal framework, in order to be licensed, radio and television channels must create and enter into multi-party self-regulatory agreements that define and adopt rules of conduct and ethics standards concerning media content (Art. 8(1)-(2) Law 2863/2000). The parties to such self-regulatory agreements are also required to establish ethics committees (*Epitropes Deontologhias*) responsible for overseeing the implementation of the respective content-related rules and principles, which must in turn communicate their decisions to the *NCRTV* (Art. 8(3)-(4) Law 2863/2000). In practice, however, and similarly to the fate of self-regulation, this co-regulatory measure has largely remained a dead letter. To the extent that they have actually been established, these committees have been inactive, not having imposed any sanctions as provided for by the relevant law.<sup>46</sup>

- Participation in media operators/(self-)regulatory bodies

The representative supervisory Assembly of Viewers and Listeners (ASKE) is a consultative body which exercises control over programmes and advertisements.

#### 2.2.11.2. Main Players in the Media Landscape

##### 2.2.11.2.1. Radio

Radio is an important means of information (news) and entertainment (notably music) in Greece. *ERT S.A.* owns five NATIONAL radio broadcasting stations (*Second Programme*, *ERA-3*, *NET Radio*, *ERA Sport*, *KOSMOS*) and an international sixth programme (*ERA-5*), which transmit via AM to Mediterranean countries, Baltic and Black Sea countries, western Europe, Africa and nearby Asian countries. However, these stations attract negligible market shares and do not feature in the Table One below. The first non-pirate private radio station was *ATHENA 9.84 FM*, which went on air in 1987 broadcast by the Municipality of Athens. Nowadays the station is still on air and owned by Municipality of Athens with journalist G. Politis as director, but does not feature in the table below as it has a mere 0.4% listenership share. Currently, around 1,058 radio stations broadcast

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<sup>45</sup> FEK A' 259/2004.

<sup>46</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

regularly in Greece (among them 56 in Attica prefecture), the vast majority of which are private and transmit locally or regionally. Most private stations (928) are not officially licensed but are considered eligible to be awarded a licence.

Multicultural radio is also developing fast as a response to the cultural diversity that currently characterises Greek society after an influx of immigrants and the *EU EQUAL* programme. There is a range of multicultural radio stations, such as *Athens & Thessaloniki Community Radio*, *Radio Filia*, which broadcast via a local frequency or online. Also, some radio stations such as *ATHENA 9.84* and *SKAI* adopt their programmes for multicultural publics. Around 40.6 percent of immigrants to Greece listen to the radio on a daily basis (see 'Media Landscape: Greece', at: [http://www.ejc.net/media\\_landscape/article/greece](http://www.ejc.net/media_landscape/article/greece)).

Table 64 below shows the listenership shares of the top fifteen (licensed) radio stations in the Attica region in the last 3-month period of 2011 and the first 3-month period of 2012. It can be seen that SKAI (owned by Alafouzos Publishing Company) and REAL (owned by entrepreneur Andreas Kouris – who also owns music radio station LOVE along with various publishing outlets) are the top news stations in terms of listenership share and typically set the political agenda. The majority of the rest of the radios with a significant share, such as RYTHMOS, KISS and MELODIA have mainly a music format. In recent years, there has been an increase in sport radio programmes with NOVA SPOR in the lead with 4.4% of the market.

**Table 64 GR: Market shares of the top 12 licensed radio stations in the Attica region (2011-2012)**

RANK (2011)	RADIO STATIONS	PARENT COMPANY	DIRECTOR OF STATION	MARKET SHARES (% , 2011)	MARKET SHARES (% , 2012)
1	SKAI 100.3	Emporiki AE (Alafouzos Publishing)	Alafouzos	7.6	5.9
2	REAL 97.8	Real Media SA	Kouris	4.6	9.8
3	NOVASPOR 94.6	NOVASPOR FM	Christoglou	4.4	4.4
4	DIESI 101.3	Radio Communication	G. Psaltis	3.9	4.6
5	RYTHMOS 94.9	Sound & Rythm AE	G. Mitrou	3.9	3.6
6	KISS 92.9	Kiss Operations AE	P. Kostakis	3.8	3.5
7	MELODIA 99.2	Melodia AE	O. Ioannou	3.5	5.1
8	BEST 92.6	Three D AE	Lymperis	3.5	3.1
9	ATHENS DJ 95.2	International Radio	D. Tsakaliotis	3.3	2.9
10	GALAXY 92.0	Aktina	S. Georgakis	3.3	3.2
11	EN LEFKO 87.7	Frontstage AE	Daskalopoulou, P. Oikonomou	3.1	2.8
12	LOVE 97.5	Love Radio Broadcasting AE	A. Kouris	3.0	2.9
13	LAMPSI 92.3	Lampsi AE	M. Tsaousopoulos	2.9	2.6
14	RED 96.3	Airlink AE	Spanolios	2.9	2.9
15	PEPPER 96.6	Captain Hijack AE	K. Sfaelos	2.3	2.5

Source: FOCUS BARI, radio listenership share in the Attica region in the periods 26/09/2011 – 18/12/2011 and 02/01/2012 – 25-02-2012



#### 2.2.11.2.2. Television

Television broadcasting in Greece was introduced in 1966, with the first network, ERT broadcasting out of the capital Athens, as a state-owned monopoly. However, throughout the 1980s, as the country began to reform and modernize at an unprecedented pace, audiences demanded a wider choice of viewing options, following the example of other European countries which had already allowed private television. Also, as a member of the European Union, Greece had to adapt to TV market liberalization policies pursued by the European Commission. But similarities with other European TV markets stop there, for the development of the Greek TV sector is distinctly different from that of most EU member states. In more particular:

Public television took its first steps during a military junta (which ruled Greece in 1967-1974), in an environment hostile to the development of objective TV broadcasts.

The direct dependence of public television on political authority continued even after the restoration of democracy and undermined the validity and reliability of *ERT*. The problem was intensified by frequent changes in *ERT*'s management. This was not conducive to long-term planning and action-taking.

The process of liberalization at the end of the 1980s was conducted without any prior economic analysis of the consequences on existing companies. *ERT* was the main victim of this de-facto liberalization as it lost a significant part of its advertising income almost overnight and today has in fact the lowest audience share of all European public TV broadcasters.

The first attempt to regulate the TV sector occurred in the mid-1990s, but even at the time of writing private TV channels are operating under a quasi legal state as they only have provisional licenses.

The penetration of cable and satellite services is negligible, mainly because of the wide availability of free-to-air national channels.

The restoration of democracy in 1974 brought new impetus to the Greek media landscape and television became the dominant medium of information and entertainment, penetrating citizens' everyday life. The TV sector is characterized by cataclysmic changes which have continued with undiminished intensity since the end of the 1980s, when the first private television stations *MEGA* (owned by *Tylepypos*, a consortium of major newspaper publishing interests) and *ANT1* (owned by *ANT1 TV S.A.* with interests also in radio, publishing and recording) went on air. Alongside these pioneer private services and the three public channels *ET1*, *NET* and *ET3*, there is a multitude of national terrestrial private channels, funded mainly by advertising, the most important of which are *ALPHA*, *STAR* and *SKY* (commercial channel *ALTER* closed down in early 2012).

Private TV grew and expanded rapidly, but it strives to adjust to a pluralistic profile in a highly politicized and commercialized environment, driven by an increasing populism. In 1994 *Multichoice Hellas* (owned by multinational *NetMed BV*) started offering analogue subscription TV services and in 1999 introduced the digital service *NOVA*, now occupying a monopoly status in the digital satellite pay-TV market after the collapse of rival digital satellite platform *Alpha Digital Synthesis (ADS)*. *NOVA* has acquired the rights to broadcast latest blockbusters as well as live football matches from the Greek League and European Champions League (now it shares these rights with free-to-air terrestrial TV broadcasters). As in many other European countries public broadcaster *ERT* has acted as



a pioneer introducing Digital Terrestrial Television (DTT) exclusive TV services to the Greek public. The digital channels are being broadcast free-to-air and are funded exclusively from *ERT's* budget as they carry no advertisements. *ERT's* digital terrestrial offerings are only available in the big cities of Athens, Thessaloniki and a handful of other major cities. *ERT* also plans to launch a second multiplex which will broadcast the current analogue channels (*ET1*, *NET* and *ET3*) and the *Parliament Channel*. Meanwhile it is planning to launch an interactive information service for citizens called *info+*.<sup>47</sup>

While satellite TV has found a niche in the Greek audiovisual market, cable TV is virtually non-existent. Likewise, IPTV (Internet Protocol Television) is largely unknown to Greeks. On the contrary, Digital terrestrial Television (DTT) seems to be taking off, boosted by the Greek government's decision to switch-off the analogue terrestrial frequency during 2012-2015, responding to the European Commission's intention to harmonize switch-off dates. As it is the case in most other European countries, the government has introduced a new law which intends to achieve the migration from analogue to DTT through the public broadcaster in collaboration with commercial analogue TV broadcasters. *ERT* has responded by setting up a subsidiary *ERT Digital* and therefore acting as a pioneer in introducing DTT services. More specifically, since 2006 the public broadcaster has launched three digital terrestrial channels which are available in big cities – *Prisma Plus*, *Cine Plus* and *Sport Plus*. The reception of the signal is free-to-view and the plan is to extend the coverage nation-wide, the programmes are advertising-free and they are different from those of the main channels *ET1*, *NET* and *ET3*, thereby making them more innovative and attractive. But their audience share is negligible.

Greeks are avid viewers. It is striking that in the multi-channel, Internet era television is still considered the most important medium for news (78% of Greeks turn to TV for news), followed by the press, the Internet and radio. In 2010-2011 the average daily TV viewing totalled 265 minutes, well above the European average. This could be attributed to the wide availability of popular national TV series, US blockbuster movies and sporting events, in particular football, which has become available on free-to-air television, whereas previously was confined to satellite pay-TV operator *NOVA*. All of the most popular programmes are available on terrestrial analogue television, which is the dominant transmission form. There is low satellite pay-TV penetration and negligible Digital Terrestrial Television (DTT) shares (see Table 65). This, however, may offer a substantial growth opportunity for broadband Internet Service Providers (ISPs) as the broadband Internet access market matures.

**Table 65 GR: TV shares in Greece, by transmission medium (2011)**

Analogue Terrestrial Television	86%
Pay TV (satellite)*	10%
Digital Terrestrial Television	4%

*Source:* Author's analysis based on company reports

\* Cable TV and IPTV (broadband TV) are virtually non-existent

Table 66 gives us a snapshot of the trends in audience shares in the years 2010-2011, indicating that the three channels of public broadcaster *ERT* combined had in 2011 one of the lowest audience shares among their European counterparts. *NET*, a purely news channel is the most popular public channel with a share of 7.7%, followed by *ET3* (mostly addressed to citizens of Northern Greece) at 3.4% and general interest channel *ET1* at

<sup>47</sup> Papathanassopoulos, S. and K. Papavasilopoulos (2009) 'The Status of Digital Television in Greece' in W. Van den Broeck and J. Pierson (eds.) *Digital Television in Europe* (Brussels: VUBpress), pp. 91-100.

2.5%. There are six commercial channels, of which the two leading ones are *MEGA* and *ANT1* with shares as high as 19.8% and 16.7% respectively. The audience shares of these two leading commercial channels decline steadily over the years due to the fierce competition from other private operators, like *ALPHA*, *STAR*, *SKY* and *ALTER* (which however closed down in February 2012). There is also speculation that *ET1* will be closed down as part of the Greek government's austerity plan to cut down public expenses.

**Table 66 GR: Annual % audience shares of the main Greek TV channels (2010-2011)**

Year	ET1	NET	ET3	ANT1	MEGA	ALPHA	STAR	ALTER	SKAI	OTHER
2010	3.0	9.5	3.6	15.1	20.2	12.2	9.7	10.9	4.0	11.8
2011	2.5	7.7	3.4	16.7	19.8	12.9	10.3	8.9	4.9	12.9

Source: AGB Nielsen Media Research, Annual Reports 2010, 2011

Table 67 shows that *MEGA* and *ANT1* are also leaders in terms of advertising expenditure, for the first half of 2011 they attract 31.6% and 27.3% respectively of the total advertising expenditure in Greece, followed by *ALPHA* at 17.4%, *STAR* at 15.6% and *ALTER* at 5.9%. State channels *NET* and *ET1* combined got only 2% advertising share in the first half of 2011, down from 4.6% in 2010 (*ET3*'s advertising share is negligible). It can be seen that the two leading channels *MEGA* and *ANT1* have in fact increased their advertising share in recent years (2008-2011), whereas in the same period the share of most of the other private channels has either decreased or remained unchanged.

**Table 67 GR: Allocation of TV advertising expenditure (% , 2008-2011)**

CHANNEL	OWNERS	2008	2009	2010	2011 (Jan-MAY)
<i>MEGA</i>	Teletypos SA	31.3	31.4	29.8	31.6
<i>ANT1</i>	M. Kiriakou Group	19.4	21.5	25.5	27.3
<i>STAR</i>	Vardinoyiannis family; Press Institution SA	16.8	17.2	14.1	15.6
<i>ALPHA</i>	E. Tsotsoros	15.5	14.3	15.4	17.4
<i>ALTER</i>	Kouris, Pavlopoulou, Koutra	10.8	11.4	10.3	5.9
<i>NET/ET1</i>	Public Service Broadcaster	6.0	3.9	4.6	2.0

Source: Media Services

### 2.2.11.2.3. Press and Publishing

The newspaper press is an industry in decline as Greek national newspaper circulation has been falling steadily in the past decades. Similarly to the trends observed in most of the other European countries, the role of newspapers as the main purveyor of information and entertainment in Greece was usurped first by television and later by the internet, digital media and online social networks. However, many publishers have expanded into broadcasting following the deregulation of the market, thereby raising levels of media market concentration and especially cross-media ownership. In addition, almost all newspapers have launched online versions, though the online revenues cannot compensate for off line revenues.

Saturday and/or Sunday newspapers dominate circulation with the offering of free magazines and gifts like CDs, films and books. This is followed by evening newspapers, whereas morning papers come third in circulation terms. In 2011 there were 13 evening newspapers selling about 45 million copies, 21 Sunday newspapers selling about 37 million copies, 6 morning newspapers selling about 15 million copies, and just 1 financial newspaper (CHRIMATISTIRIO) with a total circulation of 226,765. There were also 14 Monday sports newspapers selling 23 million copies and 12 Sunday sports papers selling just above 700,000 copies.

Table 68 below shows the numbers of copies sold and the shares of the morning papers (including their Sunday publications). It can be seen that the market is dominated by KATHIMERINI, a conservative newspaper owned by the Alafouzos family, with serious economic and political analysis. A distant second is left-wing newspaper RIZOSPASTIS, followed by four other publications with small shares. Most of the newspapers are sold in the Attica region, covering Athens and Piraeus.

**Table 68 GR: Morning Newspapers 2011 (Sunday publications included)**

NEWSPAPERS	OWNERS	ATHENS/ PIRAEUS	OTHER REGIONS	TOTAL	SHARE %
KATHIMERINI	Alafouzos family	6,938,120	4,873,844	11,811,964	79.73
RIZOSPASTIS	Greek Communist Party	1,153,437	1,205,785	2,359,222	15.93
AVGI		307,484	179,089	486,573	3.28
NIKI		72,583	19,348	91,931	0.62
LOGOS		39,498	4,326	43,824	0.3
AKROPOLIS		14,921	1,072	15,993	0.14
TOTAL		8,526,043	6,283,464	14,809,507	100.00

Source: Athens Daily Newspaper Publishers Association  
([http://www.eihea.gr/default\\_en.htm](http://www.eihea.gr/default_en.htm))

Table 69 shows the numbers of copies sold and the shares of the evening papers (excluding their Sunday publications). It is obvious that evening papers are selling far more copies than the morning ones. The market also appears to be more competitive than the morning paper market with five papers attracting shares of between around 10% and 22%. In contrast to the morning press, the evening press shows a balance in the number of newspaper copies sold in the Attica region and the rest of Greece.

**Table 69 GR: Evening Newspapers 2011 (Sunday publications excluded)**

NEWSPAPERS	OWNERS	ATHENS/PIRAEUS	OTHER REGIONS	TOTAL	SHARE %
TA NEA	Lambrakis Press SA	5,629,668	4,964,457	10,594,125	22.53
ETHNOS	Bobolas Group	2,805,113	4,604,278	7,409,391	15.59
ELEFTHEROTYPIA	Tegopoulos Publishing	3,498,856	3,476,400	6,975,256	15.16
ESPRESSO		2,768,075	3,361,023	6,129,098	12.85
ELEFTHEROS TYPOS	Press Institution SA	1,925,518	2,428,770	4,354,288	9.13
DIMOKRATIA		688,186	785,736	1,473,922	6.13
ADESMEFTOS TYPOS (RIZOS)		1,380,927	1,222,659	2,603,586	5.38
EXEDRA TON SPORTS		716,737	1,629,974	2,346,711	4.85
ALEFTHEROS		704,618	97,595	802,213	2.92
AVRIANI		368,756	366,895	735,651	1.56
VRADINI		446,967	221,677	668,644	1.41
ESTIA		459,128	186,031	645,159	1.34
ELEFTHERI ORA		264,864	281,715	546,579	1.15
TOTAL		21,657,413	23,627,210	45,284,623	100.00

Source: Athens Daily Newspaper Publishers Association ([http://www.eihea.gr/default\\_en.htm](http://www.eihea.gr/default_en.htm))

Table 70 shows the numbers of copies sold and the shares of the Sunday press. It should be noted that most of the Sunday newspapers are affiliates of the same groups owning the evening papers. The Sunday papers are selling approximately the same number of copies as the evening press, though their circulation in the Athens/Piraeus region is

smaller compared to other regions. The market is competitive with six newspapers having a circulation share of roughly between 12% and 18% of the total market.

**Table 70 GR: Sunday Newspapers 2011**

NEWSPAPERS	OWNERS	ATHENS/ PIRAEUS	OTHER REGIONS	TOTAL	SHARE %
PROTO THEMA	T. Anastasiadis	2,753,983	4,131,641	6,885,624	18.05
KATHIMERINI KYRIAKIS	TIS Alafouzos family	3,324,617	3,174,693	6,499,310	17.03
TO VIMA KYRIAKIS	TIS Lambrakis Press SA	2,609,986	3,493,121	6,103,107	15.99
REALNEWS		2,000,813	2,801,560	4,802,273	12.59
ETHNOS TIS KYRIAKIS	Bobolas Group	1,660,161	2,818,970	4,479,131	11.74
KYRIAKATIKI ELEFTHEROYPIA	Tegopoulos Publishing SA	1,699,633	2,318,270	4,017,903	11.20
TYPOS TIS KYRIAKIS	Press Institution SA	586,218	990,929	1,577,147	4.22
RIZOSPASTIS KYRIAKATIKOS	Greek Communist Party	432,890	611,413	1,044,303	2.74
ESPRESSO KYRIAKIS	TIS	265,294	362,230	627,524	1.68
TO PARON		253,235	237,706	490,941	1.29
OTHER		-	-	-	3.41
TOTAL					100.00

Source: Athens Daily Newspaper Publishers Association  
([http://www.eihea.gr/default\\_en.htm](http://www.eihea.gr/default_en.htm))

#### 2.2.11.2.4. Online media (non-linear audiovisual (media) services; websites)

According to IAB Hellas, the amount of investment in online display advertising in Greece reached 62 million Euro, up 7% compared to 2009 when online display advertising was at 57.8 million Euro. This is a small increase compared to other European countries, especially from northern Europe, but it is still significant as it occurred in the midst of an ongoing economic crisis facing Greece and demonstrates the growing importance of online media even during a period of austerity.

The financial sector appears to be top in terms of advertising expenditure with investments reaching 12.7 million Euro (20% share of the total expenditure), followed by the telecommunications sector (10.1 million Euro investment, representing a 16.2% share) and the commercial goods sector (8.4 million Euro investment, representing a 13.6% share). In the top five sectors one can find the retail sector (5.8 million Euro

investments with a 9.4% share) and the entertainment sector (5.3 million Euro investments with an 8.6% share).

*2.2.11.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers*

Cable TV and IPTV (broadband TV) are virtually non-existent in Greece. Whereas cable network operators are yet to be launched, satellite TV has found a market niche with the launch of NOVA, a digital satellite network operator, launched in December 1999 by Multichoice Hellas. NOVA offers its subscribers a wide range of international and domestic programmes (including news, sports, movies, music, children's programmes and general entertainment channels). The platform also carries the majority of popular Greek terrestrial TV channels along with a number of Greek terrestrial radio stations. In 2008, Greek telecommunications company Forthnet acquired Netmed, which is the parent company of NOVA Greece. NOVA is estimated to have about 450,000 subscribers, the majority of whom have signed up to watch 'premium content' as NOVA has acquired the exclusive rights to broadcast, among others, the domestic football league matches and blockbuster movies.

*2.2.11.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

In terms of advertising market shares involving all media in Greece, the media attracting most of the advertising expenditure are magazines and television. However, according to Table 71 the magazine sector dropped a significant share (22.26%) during 2010-2011, whereas in the same period the medium of television lost a moderate 2.89% share. Meanwhile, the radio sector dropped almost 30% of its share. The newspaper sector also showed significant losses of over 17%, owing primarily to the ongoing economic crisis but also to the appearance of the Internet, online media and social networks. As aforementioned, the amount of investment in online display advertising in Greece is much smaller compared with other European countries.

**Table 71 GR: Total Advertising Expenditure (2010-2011) (in EURO)**

MEDIUM	JAN 2010-DEC 2010	SHARES (%)	JAN 2011-DEC 2011	SHARES (%)	CHANGE (%)
Television	583,161.818	30.9	566,303.741	35.53	- 2.89
Magazines	746,009.155	39.52	579,919.160	36.38	- 22.26
Newspapers	434,131.644	23.0	359,907.549	22.58	- 17.1
Radio	124,237.490	6.58	87,815.214	5.51	- 29.32
TOTAL	1,887,540.106	100.0	1,593,945.665	100.0	- 15.55

Source: Author analysis; Athens Daily Newspaper Publishers Association ([http://www.eihea.gr/default\\_en.htm](http://www.eihea.gr/default_en.htm))

### 2.2.11.3. Conclusion and Recommendations

The Greek print media sector is largely self-regulated - as in most other European countries - on the basis of a wide range of codes of ethics, alongside provisions of general civil and criminal statutory law. The sector is dominated by a handful of powerful publication companies which have expanded to the broadcasting field, thereby raising levels of media market concentration. The broadcasting sector is characterized by a saturated private radio and TV market, a weak state broadcaster, and it is highly politicized. The analogue terrestrial television landscape is still unregulated and any attempt to 'bring order' in the chaotic analogue UHF frequencies faces resistance from various interests - commercial channels, opposition political parties, etc. Successive governments have been indecisive in regulating adequately the analogue broadcasting landscape although one can detect a willingness to set up an efficient regulatory regime to oversee the emerging digital environment (i.e. *Law 3592/2007* attempts to deal with the regulation of digital media as well as chronic matters such as media concentration). However, Greece lacks truly independent regulatory bodies, especially in the broadcasting industry, in spite of some positive recent steps towards strengthening the political and financial independence of the main broadcasting regulatory body *NCRTV*. It is in this context that one can understand why the power of the media has increased considerably, but not the power of journalists and of course not the public broadcaster. Having said this, the Greek broadcasting industry has been surprisingly resilient and adaptable to changes, particularly given that it only emerged out of a dictatorship some thirty-seven years ago.

Greece is lagging behind most other European countries when it comes to new media technologies, such as the Internet and digital television. While there is no digital or analogue cable TV service in Greece, digital satellite broadcasting has been developed to a certain extent, though the main pay-TV operator *NOVA* has monopolised the market. Digital terrestrial television seems to be the next priority of the country due in part to the recommendation of the EU to its Member-States to switch-over from analogue to digital by 2012. *Law 3592/2007* deals with the issue of digital TV and makes a clear distinction between platform, or multiplex operator and content provider. However, meeting the 2012 target date for analogue switch-off is not a priority for the Greek government, given the ongoing economic crisis. In effect, it seems likely the digital switch-over to occur at a later date, sometime between 2012 and 2015.

As far as the Internet is concerned and in the light of the absence of specific legislation to regulate content on the Internet and in blogs, Greek courts have been at a disagreement as to whether existing provisions against defamation, insult or libel in the press and the audiovisual media can be applied. While extending existing legislation to the electronic versions of magazines and newspapers, as well as to online broadcasting content may be relatively straightforward, this is not so with regard to self-generated content such as blogs, which are an interactive medium of communication with content shaped by various actors like the owner, editor or journalist, or an ordinary citizen. Is it right to extend to blogs the large sums of indemnification that are granted in cases of insult or libel in the press? Some put forward the view that self-generated content should be regulated and that offence or insult involved in blogs is the responsibility of the blogger, whilst some others argue that freedom of expression should be guaranteed on the Internet and that in cases an offence occurs it should be subject to general rules for insult against one's personality, which are contained in general statutory rules. Prior to the 1980s in Greece, political reporting emanated mainly from the government via its spokesperson, who briefed journalists. While this continues today, the Internet has contributed greatly to multiplying and decentralising the sources of information, and speeded up their



dissemination, but without necessarily enhancing their credibility. A number of interviews carried out in the context of a recent study<sup>48</sup> concluded that the vast majority of 'journalistic' blogs exist to disseminate any kind of real, but more often false or distorted information, leading to the proliferation of insulting and appalling texts against individuals, and to a kind of journalistic product that is unreliable and of bad quality.

Domestic legislation contains a number of provisions devised to promote content diversity in broadcasting. For a start, diversification and plurality of media content was achieved in the late 1980s, at the time of the liberalisation of broadcasting market. Prior to that, broadcasting content was largely uniform and centralised as the monopoly operator ERT delivered homogenised news bulletins and current affairs programming. The entry of commercial broadcasters allowed the representation of more political views (not merely the views of the ruling party), thus enhancing political diversity and cultural pluralism. The arrival of commercial broadcasters called for the introduction of content-related rules to place limits, for example, as far as advertising is concerned, and protect editorial independence from sponsorship pressures.

Technological innovations and especially the advent of the Internet and digital media have changed the way information and other types of media content are produced and delivered. The Greek state, however, still lags behind in exploring the opportunities that the new media opens up for freedom of expression and information. At the same time, policy-makers have been reluctant to explore ways to regulate new applications and media services that do not strictly fall into the traditional regulatory systems for the press and broadcasting. Despite the trend toward technological convergence, the telecommunications and the broadcasting sectors are still regarded as separate sectors, and no systematic efforts are deployed to coordinate in an effective manner the activities of the two independent authorities in charge of them: the NTPC and the NCRTV, respectively. Given the current financial crisis facing the country it would make sense to reduce public spending by merging the NCRTV with the NTPC, but such a proposal has been met with scepticism by the president of the NCRTV primarily on the grounds that the merger would be unconstitutional<sup>49</sup>.

To sum up, technological advances, media market liberalisation and political shifts brought about a proliferation of actors, norms and institutions beyond the state. Yet, media regulation has remained highly centralised in the hands of the state, and of the government of the day in particular. The government-centric model of media regulation was and it is still influenced by powerful economic and business interests and media entrepreneurs exerting pressure over policy issues. Their interests are typically unaccountable and unchecked due to the absence both of a strong and independent professional journalism and of civil society institutions. As an EU member-state Greece has an obligation to impose rules guaranteeing fair competition, but more often than not EU membership has not managed to counter the distinctive economic, political and media structures and practices of dependence and favouritism that have distorted the media market. The current financial crisis has further exposed the weakness of a defective media system as many print publications and some TV channels went bankrupt and it is likely to have a negative impact on media independence and their ability to create an informed public sphere. The viability of media outlets will largely depend on their ability to pursue high editorial standards and avoid the tendency toward populism.

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<sup>48</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

<sup>49</sup> see Iosifidis, 2011; Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does media policy promote media freedom and independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

## Recommendations

- The government should pursue further liberalisation of the media market in order to promote greater diversity and pluralism in the news, information and current affairs accessible to the public.
- The regulatory framework should prohibit concentration of media ownership, including cross-media concentration especially between the powerful press interests and broadcasting and/or internet firms. This can be achieved through the proliferation and upgrading of the power of politically and financially independent regulatory agencies, which can bring about a new culture of policymaking encompassing democratic, pluralistic functions that the media should perform.
- The undue influence of media owners and business interests can also be addressed through the establishment of a strong and independent professional journalism, as well as the strengthening of civil society pressures.
- It is essential to reform ERT in order to become a public service broadcaster that would serve the public interest through the provision of quality, accurate and impartial news coverage and reporting. This can be done by ensuring the financial and editorial independence of ERT. In the midst of a difficult economic climate, the viability of the public news medium will largely depend on its ability to promote high standards of journalism and prioritise quality information to sensational and populist reporting.
- There should be further investment in new media technologies like the Internet and digital television which, alongside the progressive technological convergence, will contribute to the proliferation of players, norms and institutions beyond the state.
- Greece should take advantage of its membership in the EU and the obligations imposed by European authorities in order to counter and shift the distinctive political economy structures and the informal practices of dependence and favouritism that have traditionally distorted the communications sector. This can be achieved by ensuring implementation of EU rules and norms that defend media impartiality and independence against state or powerful commercial interests that seek to undermine these.

## HUNGARY

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### 2.2.12. Hungary

#### 2.2.12.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

Since the study of 2004 there have been extensive changes in the regulatory framework of Hungary. At the beginning of this year (2012) a new Fundamental Law has entered into force. The media segment is also regulated by new laws dated from 2010, having come into force and been amended in 2011.

#### 2.2.12.2. Human rights/Fundamental freedoms

- Freedom of expression/Freedom of the media

At the constitutional level the basic norms of freedom of expression and freedom of the media are defined by Article IX of the Fundamental law<sup>1</sup> as follows:

*„(1) Everyone shall have the right to freely express their opinion.*

*(2) Hungary shall recognise and protect the freedom and pluralism of the press, and ensure the conditions for freedom of information necessary for the formation of democratic public opinion.*

*(3) The detailed rules relating to the freedom of the press and to the organ supervising media services, press products and the infocommunications market shall be laid down in a cardinal Act.”<sup>2</sup>*

Within the context of the Fundamental law “cardinal acts” means those acts that have to be adopted by a two-thirds majority of the Parliament.

The laws directly governing the media are

- Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content (“MC”);<sup>3</sup>
- Act CLXXXV of 2010 on Media Services and Mass Media (“MM”).<sup>4</sup>

MC, often dubbed as “Media Constitution”, defines the basic rules of media content, while MM provides the detailed rules of media regulation.

In December 2011 the two acts have been subject of a decision of the Constitutional Court (decision 165/2011. (XII.20.) AB). As a consequence of this decision the Parliament is currently in the process of the adoption of an act<sup>5</sup> amending MC, MM and various connected laws. The amendment will lift a number of obligations originally

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<sup>1</sup> [http://hunmedialaw.org/dokumentum/152/Smtv\\_110803\\_EN\\_final.pdf](http://hunmedialaw.org/dokumentum/152/Smtv_110803_EN_final.pdf).

<sup>2</sup> The source of translations of the legal texts quoted in this paper is the hunmedialaw.org website.

<sup>3</sup> [http://hunmedialaw.org/dokumentum/152/Smtv\\_110803\\_EN\\_final.pdf](http://hunmedialaw.org/dokumentum/152/Smtv_110803_EN_final.pdf).

<sup>4</sup> [http://hunmedialaw.org/dokumentum/153/Mttv\\_110803\\_EN\\_final.pdf](http://hunmedialaw.org/dokumentum/153/Mttv_110803_EN_final.pdf).

<sup>5</sup> Bill T/7022. “on amending certain acts related to media services and press products”.

imposed on print and online media, will introduce detailed rules for protecting journalistic sources, and will re-regulate access to data by the media authority in its procedures.<sup>6</sup>

As regards to specific safeguards and rights for the media at the constitutional level the long-standing and consequently-followed practice of the Constitutional Court is to be recalled. According to the court freedom of opinion is directly linked to the existence of the democratic public opinion. As it is constantly held by the court<sup>7</sup> the role of the state cannot be limited to non-interfering in this respect, instead, it is the responsibility of the state to promote and maintain the "institution" of the democratic public opinion.

- Freedom to receive and to access information

Beyond the constitutional provision that grants freedom of expression to individuals (Article IX. (1) quoted above), Article VI. (1) and (2) of the Fundamental Law also provide special constitutional protection for accession to and dissemination of data of public interest:

*"(2) Every person shall have the right to the protection of his or her personal data, and to access and disseminate data of public interest.*

*(3) The exercise of the right to the protection of personal data and the access to data of public interest shall be supervised by an independent authority."*

- Safeguards on regulatory authorities

As regards constitutional safeguards concerning regulatory authorities reference has to be made to Article IX (3) of the Fundamental Law as quoted above.

- Safeguards on "universal service"

In the Hungarian law the term "universal service" is used generally within the meaning of Directive 2002/22/EC (Universal Service Directive). The constitutional requirements related to public service media are developed by the Constitutional Court from the "institution" of the democratic public opinion and the constitutional obligation of the state to maintain and promote it.

#### 2.2.12.1.2. *Media order (de lege lata and de facto)*

- "Market Entry"
  - Licensing schemes; remit psm; notification for print publications

The legal possibilities of entering into the media market are defined by the MC. According to its relevant provisions

- *"The Act may set official registration as a precondition for the commencement or pursuit of media services and the publication of press products. The conditions set for registration may not restrict the freedom of the press."*<sup>8</sup>

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<sup>6</sup> A summary of the decision: Standards Media Monitor (Mérték Médiaelemző Műhely): Ruling No. 165/2011. (XII. 20.) AB of the Constitutional Court – Summary, is available at: <http://mertek.eu/en/article/ruling-no-1652011-xii-20-ab-of-the-constitutional-court-summary>.

<sup>7</sup> See inter alia decision 30/1992. (V.26.) AB of the Constitutional Court.

<sup>8</sup> MC 5. § (1).

- *"When limited state-owned resources are used by the media service provider, successful participation in a tender procedure announced and conducted by the Media Authority may also be set as a condition for the commencement of the media service."*<sup>9</sup>

In accordance with these MM defines the rules of procedures for

- tendering the broadcasting possibilities that are given via analogue terrestrial frequencies<sup>10</sup>, and
- registration of radios and televisions operating via other channels (digital terrestrial, cable, satellite, etc ...)<sup>11</sup>
- registration of non-linear audiovisual media services<sup>12</sup>
- registration of printed and online press products under the scope of the acts<sup>13</sup>.

Printed and online press products can be published simultaneous with the initiating of registration. According to the Media Law, the media authority shall withdraw the registration if a specified conflict of interests exists vis-à-vis the notifier, or the name of the notified press product is identical with, or is confusingly similar to, the name of a press product registered earlier with valid records at the time said application was submitted. The press product shall be deleted from the register in the previous cases, in case of the requesting of the deletion, in case of interruption of publication for over 5 years, or if a final decision by the court has decreed cessation of a trade mark infringement perpetrated through the title of the press product and barred the infringer from further trade mark infringement. The prospect of deletion by the authority as a sanction against the publisher is not holded out. If the publisher or founder of a press product fails to comply with its obligations related to registration, the media authority may impose a fine of up to one million forints.

The registration rules regarding the non-linear media services are more or less the same as the previous rules, but the rules on the registration of linear media services are more detailed and stricter. The main difference is the content of the notification and the possibility of the deletion of the service provider from the register as a sanction in the case of repeated and serious violation of the law.

The regulation of the tendering for broadcasting possibilities is imperfect and controversial at many points. One of the most crucial points of this regulation is that the rules on tender procedures for broadcasting frequencies allow the Media Council to prolong the closing of bids for a given media service right (frequency) as long as there is a bidder who is to the authority's liking. In fact, the authority may terminate the tendering process at any time if "by its own consideration, the media policy aspects [...] cannot be ensured by completing the tender procedure". There are other tender rules as well that allow the authority to arbitrarily apply the laws, such as by failure to regulate the evaluation criteria, and may lead to complete legal uncertainty, as well as ambiguous and unpredictable procedure with regards to the bidders.

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<sup>9</sup> MC 5. § (2).

<sup>10</sup> MM.

<sup>11</sup> MM 42. §.

<sup>12</sup> MM 45. §.

<sup>13</sup> MM 46. §.

Tender decisions can be contested before the court (Regional Court of Budapest). The court has to overview the decision within 30 days, and against its decision no appeal is permissible.<sup>14</sup>

The Media Council and media providers winning a bid enter into a so-called official administrative contract which provides for a significant part of the terms and conditions under which the provider will operate. The contract reveals how much the provider is to pay the media authority, sets forth commitments regarding programming structure and content, stipulates sanctions, and may even impose obligations for a digital switchover further down the line. Although these details have a fundamental bearing on the entire media system in Hungary, they are not public at the present time.

In the tender procedures, the media service provision fee is a constant and important criterion. This fee is to pay by all media service providers, irrespective of the distribution technology. In case of providers on cable, satellite, IPTV or DVB-T platforms, the amount of the fee is determined by a decision of the media authority. Recently, the Media Council has revised the contracts of the nationwide commercial television stations in light of the new Media Act, and did the same with the contracts of the nationwide radio stations. Very likely, this revision was more than just a formality and effected material and substantive parts of the contracts, particularly as regards the rate of the media provision fee. The Media Council amended the contracts not only in complete secrecy but even disregarding the explanation requirements stipulated by procedural rules. The contract itself is not public, and the officially posted explanation of the resolution declaring its transformation into an administrative contract is evasive.<sup>15</sup>

The conclusions of the tender practise can be summarized as follows.

- In the completed process of the Media Authority, a few “preferred” applicants were awarded nearly half of the announced frequencies.
- Although local content was a pre-eminent evaluation criterion during the evaluation process, certain decisions by the Media Council overruled the previously represented media policy considerations. The purity of the tendering process, the equality of treatment and of competitive conditions are threatened when a contract is amended within a short period and, as a result, the commitment that initially made it a winning tender can no longer be fulfilled.
- The three applicants who were successful in the processes endeavour national coverage and place life of faith in the center of their broadcast; the underlying media political aspects were omitted from the justification of the Media Council's decisions.
- The situation has worsened for those participants who endeavour national coverage and operate on the basis of former market conditions. They were unable to win tenders where there was a competition. There was only one music radio (*Rádió1*) winning two tenders, but only on those frequencies where it was the only bidder. The marginalization of former market participants also means less economical danger from the major national radio stations (Class Fm, Neo Fm), and other broadcasters on the radio market with different profiles and ever-expanding coverage areas become the leading participants.

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<sup>14</sup> MM 62. § (5)-(6)

<sup>15</sup> Mérték Médielemző Műhely (Standards Media Monitor): Secrets and Lies: The Contracts of National Media Providers, <http://mertek.eu/en/article/secrets-and-lies-the-contracts-of-national-media-providers>.

- Due to deficiencies in the justification of decisions and, primarily, deficiencies in the publicity of decisions made during such processes, the requirement of transparent and controllable decision-making was not fully satisfied.
- The voting on the final results was unanimous in each case, which indicates that the Media Council has established those media political objectives that were realized in the decisions as a uniform approach.<sup>16</sup>

MM provides the detailed rules on the regulatory authority for the media. The National Media and Telecommunications Authority<sup>17</sup> (NMHH) is a “convergent” authority responsible for administering both the segments of telecommunications and media. Tasks related to media regulation are performed by the Media Council<sup>18</sup>, a collective body with relative autonomy within the organisation of the authority. In performing their duties, members of the Media Council cannot take orders from anyone<sup>19</sup>; they cannot be recalled<sup>20</sup>; and they have to comply with strict incompatibility rules<sup>21</sup>. The elected members of the Media Council are expected to have no ties, either formal or informal, with any political party or with the government<sup>22</sup>.

It is also to note that the Commissioner for Fundamental Rights (the “ombudsman”) has recently submitted a motion<sup>23</sup> to the Constitutional Court regarding the regulation governing the election of the president of the Media Council. In his motion the commissioner suggests the court to annihilate these rules as they lack proper legal clarity. The Parliament remedied\_ these objections of the Commissioner by modifying the act in June 2012; the result of this modification is that the present chairman and members of the Media Council will hold their position until the new Parliament can elect a new chairman and new members with a two-third majority.

The remit of the public service media is summarized by the MC stating that “*Public media service is operated in Hungary in order to preserve and strengthen national and European identity, foster and preserve national, family, ethnic and religious communities, and promote and enrich Hungarian language and culture and minority languages and culture and meet the needs of citizens for information and culture.*”<sup>24</sup>

Other provision regarding the remit of the public service media are also foreseen in the Public Service Code. The content of this code is defined by MM as follows:

„*The Code can, among other things, regulate the following:*

- a) the means and method of attaining the statutory objectives of public media service,*
- b) the basic principles of independence from political parties and political organisations,*
- c) the principles regarding the presentation of the diversity, objectivity and balanced nature of news and timely political programmes, presentation of disputed matters and the diversity of opinions and views, (...)*

<sup>16</sup> Further information: Mérték Médielemező Műhely (Standards Media Monitor): The Media Council's Tender Procedures for Broadcasting Frequencies - Executive Summary, <http://mertek.eu/en/reports/the-media-councils-tender-procedures-for-broadcasting-frequencies-executive-summary>.

<sup>17</sup> <http://www.nmhh.hu/inex.php?lang=en>.

<sup>18</sup> <http://www.mediatanacs.hu/english.php>.

<sup>19</sup> MM 123. § (2).

<sup>20</sup> MM 129. § (1).

<sup>21</sup> MM 118. § (1); 127. § (1).

<sup>22</sup> MM 118. § (3); 127. § (1).

<sup>23</sup> Motion AJB-3299/2012.

<sup>24</sup> MC 11.§.



- f) *the principles of presenting cultural, scientific, ideological and religious diversity,*
- g) *the principles of performing tasks with regard to the protection of minors,*
- h) *the principles relating to ethical norms governing the broadcasting of commercial communications, advertising activities and the sponsorship of programmes, (...)*
- j) *the principles relating to the extent and guarantees of the autonomy and responsibility of production companies employed by the public media service provider, and to the guarantees of their participation in the definition of the principles of the production and editing of programmes.*

The Code of Public Service was finalised in the summer of 2011, but it is a handful of declarations, failing to offer tangible guidance as to the operation of public service. One of the cardinal flaws of the new law is its omission to expressly provide for a public service mandate.

As regards registration of press products it is to note that the scope of the acts covers exclusively content services that are provided as commercial services<sup>25</sup>. As a consequence, private blogs without any economic purpose, for example, are not subjects of, *inter alia*, registration on the basis of the acts. But the definitions in the act are not clear enough to delineate unambiguously the scope of the law.

The rules of registration are designed in a way to make decisions automatic. If the applicant complies with the formal criteria defined by the MM its registration is compulsory. The NMHH is not in the position to exercise any discretion in this regard.

In the case of printed and online press products the authority cannot refuse registration even if their application is incomplete<sup>26</sup>.

- Media pluralism/ownership; competition law aspects

Media ownership rules are generally based on the actual ratings of media outlets. According to MM *"linear audiovisual media service providers with an average annual audience share of at least thirty-five percent, linear radio media service providers, and media service providers having a joint average annual audience share of at least forty percent on the linear audiovisual and linear radio markets, any owners of the media service provider and any person or undertaking having a qualifying holding in the media service provider's owner*

- a) *may not launch new media services, may not acquire shares in undertakings providing media services, and*
- b) *shall take measures in order to increase the diversity of the media market by modifying the programme flow structure of its media services, by increasing the proportion of Hungarian works and programmes prepared by independent production companies, or in any other way."*<sup>27</sup>

Considering the actual market circumstances, the 35 percent limit can not be reached by any market actors. The new media ownership rules ensure wider latitude to the media enterprises, but the obligations applicable in case of reaching the legal ownership

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<sup>25</sup> MC 1. § 1., MM 203. § 40.

<sup>26</sup> MM 46. § (4) – (5).

<sup>27</sup> MM 68. § (1).

restrictions are not clear. The affected media service provider shall take measures in order to increase the diversity of the media market, but the act gives just some examples to this obligation, and in case of doubt, it is the media service provider's responsibility to prove that the measures are able to strengthen the diversity.

The complete lack of rules restricting the interweaving of various media types (cross-ownership) threatens fulfilling of the requirement of diversified information in the long run. The media market trends confirm the risk that a given enterprise may be able to present its own views via various media types – television, radio, newspapers and online services. This poses a serious constitutional risk particularly with regards to the domestic media market trends.

Beyond these, MM also defines the category of "media service providers with significant influence" as "*linear audiovisual media service providers and linear radio media service providers with an average annual audience share of at least fifteen percent (...) provided that the average annual audience share of at least one of their media service reaches three percent*"<sup>28</sup>. Currently there are two television and two radio broadcasters of significant influence, the national channels operating on analogue terrestrial frequencies. Broadcasters of significant influence have to broadcast a news programme or general information programme, and to ensure in the course of all of its media services transmitted by digital media service distribution, that at least one quarter of the cinematographic works and film series originally produced in a language other than Hungarian, shall be available in their original language, with Hungarian subtitles.

Independently of these specific qualifications and the attached obligations general rules of competition law are also applicable. But the new Media Act entitled the Media Council to intervene in the procedure of the competition authority in the cases of concentration regarding the media market.<sup>29</sup> According to the act, the Hungarian Competition Authority shall obtain the position statement of the Media Council for the approval of concentration of enterprises, which enterprises bear editorial responsibility and the primary objective of which is to distribute media content to the general public via an electronic communications network or a printed press product. The position statement of the Media Council binds the Hungarian Competition Authority. This rule had to apply also to ongoing procedures.<sup>30</sup> It made possible to prevent the merger between Ringier and Axel-Springer which would have had the effect to weaken the market position of the biggest opposition newspaper. The decision of the Media Council was not established; it is not suitable to give directions to prospective concentrations.

- Legal framework for psm; ability to fulfill their tasks

In 2011 the substantial restructuring of the Hungarian public service media took place. The definitive element of the system of the Hungarian public service media is the Media Service Support and Asset Management Fund<sup>31</sup> (MTVA). The MTVA secures the production capacities and handles the assets of the four public service media entities:

- the Hungarian Television Non-profit Co. Ltd.
- the Hungarian Radio Non-profit Co. Ltd.
- the Duna Television Non-profit Co. Ltd. and

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<sup>28</sup> MM 69. § (1).

<sup>29</sup> MM 171. §.

<sup>30</sup> MM 216. § (5).

<sup>31</sup> <http://www.mtva.hu/hu/english>.

- the MTI Non-profit Co. Ltd., the national news agency.
- the MTVA, as a fund, is managed by the Media Council.

Media content available through public service media consists of these offers:

- One national broadcasting TV channel (M1) with terrestrial transmission, three satellite TV channels (M2, Duna TV, Duna World);
- Seven radio stations (three national FM channels: one talk radio (Kossuth Rádió), one music radio (Petőfi Rádió), one classical music radio (Bartók Rádió), one national middle wave channel with programmes for ethnical minorities, one middle wave regional channel with network transmission, two online radio stations (one life broadcast from the parliament, one with folk music content)).

There is a Board of Public Service Curators (Trustees), which exercises ownership rights, and there is a Public Service Body destined to exercise social control over the operation. Besides the ownership rights the Board of Trustees has the following major tasks and responsibilities related to public service media (Article 90.):

“(1) The Board of Trustees:

- a) monitors whether the objectives of the public media service are fulfilled through the activities of the public media service providers,
- b) if in its opinion the behaviour of a public media service provider seriously violates or threatens the attainment of public media service objectives, then it may initiate the Media Council’s proceedings,
- c) safeguards the independence of the public media service provider,
- d) establishes and amends the Statutes of public media service providers,
- e) elects the Director Generals of the public media service providers, and determines the terms and conditions of their employment contract and remuneration,”

The Board of Public Services has the following tasks (Article 97.):

- “(7) The Board of Public Services constantly monitors how public service orientation is manifested, and exercises control in accordance with Paragraphs (8)-(13) over the public media service providers in relation to the enforcement of the provisions of this Act.
- (8) Once every year, by 28 February of the year following the current calendar year, the Director Generals of the public media service providers prepare a report on whether the media service provider under their management, in their own assessment, has fulfilled the requirements outlined in this Act regarding the objectives and basic principles of public media service.”

Although these organisations are operational and functional, until today they have not left any footprint in the publicity, and in the design of the public media content.

The several cases of counterfeit reporting in 2011, including the Cohn-Bendit affair and the Lomnici Affair, failed to provoke the Media Council, the Board, and the Body to speak

out in any meaningful way. In the Lomnici case, the managing directors of the Fund and MTI, the national news agency, took measures in the capacity of employers, although it never came to light precisely along what procedural lines the disciplinary action was taken and based on what official explanation. Certain individuals were named and held accountable, but nothing that happened really taught us anything about what public service should consist of and how it should operate. In other words, these cases did not offer any legally useful lesson as to the nature of public service in the media. On the level of day-to-day operation, the currently effective provisions fail to lay down the prerequisites of public service (an a priori omission) and fail to set forth the procedures of holding violators accountable (an a posteriori oversight).

Neither does the new MM formulate a coherent order of responsibilities for compliance with public service requirements. The most characteristic attributes of the new system are the absence of transparency and regulating the field on an "as-it-were" basis. It seems that all necessary actors are present. In reality, however, they are not the crucial players. The key decisions are taken by the MTVA and the Media Council and its president. In the present scheme of things, neither the Board nor the Body has properly regulated relations with the Fund, despite the fact that the Fund has inherited the relevant public service assets, manufacturing capacities, and the professional staff.

The most frequently-debated element of this restructuring was the role of MTI as the central news agency for the entire public service media. Opponents of this structure refer to recent cases of editorial behaviour on behalf of MTI and MTVA that induced criticism. On the other hand, defenders of this solution emphasise the aspect of cost efficiency.

There is no pertinent data available which would support an assessment on the cost efficiency of the Hungarian public service media. It is fact, however, that the official state budget allocated to the PBS has increased in 2012 in comparison with the previous years.

- The role and functioning of regulatory authorities in these respects

The Media Council, which has significant and material control over the entire media selection and the programmes of each broadcaster through the distribution of broadcasting rights and monitoring programme requirements, was created on the basis of nomination and selection rules that allowed for the involvement of nominees exclusively from the larger governing party. As a result, the government and/or the parliamentary majority gains sole influence over the control of the media system while making it impossible for third parties to oversee the media authority's operations. Completely excluding the opposition from the media authority's operations does not exclusively and primarily mean exclusion from decision-making, but it may also make it impossible to monitor the preparation and justification of decisions.

The chairman of the Media Council is nominated by the prime minister, the members of the Council are nominated by an ad hoc committee of the Parliament, in that the members have a number of votes corresponding to the headcount of the parliamentary faction they were appointed by. In the first voting round, the nominating is bound to a solid vote, but in the second round the members can be nominated by a two-third majority. These rules resulted in the exclusivity of the candidates of the Fidesz.

The chairman of the NMHH is the chairman of the Media Council, and he has a scope of authority broad enough to enable him/her to effectively shape the most important decisions relevant to the media system, and she/he is the only decision-maker regarding the telecommunication issues.

The competences of the Media Council cover i.a. the tendering of radio frequencies, the registration of the media service providers and the press organisations, the control and sanctioning of all media contents, the subsidies to the media service providers<sup>32</sup>, the nomination of the chairman and a member of the Board of the Public Broadcasting Foundation, the nomination of the CEO of PBS providers, and the appointment of the chairman of the Media Service Support and Asset Management Fund that is the trustee of the PBS providers.

The registries of the services mentioned above in this chapter are kept by the NMHH.

The Media Council is entitled to nominate candidates for the board of the Public Service Foundation for the positions of the director generals of the public service media providers. The Media Council is obliged to nominate two candidates for each position. The director generals are elected by the Board of Trustees of the Public Service Foundation.<sup>33</sup>

The informal power of the Media Council and its president in the newly established structure is secured through the appointment and election process of the leaders at PBS organs. Neither the Council, nor the Board Trustees, nor the Board of Public Service has so far practiced its rights established by MM for the transparent and formal accountability of content control.

In some cases the Media Council declared to reject any responsibility for the fulfilment of the requirements of PBS. Despite of such declarations the MM establishes a named task as follows (Article 182 bm):

“Acting in its regulatory powers, the Media Council, in accordance with Article 132, (b) shall perform regulatory supervision regarding the following statutory provisions herein defined:

(bm) rules on the performance of tasks in public media service;”

The latest public correspondence in the subject took place in April 2012.

The Works Council of the MTI addressed an open letter, signed by the majority of the news agency's employees, to the president of the Media Council, demanding that the Fund restore the agency's professional and organizational independence. The letter was motivated by the recognition of the fact that the merger of the public service media and the MTI, along with the attendant problems of employment law and financing, hinder the work of the agency.

A few days later, the president of the Media Council sent a letter in reply, explaining that neither the National Media and Infocommunications Authority nor its Media Council possessed any competence regarding the operation of MTI Nonprofit Zrt.

In their reports, all the international organizations raise criticism over the alleged independence of public service media. The procedure of nominating and appointing senior management official to public service media — a procedure crucially overseen by the President of the Media Council — ran counter to international standards because it failed to ensure freedom from undue political influence. For much the same reason, international criticism was strong over the move whereby the President of the Media Council became, indirectly through the Media Support and Asset Management Fund, the employer of practically every single journalist working in public service media. As for the

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<sup>32</sup> About the problems of this practise see Support and Policy: The Subsidization of Community Radio Stations, <http://mertek.eu/en/article/support-and-policy-the-subsidization-of-community-radio-stations>.

<sup>33</sup> MM 102. §.

regulation of the public service system, different international reports also conclude that the current scheme of control over the institutions fails to guarantee political independence, nor does the regulation of financing ensure the independence of day-to-day operations.

- “Pursuit of Core Activity”
  - Ordinary law safeguards for journalistic activity

The basic rules and safeguards of journalistic activities are defined by the MC. On the one hand, it provides for the protection of human dignity<sup>34</sup> and human rights<sup>35</sup>, the constitutional order<sup>36</sup>, minors<sup>37</sup>, and consumers<sup>38</sup> without giving real definitions as to what these legal terms mean in everyday journalistic practice. For the linear media services it provides for a number of similarly vaguely defined terms such as the obligation of diverse, comprehensive, factual, up-to-date, objective and balanced coverage.<sup>39</sup> It is important to note that the legislation introduces a wide variety of sanctions and investigative powers in the hands of the Media Authority against media outlets disregarding these obligations.

On the other hand, it grants certain privileges for journalists, by providing explicit protection against interference of owners of media outlets to editorial work<sup>40</sup> and by granting immunity for journalists for minor offences committed in the course of their investigative work<sup>41</sup>. These privileges, however, remain inadequately determined and are not incorporated in relevant other legislations.

MC also contains rules of protecting sources of journalists' information<sup>42</sup>. These rules have been subjects of the recent decision of the Constitutional Court.

The single most critical legislative issue in the above-mentioned order of the Constitutional Court is whether the supervision of the printed and online press by the media authority will be allowed to stand. Although instating control over the media by a media authority must be seen as the most regressive step in the cause of the free press, the Constitutional Court did not rule out the possibility of such control but merely placed restrictions upon it. Pursuant to the ruling, the media authority retains its power — theoretically at least — to take action against hate and discriminative speech posted on online journals or news portals, violations of constitutional law and order, the self-serving, offensive representation of helpless and vulnerable individuals, content deemed severely harmful for children, and unlawful commercial messages (advertising). No media authority supervision is allowed regarding posts and publications violating human dignity, privacy, and human rights in general, nor regarding violations of the obligation to withdraw such statements. The authority's options to step in against messages of hate and discrimination have been scaled back by the Constitutional Court far enough as to virtually prevent such intervention in the future.

The Constitutional Court ordered to revise the rules of source protection following the case of a non-profit investigative journalism site, *Atlatszo.hu*, which challenged the rules.

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<sup>34</sup> MC 14. §.

<sup>35</sup> MC 16. §.

<sup>36</sup> MC 16. §.

<sup>37</sup> MC 19. §.

<sup>38</sup> MC 20. §.

<sup>39</sup> MC 13 §

<sup>40</sup> MC 7. §.

<sup>41</sup> MC 8. §.

<sup>42</sup> MC 6. §.



Acknowledging that *atlatzo.hu*'s claims were right, the Constitutional Court of Hungary decided that the protection of journalists' sources is not sufficiently guaranteed by the new, widely criticised 2010 media law. It happened with reference to this law that the organised crime unit of the Hungarian Police summoned Tamás Bodoky, editor-in-chief of *atlatzo.hu*, as witness, after he refused to identify a confidential source.

Bodoky did not identify his source as a witness either, he claimed reporter's privilege – police seized a hard disk as evidence at the journalist's apartment. *Atlatzo.hu* filed several legal complaints against the police obligation to identify a journalist's source and seizing confidential data, but the Public Prosecution Office – responsible for overseeing criminal investigations and ensuring that the police comply with the law – stated that police claim to reveal the sources was justifiable.

In revising the provisions regulating the protection of information sources, the decision of the Constitutional Court made it indispensable to incorporate substantive and procedural safeguards, for instance by prohibiting investigative agencies to order a journalist to reveal his source unless the information sought cannot be obtained in any other manner. Furthermore, the Court order means that the modifications should enshrine the journalist's right to seek remedy against such an investigative resolution prior to revealing his source. It will be impossible to maintain the precedence of classified information, such as state secrets, over the interests in keeping sources anonymous. For this reason, legislators should incorporate the option of deliberating between the respective benefits of revealing sources and of keeping them unidentified, even when the information in question is classified, and must again uphold the right to seek remedy in court. Additionally, an amendment of penal and civil procedures is called for to make it unequivocally clear that journalists are entitled to protect their sources in all conceivable procedures.

The forthcoming amendment of MC was to clarify that only courts may oblige journalists to reveal their sources of information in exceptional cases during criminal procedures. The amending bill also aimed at introducing safeguards into various procedural laws strengthening this right of journalists. According to the proposed amendment of MC the right of journalists to keep their sources confidential would be applicable *mutatis mutandis* to their records and documents.

The Hungarian Parliament adopted on 24 May 2012 a more flexible version of the much-criticised media law, that mainly introduced the requested amendments guaranteeing the protection of journalists' sources. According to the new provisions, the media authority NMHH no longer controls editorial content in print media, but the examination of audiovisual media content remains under its attributions. Journalists can no longer be forced by the NMHH to disclose their sources and breaking of the law, such as breach of privacy, can only be heard in court.

Still not included in the amendments is the aspect regarding the political independence of the media regulatory authority, its president being further appointed by the prime minister personally.

- Specific positive content obligations

Public service media are subjects of content obligations defined by the Public Service Code regarding: the criteria for supporting and sustaining the mother tongue culture, the principles of the rules of presenting the culture and life of national and ethnic minorities living in Hungary, the principles of communicating public service announcements, the principles of keeping members of the Hungarian nation living abroad adequately



informed, and also of providing adequate information about them, the principles of formulating basic ethical rules, other than those in this Act, applying to staff members, with special regard to those employed in relation to news and political programmes."<sup>43</sup>

The Code has established only fragments of professional, ethical rules. Apart from the general declarations the Code does not provide further guidelines on the creation of the content. Is generally understood, that in the lack of professional standard the operation of the public service media is running in a black box.

In the commercial sector media service providers with significant market power are subject to special content obligations (they are obliged to provide news services and to make a proportion of their content available with subtitles or sign language for persons of impaired hearing).

- Funding schemes for specifically desired content

MTVA is also the source of funding public service programme items, community media, films and contemporary music. Funding is provided by the decisions of the Media Council of the NMHH in tendering procedures.

- Political advertising and/or broadcasting time

According to the relevant provisions of MM:

*"(3) During election campaign periods, political advertisements may only be published in accordance with the provisions of the acts on the election of members of Parliament, members of the European Parliament, representatives of local and county governments, mayors and the election of minority self-governments. Outside of election campaign periods, political advertisements may only be published in connection with referendums already ordered. The media service provider shall not be responsible for the content of the political advertisement, if the request for the publication of the political advertisement is in compliance with the provisions of the Act on election procedures, and in such case the media service provider shall be obliged to publish the advertisement without further consideration.*

*(4) Upon the publication of political advertisements, public service announcements and public service advertisements, the person or entity ordering the publication shall be identified unequivocally."*<sup>44</sup>

- Codes of conduct and their organisational framing

As a new legal institution of the media regulatory system the MM established a co-regulatory scheme in which the self-regulatory organisations and the Media Council of the NHMM work together in favour of a more flexible and more effective prosecution of media rights.

The MM contains also the mechanism of cooperation in detail<sup>45</sup>. The self-regulatory organisations should draw up their codes of conducts, and sign an administrative contract with the Media Council of the NMHH. According to the authorization which derives from these documents the organisations can carry out self-management activities among their

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<sup>43</sup> MM 96. §.

<sup>44</sup> MM 32 (3)-(4).

<sup>45</sup> MM 190-196.

members<sup>46</sup>. On this basis the co-regulation creates a connection between the authority of the state and the union of media market actors. Nevertheless, self-regulatory bodies operating also as co-regulatories are forums of the first instance in case of public complaints concerning their members. Complaints come in the second ground before the authority, for official adjudication, which obliges the members concerned to follow the self-regulatory forum just in need. Funding for performing the co-regulatory tasks is also provided to the self-regulatory organisations by the Media Council of the NMHH<sup>47</sup>. From one side the bodies of the new legal institution keep distance both from the state and from the market to fulfil individually the bridge-function between them, but from the other side the state provides the funding for completing their tasks and the actors of the market are the salaried to carry out the tasks. The real loophole is that the rules in case of conflicts of interest are not laid down.

The other weakness of the new legal institute is that at the time the drafts of the regulation occurred, in Hungary there were only two self-regulatory bodies on this field carrying out self-management activities among their members according to their declared professional standards. Voluntary, effective and independent self-regulation does not have a long tradition, stable basis, it can hardly fulfil the tasks the co-regulation put on it without the impairment of the professional background. The regulation conceals the prospect for the self- and co-regulatories to become the alternative dispute resolution forum of the Media Council of the NMHH.

At the moment there are four organisations performing self-regulatory tasks within this system.

These are:

- the Association of Hungarian Content Providers (MTE)<sup>48</sup>,
- the Association of Hungarian Electronic Broadcasters,
- the Association for Self-regulating Advertisers (ÖRT)<sup>49</sup>, and
- the Association of Hungarian Press Publishers (MLE)<sup>50</sup>.

According to the latest analyses public complaints do not arise at the associations. The reason can be the complicated process prior to sending in a complaint or that the complaint forum function of the associations are not part of the common knowledge yet.

- The role and functioning of regulatory authorities in these respects

The media authority is responsible for applying the rules of MC and MM in this regard too. Decisions of the NMHH are subjects of judicial control.

It is also the role of the NMHH to supervise the activities of the self-regulatory organizations, as mentioned above, in accordance with the agreements concluded with the respective parties.

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<sup>46</sup> MM 191. (1)

<sup>47</sup> MC 190 – 202. §.

<sup>48</sup> [http://www.mte.hu/eng\\_egyesulet.html](http://www.mte.hu/eng_egyesulet.html).

<sup>49</sup> <http://www.ort.hu/>.

<sup>50</sup> <http://www.mle.org.hu/>.

- Distribution Aspects

Distribution aspects of electronic media are dealt with primarily within the framework of telecommunications law.

- Access to frequencies

Frequency management is the role of the NMHH. Act LXXIV of 2007 on digital switchover and on rules of programme distribution provides a comprehensive set of rules for distributing radio and television programmes. The act defines 31 December 2014 as the date of digital switch-over (analogue switch-off) of television broadcasting<sup>51</sup>. The original date was 31 December of 2011, but the Parliament modified it several times because of the deficiencies of public information and the deficiencies of forming the financial aid system, and because of the market uncertainties. The former telecommunications authority tendered five nationwide digital television and two nationwide digital radio frequencies in 2008. The object of the tendering was the operating of the digital terrestrial platforms. The winner, the Antenna Hungaria owned by Télédiffusion de France (TDF), is entitled to distribute the digital capacities to the media service providers. Media service providers on the digital terrestrial platform do not need to take part on specific tender procedures. They have to register at the Media Council and to agree with the operator on the conditions of digital transmission. The procedure of the local digital switch-over is not clarified yet, in spite of the fact that the new media act contains the applicable procedure rules.

A frequently-cited recent case of controversy related to tendering broadcasting possibilities via analogue terrestrial frequencies is the case of Klubrádió.<sup>52</sup> This is a regional radio station presenting mainly news and current affairs. As the broadcasting contract of the station expired the NMHH launched a tender concerning the frequency it operates on. Having lost the tender Klubrádió has initiated the judicial review of the process. The court examining the case has found that the procedure of the NMHH was not in accordance with the relevant provisions of MM and annulled the decision of the authority.

The future of Klubradio may well hinge on the outcome of two court reviews. The first has to do with the tender announced for the 92.9 MHz frequency in Budapest. Although Klubradio won the tender in April 2010, the Media Council that had formed in the meantime refused to sign a contract with the station. The other process reviews the results of the tender for the 95.3 MHz frequency, in which Klubradio finished as a close second bidder. In both litigations, the court ruled — in the first instance in the first case, and in a final and non-appealable judgment in the second case — that the Media Council had violated the law. It clearly follows from these judgments that Klubradio actually won both tenders.

In the case of the 92.9 MHz frequency, the Media Council sought to justify its refusal to sign a contract with the station by saying that Klubradio had not been eligible to file a bid in the first place, because it was airing broadcasts at the time using another frequency in Budapest. However, the station had made the commitment, obeying the requirement set forth in the tender announcement, to resign that other frequency if it won. It is true that certain lawsuits over other radio tenders pending at the time did feature similar rationalizations about initial eligibility, but these arguments had disappeared by the time those cases reached final judgment. Furthermore, even if there had been a flaw in

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<sup>51</sup> Act LXXIV of 2007 38. § (1).

<sup>52</sup> Summary of the Case of Klub Radio, <http://mertek.eu/en/article/summary-of-the-case-of-klub-radio>.

Klubradio's bid, it would not have affected the winning bid unless another bidder contested the final result in court. Consequently, entering into contract with the winning bidder — with Klubradio, in the case of the 92.9 MHz frequency — is not an option but an obligation and a liability, and at once the only way to uphold the option of the losers to seek legal redress in their turn.

Ultimately, the court not only declared that the Media Council had acted against the law by refusing to sign the contract, but in effect produced that contract itself by virtue of this very judgment. The Media Council, nevertheless, filed an appeal against this first-instance decision.

In the case of the 95.3 MHz frequency, Klubradio appealed the Media Council's resolution after it had lost to a competitor by a few points. In some of its parts, the result of the tender is bound to objective criteria, in the evaluation of which the Media Council has no discretion to deliberate, and the number of points can be calculated beyond any dispute. The other part of the total awarded score, however, comes from the quality assessment of the proposed programme schedule, where the authority can easily tailor points to suit its preferences, and ultimately to the end result it would prefer to see. The suspicion that this is indeed what happened is substantiated by the fact that, in the course of the lawsuit, the Media Council modified its own explanation originally attached to the resolution in respect of these very subjective criteria.

Finally, the court annulled the result of the tender citing formal errors, noting that the winning bid was not affixed by properly authorized signatures. The court then ordered the Media Council to reevaluate the submitted bids. Since the original evaluation had relegated Klubradio to the second place, the outcome of this reevaluation could hardly be other than declaring Klubradio as the winner. The Media Council, however, has not passed a new resolution in the matter ever since.

After all these, the Parliament intervened in the court procedure in June 2012 by modifying the Media Act.<sup>53</sup> The final text of the modification – which had more versions before the passing – contains three risks to Klubradio. There is no process to convert the contract concluded on the basis of the old media law to a contract appropriate to the new law. Secondly, the Klubradio cannot get a community license. According to the new law, community status can be awarded just in a tender that was published by the Media Council or in a specific process that can be initiated by a radio or television provider that does not use frequencies; Klubradio not meeting these requirements. In the end, it can be only concluded that the future of Klubradio depends on the law interpretation of the court in the 92.9 MHz case.

Evaluation of the tendering practice of NMHH proves the marginalization of former incumbent radio stations, while the right-wing Lanchid Radio and two religious stations, Maria Radio and Europa Radio, won several local frequencies.<sup>54</sup>

- Access to distribution networks and control of actual conditions

MM defines specific rules for securing pluralism on distribution network as follows:

*"(1) The number of media services in the providers of which the same undertaking has a qualifying holding shall not exceed one quarter of the audiovisual media services or half the radio media services distributed on the given transmission system.*

- (2) *The number of media services the providers of which also perform media service distribution activities or in the providers of which the same media service distributor undertaking has an ownership stake shall not exceed one quarter of the audiovisual media services or half the radio media services broadcasted on the given transmission system.*
- (3) *The ratios defined under Paragraphs (1)-(2) shall also apply to the programme package, offered by the media service distributor undertaking to viewers or listeners, which had the highest number of subscribers at the end of the previous calendar year in the given transmission system”<sup>55</sup>*

Beyond specific rules radio and television programme distribution is also subject of the general rules of competition law.

- Must-carry/must-offer rules for electronic media

The role of the multiplex operators is developed by the act as a “strong” one. In this model, while complying with a set of “must-carry” obligations, multiplex operators are free to decide which programmes they distribute.

Detailed “must-carry” and “must-offer” rules for platform operators (most importantly for cable operators) are defined by the MM<sup>56</sup>.

Beneficiary media service providers of the must-carry rules are the public service broadcasting providers and the community providers. All platform operators have to distribute 4 PSB channels, 2 local and 3 local or regional community channels. The Media Authority may define 2 other PSB channels and 1 community channel as subject of the must-carry rules. The biggest, so-called influential media service distributors have an obligation to contract in respect of three further community media services. Altogether, media service distributors have to distribute 14 channels; these obligations are a significant burden on the platform operators. Furthermore, the criteria of community services are not clear enough to prevent abuses. The rules made possible to new channels as community providers to get into the cable packages and demand a large amount of copyright fee from the operator. The last modification of the Media Act has reacted on this failure; according to the modification, if the community media service provider and the platform operator have debates on the distribution conditions, the media authority will decide this debate in the way that it will define the price of distribution in 0 HUF.

These prescriptions are completed with some must-offer obligations.<sup>57</sup> A media service provider with significant influence or a media service provider in which an influential media service distributor has a qualifying holding shall contract with any media service distributor in respect of all its linear media services in order to be able to transmit the media services within the distributor’s programme packages. The obliged media service provider may not make the conclusion of an agreement pertaining to any of its media services, or the determination of the material contents of this agreement, conditional upon the entering into another agreement in respect of its other media services which are not essential for the distribution of the given media service, or upon the purchase or

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<sup>53</sup> On Lex Klub Radio: The legislative machinery will not rest ..., <http://mertek.eu/en/article/on-lex-klub-radio-the-legislative-machinery-will-not-rest>.

<sup>54</sup> [http://mertek.eu/sites/default/files/reports/report\\_on\\_tender\\_procedures.pdf](http://mertek.eu/sites/default/files/reports/report_on_tender_procedures.pdf).

<sup>55</sup> MM 72. § (1) – (3).

<sup>56</sup> MM 73 - 81. §.

<sup>57</sup> MM 78. §

use of other services or products. The obliged media service provider and media service distributor shall formulate the agreement and the contractual terms and conditions thereof – in particular, but not solely the fee – in line with the principle of equal treatment, by setting an affordable price level and having regard to the principles of technological neutrality and economies of scale.

- The role and functioning of regulatory authorities in these respects

The supervision of the implementation of the rules above by operators is the role of the NMHH. The Media Council is entitled to decide the debates on must-carry or must-offer rules between media service providers and platform operators.

- Access to Information
  - Transparency of media ownership situations

The registry of media service providers, as described in this paper under the heading “market entry” is public. This is complemented by the publicity of the records of the courts of registration.

- Accountability of public service media

In this regard reference has to be made to the director generals’ obligation to prepare a report on „whether the media service provider under their management, according to their own assessment, has fulfilled the requirements outlined in [MM] regarding the objectives and basic principles of public media service.”<sup>58</sup> If the Board of Public Services, after having personally interviewed the CEO, decides to reject the report, the Board of Public Services may consider submitting a proposal to the Board of Trustees for the termination of the CEO’s employment relationship.

During the course of May all management reports have been accepted by the Board of Public Services.

A major gap of the Hungarian media legislation is that the MM does not make a clear description on the public service mandate. In this context, the budget to render the public service mission is consequently missed. The current financing method of the PSB most probably does not fulfil the requirements of the EU Commission on the State aid to PSB.

Due to the lack of essential regulation, it is not able to establish and maintain a transparent operation.

As to the role and composition of the Board of Public Services see the reference to “participation in bodies of media operators (viewers’ and listeners’ councils or alike) or in (self-)regulatory authorities/bodies” below.

- **Freedom of information laws**

Reference shall also be made to Act CXII of 2011 on Informational Self-determination and Freedom of Information<sup>59</sup> (“Freedom of Information Act”). Beyond defining the right of the individual to privacy in respect of his/her personal data the act also defines the

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<sup>58</sup> MM 97. § (8).

<sup>59</sup> [http://www.naih.hu/files/act\\_2011\\_cxii\\_in\\_eng\\_v2.pdf](http://www.naih.hu/files/act_2011_cxii_in_eng_v2.pdf).

circle of data of public interest and provides for their openness as a general rule. For the protection of the rights enshrined in the Freedom of Information Act the Authority for Data Protection and Freedom of Information<sup>60</sup> has been set up as an autonomous regulatory organ.

The act also defines the procedure of granting access to data of public interest. In accordance with its rules

- *"Requests for accessing data of public interest may be made verbally, submitted in writing or electronically by anyone."*<sup>61</sup>
- *"The body undertaking public duties controlling the data shall satisfy the requirements relating to accessing data of public interest within the shortest possible space of time, but within a maximum period of 15 days."*<sup>62</sup>

Beyond providing information on request, state institutions also have the obligation to publish a circle of specified data of public interest *"free of charge in digital format on internet websites for anyone interested, without disclosing any personal ID data or applying restrictions, in printable format ensuring the opportunity to copy parts of the text without data loss or distortion, enabling the document to be viewed, copies to be downloaded and printed, as well as network data transfer"*<sup>63</sup>. Access to such data cannot be subject to the disclosure of personal data<sup>64</sup>.

- Accessibility of products/services and distribution networks

There are no information to mention or applicable here.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

As a representative of the public in issues related to telecommunications and media services MM established the institution of the Media Commissioner<sup>65</sup>. The role of the Commissioner is to consider complaints from members of the public and initiate dialogue with the service providers.

Since his appointment the Commissioner, *inter alia*, conducted an inquiry regarding SMS votings in television programmes. This resulted in a report and a recommendation. Another action of the Commissioner was the initiation of a professional debate on the portrayal of suicide in the media.

It is to note that on the basis of the recent decision 165/2011. (XII.20.) AB of the Constitutional Court<sup>66</sup>, the amendment currently under acceptance by the Parliament provides that the Commissioner will no longer be in the position to consider complaints with regard to any individual media outlet.

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<sup>60</sup> <http://www.naih.hu/information.html>.

<sup>61</sup> Freedom of Information Act 28. § (1).

<sup>62</sup> Freedom of Information Act 29. § (1).

<sup>63</sup> Freedom of Information Act 33. § (1).

<sup>64</sup> Freedom of Information Act 33. § (1).

<sup>65</sup> <http://www.mhb.nmhh.hu/?id=hfjkmnu&mid=1373>.

<sup>66</sup> [http://hunmedialaw.org/dokumentum/94/08\\_1652011\\_Abh\\_final.pdf](http://hunmedialaw.org/dokumentum/94/08_1652011_Abh_final.pdf).



- Participation in media operators/(self-)regulatory bodies

In order to carry out the function of "*social control over the public media service*"<sup>67</sup> MM instituted the body of the Board of Public Services. This board constantly monitors how public service orientation is manifested, and exercises certain control over the public media service providers<sup>68</sup>. The membership of the board is composed of representatives of organisations of the civil society, churches, and other similar associations.

### 2.2.12.3. Main Players in the Media Landscape

Hungary is a relatively small media market with approximately 3.8 million households. This has definitive consequences for its media markets.

#### 2.2.12.2.1. Radio

At the national level there are two commercial radio channels Class FM and Neo FM. They concluded their broadcasting contract with the ORTT (the predecessor of the Media Council of the NMHH) in 2009 following a tender. The tender itself was scandalous, and the president of the ORTT has resigned after the decision. It was clear that the financial bids of the two winners were absolutely unrealistic (Class FM: 200 million HUF + 55% of the revenue, Neo FM: 200 million HUF + 50% of the revenue annually). The developments of the last years proved the worst-case scenarios in two ways, the political forces determining the sustainability of the two stations: Class FM, closely related to the biggest governmental party, is heavily financed by making available airtime to commercials of state-owned companies (e.g. gambling monopoly), while Neo FM, linked to the Socialist Party, has no prospects for profitable operation. It was unable to pay the licence fee, so the NMHH cancelled its contract on 20 June 2012. Neo FM will be closed after the legal procedure.

The public service radio is present, *inter alia*, with three national programmes on the market. MR1-Kossuth is a generalist channel focusing mainly on news and talk. MR2-Petőfi is dedicated mainly to light entertainment (i.e. contemporary music). On the other hand, the backbone of the programme MR3-Bartók is provided by classical music.

Among the national radios Class FM has the highest ratings. It is followed by MR1-Kossuth and Neo FM<sup>69</sup>.

The national level of the radio market is complemented by a considerable segment of local radio channels. Currently there are 222 local broadcasters in the registry of the NMHH, most of them are local radio stations (local television channels account for a significantly smaller portion among them). Local radios have typically high ratings<sup>70</sup>.

#### 2.2.12.2.2. Television

A definitive characteristic of the Hungarian television broadcasting landscape is the almost total lack of the regional and local level. Although there are a number of local television channels they cannot be considered as a significant part of the media market, both in terms of ratings and revenues. As to the different actors of the Hungarian media landscape their three main types can be distinguished:

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<sup>67</sup> MM 97. § (6).

<sup>68</sup> MM 97. § (7).

<sup>69</sup> Data of 2011 december, IPSOS-GfK, ReachN.

<sup>70</sup> IPSOS-GfK, research of 2011 September – available at: [http://www.helyiradiok.hu/index.php?action=kutatas\\_hallg.](http://www.helyiradiok.hu/index.php?action=kutatas_hallg.)

- In market terms the most important broadcasters are M-RTL Zrt. and MTM-SBS Zrt, the operators of the two national terrestrial television channels under the brands of "RTL-Klub" and "Tv2". Both of them are subsidiaries of major pan-European media enterprises: M-RTL is part of the RTL Group, MTM-SBS has been acquired by the Pro7Sat.1-holding. They began to provide their programmes right after the creation of the dual media system in 1997 at about the same time. Their broadcasting contracts are valid until the summer of 2012. After the years of close competition between the two national commercial channels RTL Klub became the dominant player. Today RTL Klub is clearly the market leader, while market share of Tv2 is declining and it generated huge financial loss in 2012. There are rumours about the sale of MTM-SBS and the potential buyer is Infocenter. It is one of the biggest Hungarian media groups, partly owned by *Zsolt Nyerges*, who is closely related to the current right-wing government. *Infocenter* owns *Class FM* commercial radio, *Heti Valasz*, a political weekly magazine, and *Lanchid Radio*, the regional radio station that acquired several local frequencies in the first months of 2012.
- The second most significant group of television broadcasters in Hungary is the segment of thematic channels. There are approximately 100 television channels available for the Hungarian audiences in the national language as parts of the offers of various cable television and satellite network operators. It is worth noting that only 22 of them operate under the Hungarian jurisdiction. The rest are registered mostly in the Czech Republic, Romania or in the UK.
- The two public service television companies, MTV and Duna Tv, have obviously not recovered from the shock they suffered by losing their monopoly in 1997, when M-RTL and MTM-SBS entered the Hungarian market. Now, compared to their huge economic weight (their aggregated yearly turnover equals approximately one third of the total Hungarian market's) their audience share is extremely low (in the fourth quarter of 2011 it was 13.6%)<sup>71</sup>. They operate four public television channels.

### 2.2.12.2.3. Press and Publishing

The daily of the largest circulation is Metropol, with an average of 274 296 copies<sup>72</sup> disseminated per issue. However, Metropol is distributed for free, therefore it cannot be compared to other newspapers.

The daily newspaper sold in the highest numbers is the Ringier-owned tabloid *Blikk* with 173 969 copies sold as a daily average.

The best selling political daily is the Ringier-owned *Népszabadság*, with 61 811 copies sold per day. The other major political dailies are *Magyar Nemzet* (with 44 610 copies sold as daily average), *Népszava* (with 19 149 copies sold as daily average) and *Magyar Hírlap* (with 10 651 copies sold as daily average).

Concerning the readership data, *Blikk* is the market leader daily newspaper (1,043,000 readers), followed by *Metropol* (623,000 readers) and *Nemzeti Sport*, the only Hungarian sports newspaper (261,000 readers). The most popular political daily, *Népszabadság*, has only 222,000 readers.<sup>73</sup>

<sup>71</sup> [http://www.agbnielsen.com/Uploads/Hungary/stat\\_shr\\_negyedebes\\_2011.pdf](http://www.agbnielsen.com/Uploads/Hungary/stat_shr_negyedebes_2011.pdf).

<sup>72</sup> The source of the data in this chapter is [http://www.matesz.hu/data/#mainpart\\_2](http://www.matesz.hu/data/#mainpart_2). All data reflects to the 4<sup>th</sup> quarter of 2011.

<sup>73</sup> 2011Q4 data. Source: Marketing&Média (2012 April 25-May 8, p. 22).

In the local press sector the German Axel Springer publishing house is still the largest player with ten titles published daily. The market of weeklies, monthlies and other magazines are dominated by Axel Springer, Ringier and Sanoma.

In general, the market of the printed press is characterised by a constant and general decline. *Népszabadság*, for example, has lost more than a third of its readers since 2008. However, due to the similar scale of losses at other newspapers, it managed to keep its leading position among political dailies even with this shrinkage.

#### 2.2.12.2.4. *Online media (non-linear audiovisual (media) services; websites)*

Non-linear audiovisual media services account for a small part of the Hungarian audiovisual market. There are currently 59 non-linear media service providers registered at the media authority. These services are, in most of the cases, ancillary services to other content services (radio and television programmes).

The most frequently visited<sup>74</sup> Hungarian website is origo, a subsidiary of the incumbent telecommunications services provider T-Com. The other most visited group of websites is of the Central European Media & Publishing (CEMP) group, index being the largest of them. Both origo and index are news sites.

Ringier (*Népszabadság Online - Nol*), Sanoma (*Startlap*) and Axel Springer (*Világgazdaság online*, internet versions of regional newspapers) are also present in the on-line segment of the Hungarian media market with their content services.

Just like in other countries, blogs, social networking sites and other web 2.0 services became an important field of the public debates; mainstream media companies have decreasing influence on agenda setting.

#### 2.2.12.2.5. *Cable/Satellite network operators, IPTV & Internet Access Providers*

The dominant platform of audiovisual programme distribution is cable in Hungary. The share of the particular programme distribution methods can be outlined as follows<sup>75</sup>:

**Table 72 HU: Shares of distribution platforms**

Analogue cable	40%
Digital cable/IPTV	18%
Satellite with subscription	24%
Digital terrestrial	3%
Analogue terrestrial	14%

The three main operators of programme distribution platforms are:

- UPC (with 25.8% of the television households)
- Digi (with 23% of the television households)
- T-Home (with 22.7% of the television households)<sup>76</sup>

<sup>74</sup> The basis of the information provided under this chapter is the data of Webaudit concerning the week of 20<sup>th</sup> – 26<sup>th</sup> of February this year.

<sup>75</sup> [http://english.nmhh.hu/dokumentum/150011/tv\\_gyorsj\\_2012\\_marcus\\_eng.pdf](http://english.nmhh.hu/dokumentum/150011/tv_gyorsj_2012_marcus_eng.pdf).

The digital switchover on the terrestrial radio and television platforms began in 2008, when the telecom regulator NHH (predecessor of the current NMHH), following a tendering procedure, has concluded the administrative contracts with Antenna Hungária Zrt. for digital radio and television programme distribution. According to data of the NMHH the share of digital transmission was 60.0% on the Hungarian television market in March of 2012<sup>77</sup>. The share of digital terrestrial television was 3%<sup>78</sup>.

As regards Internet access the leading fix internet providers are T-Home (a subsidiary of Deutsche Telekom), UPC and Digi. operators. Although the dominant way of internet access is fixed access, mobile broadband services are gaining an increasing share on the market, all of the three players (T-mobile, Telenor, Vodafone) have growing subscription base.<sup>79</sup>

**2.2.12.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)**

Data on media usage can be obtained from various actors:

- Radio audience measurement is provided by the GfK<sup>80</sup>/Ipsos<sup>81</sup>-consortium;
- Television ratings are provided by Nielsen Audience Measurement<sup>82</sup>;
- Circulation of newspapers is followed by the Hungarian Association for Controlling Circulation (MATESz) Print Audit<sup>83</sup>;
- Data on the usage of websites are provided by gemius/Ipsos<sup>84</sup>.

According to the estimates of the Hungarian Advertisers' Association the total volume of the Hungarian advertising market was 151.474 billion Huf (approximately 587.337 million Euros) in 2011<sup>85</sup>. The shares of the main types of media within this total turnover were<sup>86</sup>:

**Table 73 HU: Advertising market shares**

Television	36.2%
Print media	27.5%
Internet	18.8%
Outdoor + Ambient	10.0%
Radio	4.9%

<sup>76</sup> source of data: nmhh flash report on television 2012 march, available at [http://english.nmhh.hu/dokumentum/150011/tv\\_gyorsj\\_2012\\_marcus\\_eng.pdf](http://english.nmhh.hu/dokumentum/150011/tv_gyorsj_2012_marcus_eng.pdf).  
<sup>77</sup> [http://english.nmhh.hu/dokumentum/150011/tv\\_gyorsj\\_2012\\_marcus\\_eng.pdf](http://english.nmhh.hu/dokumentum/150011/tv_gyorsj_2012_marcus_eng.pdf).  
<sup>78</sup> [http://nmhh.hu/dokumentum/151795/dig\\_atallas\\_2012\\_tavaszb\\_webre\\_vegleges.pdf](http://nmhh.hu/dokumentum/151795/dig_atallas_2012_tavaszb_webre_vegleges.pdf).  
<sup>79</sup> for details see the research of the NMHH of 2011: [http://nmhh.hu/dokumentum/2220/lakossagi\\_net\\_2011\\_vegleges\\_webre.pdf](http://nmhh.hu/dokumentum/2220/lakossagi_net_2011_vegleges_webre.pdf).  
<sup>80</sup> <http://www.gfk.hu/index.en.html>.  
<sup>81</sup> <http://www.ipsos.hu/site/?lang=en>.  
<sup>82</sup> <http://www.agbnielsen.net/whereweare/dynPage.asp?lang=english&id=318&country=Hungary>.  
<sup>83</sup> <http://www.matesz.hu/data/index.php>.  
<sup>84</sup> <http://opa.gemius.hu/>.  
<sup>85</sup> <http://mrsz.hu/download.php?oid=Ta3f31594b5d0814974b2fe97a550276;aid=T73735504853071a9b4cc369a0a43f00>.  
<sup>86</sup> <http://mrsz.hu/download.php?oid=Ta3f31594b5d0814974b2fe97a550276;aid=T73735504853071a9b4cc369a0a43f00>.

The overall turnover of the Hungarian advertising market is constantly declining since 2008.

#### 2.2.12.4. Conclusion and Recommendations

Media fulfils the same dual role in every culture: it preserves and develops the common cultural heritage and provides the free flow of credible information necessary for the functioning of democracy. By the very nature of media economics these roles require the same scale of commitment from small and great countries. In this context the relatively small size of the Hungarian media market means that the Hungarian media has to fulfil its role on a significantly smaller economic basis than some of its European counterparts. This leads to sometimes unavoidable compromises in terms of quality and diversity of content.

As regards regulation reference has to be made to the widespread international criticism expressed in relation with the legislation of 2010. The Hungarian media regulation, as it is indicated by the recent decision of the Constitutional Court, and the recent motion of the Commissioner for Fundamental Rights certainly had and has its weaknesses. However, these decisions also indicate, that internal correctional mechanisms are functional in this respect.

As conclusions and recommendations, we can cite the analyses and recommendations of the international organisations.

The Constitutional Court failed to even dredge up the most sensitive regulatory issues in his decision in December 2011. For instance, it failed to address the extent of sanction, the independence of the Media Council, and the constitutional viability of the entire system of public service institutions. It will be impossible to restore freedom of the press without solving these problems. Although the Constitutional Court refrained from forcing the legislature to make a move in these issues, there are places it could well turn to for inspiration to hammer through comprehensive amendments even more far-reaching than the considerations itemized above. Many studies and analyses of the Media Act have been published since its adoption, both in Hungary and abroad. These have been invariably swept aside or simply ignored by the government. The situation has changed somewhat in that the Council of Europe is now looking into the compatibility of the Act with the European Convention on Human Rights and various Council of Europe documents. Lending further weight to the investigation, the Vice-President of the European Commission responsible for the Digital Agenda publicly forced the Hungarian Minister of Public Administration and Justice to promise that the findings will be respected.

The most comprehensive critics were formulatad by the Council of Europe in May 2012.<sup>87</sup> This expertise analysed the problems of the Hungarian media acts on 47 pages. There is no point in the acts that are not object of considerable criticism. Most of the critic has turned up in former documents of the Council of Europe and other NGOs, but this analysis makes it clear that the acts cannot be improved by partial modification but rather they need to be fundamentally overiewed. The result of this overview is probably a new legislation.

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<sup>87</sup> Expertise by Council of Europe experts on Hungarian media legislation, [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CE8QFjAA&url=http%3A%2F%2Fwww.coe.int%2F%2Fdocument\\_library%2Fget\\_file%3Fuuid%3Dfbc88585-eb71-4545-bc5d-b727e35f59ae%26groupId%3D10227&ei=1iTrT\\_-1GIbd4QTTorzmAg&usq=AFQjCNHHwEFUxRlvj6eB3UeQwj2Stkaqg&sig2=iXkijJCYhDh0r-bSWdAyig](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CE8QFjAA&url=http%3A%2F%2Fwww.coe.int%2F%2Fdocument_library%2Fget_file%3Fuuid%3Dfbc88585-eb71-4545-bc5d-b727e35f59ae%26groupId%3D10227&ei=1iTrT_-1GIbd4QTTorzmAg&usq=AFQjCNHHwEFUxRlvj6eB3UeQwj2Stkaqg&sig2=iXkijJCYhDh0r-bSWdAyig).

In March 2012, the Council of Europe formulated four objections to be taken into account in order to promote the legislative process. These objections point the way far beyond the Resolution of the Constitutional Court, and both their wording and timing clearly suggest that their aim was to influence the amendment in meaningful ways. In its own civilized European manner — and perhaps erring on the side of political correctness — the CoE voiced its expectations concerning the political independence of the Media Council, the reformation of the system of sanctions, the clarification of media-rights prohibitions and obligations, and the protection of sources. Even if the government chooses to consider the CoE's position a legislative "must", the issue of the Media Council's independence is likely to be bogged down in endless debate. This is because the government and the ruling parties are convinced that the Media Council is independent as it is, and it will be very difficult to move away from this position.

In February 2011, the Council of Europe and its Commissioner for Human Rights posted a comprehensive report on the Media Act and made proposals for its amendment.<sup>88</sup> The Council of Europe, however, is not the only body that has compiled a detailed list of objections. In February 2011, the Organization for Security and Co-operation in Europe (OSCE) published a study on the Media Act.<sup>89</sup> In April that year, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, delivered a set of critical observations and recommendations in a statement.<sup>90</sup> The overwhelming majority of these recommendations are yet to be fulfilled despite the fact that the National Assembly satisfied all expectations of the European Commission regarding harmonization with European Union media laws last March. These revisions, however, left the most serious doubts about the Act unaddressed.

The cause of abolishing the regulation of print and online media products has been most firmly embraced by the OSCE, which protests the hazy definitions used by legislators as something that permits further services to be subjected to the Media Act. The UN Rapporteur also considers the scope of the regulation "problematic," and recommends limiting it to the audiovisual sector in relation to distribution of frequencies, while encouraging self-regulation of the print media and the Internet.

The February report of the Council of Europe voiced doubts over the ambiguity of stipulations, particularly as regards balanced coverage. Although the requirement of balanced coverage has since been narrowed down to radio and television programming from the original version of the Media Act, this does not affect the validity of the Council of Europe's previous finding that, "whether or not Article 13 is interpreted in a manner which restricts media freedom, the very fact that such a possibility exists is enough to have a profound chilling effect on media's preparedness to challenge, dissent and assume unpopular positions." It recommended, and continues to recommend in its own gentle manner, that the stipulation of balanced coverage be abolished altogether as is. The criticism of vaguely worded provisions, and the requirement of balanced coverage in particular, which permits a variety of subjective and unpredictable interpretations — and as such belongs in the preamble to the Act in the opinion of the OSCE — recurs in the reports delivered by both the OSCE and the UN. The UN Rapporteur recommends that the requirement of balanced coverage not be stipulated by law but regulated by media organisations as voluntary codes of conduct. The OSCE extends these doubts to the provisions requiring certain diversity of programming from "providers of significant powers of influence".

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<sup>88</sup> <https://wcd.coe.int/ViewDoc.jsp?id=1751289>.

<sup>89</sup> <http://www.osce.org/fom/75990>.

<sup>90</sup> <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10915&LangID=E>.



The OSCE report reserves approval of regulating the interdiction of hate speech by media law exclusively on condition that the scope of the regulation does not encompass each type of media. Unlike the Hungarian Constitutional Court, the OSCE does not consider regulations in excess of existing prohibitions by criminal law to be acceptable except when confined to television and radio broadcasting at most. Additionally, the report argues that the interdiction of exclusion is laid bare to abuse by permitting a broad range of interpretations.

In the opinion of the Human Rights Commissioner of the Council of Europe, the system of sanctions set forth by the Media Act needs substantial revision to be reconciled with the Convention of Human Rights and case law of the European Court of Human Rights in respect of freedom of expression. Already in February 2011, the Commissioner argued that the system of sanctions should be repealed altogether and violations dealt with on the basis of general sanctions available under existing provisions of civil and criminal law. Essentially the same recommendation to abolish these sanctions as being frustrating for media providers and encouraging self-censorship — and therefore detrimental to diversity — can be found in the statement delivered by the UN Rapporteur.

In terms of the requirement to register print and online media, the Commissioner went much further than the Constitutional Court and proposed that these media products should be simply excluded from the registration requirements altogether. The UN and the OSCE has taken the same view of this matter.

In their reports, all the international organisations raise criticism against the composition and powers of the media authority. Regarding the body's independence, the Council of Europe concludes that "[t]he provisions regarding appointment, composition and tenure demand amendment not least because they lack the appearance of independence and impartiality, quite apart from a de facto freedom from political pressure or control. The opinion refers to the Recommendation of the Council of Europe for guidance, which enumerates the following safeguards of independence: rules should guarantee that the members of these authorities are appointed in a democratic and transparent manner; that immunity from instructions is given; that members refrain from making any statement or undertake any action which may prejudice the independence of their functions; and that precise rules exist in respect of grounds for dismissing members. The OSCE objects to the Media Council's excessive powers encompassing both print and Internet-based media, and finds the body's independence dubious. According to the report, it is imperative to guarantee the political pluralism of the media authority, regardless of the degree to which the ruling parties may be dominating in Parliament. The study also takes issue with the excessive concentration of power that subsumes control over the operation of the public service institutions, as well as with the overly long terms of office to which members of the Media Council are appointed. The UN Rapporteur is hardly more optimistic about the independence and impartiality of the media authority, which he claims will pose a serious risk of arbitrary applications of the law — a jeopardy compounded by the vagueness of the stipulated requirements. In line with the other organisations, the Rapporteur recommends that the Government "consider alternative methods of nominating, reviewing, and appointing members of the Media Authority."

In its opinion delivered in February 2011, the Council of Europe had voiced concerns over the alleged independence of public service media provision, but this issue did not come up among the topics dealt with in this year's assessment. At the time, the opinion found that, under the Media Act, the procedure of nominating and appointing senior management officials to public service media — a procedure crucially overseen by the



President of the Media Council — ran counter to CoE standards because it failed to ensure freedom from undue political influence. For much the same reason, the opinion criticizes the move whereby the President of the Media Council became, indirectly through the Media Support and Asset Management Fund, the employer of practically every single journalist working in public service media. As for the regulation of the public service system, the OSCE report also concludes that the current scheme of control over the institutions fails to guarantee political independence, nor does the regulation of financing ensure the independence of day-to-day operations.

To sum up the above, we recommend to the Hungarian legislator to take into consideration the analyses of national and international organisations as well as NGOs and accomplish a comprehensive overhaul of the Hungarian media law. We recommend to the European Parliament and other European institutions to give help to this work and control the Hungarian governance in this process.

## IRELAND

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### 2.2.13. Ireland

#### 2.2.13.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.13.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The Freedom of Expression is enshrined in the Constitution of the Republic Of Ireland which states under Article 40, paragraph 6.1 as follows:

"The State guarantees liberty for the exercise of the following rights, subject to public order and morality: (i) The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law".<sup>1</sup>

The European Convention on Human Rights Act, 2003 incorporated the European Convention on Human Rights into Irish law. The Act provides in Section 2(1) that "*In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.*"

- Specific safeguards and rights for the media

Media are specifically mentioned in the Constitution ("organs of public opinion, such as the radio, the press, the cinema"; television was added to the list by case-law<sup>2</sup>).

- Safeguards on regulatory authorities

The Constitution of the Republic Of Ireland contains no specific provisions regarding regulatory authorities.

- Safeguards on "universal service"

The fundamental Law does not include specific safeguards regarding universal service obligations in the media sector.

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<sup>1</sup> The Constitution of Ireland, [http://www.taoiseach.gov.ie/attached\\_files/Pdf%20files/Constitution%20of%20Ireland.pdf](http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20Ireland.pdf).

<sup>2</sup> State (Lynch) v. Cooney [1982] IR 337.

2.2.13.1.2. *Media order (de lege lata and de facto)*

- “Market Entry”
  - Licensing schemes; remit psm; notification for print publications

The Broadcasting Authority of Ireland (BAI) is responsible for the licensing of broadcasting services<sup>3</sup> including those provided by the public service broadcasters, as the Broadcasting Act stipulates. All national, regional, local, special interest and television content services are licensed for a period of 10 years. Community, community of interest and institutional services are licensed for 5 years or 10 years.

Section 114 of the Broadcasting Act specifies in detail the remit of the national Public Service Broadcaster RTÉ:

- (a) to establish, maintain and operate a national television and sound broadcasting service which shall have the character of a public service, be a free-to-air service and be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland,
- (b) to establish and maintain a website and teletext services
- (c) to establish and maintain orchestras, choirs and other cultural performing groups
- (d) to assist and co-operate with the relevant public bodies in preparation for, and execution of, the dissemination of relevant information to the public in the event of a major emergency,
- (e) to establish and maintain archives and libraries containing materials relevant to the objects of RTÉ under this subsection,
- (f) to establish, maintain and operate a television broadcasting service and a sound broadcasting service which shall have the character of a public service, which services shall be made available, in so far as RTÉ considers reasonably practicable, to Irish communities outside the island of Ireland,
- (g) subject to the consent of the Minister, the Minister having consulted with the Authority, to establish, maintain and operate, in so far as it is reasonably practicable, community, local, or regional broadcasting services, which shall have the character of a public service, and be available free-to-air,
- (h) subject to the consent of the Minister, the Minister having consulted with the Authority, to establish and maintain non-broadcast non-linear audio-visual media services, in so far as it is reasonably practicable, which shall have the character of a public broadcasting service.
- (i) to establish, maintain, and operate one or more national multiplexes,

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<sup>3</sup> The Broadcasting Act, 2009 defines broadcasting service as “a service which comprises a compilation of programme material of any description and which is transmitted, relayed or distributed by means of an electronic communications network, directly or indirectly for simultaneous or near simultaneous reception by the general public, whether that material is actually received or not, and where the programmes are provided in a pre-scheduled and linear order”. However, excluded from the definition of a broadcasting service are services provided in a non-linear manner where each user of the service chooses a programme from a catalogue of programmes (such as video on demand), and audio and audiovisual services provided by way of the internet.

- (j) so far as it is reasonably practicable, to exploit such commercial opportunities as may arise in pursuit of the objects outlined in paragraphs (a) to (i).

Article 114 further requires that in pursuit of the stated objects, RTÉ shall,

- (a) be responsive to the interests and concerns of the whole community, be mindful of the need for understanding and peace within the whole island of Ireland, ensure that the programmes reflect the varied elements which make up the culture of the people of the whole island of Ireland, and have special regard for the elements which distinguish that culture and in particular for the Irish language,
- (b) uphold the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression, and
- (c) have regard to the need for the formation of public awareness and understanding of the values and traditions of countries other than the State, including in particular those of other Member States.

Section 39 of the Broadcasting Act 2009 regulates specific statutory obligations in relation to the manner and content of coverage. It provides that every broadcaster shall ensure that

- (a) all news broadcast by the broadcaster is reported and presented in an objective and impartial manner and without any expression of the broadcaster's own views,
- (b) the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair to all interests concerned and that the broadcast matter is presented in an objective and impartial manner and without any expression of his or her own views, except that should it prove impracticable in relation to a single broadcast to apply this paragraph, two or more related broadcasts may be considered as a whole, if the broadcasts are transmitted within a reasonable period of each other.

For print publications there are no notification required.

- Media pluralism/ownership; competition law aspects

Section 25 of the Broadcasting Act requires that BAI shall ensure the provision of open and pluralistic broadcasting services. The Act specifies that in fulfilling the above general duties BAI shall "promote diversity in control of the more influential commercial and community broadcasting services". In addition, the Act requires BAI when awarding a licence to have regard to the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in the area and the desirability of having a diversity of services in the area catering for a wide range of tastes including those of minority interests.<sup>4</sup> In the 2012 document "Ownership and Control Policy",<sup>5</sup> BAI specified that one investor should not hold more than 25% of the licences. Up to 15% of the total number of licences is deemed "acceptable" with up to a further 10% ownership of the total number requiring "more careful consideration by the Authority". There are no set-percentages for permissible cross-media ownership restrictions in Ireland, although BAI must have regard to "the desirability of allowing any person (...) to have control of (...) an undue amount of the

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<sup>4</sup> *Broadcasting Act 2009*, s 66(2)(f).

<sup>5</sup> <http://www.bai.ie/wordpress/wp-content/uploads/2012-OC-policy-Apr-2012.pdf>.

communications media in the area specified". The lack of set-percentages for permissible cross-media ownership has allowed the development of some major players, such as *O'Brien's Communicorp*, which has interests in the radio and publishing sectors in Ireland. Subsequent moves by Communicorp to grow even further have been consistently accepted by the BAI.

The unique features of the media sector and the concentration thereof have also been recognised by the Irish Competition Act, 2002,<sup>6</sup> which provides for a specific procedure for the review of media mergers. Generally, mergers have to be notified to the Competition Authority only after certain turnover thresholds are exceeded. However, media mergers must be notified to the Competition Authority irrespective of the turnover of the merging companies. Media merger is defined as a merger or acquisition in which two or more of the undertakings involved carry on a media business in Ireland. Media mergers are assessed by the Competition Authority (on competition grounds) and the Minister of Enterprise, Trade and Employment (on pluralism grounds). The Minister has quite wide ranging powers in this respect. He may order the Authority to open a second phase investigation, or decide that the merger may not be approved.

Where a media merger involves the assignment of a broadcasting licence, or the change in ownership or control of a broadcaster licensed by the BAI, the prior written consent of the BAI is required for the media merger to proceed.

In March 2008 the Minister for Enterprise, Trade and Employment established the Advisory Group on Media Mergers. In January 2009 the Minister published the Report of the Group.<sup>7</sup> The main recommendation is that the Competition Act should be amended to incorporate a statutory test to be applied by the Minister in the discharge of his or her function in relation to media mergers and there should also be a statutory definition of media plurality. The statutory test suggested by the Advisory Group is "whether the result of the media merger is likely to be contrary to the public interest in protecting plurality in media business in the State." In addition, the Report recommends that the definition of "media business" should be amended to include publication of newspapers and periodicals over the Internet and broadcast of certain audiovisual material over the Internet. In September 2011 the Minister for Communications announced that the government is working on a legislation to put the Group's recommendations into practice.<sup>8</sup> The rules on media mergers will form part of the new and complex consumer and competition Bill which is due to be published in the end of 2012. In May 2012, the Minister attempted to fast-track the media merger legislation by extracting the sections dealing with media mergers from the larger Bil and having a separate Bill on media mergers adopted before the summer recess of the Irish Parliament. Unfortunately, this effort proved unsuccessful.<sup>9</sup>

As factual situation with regard to media concentration it is worth mentioning that the two top-selling daily newspapers and the two top-selling Sunday papers are owned by one company, Independent News and Media (Ireland) Ltd. The company also publishes 13 local newspapers.

There is also a problem with the cross-ownership of newspapers and radio stations. In July 2007, *Denis O'Brien's* company Communicorp, which owns two Dublin radio stations

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<sup>6</sup> *Competition Act 2002*, (No. 14 of 2002).

<sup>7</sup> "Tánaiste publishes Report of the Advisory Group on Media Mergers", Department of Enterprise, Trade and Employment, Press Release, 2 January 2009, <http://www.entemp.ie/press/2009/20090102.htm>, accessed 14 October 2009.

<sup>8</sup> <http://www.irishtimes.com/newspaper/ireland/2011/0919/1224304354681.html>.

<sup>9</sup> <http://www.irishtimes.com/newspaper/ireland/2012/0517/1224316239749.html>.

(98FM and Spin FM), one national radio station (Newstalk) and a 26% stake in Independent News and Media, acquired national radio station Today FM and Dublin station FM104 from Emap. This acquisition would give Communicorp control over almost 25% of all commercial radio licences in Ireland and over 53% audience share in Dublin. The Competition Authority ordered Communicorp to divest itself of FM104<sup>10</sup> and at the end of 2007, Communicorp sold FM104 to UTV.<sup>11</sup> However, the cross-ownership issue with Independent News and Media was dismissed by the Competition Authority which stated that radio and press advertising are two separate markets. In July 2008 the Broadcasting Commission of Ireland (BCI) investigated the cross-ownership concern between Communicorp and Independent News and Media, but concluded that the interests of Communicorp in Independent News and Media were not substantial. This seemed to have changed in March 2009 when three of *O'Brien's* long-term associates were appointed to the board of Independent News and Media. However, in July 2009 the BCI concluded again that Communicorp does not control an "undue" share of the country's media market. In April 2012, Gavin O'Reilly, stepped down as chief executive of Independent News and Media, the move which ended 39 years of direct control by his family of Ireland's largest media group. His decision followed weeks of speculation in the Irish press that O'Brien would seek to have O'Reilly removed at the annual meeting in June. Reacting to the event, the Irish Prime Minister Enda Kenny commented that 'the Government would consider 'cross-ownership' of the media after an escalation in the battle for control of INM'.<sup>12</sup>

- Legal framework for psm; ability to fulfill their tasks

Public service broadcasting is regulated by Part 7 of the Broadcasting Act, 2009. There are two public service broadcasters in Ireland – RTÉ and TG4. They are financed by licence fee and advertising and operate under the oversight of their governing boards.

RTÉ submitted its Statement of Strategy for 2010-2014 to the Minister of Communications, Energy and Natural Resources on 12 January 2010.

In addition, both RTÉ and TG4 are required to prepare an Annual Statement of Performance Commitments and to make this document publicly available, having consulted with the Authority and the Minister. The Statement is required to take into account the organisation's objects under the Broadcasting Act, their strategy statement and their public service statement. It must also detail any activities which the broadcaster intends to commit to in that year and to include any associated performance indicators.<sup>13</sup>

RTÉ's 2011 high-level strategic objectives were:

- Excellence in Public Service: Fulfil all our Public Service Objects and strive for the highest standards in ethics and accountability, on and off-air;
- High quality, distinctively Irish content: Be the leading creator of the best quality, distinctively Irish content and the premier and most trusted source of Irish news and current affairs;

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<sup>10</sup> The Competition Authority, Determination of Merger Notification M/07/040, *Communicorp/SRH*, 7 December 2007.

<sup>11</sup> The Competition Authority, Determination of Merger Notification M/07/069, *UTV/FM104*, 17 January 2008.

<sup>12</sup> 'O'Reilly resigns as IN&M head', *The Irish Times*, 19 April 2012.

<sup>13</sup> See BAI [http://www.bai.ie/?page\\_id=2146](http://www.bai.ie/?page_id=2146).

- Technology - Delivery of our content: Harness technologies to ensure delivery of and access to our content across the widest range of platforms and devices to meet the needs of the audience;
- Finances: Effectively manage RTÉ's finances into the future through optimising funding sources and controlling costs;
- Organisation, structures and staff: Ensure that RTÉ has a high quality workforce and is optimally organised to deliver the best value for money service to the Irish public;
- Partnerships: Establish and maintain collaborative partnerships and take a leadership role in the creative and digital economies in Ireland.

According to the Annual Statement of Performance Commitments 2011 the objectives were for the large part fulfilled.

- The role and functioning of regulatory authorities in these respects

The responsibility for regulating the broadcasting sector in Ireland lies with several different authorities. BAI<sup>14</sup> is a content regulator. It issues licences and deals with media pluralism and diversity aspects. The Department of Communications, Energy, and Natural Resources develops a policy and legislative framework for broadcasting in Ireland and the Department of Enterprise, Trade and Employment takes part in the approval of media mergers from a media pluralism perspective. The Commission for Communications Regulation (ComReg)<sup>15</sup> is responsible for the regulation of broadcasting transmission and the Competition Authority deals with competition issues.

Broadcasting regulation in Ireland has recently undergone a significant change. As mentioned in the previous Report,<sup>16</sup> in December 2002 the Minister for Communications announced that he intended to create a new structure for regulation in this area. The new *Broadcasting Act, 2009* transposes the Audiovisual Media Services Directive (AVMS) into Irish law and repeals most of the previous legislation in the area.<sup>17</sup> The key features of the reform are, first and foremost, the establishment of BAI as a single content regulator for all commercial, community and public service broadcasters in Ireland. The BAI encompasses the existing regulatory functions of the Broadcasting Commission of Ireland, the Broadcasting Complaints Commission and the RTÉ Authority. BAI is not, however, a fully-integrated broadcasting and communications regulator similar to OFCOM because the communications regulator (ComReg) and the Competition Authority remain separate. The BAI was established on 1 October 2009 and comprises nine members.

BAI exercises the following attributions: licensing broadcasting and multiplex services; developing of a Statement of Strategy for the regulation of broadcasting services in Ireland;<sup>18</sup> examining ownership issues; operating a complaints procedure; developing a

<sup>14</sup> Before the *Broadcasting Act, 2009*, BAI was known as the Broadcasting Commission of Ireland (BCI).

<sup>15</sup> See *Communications Regulation Act, 2002* (No. 20 of 2002), which established the Commission for Communications Regulation (ComReg), Sections 6-38.

<sup>16</sup> Final report of the study on "The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed" Prepared on behalf of the European Parliament by the European Institute for the Media, 2004, p. 107, <http://www.epra.org/content/english/press/papers/European%20Citizen%20Information%20Project%20Final%20REPORT.pdf>.

<sup>17</sup> In particular, *Radio and Television Act, 1988* (No. 20 of 1988) and *Broadcasting Act, 2001* (No. 4 of 2001).

<sup>18</sup> BAI Broadcasting Services Strategy, <http://www.bai.ie/wordpress/wp-content/uploads/BAI-BSS-2012-BF.pdf>.



right of reply scheme; developing broadcasting codes and rules; consulting with the Commission for Communications Regulation (ComReg) on frequency planning and allocation for radio and television services.

BAI consults with the Minister for Communications on a range of public service broadcasting matters including assessing the extent to which RTÉ and the Irish language station, TG4, has fulfilled its public service commitments in respect of its public service objectives. It also reviews the funding levels to ensure there is the funding necessary to carry the public service role.

The Commission for Communications Regulation (ComReg) is the statutory body responsible for the regulation of the electronic communications sector (telecommunications, radio communications and broadcasting transmission) and the postal sector. With regard to the broadcasting sector, the main roles of ComReg are as follows:<sup>19</sup> to plan and co-ordinate internationally, in co-operation with other stakeholders, broadcast transmission networks for Ireland; to input into national broadcasting policy development; to develop and issue licences to BAI and RTÉ containing rights of use to spectrum for terrestrial TV and radio broadcasts; to devise new licensing regimes as required and draft appropriate secondary legislation, and to monitor and enforce compliance with licence terms and conditions.

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

Another new development since the situation described in the previous report in 2004, was the adoption of the Defamation Act, 2009. The Act removed the distinction which existed at common law between torts of libel and slander and replaced it by a single tort of defamation. Before the adoption of the 2009 Act, there had been a trend towards awarding very high damages in defamation cases.<sup>20</sup> One of the reasons was the fact that judges were prohibited from providing any directions to juries as far as damages were concerned. This had been subject to criticism and calls for reform. Thus, the Defamation Act, 2009 provides that parties may make submissions to the court on the matter of damages and High Court judges shall give directions to the jury on the matter of damages. In addition, the Act introduced new fast-track measures allowing matters to be disposed of pre-trial (e.g. summary disposal procedure, lodgement of money) and it provided for alternative remedies to damages (declaratory order or correction order). It also updated the list of available defences (the most noteworthy is the introduction of the defence of fair and reasonable publication and the offer to make amends).

There is no express reference to a right to privacy in the Irish Constitution. The Supreme Court ruled that the right derives from the unspecified personal rights in Article 40.3.1 of the Constitution. There is no overarching statute. A Privacy Bill was proposed in 2006 and envisaged the creation of a specific tort of the invasion of privacy. The Bill was much criticised and as a result it has never been signed into law and is currently shelved.

Article 40.6.1(i) of the Constitution provides that "the publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law". The previous Defamation Act, 1961, provided for penalties for printing or publishing blasphemous libel, but no definition of "blasphemy". Thus, in the only case involving allegations of blasphemy, the Supreme Court refused prosecution due

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<sup>19</sup> See [http://www.comreg.ie/radio\\_spectrum/broadcasting.542.html](http://www.comreg.ie/radio_spectrum/broadcasting.542.html).

<sup>20</sup> €10 million awarded to Donal Kinsella in 2010.

to lack of any definition of blasphemy in either the Constitution or statute.<sup>21</sup> A definition has controversially been introduced in Section 36 of the Defamation Act, 2009. The ingredients of the offence of blasphemy are as follows: (i) uttering material grossly abusive or insulting in relation to matters held sacred by any religion, (ii) when the intent and result is outrage among a substantial number of the adherents of that religion. The offence is punishable by a maximum fine of € 25,000. A defence is permitted for work of genuine literary, artistic, political, scientific, or academic value. The definition of "religion" excludes profit-driven organizations or those using "oppressive psychological manipulation".

The Broadcasting Act, 2009 provides for a wider right of reply mechanism than previously. Section 49 specifies that the right applies to any person whose honour or reputation has been impugned by an assertion of incorrect facts or information in a broadcast. The reply must state to what extent the information was incorrect or misleading and must be limited to factual assertions necessary to rectify what would otherwise be an incomplete or distorting assertion.

Furthermore, the Defamation Act, 2009 stipulated that the courts can have regard to the decisions of the Ombudsman and the Press Council in defamation cases.

Up until recently the protection of journalists' sources and the existence of journalistic privilege has been uncertain. Refusal to answer questions in court during cross-examination may amount to obstruction of justice and be classified as criminal contempt of court. Privilege to refuse to answer questions in court is enjoyed in certain circumstances by solicitors, clergy and members of the parliament. However, already in the case *Re Kevin O'Kelly* (1974), the Court of Criminal Appeal ruled that there was no protection of journalistic sources in Ireland and the fact that a communication was made under terms of express confidence or implied confidence did not create a privilege against disclosure. A recent Supreme Court judgment in a seminal case in *Mahon v Keena and Kennedy* (2009) marked a departure from the approach in *Re Kevin O'Kelly*. Referring to a number of decisions<sup>22</sup> of the European Court of Human Rights,<sup>23</sup> the Supreme Court ruled that journalistic privilege exists in Ireland and there must be an overriding requirement in the public interest to justify the interference with the privilege.

- Specific positive content obligations

No provision regarding specific positive content obligations are here to mention.

- Funding schemes for specifically desired content

The creation of the Broadcasting Fund was one of the innovations of the 2009 Broadcasting Act. It is funded by up to 7% of the net receipts from the payment of TV licences. Its purpose is to offer an independent source of funding for high-quality original or public service programming. There are detailed rules specifying which programmes qualify for funding.

In addition, the Broadcasting Act 2009 directs the BAI to develop a scheme for the archiving of programme material. The aim of the Broadcast Archiving Scheme is to

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<sup>21</sup> *Corway v Independent Newspapers* (1999).

<sup>22</sup> I.a. *Fressoz and Roire v France* (1999) 31 EHRR 28; *Goodwin v United Kingdom* (1996) EHRR 123.

<sup>23</sup> The European Convention on Human Rights Act, 2003 incorporated the European Convention on Human Rights into Irish law. The Act provides in Section 2(1) that "In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such

encourage and support the development of an archiving culture in the Irish broadcasting sector as a whole. Early in 2012, the scheme was approved by the Minister for Communications, Energy and Natural Resources. The Scheme will be financed through a percentage of the annual Broadcasting Fund derived from the TV licence fee.

- Political advertising and/or broadcasting time

Section 41(3) of the Broadcasting Act, 2009 contains a total prohibition of political advertising, i.e. advertising which is "directed towards a political end or which has any relation to an industrial dispute". There is no definition of "political end" in the legislation, but it is understood to include all advertising that might contain political content (e.g. promoting or opposing changes in legislation, government policies or policies of government authorities; influencing a political decision making-process). The ban is directed at broadcasting only. The Irish courts have refused to hold the ban unconstitutional on freedom of expression grounds – a position which seems to be at odds with the case-law of the European Court of Human Rights.<sup>24</sup> It is important to note here that party political broadcasts during elections are not affected by the prohibition. According to the Broadcasting Act, the above requirements do not prevent a broadcaster from transmitting party political broadcasts provided that a broadcaster does not, in the allocation of time for such broadcasts, give an unfair preference to any political party. The BAI Code of Referenda and Election Coverage<sup>25</sup> sets out the rules that Irish broadcasters must comply with when covering any election, including presidential elections, or referendum held in the Republic of Ireland. The key aim of the Code is that a broadcaster's coverage of all elections and referenda is fair, objective and impartial to all interests. Coverage should be undertaken without any expression of a broadcaster's own views on an election or referendum or on election parties or candidates. The Code contains specific provisions that relate to party political broadcasts and moratoria on coverage of referenda and/or elections.<sup>26</sup>

- Codes of conduct and their organisational framing

The model of press regulation in Ireland is a hybrid one – it combines elements of both self-regulation (funded by the press industry, here operates a Code of Practice) and statutory requirements (formally recognised by the Defamation Act 2009, as was mentioned above).

The 2004 report mentioned that there was no system for dealing with press complaints in Ireland at the time and the debate was ongoing over the establishment of the Press Council. Currently, in addition to the general laws on defamation and privacy, the press in Ireland is also regulated by the Press Council and Press Ombudsman, both operating since 1 January 2008. The Press Council consists of 13 members – 7 members, including the Chairman, are drawn from "suitably qualified persons representative of a broad spectrum of Irish society", and 6 members are appointed from within the industry.

A complaint to the Ombudsman can be made against any newspaper which is covered by the Code of Practice by the individual who is personally affected by the impugned publication, or by a third party acting with the written consent of the person affected. In the first instance the complainant is directed to contact the editor before making a

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interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

<sup>24</sup> See *VgT Verein Gegen Tierfabriken v Switzerland (Tierfabriken I)*, (2002).

<sup>25</sup> BAI Code of Referenda and Election Coverage:  
[http://www.bai.ie/wordpress/wp-content/uploads/20110913\\_RefElecCode\\_Eng.pdf](http://www.bai.ie/wordpress/wp-content/uploads/20110913_RefElecCode_Eng.pdf).

<sup>26</sup> See [http://www.bai.ie/?page\\_id=1955](http://www.bai.ie/?page_id=1955).

complaint to the Ombudsman. Decisions of the Ombudsman may be appealed to the Press Council.

- The role and functioning of regulatory authorities in these respects

BAI is the regulatory authority which publishes and oversees the compliance with the Codes it has issued.

- Distribution Aspects

- Access to frequencies

Under Section 35 of the Communications Regulation Act, 2002, the Commission for Communications Regulation (ComReg) is responsible for formulating, revising, implementing and publishing the national Radio Frequency Plan detailing the frequency allocations of Ireland. ComReg publishes a table of frequency allocations for Ireland every two to three years, describing current and planned use of the radio spectrum.<sup>27</sup>

- Access to distribution networks and control of actual conditions

There are no specific provisions with respect to these aspects.

- Must-carry/must-offer rules for electronic media

Section 77 of the Broadcasting Act, 2009 provides that holders of broadcast licences are required to carry programme content regarded as serving a particular policy interest (mainly the PSB channels – RTÉ 1 and 2, TG4; digital providers must in addition carry the the Oireachtas channel and the Irish Film Channel). This obligation applies to “appropriate network providers”<sup>28</sup> (most providers of broadcast services in Ireland).

- Role of platform operators

The structure of the 2009 Act sees the platform as being ‘divided’ between various multiplex operators – public service broadcaster RTÉ on the one hand and one or more BAI-licensed contractors on the other.

ComReg issued two DTT multiplex licences to RTÉ, one in December 2007, the other in May 2011, which conveys the rights of use to spectrum in the ultra high frequency (UHF) band to provide DTT.

In May 2011, the Irish public service DTT multiplex service called SAORVIEW<sup>29</sup> was officially launched. It currently offers 9 channels. It is anticipated that by October 2012 SAORVIEW will be accessible to 98% of Irish people, replicating the population coverage of the old analogue service. The service requires a set-top-box and some viewers will also have to purchase new aerials. As of February 2012, it has been reported that only 45,000 people have subscribed to Saorview.<sup>30</sup>

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<sup>27</sup> ComReg, Radio Frequency Plan for Ireland, [http://www.comreg.ie/\\_fileupload/publications/ComReg0890R3.pdf](http://www.comreg.ie/_fileupload/publications/ComReg0890R3.pdf).

<sup>28</sup> “Appropriate network” is defined as an electronic communications network which is used for the distribution or transmission of broadcasting services to the public.

<sup>29</sup> <http://www.saorview.ie/>.

<sup>30</sup> <http://www.herald.ie/news/hd-tv-costs-1400-a-viewer-3009443.html>.

Commercial DTT multiplex licence has not yet been awarded. In August 2010, the BAI gave further detailed consideration to the prospects for commercial DTT in Ireland.<sup>31</sup> It reiterated its disappointment that, having discharged its responsibilities under the 2009 Act, the outcome was that none of the three applicants had been able to bring matters to a satisfactory conclusion. It also decided that it would not be practicable to re-activate a commercial DTT multiplex licensing process in the immediate future. It further stated that a competition could potentially be held again during 2012 with a view to commercial DTT being operational in 2013. Nothing happened on that front yet.

Digital Radio using T-DAB technology is also available in Ireland today, provided by RTÉ. ComReg issued one digital radio multiplex licence to RTÉ in April 2009.

- The role and functioning of regulatory authorities in these respects

ComReg issues multiplex licenses affording the rights of use to spectrum in the ultra high frequency (UHF) band to provide DTT and BAI.

The Broadcasting Act, 2009 gives the BAI responsibility for licensing DTT multiplex operators. The aim is to ensure the continued availability of a diversity of services and programming content in a digital era. BAI also has responsibility for the licensing of multiplex services and entering into contracts in respect of electronic programme guides (EPGs).

- Access to Information
  - Transparency of media ownership situations

All commercial broadcasters licensed by BAI are listed on the Authority's website with links to their individual websites.<sup>32</sup>

- Accountability of public service media

In order to demonstrate how they fulfilled their tasks and to show their actual performance in the preceding year, both PSBs are required to submit a report to the Authority and the Minister detailing how it has performed against the commitments set in the previous year and to provide an explanation of any differences arising.

- Freedom of information laws

The Freedom of Information Act 1997<sup>33</sup> was introduced to ensure more openness of governmental and state bodies regarding access to information. However, the Freedom of Information (Amendment) Act in July 2003 introduced financial charges for access to information/documents etc. It also excluded certain records from the application of Act which were previously available. The change has been criticised by many (including national journalists, the European Federation of Journalists, civil liberties groups and many politicians) as undermining openness and transparency.

- Accessibility of products/services and distribution networks

The Act 2009 requires the BAI to administer and report on the Access Rules, requiring broadcasters to meet specific quotas for subtitling, audio description and Irish Sign

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<sup>31</sup> BAI Statement on Conclusion of Commercial DTT Multiplex Licensing Process, <http://www.bai.ie/?p=1469>.

<sup>32</sup> [http://www.bai.ie/?page\\_id=895](http://www.bai.ie/?page_id=895).

<sup>33</sup> Freedom of Information Act, 1997, <http://www.irishstatutebook.ie/pdf/1997/en.act.1997.0013.pdf>.

Language, expressed as percentages of total broadcast time. Accordingly, the BAI published the Access Rules<sup>34</sup> which determine the levels of subtitling, sign language and audio description that broadcasters in Ireland will be required to provide in accordance with their statutory obligations.

In addition, the Disability Act 2005 requires all public bodies (e.g. RTÉ) to ensure that their services are accessible for people with disabilities by providing integrated access to mainstream services where practicable and appropriate.

With regard to Saorview (DTT), the issues of dish install or digital set-top-box subsidies have not been decided yet.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

Section 48 provides for a broader complaint system whereby complaints may be made by parties who were not directly referred to or implicated by the broadcast in question. The system puts initial responsibility on broadcasters – complaint must first be made directly to the broadcaster. Only in the second instance, the complaints are dealt with by the BAI's Compliance Committee.

- Participation in media operators/(self-)regulatory bodies

There is no such participation to be mentioned.

#### 2.2.13.2. Main Players in the Media Landscape

Ireland's media landscape remains influenced by historical and geographical relations with the United Kingdom. British terrestrial television channels are available to majority of the population, mainly through cable services. There are also a wide range of UK based newspapers available in Ireland.

##### 2.2.13.2.1. Radio

Radio is a more popular medium in Ireland than in most European countries with 85% of the population claiming to listen on a daily basis.<sup>35</sup> As of 2012 there are 57 licensed commercial radio stations, 1 national, 1 quasi-national and the rest local, regional or multi-city. The national Public Service Broadcaster RTÉ runs four analogue channels - RTÉ Radio 1, RTÉ 2fm, RTÉ lyric fm and RTÉ Raidió na Gaeltachta (the Irish language station) and five digital channels (RTÉ 2XM, RTÉ Chill, RTÉ Choice, RTÉ Gold, RTÉjr and RTÉ Pulse)

Since 2007, the one national commercial radio station, *Today FM*, is 100% owned by the company Communicorp belonging to businessman Denis O'Brien, which also owns 3 local radio stations<sup>36</sup> and is the second largest shareholder in the publishing company Independent News and Media. Following the Competition Authority's order for Communicorp to divest itself of Dublin station FM104 (see above at 1.4.3), there have been no further developments with regard to concentration of, or major cross-regional ownership in, the local/regional radio sectors. Ulster Television (UTV) owns five Irish local radio stations. The majority of local radio licenses are owned by local consortia usually

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<sup>34</sup> BAI Access Rules, [http://www.bai.ie/wordpress/wp-content/uploads/access\\_rules\\_june\\_07.pdf](http://www.bai.ie/wordpress/wp-content/uploads/access_rules_june_07.pdf).

<sup>35</sup> European Journalism Centre, "Media landscape: Ireland", November 2010.

<sup>36</sup> Newstalk (quasi-national), 98FM (Dublin), Spin (Dublin), Spin South-West.

consisting of a mixture of individuals, companies, community groups, local Government and religious groups.

**Table 74 IE: Main Radio Companies\***

Companies	Main radio stations	National market share	Regional market share
RTÉ (PSB)	Analogue: Radio 1, 2 FM, Lyric FM, RTÉ Raidió na Gaeltachta Digital: RTÉ 2XM, RTÉ Chill, RTÉ Choice, RTÉ Gold, RTÉjr and RTÉ Pulse	39%	—
Communicorp	Today FM Newstalk 98FM Spin Spin South-West	21%  (Today FM – 13% Newstalk – 8%)	Dublin: 27% (98FM: 13%, Spin: 14%)  Spin South-West: 19%
UTV	Q102 (Dublin) FM104 (Dublin) 96FM (Cork) Live 95FM (Limerick)	—	Dublin: 33% (Q102: 13%, FM104: 20%) Cork: 48% Limerick: 48% Louth-Meath: 24%
Others (local consortia)		40%	

\* Figures by JNLR/Ipsos MRBI 2011-3 (October 2010 - September 2011), <http://www.medialive2.com/radio/radio-listenership/market-share/radio-listenership/market-share.html>

#### 2.2.13.2.2. Television

The Public Service Broadcaster RTÉ provides two channels (and co-operates with the Irish language PSB, TG4). Ireland has one commercial broadcaster TV3 which is operated by the TV3 group owned by Tullamore Beta Limited, a subsidiary of a British private equity fund Doughty Hanson & Co.

Bearing in mind the European Commission's digital switchover deadline of 2012, in 2007 the public service broadcaster RTÉ was awarded the automatic DTT multiplex licence. As already explained, in May 2011, the Irish DTT service called SAORVIEW<sup>37</sup> was officially launched. It currently offers 9 channels. It is anticipated that by October 2012 SAORVIEW will be accessible to 98% of Irish people, replicating the population coverage of the old analogue service. The service requires a set-top-box and some viewers will also have to purchase new aerials. The issue of subsidies is not decided yet, the Government is to commission a study. As of February 2012, it has been reported that only 45,000 people have subscribed to Saorview.<sup>38</sup> Commercial DTT multiplex licence has not yet been awarded.

<sup>37</sup> <http://www.saorview.ie/>.

<sup>38</sup> <http://www.herald.ie/news/hd-tv-costs-1400-a-viewer-3009443.html>.



**Table 75 IE: Main Television Companies**

Companies	Ownership Structure	Main TV stations	Total market share*
RTÉ TG4	PSB PSB	RTÉ 1, RTÉ 2 TG4	33.5% 2.2%
TV3	Tullamore Beta Limited	TV3 3e	12.9% 1.3%
BBC (UK)	PSB (UK)	BBC1, BBC2	7%
Others (UK commercial and other)		UTV, Channel4, E4, Sky1, Sky News, Sky Sports, other	

\* 2011 figures by AC Nielsen, <http://www.medialive2.com/television/channel-share-of-viewing/channel-share-of-viewing.html>

### 2.2.13.2.3. Press and publishing

The Irish press market is divided into two segments: national (daily and Sunday newspapers) and regional (weekly newspapers). There are four national dailies, one national evening newspaper, four national Sunday newspapers, as well as over fifty regional and local newspapers. Total circulation of daily national newspapers is over 550,000 (Jan-Jun 2011).

One of the major daily papers, the *Irish Times*, is owned by the Irish Times Trust, a non-profit fund.

Three daily newspapers (*Irish Independent*, *Evening Herald* and *Irish Daily Star*), as well as two Sunday newspapers (*Sunday Independent* and *Sunday World*) and 13 weekly regional papers are owned by Independent News and Media (INM), the leading newspaper publisher in Ireland. The INM's papers are market leaders in their sectors.

Thomas Crosbie Holdings Ltd owns the national daily *Irish Examiner* and the national Sunday newspaper *Sunday Business Post*. It also has eleven regional newspapers and five regional radio stations.

The strength of the British press in Ireland is a unique feature of the Irish print media scene.

**Table 76 IE: Main Newspaper Publishing Companies**

<b>Publishing companies</b>	<b>Main national titles Daily and Evening</b>	<b>Market share*</b>	<b>Main national titles Sunday</b>	<b>Market share*</b>	<b>Regional</b>
Independent News and Media	Irish Independent Irish Daily Star Evening Herald	47%	Sunday Independent Sunday World	57%	13 titles
Irish Times Trust	Irish Times	16%	Sunday Times	13%	
Thomas Crosbie Holdings	The Irish Examiner	7%	Sunday Business Post	6%	11 titles
<i>UK based titles</i>		30%		20% +	

\* Jan-Jun 2011 figures by ABC, <http://www.medialive2.com/press/national-press/circulation-review-july---december-2006.html>

#### *2.2.13.2.4. Online media (non-linear audiovisual (media) services; websites)*

The two most popular online services: [www.rte.ie](http://www.rte.ie) and [www.irishtimes.com](http://www.irishtimes.com) are provided by the traditional media providers RTÉ (PSB) and the Irish Times (newspaper publisher). *Daft.ie* website is dominant in property classified ads and *CarZone.ie* dominates motoring classified. There are also some niche competitors present (Politics.ie; Beaut.ie; Askaboutmoney.com). There are two interesting news websites: TheJournal.ie and Storyful.com. TheJournal.ie is an Irish news website that invites its users to shape the news agenda, and Storyful.com is a project founded and run by RTÉ journalist Mark Little and a team of other web journalists.

#### *2.2.13.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers*

BSkyB, through Sky Digital, remains the sole provider of digital satellite television services in Ireland. In comparison to the situation described in the 2004 Report, it noted a dramatic increase in the number of subscribers (from 245, 000 to 675,000).

The Irish cable market has been fundamentally restructured since 2004. Ireland used to have two main cable operators: NTL (Éire), and Chorus Communications (owned by Liberty Global). In 2005 NTL was fully taken over by Liberty Global. The sole cable provider in Ireland has been renamed UPC Ireland and is owned by Liberty Global Europe operating through UPC broadband. As of 2011, it had 473,000 subscribers to its cable tv service in Ireland.

**Table 77 IE: Cable and Satellite Companies**

Companies	Ownership Structure	Subscription 2011
UPC Ireland (formerly Chorus + NTL) (Cable and MMDS)	Liberty Global Europe operating through UPC broadband (100%)	473,000* (328,000 digital subscribers)
BSkyB (Satellite)	News Corporation (39.1%)	675,000**

\* <http://www.lgi.com/europe-ireland.html>.

\*\* <http://www.irishtimes.com/newspaper/finance/2012/0204/1224311249262.html>.

*2.2.13.2.6. Audience/Readership/Usage/Subscription;  
Advertising market shares (all media)*

The most important fact to note here is that the share of advertising revenue is shifting from traditional to online media.<sup>39</sup> Online advertising is now the third-largest advertising medium in Ireland, after press and television, but before radio.<sup>40</sup>

The table below outlines the share of advertising revenue in the Irish media sector.

**Table 78 IE: Share of advertising revenue within the media sector 2010-2011**

Media	Market share in approx. %
Press	57% *
Television	23% *
Online	13% **
Radio	7% *

\* Source: Ad Dynamix Nielsen Media Research 2010 ([www.medialive.ie](http://www.medialive.ie))

\*\* Source: IAB/PwC Online Adspend Study, 2010 (<http://iabireland.ie/wp-content/uploads/2010/11/H1-2010-IAB-PWC-PDF.pdf>)

<sup>39</sup> RTE background document, "Digital advertising and its impact on traditional publishers", November 2010.  
<sup>40</sup> IAB/PwC Online Adspend Study, 2010 (<http://iabireland.ie/wp-content/uploads/2010/11/H1-2010-IAB-PWC-PDF.pdf>).

### 2.2.13.3. Conclusion and Recommendations

Main changes in comparison to the 2004 Report:

- Adoption of the Broadcasting Act, 2009
- Adoption of the Defamation Act, 2009
- Introduction of the new offence of blasphemy by the Defamation Act 2009
- Recognition by the Supreme Court of the existence of the journalistic privilege (2009)
- Launch of DTT in May 2011
- Ongoing reform of the media mergers review system
- Number of cable providers falling from two to one (as a result of merger between Chorus and NTL)
- Share of advertising revenue shifting from traditional to online media

The introduction of the offence of blasphemy by Section 36 of the Defamation Act, 2009 has been highly controversial and met with widespread protest. Already in 1991 the Law Reform Commission, opined that there is no place for the offence of blasphemous libel in a society which respects freedom of speech, and that the prohibition of Incitement to Hatred Act 1989 provides an adequate protection for outrage against religious belief.<sup>41</sup> However, since the ban on blasphemy is mandated by the Constitution, abolishing the offence would require a referendum (the Irish Constitution may only be changed following a referendum). In the Commission's opinion a referendum solely for that purpose would be a time wasting and expensive exercise. In the 2008 Report on Article 40.6.1(i) the parliamentary Joint Committee on the Constitution reiterated that "...(t)he specific reference to blasphemy should be deleted from the Constitution. The reference itself has effectively been rendered a "dead letter" and that [In] a modern Constitution, blasphemy is not a phenomenon against which there should be an express constitutional prohibition." There have been several referenda held in Ireland in recent years, and despite declarations by the government, none of them included the proposal to remove the reference to blasphemy from the Constitution.

Recommendation: The government should consider removing the reference to blasphemy from the Constitution and the offence of blasphemy from the Defamation Act, 2009. A referendum to this end should be held at the nearest possible occasion.

Independent News and Media is dominant in both the daily and Sunday newspaper market segments in Ireland, where it has a 47% and 57% market share respectively. Nevertheless, the Competition Authority concluded that the Irish newspaper industry has sufficient editorial diversity and, thus, media pluralism is not threatened. However, while it may be true that there is a large degree of editorial diversity, such dominance in any media market is always a threat to media pluralism. There is also a problem with the cross-ownership of newspapers and radio stations involving the company Communicorp. On 7 February 2012, an Irish MEP *Nessa Childers* hosted a conference in Dublin entitled "Media Diversity: Why does it matter?". In preparation for the conference, *Nessa Childers*

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<sup>41</sup> Consultation Paper and Report on Criminal Libel (1991).

commissioned a survey of Irish journalists on media ownership and diversity. The survey, carried out in conjunction with the National Union of Journalists, revealed that 77% of Irish journalists believe that media diversity is at risk in Ireland due to trends in media ownership.<sup>42</sup>

Recommendation: The situation with regard to media ownership and diversity should be continuously monitored. In particular, the issue of 'cross-ownership' between Coomunicorp and INM should again be carefully considered after the recent escalation in the battle for control of INM.

The Minister for Communications, *Pat Rabbitte*, spoke at the conference and confirmed that the government is working on the drafting of a new legislation on media mergers based on the recommendations of the Advisory Group on Media Mergers. The government expects to publish the draft in the coming months.

Recommendation: The works on the new legislation on media mergers should not be delayed. The failure to fast-track the legislation so that the rules on media mergers were adopted before the summer 2012 was disappointing. The new legislation should be introduced before the end of the year without any delay.

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<sup>42</sup> 2012 Survey of Irish journalists on media ownership and diversity, [http://www.nessachilders.ie/download/nessachilders/pdf/2012\\_survey\\_of\\_irish\\_journalists\\_on\\_media\\_ownership\\_and\\_diversity\\_nessa\\_childers\\_mep.pdf](http://www.nessachilders.ie/download/nessachilders/pdf/2012_survey_of_irish_journalists_on_media_ownership_and_diversity_nessa_childers_mep.pdf).

## ITALY

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### 2.2.14. Italy

#### 2.2.14.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.14.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The freedom of expression is expressly enshrined in Article 21 of the Italian Constitution. Article 21 of the Constitution consists of seven paragraphs. The first paragraph contains a broad statement that everyone has the right to express his or her thoughts through any media.

In addition, in accordance with Article 117, para. 1, of the Constitution, Italian legislation must comply with EU Law and international agreements to which Italy is a party: in this context, particular significance is given to Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which also protects the freedom of expression, and to the interpretation given to this provision by the European Court of Human Rights (ECtHR)<sup>1</sup>.

- Specific safeguards and rights for the media

The paragraphs 2 to 6 of Art. 21 of the Constitution unravel a set of guarantees protecting the means of communication that, at the time the Constitution was drafted, appeared as the most relevant one: the press. In particular, the Constitution provides that press may not be subjected to authorization or censorship; seizure of press is permitted only for offences expressly set out by the law and on the basis of a reasoned court order,<sup>2</sup> except in cases of urgency where the timely intervention of the judicial authority is not possible; the law may establish that the financial sources of the periodical publications be disclosed. Paragraph 7 of Article 21 sets out the only express derogation from the freedom of expression affirmed in paragraph 1: public morals. Printed publications and shows contrary to public morals are prohibited and punished in accordance with the law.

- Freedom to receive and to access information

The freedom of information is generally understood as having a threefold dimension: active (the right to inform others), passive (the right to be informed), and reflexive (the right to gain access to undisclosed information).

Article 21 of the Constitution expressly protects only the active form, i.e. the freedom to inform others.<sup>3</sup> Nevertheless, the Constitutional Court,<sup>4</sup> following the pattern of Article 10 of the ECHR, has extended the constitutional protection also to the passive and reflexive dimensions of the freedom of information. Indeed, both the reception of information and

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<sup>1</sup> R. Mastroianni, *Riforma del sistema radiotelevisivo italiano e diritto europeo* (Turin: Giappichelli, 2004).

<sup>2</sup> Law no. 47 of 8 February 1948, OJIR no. 43 of 20 February 1948, Serie generale.

<sup>3</sup> See G. Gardini, *Le Regole dell'Informazione. Principi giuridici, strumenti, casi*, (Milan: Bruno Mondadori, 2009) 34.

<sup>4</sup> Constitutional Court, Judgment no. 25 of 1965; no. 18 of 1966; no. 122 of 1970; no. 175 of 1971; no. 105 of 1972; no. 113 of 1974; no. 16 of 1981; no. 18 of 1981; no. 225 of 1975; no. 231 of 1975; no. 826 of 1988; No 420 of 1994; no. 112 of 1993; no. 466 of 2002.

access to information are essential for the proper functioning of a democratic society and for the development of an open political debate.

The Constitutional Court has consistently held that freedom of expression seeks to protect the free flow of information and the pluralism of opinions because they are essential elements for the proper functioning of a democratic polity.<sup>5</sup> With specific reference to the press, the Court of Cassation has ruled that it constitutes a privileged forum for the involvement of the public opinion in the political debate taking place within elected bodies.<sup>6</sup> Recalling the ECtHR jurisprudence,<sup>7</sup> the Court of Cassation added that newspapers must be regarded as the 'watchdogs' of democratic institutions, including the judiciary<sup>8</sup>. The Court of Cassation also held that the exercise of the right to report and to comment by journalists is to be welcomed insofar as it contributes to monitor the administration of justice and to ensure that members of the judiciary do not overstep the bounds of their profession.<sup>9</sup>

- Specific rights for the citizens

The protection of freedom of expression as laid down in Article 21(1) of the Constitution directly concerns citizens, as do most of the other articles comprised in Part I of the Italian Constitution (e.g. relating to freedom of assembly, of religion, of movement etc.), whose heading is, emblematically, "Rights and duties of citizens". In this connection, regard must be had also to Article 15 of the Constitution, which directly protects the freedom and confidentiality of private correspondence. Indeed, according to the second paragraph of Article 15, freedom of correspondence can be constrained only in accordance with the law and on the basis of a reasoned decision of a judicial body.

- Safeguards on regulatory authorities

The Italian media regulatory authority (AGCOM) was established in 1997, forty years after the promulgation of the Italian constitution. It is thus no wonder that the latter does not envisage such an authority. Generally speaking, independent authorities were not part of the original design of the Drafters of the Italian Constitution. Most of those authorities were established in the 1990s, in the context of the EU-driven liberalization and re-regulation of public utilities.

The Constitution, however, does take into account the role of public powers *vis-à-vis* the freedom of expression by stating that: i) the executive must not interfere with the freedom of expression (e.g. prior authorization schemes are banned); ii) the legislature must lay down a general legal framework to strike a balance between freedom of expression and conflicting constitutional concerns (e.g. public security, public morals etc.); and iii) only the judiciary may impinge upon the freedom of expression in individual cases, provided that it does so in accordance with the law and by way of reasoned decisions that can be challenged before a higher court.

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<sup>5</sup> Italian Constitutional Court ('ICC'), judgement no. 1030 of 1988; Constitutional Court, judgement no. 81 of 1993.

<sup>6</sup> See Court of Cassation, Judgment of 2 July 2007, no. 25138.

<sup>7</sup> See ECtHR, *Kobenter and Standard Verlags GmbH v. Austria*, application no. 60899/00, paras 29 and 30.

<sup>8</sup> See Court of Cassation, Judgment of 9 February 2011, no. 15447.

<sup>9</sup> See Court of Cassation, Judgment of 23 January 1984 no. 3743 and Judgment of 21 February 2007 no. 25138.



- Safeguards on “universal service”

The notion of “Universal Service” is alien to the Italian public service tradition and was only introduced as a consequence of Italy’s membership in the EU. However, it is inherent in the Italian notion of “servizio pubblico” that operators entrusted with the provision thereof may be required to carry out specific task in the general interest which they would not perform, or would perform under different conditions, were they motivated exclusively by market considerations. Moreover, as per Article 117, paragraph 2, letter m) of the Constitution, the central Government enjoys an exclusive competence to set the essential content of civil and social rights whose enjoyment must be ensured throughout the national territory.

As far as media is concerned, the concept of universal service can be regarded as a subset of that of public service media (or public service broadcasting), which is not expressly set out in the Constitution, but has been introduced and developed through legislation.

#### 2.2.14.1.2. *Media order (de lege lata and de facto)*

- “Market Entry”
  - Licensing schemes; remit psm; notification for print publications

As far as entry to the analogue broadcasting market is concerned, in view of the trend towards the switch-over to the digital standard, analogue broadcasting can only be exercised on the basis of concessions issued under the past regulatory framework. The validity of those concessions is extended until the completion of the switch-over process (end of 2012).<sup>10</sup> Moreover, operators engaging in analogue broadcasting without a broadcasting concession but in line with certain legal requirements may continue to do so until the completion of the transition to the digital standard.<sup>11</sup>

In this connection, it must be noted that the *de facto* exercise of broadcasting activities and the occupation of broadcasting frequencies by unlicensed operators has been tolerated by Italian broadcasting legislation in the past.<sup>12</sup> Notably, in 2008 the ECJ established that failure by the Italian government to free up broadcasting frequencies and to allocate them to the legitimate right holder, the company Centro Europa 7, on the basis of objective, transparent, non-discriminatory, and proportionate criteria was at odds with the freedom to provide services and the EU electronic communications directives.<sup>13</sup> Most recently, also the European Court of Human rights held that failure by the Italian government to allocate broadcasting frequencies to the holder of a broadcasting licence obtained following a public tender constituted a breach of that company’s freedom of expression and information (Article 10 ECHR) and right of property

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<sup>10</sup> Article 23, para 1, CLARMS.

<sup>11</sup> Article 23, para 2, CLARMS.

<sup>12</sup> For instance, the Maccanico Law enabled the ‘de facto users’ of radio frequencies, authorised to carry on their activity under the earlier system, to continue broadcasting on a transitional basis; Decree Law 24 December 2003, no. 352 (OJIR 29 December 2003, no. 29, p. 4) authorised the channels in breach of the concentration thresholds to continue their broadcasts pending the completion of an inquiry into the development of digital television channels; the Gasparri Law extended, by a general authorisation mechanism, the possibility for the channels in breach of the threshold to continue to broadcast on the terrestrial radio frequencies until the national allocation plan for radio frequencies for digital television was implemented.

<sup>13</sup> ECJ, Judgment of 31 January 2008, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, Case C-380/05, ECR 2008 Page I-00349.

(Article 1 of Protocol n. 1 to the ECHR).<sup>14</sup> In particular, the Strasbourg Court found that the relevant Italian broadcasting legislation lacked clarity and precision, in that it frustrated *Centro Europa 7*'s legitimate expectations, and that the Italian authorities had failed to put in place an appropriate legislative and administrative framework guaranteeing effective media pluralism and protecting *Centro Europa 7* against arbitrariness.

Turning to access to the digital broadcasting market, the CLARMS<sup>15</sup> provides for different authorization schemes. The activity of linear audiovisual content provider on terrestrial frequencies is conditional upon a prior authorization issued by the Ministry for Economic Development,<sup>16</sup> on the basis of the rules set out in AGCom's Digital Broadcasting Regulation.<sup>17</sup>

To be eligible, applicants must: i) be undertakings established in the European Economic Area or in a state ensuring full reciprocity;<sup>18</sup> ii) have as their object the exercise of television broadcasting, information, or related activities; iii) have a share capital and a number employees greater than the minimum requirements set out in the Digital Broadcasting Regulation;<sup>19</sup> iv) ensure the broadcasting of programmes bearing the same trademark for at least 24 hours every week. Public entities, state-controlled companies, and credit institutions cannot either directly or indirectly hold the authorization concerned.<sup>20</sup>

The provision of linear audiovisual media or radio services through other electronic communication networks (e.g. live streaming, IPTV, web-tv etc.) is subject to an authorization granted by AGCom in accordance with the rules set out in its Decision no. 606/10/CONS.<sup>21</sup> To be eligible, applicants must: i) be companies, foundations, or associations established in the European Economic Area or in a state ensuring full reciprocity;<sup>22</sup> ii) have as their objects the exercise of broadcasting, information, or related activities;<sup>23</sup> iii) not be represented or administered by persons convicted for crimes punishable by imprisonment of more than six months.<sup>24</sup> Public entities, state-controlled companies, and credit institutions cannot directly or indirectly hold the authorization concerned.<sup>25</sup> Applicants must pay a fee for the processing of their application.<sup>26</sup>

On-demand service providers are also subject to the general authorization scheme<sup>27</sup>. The undertakings concerned must notify AGCom of the start of their activities, unless AGCom resolves, within 30 days, to enjoin them to stop<sup>28</sup>. To be eligible, applicants must: i) be companies, foundations, and associations established in the European Economic Area or

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<sup>14</sup> ECtHR, case *Centro Europa 7 S.r.l. and Di Stefano v. Italy* (application no. 38433/09).

<sup>15</sup> Consolidated Law on Audiovisual and Radio Media Services (Legislative Decree no. 2005/177 as amended by Legislative Decree no. 44/2010).

<sup>16</sup> Article 16, para 1, CLARMS.

<sup>17</sup> See AGCom Decision 353/11/CONS, OJIR 6 July 2011, no.155 (AGCom Digital Broadcasting Regulation).

<sup>18</sup> *Ibid.*, Article 3, para 2.

<sup>19</sup> *Ibid.*, Article 3, paras. 4 and 5 (requiring a share capital of 6.2 million euros and at least 20 employees for nation-wide broadcasting and a share capital of 155.000 euros and at least four employees for local broadcasting).

<sup>20</sup> *Ibid.*, Article 3, para 3.

<sup>21</sup> See Attachment A to AGCom Decision no. 606/10/CONS.

<sup>22</sup> *Ibid.*, Article 3, para 2.

<sup>23</sup> *Ibid.*, Article 3, para 4.

<sup>24</sup> *Ibid.*, Article 3, para 3.

<sup>25</sup> *Ibid.*, Article 3, para 4.

<sup>26</sup> *Ibid.*, Article 6.

<sup>27</sup> Article 22-bis, para 1 CLARMS.

<sup>28</sup> Article 3, para 2, of Attachment A to AGCom Decision no. 607/10/CONS, OJIR 3 January 2011, no. 1.

in a state ensuring full reciprocity;<sup>29</sup> ii) have as their objects the exercise of broadcasting, information, or related activities;<sup>30</sup> iii) not be represented or administered by persons convicted for intentional crimes punishable by imprisonment of more than six months.<sup>31</sup> Applicants must pay a fee for the processing of their application.<sup>32</sup>

Article 49, paragraph 1, CLARMS<sup>33</sup> entrusts the operation of PSM to RAI-Radiotelevisione Italiana S.p.A. (hereafter: RAI) until 6 May 2016. The entrustment of PSM to RAI was not carried out, as generally required by the EU regulations on public procurement, through a public tender<sup>34</sup>, but rather through a direct conferral of the PSM tasks to Italy's former broadcasting monopolist, RAI.

As requirements for the PSM remit, CLARMS includes: the transmission of programmes of general interest on the whole national territory; an appropriate number of hours, also during prime time, devoted to education, information, cultural promotion through cinema, theatre and musical works; access to programming to political parties, trade unions, religious groups and other associations of social interest; programming destined to be broadcast abroad to promote the knowledge of Italian language and culture; protection of historical archives of radio and television programs; broadcasting in minority languages; measures to protect disabled people; long-distance teaching; interactive digital services.

As far as press is concerned, Article 5 of Law no. 47/1948 requires all newspapers and periodicals to register with the Court Registry of the place where the newspaper or periodical is going to be published.

The application for registration must include the following documents:

- 1) a statement, authenticated by the signatures of the owner and the director or deputy managing director, stating the name and domicile of the person who exercises the journalistic enterprise, if that person is different from the owner, and the title and the nature of the publication;
- 2) proof of enrollment in the Journalists' Roll, in cases where this is required by the Journalist Profession Law;
- 3) copy of the articles of association and of the company's statute, if the owner is a company.

The president of the Court or a judge delegated by him or her, checks compliance with the above requirements and orders, within fifteen days, the registration of the newspaper or magazine in a public Register.

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<sup>29</sup> Ibid., Article 3, para 3.

<sup>30</sup> Ibid., Article 3, para 4.

<sup>31</sup> Ibid., Article 3, para 5.

<sup>32</sup> Ibid., Article 6.

<sup>33</sup> Consolidated Law on Audiovisual and Radio Media Services (Legislative Decree no. 2005/177 as amended by Legislative Decree no. 44/2010).

<sup>34</sup> *But see* Judgment of the Court of First Instance of 26 June 2008, *SIC – Sociedade Independente de Comunicação, SA v Commission of the European Communities* Case T-442/03 [2008] ECR II-01161 (holding that Portuguese Republic was 'in no way' required to organise a competitive tendering prior to entrusting PSM tasks to RTP). On the necessity of awarding PSM obligations on the basis of competitive tendering, See R. Mastroianni, *Public Service Media and Market Integration: A Differential Application of Free Movement and State Aid Rules?* in M. Cremona (ed), *Market Integration and Public Services within the EU* (Oxford: Oxford University Press, 2011) 167-169.

- Media pluralism/ownership; competition law aspects

The concentration of media ownership in Italy has traditionally been a sensitive issue, as summarised by the Council of Europe Parliamentary Assembly in its Resolution 1387 (2004) on monopolisation of the electronic media and possible abuse of power in Italy:

"Through Mediaset, Italy's main commercial communications and broadcasting group, and one of the largest in the world, Mr Berlusconi owns approximately half of the nationwide broadcasting in the country. His role as head of government also puts him in a position to influence indirectly the public broadcasting organisation, RAI, which is Mediaset's main competitor. As Mediaset and RAI command together about 90% of the television audience and over three quarters of the resources in this sector, Mr Berlusconi exercises unprecedented control over the most powerful media in Italy.

This duopoly in the television market is in itself an anomaly from an antitrust perspective. The status quo has been preserved even though legal provisions affecting media pluralism have twice been declared anti-constitutional and the competent authorities have established the dominant positions of RAI and the three television channels of Mediaset. An illustration of this situation was a recent decree of the Prime Minister, approved by parliament, which allowed the third channel of RAI and Mediaset's Retequattro to continue their operations in violation of the existing antitrust limits until the adoption of new legislation. Competition in the media sector is further distorted by the fact that the advertising company of Mediaset, Publitalia '80, has a dominant position in television advertising."

At the moment, the CLARMS lays down both "technical" and "economic" anti-concentration limits for the media sector. The former limit applies to the number of channels broadcast by the same subject. In particular, the CLARMS provides that, once the digital switchover process is complete, no content provider will be allowed to broadcast more than 20 percent of the total television channels and more than 20 percent of the total radio channels.<sup>35</sup> Pending the completion of that process, content providers cannot broadcast more than 20 percent of television broadcasts conveyed on analogue or digital networks, excluding simulcasts of analogue programmes and digital broadcasts accessible to less than 50 percent of Italian viewers.<sup>36</sup>

Both institutional actors and academic commentators have expressed concerns about the technical limit applicable prior to the completion of the digital switchover, in that it replaced an earlier limit of 20 percent applicable to analogue broadcasting only. By taking into account both analogue and digital broadcasting, the technical limit set out in the CLARMS, in fact, allows existing dominant operators in the analogue sector to consolidate their dominance also in the digital sector.<sup>37</sup> The Venice Commission, in particular, considered that the threshold of 20% of the channels was "not a clear

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<sup>35</sup> Article 43, para 7, CLARMS.

<sup>36</sup> Article 43, para 8, CLARMS.

<sup>37</sup> See Council of Europe, Parliamentary Assembly Resolution 1387 (2004) on monopolisation of the electronic media and possible abuse of power in Italy, para 6: "The Assembly believes that the newly-adopted 'Gasparri Law' on the reform of the broadcasting sector may not effectively guarantee greater pluralism simply through the multiplication of television channels in the course of digitalisation. At the same time, it manifestly allows Mediaset to expand even further, as it gives the market players the possibility to have a monopoly in a given sector without ever reaching the antitrust limit in the overall integrated system of communications (SIC)." R. Zaccaria and A. Valastro, *Diritto dell'informazione e della comunicazione* (Padua: Cedam, 2010) 558-559.

indicator of market share” and argued that it should be combined “with an audience share indicator”.<sup>38</sup>

Turning to “economic” media anti-concentration, regard must be had, first and foremost, to the notion of Integrated Communications System (hereafter: ICS) laid down in Article 43 CLARMS. The ICS is a statute-defined relevant market encompassing the following activities: newspapers and magazines, yearly and electronic publishing; radio and audiovisual media services, cinema, outdoor advertising, communication initiatives for products and services, and sponsorships.<sup>39</sup>

The CLARMS prohibits holding a dominant position in the ICS and in its constituent submarkets.<sup>40</sup> Moreover, the CLARMS stipulates that no communication operator may, either directly or through controlled or connected companies, achieve revenues in excess of 20 percent of the total ICS revenues.<sup>41</sup> Such revenues include *inter alia* those derived from the sale of daily newspapers and periodicals, from online publishing, from advertising, teleshopping, sponsorships etc.<sup>42</sup> The 20 percent limit is reduced to 10 percent for companies achieving more than 40 percent of the overall revenues of the electronic communications sector.<sup>43</sup>

As far as the press sector is concerned, Law no. 416/81, as amended by Law no. 67/87, sets out a ban on the holding of a dominant position in the daily newspaper publishing market.<sup>44</sup> For the purpose of that ban, the notion of dominant position is defined by reference to the share of the total circulation of daily newspapers in Italy or one of the four inter-regional areas defined by the law.<sup>45</sup> Transactions leading to the creation of a dominant position are null and void<sup>46</sup> and can result in the compulsory sale of shares or newspapers so as to eliminate the dominant position.<sup>47</sup>

Moreover, the CLARMS also precludes companies engaging in nation-wide broadcasting or electronic communications exceeding certain revenue thresholds from acquiring stakes or participating in the establishment of publishers of daily newspapers (with the exception of daily newspapers issued only in electronic form) before 31 December 2012.<sup>48</sup> The relevant revenue thresholds are 8 percent of the overall ICS for broadcasting companies and 40 percent of the revenues in the electronic communications sector for electronic communications companies.<sup>49</sup>

Also advertising in the daily newspaper publishing sector is subject to specific restrictions. Law no. 416/1981 stipulates that no advertising agency can enter into exclusive dealing arrangements with a number of daily newspapers whose combined

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<sup>38</sup> Opinion of the Venice Commission, adopted at its 63rd Plenary Session (10-11 June 2005), on the compatibility of the “Gasparri” and “Frattini” laws of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media.

<sup>39</sup> Art. 2 para. 1, lett. l) of Legislative Decree no. 177 of 31 July 2005, in GURI n. 208 of 7 September 2005, Supplemento ordinario n. 150.

<sup>40</sup> Article 43, paras. 2 and 9 CLARMS.

<sup>41</sup> Article 43, para 9, CLARMS.

<sup>42</sup> Art. 43, para 11 of Legislative Decree no. 177 of 31 July 2005, in GURI n. 208 of 7 September 2005, Supplemento ordinario n. 150.

<sup>43</sup> Article 43, para 11, CLARMS.

<sup>44</sup> Law 5 August 1981, no. 416, OJIR 6 August 1981, no. 215; Law 25 February 1987, no. 67, OJIR 9 March 1987, no. 56.

<sup>45</sup> *Ibid.*, Article 3(1).

<sup>46</sup> *Ibid.*, Article 3(4).

<sup>47</sup> *Ibid.*, Article 3(5)-(6).

<sup>48</sup> Article 43, para 12, CLARMS.

<sup>49</sup> *Ibid.*

circulation exceeds 30% of the total nation-wide circulation.<sup>50</sup> The applicable threshold drops to 20% for advertising agencies having corporate connections with publishers.<sup>51</sup>

- Legal framework for psm; ability to fulfill their tasks

The PSM remit is outlined in Articles 45 and 46 CLARMS as a number of minimum objectives the PSM operator has to meet.

The PSM remit is specified in greater detail in a 'service contract' (contratto di servizio) renewed every three years between the PSM operator and the Ministry of Economic Development.<sup>52</sup> Prior to each renewal, the Ministry and AGCom jointly issue guidelines setting out the contents of further PSM obligations to take into account changes in the market and technological context, as well as in the cultural needs of the national and local audience. The latest guidelines were adopted on 12 November 2009<sup>53</sup>. The service contract for the years 2010-2012 was signed on 7 April 2011.

The company entrusted with PSM is also allowed to carry out commercial activities other than its public service remit, provided that these additional activities do not interfere with its PSM duties and contribute to ensuring a balanced management of the company.<sup>54</sup> To this end, the CLARMS lays down specific restrictions on advertising on PSM channels. Indeed, while the PSM operator can schedule advertising for no more than 4% of its weekly airtime and up to 12% of its hourly airtime,<sup>55</sup> free-to-air commercial broadcasters are subject to a 18% hourly advertising limit and to a 15% daily advertising limit that can be extended to 20% if broadcasters schedule advertising types other than spots (e.g. telepromotion).<sup>56</sup>

The PSM operator is financed through a dual-funding system, in that its revenues include both remuneration for commercial activities (notably the sale of advertising space) and compulsory licence fees (*canone di abbonamento*) levied on all owners of television sets.<sup>57</sup> The amount of the latter is set every year in accordance with a decree issued by the Minister, as per Article 47, paragraph 3, CLARMS. The licence fee dates back to the 1930s and is still regulated by Royal Legislative Decree no. 246 of 21 February 1938 and by Legislative Decree no. 458 of 21 December 1944.

The basic rules for the PSM funding are set forth in Article 47 of the CLARMS and include the principle whereby the licence fee can be employed exclusively to fulfil PSM functions, not commercial activities. To this end, the CLARMS lays down a separate accounting requirement: in particular, RAI is required to draw up its balance sheet in accordance with a prospectus approved by AGCom in its Resolution no. 186/05/CONS.<sup>58</sup>

The constitutional justification of the licence fee has been the subject of several recent rulings by the Constitutional Court.<sup>59</sup> While in the past the licence fee constituted a form of commercial consideration for the services provided by RAI, nowadays it is regarded as a purpose tax (*«imposta di scopo»*), whose aim is to allow the PSM public service

<sup>50</sup> Law no. 416/81, Article 12(3).

<sup>51</sup> Ibid, Article 12(4).

<sup>52</sup> Article 45, para 1, CLARMS.

<sup>53</sup> AGCom Decision no. 614/09/CONS, OJIR 26 November 2011, no. 276.

<sup>54</sup> Article 45, para 5, CLARMS.

<sup>55</sup> Article 38, para 1 CLARMS.

<sup>56</sup> Article 38, paras. 2 and 3 CLARMS.

<sup>57</sup> See *generally* C. Schepisi, 'Televisioni e aiuti di Stato: il finanziamento del servizio radiotelevisivo pubblico e gli aiuti per il passaggio al digitale terrestre', *AIDA* (2010), 48 et seq.

<sup>58</sup> Resolution no. 186/05/CONS, published in the Official Journal of the Italian Republic no. 150 of 30 June 2005.

<sup>59</sup> See Constitutional Court, Judgment no. 248 of 2002 and 155 of 2002.



broadcaster to carry out its remit. Indeed, as the Constitutional Court put it, 'a system of funding based exclusively on advertising revenues would force the public service broadcaster to take account of audience shares and to adapt the quality and breadth of its programming to that of its competitors.'<sup>60</sup>

Doubts have been expressed in academic circles as to the effectiveness of the current PSM funding system to fully ensure the independence of the PSM operator from political and governmental influence.<sup>61</sup> As explained above, the amount of RAI's mandatory licence fee is set, every year, by a member of the Government, the Minister of Economic Development, which must 'take account of such expenses that the public service broadcaster is expected to incur in fulfilling the specific general public broadcasting service obligations for the year in question as can be inferred from the previous budget, the perspective inflation rate, and the needs of technological development.'<sup>62</sup>

Also relevant to RAI's ability to fulfil its public service and information tasks are the rules governing the appointment of its Board of Directors. RAI's Board of Directors consists of nine members, seven of which are appointed by the Parliamentary Supervision Committee, whose membership reflects, in proportion, the political composition of the Parliament. The other two members of the Board of Directors – one of which is the Chair of the Board – are appointed directly by the majority shareholder, i.e. the Ministry of Economy and Finance. The appointment of the Chair, however, becomes effective only upon approval by the Parliamentary Supervision Committee by a two-thirds majority vote.

Concerns have been voiced both by scholarly and institutional commentators as to the ability of RAI's current governance system to ensure its *de facto* independence from political and governmental influence. In particular, the European Parliament, in its Resolution no. 2003/2237(INI), regretted the "repeated and documented instances of governmental interference, pressure and censorship in respect of the corporate structure and schedules (even as regards satirical programmes) of the RAI public television service, starting with the dismissal of three well-known professionals at the sensational public request of the President of the Italian Council of Ministers in April 2002 – in a context in which an absolute majority of the members of the RAI board of governors and the respective parliamentary control body are members of the governing parties."<sup>63</sup> The following year, the Parliamentary Assembly of the Council of Europe, in its Resolution 1387 (2004), underscored that RAI 'has always been a mirror of the political system of the country' and that it 'has moved from the proportionate representation of the dominant political ideologies in the past to the winner-takes-all attitude reflecting the present political system.'<sup>64</sup>

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<sup>60</sup> Constitutional Court, Judgement no. 284/02.

<sup>61</sup> See R. Mastroianni, *Riforma del sistema radiotelevisivo italiano e diritto europeo* (Turin: Giappichelli 2004) 83.

<sup>62</sup> See Article 47, para 3, CLARMS.

<sup>63</sup> European Parliament, resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights), 2003/2237(INI), OJEU C 104E, 30 April 2004, p. 1026–1040, para 60.

<sup>64</sup> See, Council of Europe, Parliamentary Assembly Resolution 1387 (2004) on monopolisation of the electronic media and possible abuse of power in Italy, para 7 (noting that RAI's situation is "contrary to the principles of independence laid down in Assembly Recommendation 1641 (2004) on public service broadcasting"). See also Council of Europe, Commissioner for Human Rights, Issue Discussion Paper of 6 December 2011 on "Media pluralism and human rights", para 3.2, (noting that "Italy also has an ongoing record of control over public service television by political parties and governments.").



- The role and functioning of regulatory authorities in these respects

The enforcement of anti-concentration rules is entrusted to AGCom<sup>65</sup>. To facilitate AGCom's enforcement tasks, all companies active in the ICS are required to notify agreements and mergers to AGCom.<sup>66</sup> All contracts, mergers and agreements at variance with the prohibitions set out in Article 43 CLARMS are null and void.<sup>67</sup>

AGCom adopts every year a decision setting out an estimate of the overall ICS revenues.<sup>68</sup> If AGCom establishes a breach of the prohibitions set out in Article 43 CLARMS, it must take appropriate measures to ensure that those breaches are remedied in a timely fashion.<sup>69</sup>

Oversight of the Italian PSM operator is shared between AGCom and the Parliamentary Supervision Committee (PSC).

The PSC may issue directives to the PSM as to its investment and expenditure plans, its programme schedule, and its advertising policy,<sup>70</sup> so as to ensure that the PSM operator conforms to the fundamental principles governing the broadcasting sector, i.e. independence, objectivity and a pluralistic attitude towards diverse cultural, social and political views.<sup>71</sup> The PSC also monitors compliance with its own guidelines and directives by the PSM operator.

AGCom is entrusted with the task of monitoring compliance by the PSM operator with its public service remit.<sup>72</sup> AGCom may seek information and require disclosure of documents, consult with experts and carry out searches of business premises. If AGCom establishes a breach by the PSM operator of its remit, it may enjoin the company to rectify its conduct and may also impose, if need be, a fine up to 3 percent of the PSM operator's turnover. If the PSM operator fails to comply with the above injunction, AGCom may impose an additional fine and, in the most egregious cases, may order the suspension of all broadcasting activities up to ninety days.

The PSC consists of twenty Members of the House of Representatives and twenty Senators appointed by the Chairs of both the Houses on the basis of the parliamentary groups' designations.<sup>73</sup> Accordingly, the PSC tends to reflect, in proportion, the balances between political parties represented in the Parliament.

AGCom consists of four different bodies: the President, the Council, the Commission for Services and Products (hereafter: CSP) and the Commission for Infrastructures and Networks (hereafter: CIN). The Council is composed of the President and eight Commissioners (also known as AGCom 'Members'); the CSP and the CIN are each composed by the President and four Commissioners. The President is designated by the Italian Prime Minister, upon agreement with the Minister for Economic Development. The appointment of AGCom's President takes the form of a decree of the President of the Republic, which requires approval by a two-thirds majority by the relevant parliamentary committees. The President's term of office is seven years. He or she cannot be re-

<sup>65</sup> Art. 43, para 5 of Legislative Decree no. 177 of 2005.

<sup>66</sup> Article 43, para 1 CLARMS.

<sup>67</sup> Art. 43, para 4 of Legislative Decree no. 177 of 2005.

<sup>68</sup> See AGCom Decision no. 126/11/CONS (stating that the overall value of ICS revenues in 2009 was 23 billion euros).

<sup>69</sup> Article 43, para 5, CLARMS.

<sup>70</sup> Article 4 of Law 103 of 1975.

<sup>71</sup> See Articles from 3 to 7 CLARMS.

<sup>72</sup> See Article 48 CLARMS.

<sup>73</sup> Article 1 of Law no. 103 of 1975.

elected. The remaining eight AGCom Members are appointed by the Parliament, four by the House of Representatives and four by the Senate. Each Member of Parliament can vote for two candidates, one for the CSP and one for the Commission for the CIN.

AGCom's status as an 'independent authority' implies that it is not accountable to the Government and that it should not be subject to any sort of political influence. Law 14 November 1995, no. 481 sets out the eligibility requirements, cases of incompatibility, confidentiality obligations and remuneration of AGCom Members. To be eligible, AGCom Members must be endowed with an undisputed expertise and competence in the relevant sector. AGCom Members cannot exercise, directly or indirectly, consultancy or professional activities, be managers or employees of public and private entities, hold public offices of any nature, including positions in political parties, or have any interest, direct or indirect, in any undertakings active in the sector within the purview of AGCom.

Although those institutional arrangements formally safeguard AGCom's independence, a recent study has expressed concerns over the "vague nomination and appointment procedure" of AGCom Members.<sup>74</sup> In particular, the independent experts interviewed in the context of that study suggested that the current procedure might provide suboptimal outcomes in terms of i) expertise and qualification of AGCom Members (as no specific requirements are set out in that respect); ii) AGCom Members' independence from political parties, whose balances in the Italian Parliament tend to be reflected in administrative and governmental bodies (*lottizzazione*). As to the latter aspect, the above study reported that, in June 2010, one of AGCOM's commissioners resigned following a judicial inquiry into alleged pressures applied by the then Prime Minister Mr. Silvio Berlusconi in order to stop certain broadcasts on RAI that were highly critical towards the government.<sup>75</sup>

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

In order to safeguard the independence of journalistic activity from the government, the seizure of press is permitted only in connection with criminal offences for which the Press Law expressly requires seizure, only for printed materials that have already been published, and only in the presence of a Court order.<sup>76</sup> In cases of urgency, when obtaining a court order is unfeasible, law enforcement agencies can autonomously seize printed publications, but must notify the court having jurisdiction of the seizure.<sup>77</sup> That court must uphold the seizure within 24 hours, otherwise the seizure becomes ineffective.<sup>78</sup>

Journalists' independence from the political leanings of the newspaper they work for is ensured by the so-called Conscience Clause (*clausola di coscienza*), included in the collective agreement entered into between the National Federation of Italian Journalists (*Federazione Nazionale della Stampa Italiana*) and the Italian Federation of Newspaper Publishers (*Federazione Italiana Editori Giornali*).<sup>79</sup> Under the conscience clause, a

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<sup>74</sup> See Hans Bredow Institute for Media Research et al., INDIREG, Preliminary final report, 285-287, available at: [http://ec.europa.eu/avpolicy/docs/library/studies/regulators/final\\_report.pdf](http://ec.europa.eu/avpolicy/docs/library/studies/regulators/final_report.pdf) , pp. 286-287.

<sup>75</sup> Ibid., p. 130 and p. 285.

<sup>76</sup> See Article 21, para 3 of the Constitution.

<sup>77</sup> See Article 21, para 4 of the Constitution.

<sup>78</sup> See Article 21, para 5 of the Constitution.

<sup>79</sup> Contratto Nazionale di Lavoro Giornalistico 2009-2013, available at: [http://www.fnsi.it/Download/CNLG\\_FNSI\\_FIEG\\_2009\\_2013.pdf](http://www.fnsi.it/Download/CNLG_FNSI_FIEG_2009_2013.pdf).

journalist is entitled to unilaterally terminate his or her employment relationship, with full economic benefits, in case of a significant shift in the newspaper's political alignment.<sup>80</sup>

Turning to journalists' protection against "silencing" libel and defamation claims, some judgements of the Court of Cassation<sup>81</sup> suggest that the right to report exercised by journalists enjoys stronger protection relative to other forms of expression, insofar as journalists facing defamation charges may rely on specific affirmative defences. In fact, the preferential status accorded to the right to report does not stem from Article 21 of the Constitution (which protects all forms of expression alike) but from the Criminal Code, according to which one cannot be punished for exercising his or her rights.<sup>82</sup> The Constitutional Court endorsed this view.<sup>83</sup> The Court of Cassation, moreover, delivered a landmark ruling (known as the 'Decalogue Ruling') summarizing the three requirements that must be met for the exercise of freedom of the press not to give rise to liability: i) the diffusion of the news must be socially useful; ii) the reported facts must be true, and iii) the representation and assessment of fact must be sober and fair.<sup>84</sup> The Court of Cassation subsequently added a fourth requirement, i.e. the timeliness of the news,<sup>85</sup> which rests on the recognition of the so-called 'right to be forgotten'.<sup>86</sup>

The Journalist Profession Law expressly requires journalists and publishers to maintain professional secrecy about the source of the news when it is necessary due to confidentiality of the news.<sup>87</sup> That provision, however, does not expressly state that journalists and editors can lawfully refuse to disclose the identity of their source if so requested by a court.<sup>88</sup>

The Code of Penal Procedure, enacted in 1988, provides that registered professional journalists cannot be required to divulge the names of the people from which they obtained confidential information in the exercise of their profession.<sup>89</sup> That privilege only applies to registered professional journalists (not to publicists and trainees)<sup>90</sup> and covers the name of the informant as well as any information (e.g. telephone numbers)<sup>91</sup> that could lead to his or her identification.<sup>92</sup>

The protection of journalistic sources envisaged by the Code of Penal Procedure, however, is qualified by the power vested in courts to enjoin journalists to disclose their sources if the relevant information are indispensable to prove the crime being investigated and if the truthfulness thereof can only be established by identifying the source.<sup>93</sup> It is apparent from the wording of the Code of Penal Procedure that the said

<sup>80</sup> Ibid., Article 32.

<sup>81</sup> See, e.g., Court of Cassation, Judgment of 31 May 1966, no. 1446; Judgment of 21 December 1967, no. 3003.

<sup>82</sup> See G. Gardini, *Le Regole dell'Informazione. Principi giuridici, strumenti, casi*, (Milan: Bruno Mondadori, 2009) 34.

<sup>83</sup> Constitutional Court, Judgment no. 175 of 1971.

<sup>84</sup> See Court of Cassation, Judgment no. 5259/1984.

<sup>85</sup> See Court of Cassation, Judgment no. 3679 of 1998. See also Tribunale di Bari, Judgment of 27 settembre 2008 (holding that making an article published at an earlier time available through an online database does not infringe the right of privacy or the right to be forgotten).

<sup>86</sup> But see A. Pace and M. Manetti, 'Art. 21: la libertà di manifestazione del proprio pensiero', ed. G. Branca and A. Pizzorusso, *Commentario della Costituzione* (Bologna: Zanichelli, 2006) 133-134 (arguing that the demand not to write about a particular subject has an 'inherently censorial content' and that a full-fledged right to be forgotten has no clear legal basis in Italian law).

<sup>87</sup> Article 2, paragraph 3 of the Journalist Profession Law.

<sup>88</sup> See A. Pace and M. Manetti, 'Art. 21: la libertà di manifestazione del proprio pensiero', ed. G. Branca and A. Pizzorusso, *Commentario della Costituzione* (Bologna: Zanichelli, 2006) 341-342.

<sup>89</sup> See the first sentence of Article 200, para 3, of the Code of Penal Procedure (1988).

<sup>90</sup> But See P. Caretti, *Diritto pubblico dell'informazione* (Bologna, Il Mulino, 1994) 64 (criticizing that limitation).

<sup>91</sup> See Court of Cassation, Judgment of 21 January 2004, no. 22397.

<sup>92</sup> See Court of Cassation, Judgment of 16 February 2007, no. 25755.

<sup>93</sup> See the last sentence of Article 200, para 3, of the Code of Penal Procedure (1988).

power can be exercised by courts only in exceptional circumstances (e.g. if the informant is the only witness who can prove the innocence of the defendant).<sup>94</sup>

As to the liability of journalists, the case law has set some legal limits to their right to report and comment (*diritto di cronaca e di critica*).<sup>95</sup> In particular, the Court of Cassation, in the aforementioned 'Decalogue Ruling', is of relevance here.<sup>96</sup>

The social utility criterion, the first criterion established by the Court, implies that the right to report and comment can only lawfully encroach upon other rights, such as the right to privacy, if it can contribute to the formation of public opinion about facts of objective relevance for the society as a whole.<sup>97</sup>

The (second) truthfulness criterion is expressly recognised as one of the basic duties of the journalistic profession by Law no. 69/63.<sup>98</sup> The notion of 'truthfulness' postulates an exact match between events as they are reported by the journalist and events as they actually occurred.<sup>99</sup> Mere verisimilitude does not meet the truthfulness requirement.<sup>100</sup> Accordingly, journalists are under an obligation to carefully and diligently check their sources.<sup>101</sup> Reported news, moreover, must also be comprehensive, as an incomplete account of a fact could substantially distort or misrepresent its significance.<sup>102</sup>

The fair representation and comment criterion implies that, thirdly, the exercise of the freedom of the press must neither go beyond the goal to inform the audience nor cause harm to the reputation of the persons concerned. The Court of Cassation, in particular, took the view that this criterion is not met when journalists employ subterfuges such as skilful innuendos, evocative juxtapositions and a disproportionately outraged tone.<sup>103</sup>

The fourth requirement, i.e. the timeliness of the news rests on the recognition of the so-called 'right to be forgotten':<sup>104</sup> even if the facts reported are true and accurate, every person has the right not to be indefinitely exposed to further discomfort or embarrassment as it may result from the repeated publication of facts lawfully disclosed at an earlier time. In those cases, it is necessary to determine whether there is a renewed or ongoing public interest in learning about facts reported at an earlier time.

The right to publish documents issued by public entities is an important indicator of the true democratic character of a given legal system. In this connection, regard must be had to documents covered by the so-called "secret of state". The Constitutional Court ruled that the secret of state is not incompatible with the Constitution, insofar as it is designed to protect national security as per Article 126 of the Constitution.<sup>105</sup>

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<sup>94</sup> See A. Pace and M. Manetti, 'Art. 21: la libertà di manifestazione del proprio pensiero', ed. G. Branca and A. Pizzorusso, *Commentario della Costituzione* (Bologna: Zanichelli, 2006) 344.

<sup>95</sup> See, e.g., Court of Cassation, Judgment no. 5941 of 2000; no. 747 of 2000; no. 8035 of 1998; no. 2113 of 1997; no. 40415 of 2004.

<sup>96</sup> See Court of Cassation, Judgment no. 5259/1984.

<sup>97</sup> See Court of Cassation, Judgment no. 1473 of 1998.

<sup>98</sup> See Article 2 of Law no. 69 of 1963.

<sup>99</sup> See Court of Cassation, Judgment no. 5491 of 2000.

<sup>100</sup> See Court of Cassation, Judgment no. 8848 of 1997.

<sup>101</sup> See, e.g., Court of Cassation, Judgment no. 2173 of 1993; no. 5259 of 1984; no. 7747 of 1997.

<sup>102</sup> See, e.g., Court of Cassation, Judgment no. 5259 of 1984; no. 1904 of 2003.

<sup>103</sup> See Court of Cassation, Judgment no. 5259 of 1984.

<sup>104</sup> But see A. Pace and M. Manetti, 'Art. 21: la libertà di manifestazione del proprio pensiero', ed. G. Branca and A. Pizzorusso, *Commentario della Costituzione* (Bologna: Zanichelli, 2006) 133-134 (arguing that the demand not to write about a particular subject has an 'inherently censorial content' and that a full-fledged right to be forgotten has no clear legal basis in Italian law).

<sup>105</sup> See Constitutional Court, Order no. 49/1977 and Judgment nos. 82/1977 and 86/1977.

The scope of the secret of state has been recently clarified by Law No. 124 of 2007.<sup>106</sup> According to Article 39 thereof, the secret of state covers all acts, documents, facts, and activities whose disclosure may undermine the integrity, independence and defence of the state, its relations with other states, or the functioning of state institutions and bodies of constitutional relevance. Some scholars have argued that this definition oversteps the boundaries set by the Constitutional Court as to the permissible scope of the secret of state.<sup>107</sup>

Article 261 of the Penal Code provides that the disclosure of information covered by the secret of state is punishable by imprisonment of at least five years. Article 262 of the Penal Code criminalizes the disclosure of news which the competent authority required not to be made public. Disclosing and obtaining such news are punishable by at least three years of imprisonment. The Constitutional Court clarified that the news covered by Article 262 of the Penal Code are akin to those covered by the secret of state, in that i) they must concern a state interest of compelling importance, and ii) their disclosure must be such as to appreciably undermine that interest. The characterization of a given piece of information as 'classified' by a public authority does not automatically trigger Article 262 of the Penal Code: it is for courts to determine on a case-by-case basis whether the two requirements above are met.<sup>108</sup>

The publication of court documents, especially those concerning pre-trial investigations, involves a balancing exercise between, on the one hand, citizens' right to be informed about court cases and journalists' role as watchdogs of society and, on the other one, that the course of justice is not perverted by undue information leaks. In this connection, the Constitutional Court has ruled that some court documents can be subject to investigative secrecy (*segreto istruttorio*) and that it is up to the legislature to strike a balance between the freedom of expression and the administration of justice.<sup>109</sup>

Investigative secrecy is governed by Article 329 of the Code of Penal Procedure. Documents and reports by the Public Prosecutor or by law enforcement agencies are subject to investigative secrecy until the defendant is entitled to access those documents and, in any case, until the completion of pre-trial investigations.<sup>110</sup> For investigative purposes, the Public Prosecutor may consent to the publication of specific documents covered by investigative secrecy<sup>111</sup> and may forbid the publication of documents not subject to investigative secrecy.<sup>112</sup>

The rules concerning the publication of court documents are set out in Article 114 of the Code of Penal Procedure. Paragraph 1 thereof proscribes the publication, also in part or in summary form, of investigation documents covered by investigative secrecy as well as of their contents. Investigation documents not subject to investigative secrecy can be published only after the completion of pre-trial investigation. Their contents, instead, can be published at all times. If the trial reaches the hearing stage, court documents can only be published, in whole or in part, after the judgment is delivered. In the case of closed-

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<sup>106</sup> Law 3 August 2007, no. 124, OJIR 13 August 2007, no. 187.

<sup>107</sup> P. Pisa, *Le premesse 'sostanziali' della normativa sul segreto di Stato*, 37.

<sup>108</sup> See Constitutional Court, Judgment nos. 282/1990, 333/1991 and 295/2002.

<sup>109</sup> See Constitutional Court, Judgment no. 25/1965. For commentaries, See V. Crisafulli, *In tema di limiti alla cronaca giudiziaria*, *Giurisprudenza costituzionale*, 1965, 245; V. Barosio, *Il divieto di pubblicare atti o documenti relativi ad una istruzione penale e la sua compatibilità con gli artt. 3 e 21 Cost.*, *Giurisprudenza costituzionale*, 1966, 176.

<sup>110</sup> Article 329, para 1, of the Code of Penal Procedure.

<sup>111</sup> Article 329, para 2, of the Code of Penal Procedure.

<sup>112</sup> Article 329, para 3, of the Code of Penal Procedure.

door hearings,<sup>113</sup> instead, court documents can only be published ten years after the final judgment is rendered and upon authorization by the Minister of Justice.

The identity and image of minors involved in criminal proceedings as witnesses or victims cannot be disclosed until they reach the age of eighteen. It is also forbidden to publish images depicting the defendant in handcuffs or other restraints, unless the defendant consents to the publication.

The publication of wiretap transcripts has recently given rise to a lively political and legal debate. The Constitutional Court has cautioned against the reckless publication of wiretap transcripts involving elected officials as undue means of political pressure.<sup>114</sup> The Italian Data Protection Authority, in turn, has repeatedly urged journalists to adopt a more cautious approach in publishing wiretap transcripts of famous people or elected officials as doing so could significantly undermine their right to privacy.<sup>115</sup>

The Government in 2008 proposed an outright ban on the publication of wiretap transcripts (the so-called 'Alfano Bill'),<sup>116</sup> but the bill was eventually dropped in view of the strong opposition of the public opinion and of the concerns raised by some academic commentators as to the consistency of the bill with the Constitution and with the ECHR.<sup>117</sup>

Absent specific rules on the publication of wiretap transcripts, regard must be had to the guiding principles set out in Article 6 of the Code of Practice Concerning the Processing of Personal Data in the Exercise of Journalistic Activities (PDCP).<sup>118</sup> Compliance with those provisions is a precondition for the lawful processing of personal data for journalistic purposes as per Article 137, para. 3 PDPC.

Article 6 PDCP provides that disclosure of information of substantial public or social interest is consistent with the right to privacy so long as such piece of information is indispensable in view of the originality of the relevant event or of the status of the persons involved. Accordingly, the right to privacy of famous persons and persons holding public offices must be respected if the disclosed information is not relevant to their public role.

Law 281 of 2006 grants a remedy to people harmed by the publication of the contents of illegal wiretapping (i.e. carried out in the absence of a court order): the publisher and the responsible editor are jointly and severally liable up to fifty euro cents for each printed

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<sup>113</sup> See Article 472, paras. 1 and 2, of the Code of Penal Procedure.

<sup>114</sup> Judgment no. 390/2007.

<sup>115</sup> See Personal Data Protection Authority, Decision of 21 June 2006, 'Publishing Transcripts of Tapping Records', OJIR 21 June 2006, no. 147, available in English at: <http://www.garanteprivacy.it/garante/doc.jsp?ID=1301195>.

<sup>116</sup> Chamber of Deputies, Legislative Proposal no. 1415, submitted by the Minister of Justice Mr. Angelino Alfano on 30 June 2008, available at: [http://www.camera.it/\\_dati/leg16/lavori/stampati/pdf/16PDL0005770.pdf](http://www.camera.it/_dati/leg16/lavori/stampati/pdf/16PDL0005770.pdf).

<sup>117</sup> See D. Gallo, *La riforma delle intercettazioni nel d.d.l. Alfano*, *Costituzionalismo.it*, 2009, 25 et seq., available at: <http://www.costituzionalismo.it/articolo.asp?id=325>; F. Ruggieri, *Il disegno di legge governativo sulle intercettazioni: poche note positive e molte perplessità*, *Cassazione penale*, 2008, 2239 et seq.; L. Della Corte, R. Paudice and I. Vozzo, *La disciplina delle intercettazioni (DDL Alfano) alla luce del principio della libertà di espressione garantita dalla Carta Costituzionale e dalla Convenzione Europea dei Diritti dell'Uomo*, Report of the research group directed by Professor R. Mastroianni presented on 15 July 2009, available at: <http://www.odg.it/files/Rapporto%20contro%20Alfano.pdf>.

<sup>118</sup> See R. Zaccaria and A. Valastro, *Diritto dell'informazione e della comunicazione* (Padua: Cedam, 2010) 157; D. Piccione, *Diritto di cronaca giornalistica dei parlamentari e pubblicazioni delle intercettazioni telefoniche a loro carico*, *Giurisprudenza costituzionale*, 2008 1573 et seq.



copy of the offending article or up to one million Euros if the transcripts were disclosed through radio, television, or the internet.<sup>119</sup>

- Specific positive content obligations

In addition to the specific positive content obligation that are comprised in the PSM remit (see above "legal framework for public service media operations") and to the ones imposed on all broadcasters in the field of political communication (see below "political advertising and/or broadcasting time"), Article 7, paragraph 1, CLARMS stipulates that 'the provision of information through audiovisual media services *by any broadcaster or content provider* constitutes a service of general interest' and is accordingly subject to a number of horizontal obligations (the truthful presentation of facts and events, the obligation to broadcast news programmes every day, the duty to grant access to all political subjects etc.).

- Funding schemes for specifically desired content

The press is the beneficiary of various forms of financial support from the State. The beneficiaries of direct aid are listed in Article 9 of Law no. 67 of 1987. They include *inter alia*: i) cooperatives publishing newspapers; ii) publishing companies that pledge not to distribute dividends and profits to shareholders; iii) companies publishing newspapers or periodicals that are organs of a political party.

The affiliation to a political party of a given newspaper or periodical must be apparent from its masthead. The law, however, does not impose any substantive content requirements in this connection.

Newspapers and periodicals that are organs of a political party are entitled to both a flat subsidy equal to 30% of the average costs incurred during the last two financial years and a variable subsidy to be determined according to their circulation.

Such a financing scheme has given rise to heated criticism which ultimately led the government to announce the phasing out of the current scheme and a new subsidization scheme that will enter into force 2014. The new scheme will impose stricter requirements as to the costs that can be taken into account for the purpose of calculation of the flat subsidy and will only have regard to the number of sold copies for the purpose of calculation of the variable subsidy (thus excluding copies distributed through newsboys).<sup>120</sup>

- Political advertising and/or broadcasting time

The Constitutional Court has expressly recognised the right to fair representation in election periods.<sup>121</sup> According to academic commentators, that right stems from the Constitutional principles of freedom of expression (Article 21), freedom of association (Article 49), equal access to public offices (Article 51), and popular sovereignty (Article 1, paragraph 2).<sup>122</sup>

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<sup>119</sup> Article 4 of Law 20 November 2006, no. 281, OJIR 21 November 2006, no. 271.

<sup>120</sup> See [http://www.corriere.it/economia/12\\_maggio\\_11/riforma-editoria\\_d64bb80c-9b63-11e1-81bc-34fceaba092f.shtml](http://www.corriere.it/economia/12_maggio_11/riforma-editoria_d64bb80c-9b63-11e1-81bc-34fceaba092f.shtml).

<sup>121</sup> See e.g. Constitutional Court Judgment nos. 48/1964, 161/1995, 155/2002.

<sup>122</sup> See R. Zaccaria and A. Valastro, *Diritto dell'informazione e della comunicazione* (Padua: Cedam, 2010) 362.



Law no. 28 of 2000, as amended by Law no. 313 of 2003, seeks to ensure a level playing field for all political actors both during the electoral period and outside that period.<sup>123</sup> That law applies to three categories of programmes: political communication programmes, information programmes, and self-managed slots (*messaggi autogestiti*).

Political communication programmes include all broadcasts entailing a political opinion or assessment, but not the diffusion of news in information programmes. Information programmes, which account for the most significant part of the political debate on television, also include the presentation of news in a narrative or argumentative context.<sup>124</sup> Self-managed slots are airtime portions of a predetermined duration allotted to a plurality of political actors where the latter can inform the public about their platform or programme.

Those three categories of programmes are subject to a number of general requirements, plus some specific rules during electoral periods. If broadcasters fall short of those rules, AGCom can impose sanctions either by its own motion or following a request by the political actor concerned. Those sanctions may seek to restore the balance by granting the harmed party additional time in the course of political communication programmes or additional self-managed slots. In case of serious violations, AGCom may enjoin the broadcaster concerned to give notice of the infringement decision and, if necessary, to air a reply by the harmed party, which must be given the same visibility (in terms of time-slot, presentation etc.) as the offending broadcast. Broadcasters may challenge the above decisions before administrative courts.<sup>125</sup>

Political communication in electoral periods can only take place in the form of political forums, debates, round tables, adversarial presentation of candidates and political programs, interviews and any other form that allows the comparison between the political positions and candidates.<sup>126</sup> Self-managed slots during electoral periods are subject to stringent rules as to their remuneration and allotment to political actors.<sup>127</sup> Turning to information programmes, for each electoral campaign the Parliamentary Supervision Committee and AGCom adopt *ad hoc* regulations laying down detailed rules for those programmes during the electoral period.<sup>128</sup> AGCom also establishes a '*par condicio*' task force to monitor compliance with those rules.

On the days of the elections it is forbidden for all television broadcasts to provide, either directly or indirectly, voting suggestions or to express voting preferences.<sup>129</sup> Programme presenters and anchorpersons are required to behave in a fair and impartial so as not to exert a disguised influence on the audience's freedom of vote.<sup>130</sup> Moreover, in the fifteen days preceding the elections it is forbidden to publish or otherwise disseminate the

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<sup>123</sup> Article 1 of Law 28 of 2000.

<sup>124</sup> Constitutional Court, Judgment no. 155/2002.

<sup>125</sup> Article 10 of Law no. 28 of 2000.

<sup>126</sup> Article 4, para 1, of Law no. 28 of 2000.

<sup>127</sup> Article 4 of Law no. 28 of 2000.

<sup>128</sup> See, e.g., AGCom Decision no. 153/11/CSP, Disposizioni di attuazione della disciplina in materia di comunicazione politica e di parità di accesso ai mezzi di informazione relative alla campagna per i referendum consultivi indetti dal Comune di Milano per i giorni 12 e 13 giugno 2011; no. 151/11/CSP, Ordine conformativo alla Rai Radiotelevisione Italiana Spa per l'effettivo rispetto della deliberazione della Commissione parlamentare per l'indirizzo generale e la vigilanza sui servizi radiotelevisivi recante 'Disposizioni in materia di comunicazione politica, messaggi autogestiti e informazione della concessionaria pubblica nonché tribune relative alla campagna per i referendum popolari indetti per i giorni 12 e 13 giugno 2011; no. 152/11/CSP, Invito alle emittenti televisive nazionali private ad assicurare l'informazione sui referendum popolari indetti per i giorni del 12 e 13 giugno 2011.

<sup>129</sup> Article 5, para 2, of Law no. 28 of 2000.

<sup>130</sup> Article 5, para 3, of Law no. 28 of 2000.

results of opinion polls on the outcome of elections and the political orientations of voters, even if such surveys were prepared at an earlier date.<sup>131</sup>

- Codes of conduct and their organisational framing

The bulwark of journalists' independence *vis-à-vis* the bargaining power of publishers is the Press Council (Ordine dei Giornalisti).<sup>132</sup> The Journalist Profession Law grants the Press Council a broad discretion in the establishment and enforcement of rules of professional ethics.

Article 2 thereof sets out a broad statement that journalists are entitled to report and to comment within the limits set by the law and by the need to protect personal identity. Journalists, moreover, are under an unconditional obligation to uphold the truth and to act in a dutiful and fair manner.

The Constitutional Court has expressly recognised the Council's role in safeguarding the independence of its affiliates.<sup>133</sup> Some scholarly commentators, however, have voiced doubts about the ability of a body constraining journalists' freedom to effectively safeguard their independence.<sup>134</sup>

The Press Council was established in 1925,<sup>135</sup> but it was only in 1963 that, at the request of journalists, the Parliament passed the Journalist Profession Law which remodelled the Press Council's and restored its exclusive competence to keep the Journalists' Roll.

The Press Council consists of twenty Regional Boards (one for each Italian Region) and a National Board. Regional Boards are composed of six Professional Journalists and three publicists elected by the professional journalists and publicists registered in the Journalists' Roll kept by that Board.<sup>136</sup> Regional Board Members remain in office for three years and can be re-elected.<sup>137</sup>

In 2009 the Press Council, the National Federation of Italian Journalists, and the foremost national and local broadcasters signed a Self-Regulation Code concerning the representation of court proceedings in television broadcasting.<sup>138</sup> The enforcement of that Code has been entrusted to an ad hoc Committee and to the Press Council.

The National Board of the Press Council is established within the Ministry of Justice and consists of a variable number of professional journalists and publicists from each Regional Board according to the size of the membership of that Board. Members of the National Board hold office for three years and can be re-elected.<sup>139</sup> No one can be a Member of the National Board and of a Regional Board at the same time.<sup>140</sup>

Article 48 of the Journalist Profession Law empowers Regional Boards to institute disciplinary proceedings against journalists who engage in conduct unfit for the dignity

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<sup>131</sup> Article 8, para 1, of Law no. 28 of 2000.

<sup>132</sup> This clearly emerges from the *travaux préparatoires* of the Journalist Profession Law. See M. Rossano, *Configurazione sistematica dell'esercizio della professione giornalistica*, *Giurisprudenza Costituzionale*, 1967, IV, 165.

<sup>133</sup> Constitutional Court, Judgment no. 11/1968.

<sup>134</sup> See S. Fois, *Giornalisti (ordine dei)*, in *Enciclopedia del diritto* (Giuffrè, Milan, 1969) vol. XVIII, 713.

<sup>135</sup> Law 31 December 1925, no. 2307, Disposizioni sulla stampa periodica, OJIR 5 January 1926, no. 3.

<sup>136</sup> Article 3 of the Journalist Profession Law.

<sup>137</sup> Article 7 of the Journalist Profession Law.

<sup>138</sup> Available at: <http://www.odg.it/files/codice%20di%20autoregolamentazione.pdf>

<sup>139</sup> Article 17, para 1, of the Journalist Profession Law.

<sup>140</sup> Article 18, para 1, of the Journalist Profession Law.

and repute of the profession or harmful to their own reputation or that of the Press Council.

In view of the vague wording of the said provisions of the Journalist Profession Law, the Press Council has endeavoured to flesh out those provisions by adopting a number of self-regulatory and co-regulatory instruments.<sup>141</sup>

The Treviso Charter<sup>142</sup> first adopted in 1991 by the Press Council and the National Federation of Italian Press and updated in 1995 and 2006 lays down guidelines to ensure that journalists act in a manner consistent with the proper development of minors. The Treviso Charter is expressly referred to in Article 7 of the Ethics Code concerning data processing in the journalist's profession.

The Charter of Journalists' Duties<sup>143</sup> was proclaimed by the Press Council and the National Federation of Italian Press in 1993 and is designed to lay down a number of rules of professional ethics whose violation may lead to disciplinary action. Even though the National Committee envisaged by the Charter never became fully operational, the rules set out in the Charter constitutes a key self-regulatory instrument in the context of disciplinary actions.

Regional Boards of the Press Council are responsible for keeping the Journalists' Roll and for the enforcement of the Press Law and of rules of professional ethics and for instituting disciplinary actions against offending members.<sup>144</sup> Regional Board, moreover, may bring legal proceedings against people exercising the journalists' profession or using that title without being registered in the Roll.<sup>145</sup>

The National Board, instead, is responsible for coordinating Regional Boards, providing non-binding opinions on legislative proposals concerning the journalist's profession, and hearing appeals against decisions by Regional Boards concerning registration and disciplinary matters.<sup>146</sup>

The Code of Practice Concerning the Processing of Personal Data in the Exercise of Journalistic Activities is a co-regulation instrument.<sup>147</sup> It was drafted by the National Board of the Press Council and attached to the PDPC as Annex A. The Court of Cassation confirmed that the Ethics Code is an ordinary law.<sup>148</sup> As per Article 12, para. 3, of the PDPC, compliance with the rules of such co-regulation instruments is a prerequisite for the lawful processing of data. The infringement of the rules of the Ethics Code, therefore, may result in the imposition of the sanctions set out in the PDPC.

- The role and functioning of regulatory authorities in these respects

Except for the powers attributed to AGCom and to the relevant Ministry, the bulk of regulatory powers in the field of press are exercised by the Press Council.

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<sup>141</sup> A brief description of the major self-regulatory and co-regulatory instruments is available at: <http://www.odg.it/content/le-carte>.

<sup>142</sup> Available at: <http://www.odg.it/content/minori>.

<sup>143</sup> Available at: <http://www.odg.it/content/carta-dei-doveri-del-giornalista>.

<sup>144</sup> Article 11, para 1, letters a) and d) of the Journalist Profession Law.

<sup>145</sup> Article 11, para 1, letter b) of the Journalist Profession Law.

<sup>146</sup> Article 20, para 1. Letters a), b), and d) of the Journalist Profession Law.

<sup>147</sup> Data Protection Authority, decision of 29 July 1998, OJIR 3 August 1998, no. 179, available in English at: <http://www.garanteprivacy.it/garante/doc.jsp?ID=1565746>.

<sup>148</sup> Court of Cassation, Judgment of 5 March 2008, no. 16145.

- Distribution Aspects
  - Access to frequencies

The exercise of the activity of network operator on terrestrial frequencies, as well as on cable and satellite networks, is subject to the general authorization scheme as per Article 25 of the Electronic Communications Code.<sup>149</sup> That authorization is valid for a period ranging between twelve and twenty years and renewable for a period of equal duration.<sup>150</sup> The general authorization scheme is based on a system of *ex post* control. Undertakings wishing to carry out the activity of network operators must notify the Ministry of Economic Development a notice stating their intention to do so.<sup>151</sup> Those undertakings can start carrying out their activities immediately.

- Access to distribution networks and control of actual conditions

As mentioned under licensing regulation, providers of interactive and conditional access services are also subject to the general authorization scheme laid down in Article 25 of the Electronic Communications Code.<sup>152</sup> Those providers must comply with the technical standards set by AGCom and in particular those designed to prevent minors from viewing inappropriate contents<sup>153</sup> (e.g. filtering systems and personal identification numbers).<sup>154</sup>

- Must-carry/must-offer rules for electronic media

Decree Law n. 34 of 2011, converted into Law no. 75 of 2011, required holders of the right to use broadcasting frequencies to reserve part of their transmission capacity, and in any case no less than two programmes, to local broadcasters who were not granted those rights of use.<sup>155</sup> Article 27 of AGCom Digital Broadcasting Regulation implemented that provision, specifying that the minimum amount of transmission capacity to be provided is 6 megabits and that the leasing price must be in the range of 10-16 eurocents per megabit.

- Role of platform operators

AGCom Decision no. 15/08/CONS requires RAI and RTI to grant national analogue broadcasters access to their broadcasting transmission infrastructures on a transparent and non-discriminatory basis. RAI and RTI must provide a disaggregated offer of the economic and technical conditions for access to their infrastructures. RAI and RTI are also required to adopt a system of separate accounting for their analogue television broadcasting transmission services.

- The role and functioning of regulatory authorities in these respects

AGCom is generally responsible for the monitoring and enforcement of media legislation as far as distributions aspects are concerned. AGCom's decisions imposing sanctions

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<sup>149</sup> Article 15, paras. 1 and 7 CLARMS.

<sup>150</sup> Article 15, para 5 CLARMS.

<sup>151</sup> Article 25, para 4, of the Electronic Communications Code.

<sup>152</sup> Article 31 CLARMS.

<sup>153</sup> Article 15, para 2, letter a) of AGCom Digital Broadcasting Regulation.

<sup>154</sup> Article 34, para 5, CLARMS.

<sup>155</sup> See Article 4 of Decree Law 31 March 2011, no. 34, OJIR 31 March 2011, no. 74, converted with amendments into Law 26 May 2011, no. 75, OJIR 27 May 2011, no. 122. That provision was further amended by Article 25, para 2, of Decree Law 6 July 2011 No. 98, OJIR 6 July 2011, no. 155, which at the time of writing has not yet been converted into law.

must be reasoned and can be challenged before the Regional Administrative Court for Latium.

- Access to Information
  - Transparency of media ownership situations

Media ownership in Italy is a vexed matter, because, as the European Parliament put it, Italy is characterized by 'a unique combination of economic, political and media power in the hands of one man – the former President of the Italian Council of Ministers', Mr. Silvio Berlusconi.<sup>156</sup> Mr. Berlusconi has been the largest shareholder of the Mediaset network group since its establishment in 1978 as well as the Prime Minister of Italy in office from 1994 to 1995, from 2001 to 2006 and from 2008 to 2011.

According to the European Parliament<sup>157</sup> and the Parliamentary Assembly of the Council of Europe,<sup>158</sup> this situation of conflict of interest may impinge upon the principle of freedom of expression enshrined in Article 10 ECHR and in Article 11 of the Charter of Fundamental Rights of the European Union. Moreover, according to scholarly commentators, this situation may upset the balance of electoral competition, contrary to the Constitutional principles of internal and external pluralism (Article 21), equality (Article 3), impartiality of public administration (Article 97), and equal access to public offices (Article 51).<sup>159</sup>

The debate on the conflict of interest sparked off in 1994, following Mr. Berlusconi's first election and appointment as Prime Minister. Some Members of the Parliament claimed that Mr. Berlusconi's election to the Chamber of Deputies was at variance with Article 10 of the Decree of the President of the Republic no. 361 of 1957, according to which holders of public concessions of a significant value cannot be elected to the Chamber of Deputies.<sup>160</sup> The Chamber's Committee of Elections, however, took the view that that provision only concerned persons holding broadcasting concessions 'in their own name', not indirectly through shareholdings (as in the case of Mr. Berlusconi).<sup>161</sup>

It was not before 2004 that the Parliament passed a bill aimed at regulating the conflict of interest between public officials and professional and entrepreneurial activities, the so-called Frattini Law.<sup>162</sup> The Frattini Law provides that holding a government office (e.g. the Prime Minister, ministers, etc.) is incompatible with the occupation of specific kind of posts, such as those involving the management of business undertakings.<sup>163</sup> Individual

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<sup>156</sup> European Parliament resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights), 2003/2237(INI), OJEU C 104E , 30 April 2004, p. 1026–1040, para 60.

<sup>157</sup> See. e.g., European Parliament resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights), 2003/2237(INI), OJEU C 104E , 30 April 2004, p. 1026–1040, para 60; resolution on the situation as regards fundamental rights in the European Union (2002), 2002/2013(INI), OJEC C 076 E , 25/03/2004 P. 0412 – 0429, para 37 (deploring 'the fact that in Italy in particular a situation is continuing in which media power is concentrated in the hands of the Prime Minister, without any rules on conflict of interest having been adopted').

<sup>158</sup> See Parliamentary Assembly of the Council of Europe, Resolution 1387 (2004), Monopolisation of the electronic media and possible abuse of power in Italy, para 1 (expressing concern about 'concerned by the concentration of political, commercial and media power in the hands of one person, Prime Minister Silvio Berlusconi').

<sup>159</sup> See R. Zaccaria and A. Valastro, *Diritto dell'informazione e della comunicazione* (Padua: Cedam, 2010) 72.

<sup>160</sup> Decree of the President of the Republic 30 March 1957, no. 361, OJIR 3 giugno 1957, no. 139.

<sup>161</sup> Chamber of Deputies, Committee of Elections, decisions of 20 July 1994 and of 17 October 1996.

<sup>162</sup> Law 20 July 2004, no. 215, 'Norme in materia di risoluzione dei conflitti di interessi', OJIR 18 August 2004, no. 193. The Frattini Law was named after its sponsor Minister Franco Frattini, at that time in charge of the Public Functions Department of the Berlusconi II Cabinet.

<sup>163</sup> Article 2, paragraph 1, of the Frattini Law.

entrepreneurs must entrust their undertakings to one or more trustees (including family members).<sup>164</sup>

The Frattini Law requires persons holding a government office to devote themselves exclusively to the public interest and to abstain from taking measures and participating in joint decisions in situations where there is a conflict of interest.<sup>165</sup> Conflicts of interests are defined as an act of commission or omission by persons holding a government office: i) when they are also holding an incompatible post as defined above; or ii) when that act has a specific, preferential effect on the assets of the office-holder or of his or her spouse or relatives up to the second degree, or of companies or other undertakings controlled by them, to the detriment of the public interest.<sup>166</sup>

The Council of Europe Commission for Democracy through Law<sup>167</sup> as well as a number of academic commentators and institutional actors have expressed concerns as to the ability of the Frattini Law to effectively address the situation of conflict of interest currently characterizing the Italian media sector.<sup>168</sup>

- Accountability of public service media

The CLARMS lays down both an internal and external supervision system to monitor the PSM operator's compliance with its remit.

As to internal supervision, pursuant to Article 49, paragraph 3, CLARMS, RAI's Board of Directors, apart from being the body of the company responsible for all its strategic decisions, 'is also responsible for ensuring and guaranteeing correct fulfilment of the aims and obligations of the general public broadcasting service'. The Board of Directors recently adopted an Ethics Code, which expressly mentions the principles of pluralism and impartiality among RAI's 'General Ethical Principles'. Pursuant to Article 1, paragraph 1, of the Ethics Code, the task of monitoring compliance with the provisions thereof is entrusted to RAI's Board of Directors and RAI's Director-General, who reports to the former.

The external supervision tasks are, instead, assigned to two different institutions: AGCom and the Parliamentary Supervision Committee (PSC).

- Freedom of information laws

Access to unpublished information is of paramount importance in the relationship between individuals and public authorities. Scholarly commentators have argued that Article 21 of the Constitution grants individuals a right of access to documents held by public administrations, within the limits set by the law.<sup>169</sup>

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<sup>164</sup> Article 2, paragraph 2, of the Frattini Law.

<sup>165</sup> Article 1 of the Frattini Law.

<sup>166</sup> Article 3 of the Frattini Law.

<sup>167</sup> European Commission for Democracy Through Law (Venice Commission), Opinion no. 309/2004 on the compatibility of the Laws 'Gasparri' and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, available at: [http://www.venice.coe.int/docs/2005/CDL-AD%282005%29017-e.asp#\\_ftn83](http://www.venice.coe.int/docs/2005/CDL-AD%282005%29017-e.asp#_ftn83).

<sup>168</sup> See, e.g., B. Valensise, *Il conflitto di interessi nella legge n. 215 del 2004 tra luci (poche) ed ombre (molte)*, *Studium iuris*, 2005, 834 et seq. and 1034 et seq.; F. Scintola, *La disciplina del conflitto di interessi dei membri del Governo*, *Nuova rassegna di legislazione, dottrina e giurisprudenza*, 2005, 2131 et seq.; R. Zaccaria and A. Valastro, *Diritto dell'informazione e della comunicazione* (Padua: Cedam, 2010) 72-77.

<sup>169</sup> A. Valastro, 'Articolo 21', in *Commentario alla Costituzione*, (Milan: Utet, 2006), 457.



The matter of transparency of administrative action has been firstly and comprehensively regulated by Law no. 241/1990. As per Article 1(1) thereof, “publicity” and “transparency” are two of the principles that shall govern administrative action. Those principles are operationalized by the so-called “right of access” (*diritto di accesso*), set out in Section V of Law 241/1990, which implies an enforceable right for citizens to consult and obtain a copy of all administrative documents (subject to a number of restrictions and exceptions). Article 27 of Law 241/1990 set up the Committee on Access to Administrative Acts. That Committee is established within the Presidency of the Council of Ministers.

- Accessibility of products/services and distribution networks

The right to freely install aerial and antennas for the reception of broadcasting was first recognised by Law no. 554/1940. Courts have clarified that such right is personal in nature and is not contingent upon the status of landlord. Tenants, therefore, enjoy the same right to install antennas and satellite dishes as their landlords. Insofar as antennas and satellite dishes are necessary to ensure access to information as enshrined in Article 21 of the Constitution, courts have taken the view that the installation of that equipment is, generally speaking, not subject to restrictions or authorizations of any sort, except for those flowing from the limits to the use of shared parts of a building (article 1102 of the Civil Code) and those set out in sector-specific legislation. As far as antennas shared by several users are concerned, moreover, regard must be had to the technical regulations issued by the Ministry of Communications on 11 November 2005.

The most relevant example of public subsidy in the field of broadcasting is the one granted by the Italian government in 2004 to facilitate the completion of the digital switchover process. In particular, Article 4(1) of Law n. 350/2003 granted a subsidy of EUR 150 to every user who purchased or rented equipment for the reception of DTT television signals and the associated interactive services. Following a complaint filed with the European Commission by the broadcaster Centro Europa 7, the Commission adopted Decision 2007/374/EC. That decision established that the Italian measure constituted a State aid within the meaning of Article 107(1) TFEU and that it could not be justified, *inter alia* because it was not technologically neutral in that it did not apply to digital satellite decoders, thus placing satellite broadcasters at a competitive disadvantage. Consequently, the Commission ordered the recovery of the State aid paid pursuant to the measure at issue. Mediaset SpA, a DTT broadcaster brought an action against the contested decision, which however was dismissed by the General Court of the European Union on 15 June 2010 (Case T-177/07). The appeal against that judgment was also dismissed, this time by the Court of Justice, on 28 July 2011 (Case C-403/10 P).

- “Have a Say on ...”
  - Complaint procedures, “Ombudsmen”

Law no. 112/2011 established a National Ombudsman for the protection of children and adolescents. Although it is still too early to carry out an assessment of the work of that institution, it must be noted that the UN Committee on the Rights of the Child, in its Fifty-eighth session (19 September–7 October 2011) expressly endorsed the establishment of the Children’s Ombudsman and called on the Italian government to endow that institution with the necessary funding and personnel to effectively carry out its tasks.



- Participation in media operators/(self-)regulatory bodies

As to the participation of users in media supervisory bodies, regard must be had to the National Council of Users. The 'National Council of Users' (*Consiglio nazionale degli utenti*, hereafter: NCU) was established by the Maccanico Law as an auxiliary body of AGCom's, the Italian independent media regulation authority.<sup>170</sup> The NCU replaced the Consultative Council of Users established by the Mammi Law as an auxiliary body of the Broadcasting and Publishing Supervisory Board (*Garante per la radiodiffusione e l'editoria*).<sup>171</sup>

The NCU may issue various types of acts, including proposals and recommendations. Those acts may be addressed both to communication regulation and supervision bodies (e.g. the Parliament, AGCom, the Ministry) and to communication operators.<sup>172</sup> The NCU is composed of experts, designated by associations representing various categories of users, who distinguished themselves for their role in the defence of human dignity and the protection of minors.<sup>173</sup>

In spite of NCU's activism, it is fair to say that, by and large, users' participation in the Italian media regulation systems remains marginal, insofar as powers conferred upon users' representative bodies, such as the NCU, are essentially of a consultative nature.

2.2.14.2. Main Players in the Media Landscape

2.2.14.2.1. Radio

As far as radio is concerned, it must be noted that Audiradio no longer publishes the audience data for nation-wide radio broadcasters. Therefore, regard will be had only to the revenue market shares of the company groups controlling the major radio broadcasters.

Recent surveys have shown that radio and television are, to a certain degree, complementary products, in that users tend to listen to radio in places and at times when they cannot watch television (e.g. at the office or on the go).

2.2.14.2.2. Television

The audiovisual media services (AVMS) sector in Italy consists of two major segments: free-to-air TV, which generates about two thirds of the total revenues of the sector, and pay-TV, which accounts for the remainder.

**Table 79 IT: AVMS – Total revenues for free-to-air and pay-TV (million euros)**

	2009	2010	% (2010)
Free-to-air TV	5,419.90	5,663.25	63.1
Pay-tv	3,169.83	3,313.21	36.9
Total	8,589.73	8,976.46	100

Source: AGCom Annual report 2011

<sup>170</sup> See Article 1, para 28 of the Maccanico Law.

<sup>171</sup> See Article 28 of the Mammi Law.

<sup>172</sup> See Article 1, para 28 of the Maccanico Law.

<sup>173</sup> Id.

### 2.2.14.2.3. *Press and publishing*

The press market in Italy can still be regarded as traditional in that printed press (i.e. daily newspapers and periodicals) accounts for about 88.7% of the revenues of the sector, while electronic publishing only generates 11.2% of the income.

The comparison of revenues in 2009 and 2010, however shows a non-negligible contraction of the revenues from printed press (-4.8% for daily newspapers and -7.7% for periodicals) and a significant increase of the revenues from electronic publishing (+12.7%). This is largely attributable to the substantial investments made by traditional publishers into the electronic press segment and in particular in the provision of editorial contents to portable devices such as tablets and smartphones.

**Table 80 IT: Press – Sources of income (million euros)**

	2009	2010	% (2010)
Daily newspapers	3,121.13	2,971.13	43
Periodicals	3,422.46	3,158.72	45.7
Electronic pub.	686.91	774.16	11.2
Total	7,230.50	6,904.01	100

Source: AGCom Annual report 2011

### 2.2.14.2.4. *Online media (non-linear audiovisual (media) services; websites)*

Online media is an extremely dynamic market in Italy. Recently, several pay-TV operators have started bundling online access to part of their audio-visual catalogue along with traditional subscription fees. The sale of online advertising space is a relatively concentrated market where traditional media operators have the lion's share.

**Table 81 IT: Online Advertising Market in Italy in 2010**

	Revenues	Market share
Traditional media operators	390,29	39,2
Electronic Publishers	144,39	14,5
Audio-visual Media Services Operators	14,38	1,4
Yearly publications operators	231,52	23,3
Internet operators	605,31	60,8

Source: AGCom Annual report 2011

### 2.2.14.2.5. *Cable/Satellite network operators, IPTV & Internet Access Providers*

IPTV has still a very marginal role, while DTT has recently surpassed analogue TV in terms of audience. Satellite TV accounts for almost 15% of the total audience.

**Table 82 IT: AVMS – Audience share for each platform (%)**

	March 2010	March 2011
Analogue TV	48	21,3
DTT	35,7	62,5
Satellite TV	15,1	15,7
IPTV	0,3	0,3
Total	100	100

Source: AGCom Annual report 2011

Audio-visual Media Services provided by Internet Access Providers are not taken into account specifically in AGCom’s last annual report. As shown in the next section, however, the largest Internet Access Provider in Italy (i.e. Telecom Italia) currently accounts only for 1,8% of the overall revenues for the audio-visual media services sector.

*2.2.14.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

The press market has a low concentration factor (with an HHI of less than 500). More than half of the overall revenues are generated by undertakings having a market share lower than 1%. The three largest competitors are RCS Mediagroup (with a market share of 13,3%), Gruppo L’Espresso (with a market share of 10,9%) and Arnoldo Mondadori (with a market share of 6,9%).

**Table 83 IT: Press – Market shares (revenues)**

	2009	2010
RCS Mediagroup	13,5	13,3
Gruppo L’Espresso	11	10,9
Arnoldo Mondadori	6,8	6,9
Il Sole 24 Ore	5,1	5
Caltagirone	3,5	3,5
Monrif	2,8	2,9
Condè Nast	2,3	2,5
De Agostini	1,7	1,2
Other companies	53,4	54,8
Total	<b>100</b>	<b>100</b>

Source: AGCom Annual report 2011

The AVMS sector in Italy is a highly concentrated oligopoly (with an HHI of 2,715.26) characterized by the presence of three large corporate groups having nearly symmetrical market shares: Mediaset (the current market leader, with a market share of 30.9%), which draws most of its revenues from the sale of advertising; Sky Italia (with a market share of 29.3%), whose main source of income is the provision of pay-TV contents, and RAI (with a market share of 28.4%), the Italian PSM operator, mainly financed through the *Canone*. The remaining part of the market is shared between Telecom Italia (with a market share of 1.8%) and other marginal operators including all local operators (with market shares totalling 9.6%).

**Table 84 IT: AVMS – Revenues and market shares for each operator (2010)**

	Source	Revenues (2010)	% (2010)
<b>Mediaset</b>	Advertising	2413,50	<b>30,9</b>
	Pay-tv contents	357,10	
	Total	2770,60	
<b>Sky Italia</b>	Advertising	190,59	<b>29,3</b>
	Pay-tv contents	2440,17	
	Total	2630,76	
<b>RAI</b>	<i>Canone RAI</i>	2553,84	<b>28,4</b>
	Advertising	946,58	
	Other	48,82	
	Total	2553,84	
<b>Telecom Italia</b>	Advertising	154,15	<b>1,8</b>
	Pay-tv contents	6,02	
	Total	160,17	
<b>Other operators</b>	Advertising	619,26	<b>9,6</b>
	Pay-tv contents	123,83	
	Other	118,00	
	Total	861,09	

Source: AGCom Annual report 2011

The radio sector is significantly fragmented (with an HHI lower than 1,000) and is characterised by one market leader (RAI) with a market share above 20% and four other firms having a market share around 10% each.

**Table 85 IT: Radio – Market Shares (revenues) in 2009 and in 2010**

	2009	2010
<b>RAI</b>	22,9	21,9
<b>Finelco</b>	10,3	10,3
<b>Gruppo Editoriale L'Espresso</b>	10,1	10,1
<b>RTL</b>	7,7	8,2
<b>RDS</b>	7,1	7,1
<b>Mondadori</b>	3,6	3,9
<b>Il Sole 24 Ore</b>	2,1	2,2
<b>Altri operatori</b>	36,3	33,5
<b>HHI index</b>	895	924

Source: AGCom Annual report 2011

### 2.2.14.3. Conclusion and Recommendations

Freedom of information in Italy is a matter of on-going concern both at the domestic and at the international level. The ONG "Freedom House", in its recent 2012 report on Freedom of the Press in the world, classified Italy as a "partly-free" country and ranked it 70th along with Guyana and Hong Kong in the freedom of press world ranking and penultimate (followed only by Turkey) in the Western Europe ranking.<sup>174</sup>

This report has highlighted four of what are generally regarded as the main criticalities in the existing legal framework: i) the lack of effective remedies for conflict of interest and "two-hat" situations involving overlaps between political and media power; ii) the inability of the current framework to prevent excessive media concentration and its adverse effects on media pluralism; iii) the "vague nomination and appointment procedure" of the members of the Italian Media Regulator (AGCom); iv) the risks of governmental and political influence over Public Service Media (PSM) inherent in the current appointment procedure of the Board members of Italy's PSM operator (RAI) and its financing mechanism.

First, the situation of conflict of interest that has characterized Italy for nearly two decades, and namely the overlap between media influence and political (and, at times, even governmental) power, is an ongoing concern. Other types of media, notably press and the internet, as well as the countries' constitutional safeguards for freedom of expression so far have limited, at least to some degree, the impact of such conflict of interest upon the freedom of expression.<sup>175</sup> Nonetheless, as the Council of Europe Parliamentary Assembly put it, the ongoing failure to resolve "Italian anomaly" not only poses a threat to freedom of expression in Italy, but also sets a negative example at the international level, thus undermining the promotion of independent and unbiased media in new democracies.<sup>176</sup>

The enactment of a comprehensive legal framework to address the conflict of interest arising from the current media ownership situation should thus be regarded as a top priority. The optimal solution, possibly, was that envisaged in Article 10 of the Decree of the President of the Republic no. 361 of 1957, i.e. to prevent overlaps between media and political power by precluding individuals involved in the media industry from being elected to the Italian Parliament in the first place, thus ensuring fairness throughout the electoral competition. While Article 10 was construed narrowly in the past, so as to rule out the election only of individuals holding broadcasting concessions „in their own name“, the new rules should be carefully drafted in order to cover all situations granting individuals direct or indirect control over media companies, i.e. rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on companies active in the media sector.

Second, turning to the concentration of market power in the media sector, both institutional actors and academic commentators agree that the current „technical“ and „economic“ limits laid down in the CLARMS are unable to prevent dominant positions, whose very existence poses a threat to media pluralism and freedom of information. The

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<sup>174</sup> <http://www.freedomhouse.org/sites/default/files/Booklet%20for%20Website.pdf>.

<sup>175</sup> For instance, the "Alfano Bill", setting out an outright ban on the publication of wiretap transcripts, was eventually withdrawn following a heated reaction, sparked in journalistic and academic circles and conveyed to the public through the press and the internet.

<sup>176</sup> Council of Europe, Parliamentary Assembly Resolution 1387 (2004) on monopolisation of the electronic media and possible abuse of power in Italy, para 9 (the Assembly added that "Italy, as one of the strongest contributors to the functioning of the Organisation, has a particular responsibility" in the promotion of freedom of expression in new democracies).

Venice Commission, in particular, suggested that i) the current statute-defined Integrated Communications System (ICS) should be replaced by the previously used 'relevant market' criterion, as is the case in the other European countries; ii) the 20% revenue limit set out in the CLARMS should be combined with an audience share indicator. It should be added that in the current context of technological convergence and multi-platform competition, the audience share constitutes possibly the most reliable indicator of a media operator's influence and should thus be chosen as a benchmark for alternative anti-concentration limits.

Third, doubts have been cast over the ability of the "vague nomination and appointment procedure" of the members of the Italian Media Regulation Authority (AGCom) to ensure that AGCom members are: i) sufficiently competent and qualified; and ii) not influenced by or connected to political parties.

Those concerns can be addressed by amending the appointment procedure so as to achieve a more transparent and merits-based selection process. The qualification, expertise and competence standards for AGCom members should be specified in greater detail by amending the statute establishing AGCom (Law no. 249 of 1997). Candidates should be required to disclose their CVs in advance, so as to promote public awareness. Individuals who have been associated with political parties in the recent past should be non-eligible. The appointment of AGCom members should be subject to a two-thirds majority vote in Parliament, so as to ensure greater independence from political parties.<sup>177</sup>

Fourth, both institutional actors and academic commentators have expressed concerns as to the exposure of the Italian PSM Operator (RAI) to governmental and political interferences. RAI's financing mechanism and the appointment procedure of its Board of Directors have been regarded as particularly problematic, because of the pivotal role the government and the majority party (or coalition) play in both respects.

The amount of RAI's financing should be set: i) by an independent Committee, appointed by the Parliament by a two-thirds majority vote, ii) on the basis of pre-determined criteria and iii) taking into account the PSM operator's past compliance record with its remit. That committee should also supervise the appointment of the members of RAI's Board of Directors, who should be chosen via a transparent and merits-based public selection process.

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<sup>177</sup> See Council of Europe, Parliamentary Assembly, Recommendation 1855 (2009) on the regulation of audio-visual media services, para 13.2 (highlighting the need to ensure "through appropriate regulation and practice, the independence of their national regulators for the audio-visual media sector from undue party political, governmental or commercial influences").

## LATVIA

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### 2.2.15. Latvia

#### 2.2.15.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.15.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The freedom of expression, the freedom to obtain and to impart information is safeguarded by Article 100 of *Satversme*, the Constitution of the Republic of Latvia.

More detailed safeguards to protect the media and journalists are further regulated by specific laws.

- Specific safeguards and rights for the media

The Constitutional Court (*Satversmes tiesa*) has acknowledged that the freedom of expression enshrined in Article 100 includes also media freedom.<sup>1</sup>

- Freedom to receive and to access information
  - Specific rights for the citizens

Article 104 of *Satversme* stipulates an additional right to request information from state and municipal institutions and a correlative obligation of those institutions to answer on the substance of the issue.

- Safeguards on regulatory authorities

The Constitution of the Republic of Latvia contains no provision regarding Regulatory Authorities.

- Safeguards on "universal service"

There are in the Constitution of the Republic of Latvia no specific universal service obligations for electronic media.

##### 2.2.15.1.2. *Media order (de lege lata and de facto)*

- "Market Entry"
  - Licensing schemes; remit psm; notification for print publications

Commercial radio and television broadcasters are subject to an ex-ante licensing scheme provided by the Electronic Media Law (EML). The current applicable Law was adopted in 2010, replacing the previous 1995 Radio and Television Law (cf. Report on Latvia 2004, point 1.4.). The broadcasting licenses are issued by the National Electronic Media Council (NEPLP<sup>2</sup>) – an independent regulatory authority (cf. Report on Latvia 2004, point 1.4:

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<sup>1</sup> Judgment of the Constitutional Court of Latvia as of 05.06.2003 in case No. 2003-02-0106.

<sup>2</sup> The abbreviation of the name in Latvian: Nacionālā elektronisko plašsaziņas līdzekļu padome.



according to the 1995 law the name of this institution was the National Broadcasting Council). The licenses are issued on the basis of an application, or, if a radio frequency spectrum is necessary, on the basis of a tender result.<sup>3</sup> The Latvian Supreme Court Senate has ruled that decisions on granting broadcasting licenses and respectively on tender results must be sufficiently reasoned.<sup>4</sup>

For retransmission of radio or television programmes a retransmission license is necessary, issued by the NEPLP on the basis of a relevant application.<sup>5</sup>

Providers of online services are subject to a universal permit regime according to the Electronic Communications Law: they must send a registration notification as providers of electronic communication services to the Public Utilities Commission – an independent regulatory authority.<sup>6</sup>

The legal regulation of the public service media is provided by the EML. The public service media are state-owned capital companies. Their main duty is to create and distribute programmes in accordance with the public remit. The public service media must operate in the general interest and they must ensure provision of information, which enables free opinion-making in the public. Their programmes must be diverse and take into account the various requirements of audience. The programmes of public service media must be accessible in all the territory of Latvia. Specific positive content obligations include provisions on the broadcasting of certain events important for the public, as defined by the EML<sup>7</sup> and a secondary legal act<sup>8</sup>, as well as a duty to broadcast a certain proportion of European audiovisual works and works made by independent producers<sup>9</sup>.

Currently, there are two public service media operators: a radio broadcasting company, and a television broadcasting company. There is no separate legal framework for their online operations.

- Media pluralism/ownership; competition law aspects

There are no particular media-specific anti-concentration rules provided in the current EML, in contrast to the previous 1995 Radio and Television Law (cf. Report on Latvia 2004, point 1.4.1).

However, the general merger-control provisions stipulated by the Competition Law apply. According to the Competition Law, a merger is subject to a previous clearance by the Competition Council (the national competition authority), if the combined turnover of the merger participants exceeds LVL 25 million (ca. EUR 35.57 million), or if the combined market share of the merger participants in any relevant market exceeds 40 %.<sup>10</sup> The Competition Council has reviewed several applications for merger clearance submitted by media companies. One of the first decisions with detailed reasoning was the 2010 decision allowing a merger of two major cable operators, subject to several binding commitments to safeguard free competition between media companies and to protect the

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<sup>3</sup> Article 15, section 4 of the EML (*Elektronisko plašsaziņas līdzekļu likums*), adopted on 12.07.2010, in force as of 11.08.2010.

<sup>4</sup> Judgement of the Administrative Department of the Supreme Court Senate of the Republic of Latvia, 14 June 2007. See also IRIS 2007-9:16/23.

<sup>5</sup> Article 19, section 1 of the EML.

<sup>6</sup> Articles 32-33 of the Electronic Communications Law (*Elektronisko sakaru likums*), adopted on 28.10.2004, in force as of 01.12.2004.

<sup>7</sup> Article 27 of the EML.

<sup>8</sup> Regulation No. 91 of the Cabinet of Ministers as of 01 February 2011.

<sup>9</sup> Articles 32-33 of the EML.

<sup>10</sup> Article 15, section 2 of the Competition Law, adopted on 04.10.2001, in force as of 01.01.2002.

interests of the consumers.<sup>11</sup> The most recent decision providing a scrupulous analysis of the television market in Latvia and of the competitive conditions within this market, is the 2012 decision allowing the merger of the largest Latvian commercial broadcasters.<sup>12</sup>

The Competition Council may prohibit or allow a merger only under certain commitments. Such merger shall not create a dominant position or significantly impede the efficient competition. In this regard it must be noted that the current EML provides that an electronic medium has a dominant position if its market share in the relevant market exceeds 35%.<sup>13</sup> This provision has never been applied in practice yet.<sup>14</sup>

The Competition Council has established that currently one large company has a dominant position in the wholesale market of press distribution, but also several smaller operators exist.<sup>15</sup>

- **Legal framework for psm; ability to fulfill their tasks**

The public service media are financed from the state budget, as well as from their own economic activity (e.g., advertising).

Generally, the legal framework enables the public service media to fulfil their tasks, however, there is a constant debate on the lack of sufficient financing and thus inability to provide a high quality content.

- On 17 April 2012 the NEPLP approved a Concept paper for a development of a new public service medium in Latvia, providing that a new unified public service medium body must be formed, by merging the activities of the current public service radio and television broadcasters<sup>16</sup>. On 30 May 2012 the NEPLP approved a supplemented version, and it is expected that the Ministry of Culture should submit it for review to the Cabinet of Ministers. the role and functioning of regulatory authorities in these respects

The Electronic Media Law (EML)<sup>17</sup> provides that the **National Electronic Media Council** (NEPLP) is an independent regulatory authority whose main duty is to represent the public interest in the area of electronic media and to supervise that the electronic media comply to the *Satversme* and the relevant laws. The Constitutional Court has approved that the NEPLP is outside the hierarchy of state institutions subordinated to the Cabinet of Ministers, as the NEPLP due to its functions has to be independent from the executive power.<sup>18</sup> The Constitutional Court has also pointed out that NEPLP has to promote competitiveness in the electronic media market.<sup>19</sup>

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<sup>11</sup> Decision of the Competition Council No. 83 of 13 November 2010, in case No. 1492/10/03.01.-01./13. See also IRIS 2011-2:1/32. Note: this merger did not take place in practice.

<sup>12</sup> Decision of the Competition Council No. 42 of 11 May 2012, in case No. Nr.90/12/03.01./2.

<sup>13</sup> Article 14 of the EML.

<sup>14</sup> In May 2012 a highly anticipated decision of the Competition Council is expected on the merger application between the two largest Latvian commercial broadcasters. It might address this market share criterion.

<sup>15</sup> Decision of the Competition Council No. 69 as of 28 October 2011, case No. 885/11/03.01.-01./6. Available at:

[http://www.kp.gov.lv/uploaded\\_files/2011/D069\\_2810.pdf](http://www.kp.gov.lv/uploaded_files/2011/D069_2810.pdf) (in Latvian).

<sup>16</sup> *Koncepcija par jaunā Latvijas elektroniskā sabiedriskā medija izveidi*, available at: <http://www.nrtp.lv/lv/padome/page/2/aktualitates/1709-koncepcija-->. See also: IRIS 2012-6/26.

<sup>17</sup> EML (*Elektronisko plašsaziņas līdzekļu likums*), adopted on 12.07.2010, in force as of 11.08.2010.

<sup>18</sup> Judgment of the Constitutional Court of Latvia as of 16.10.2006 in case No. 2006-05-01; paras. 17 and 18 (the judgment was adopted in respect of the interpretation of the previous Radio and Television Law (1995), however, the relevant provisions of the EML are essentially the same).

<sup>19</sup> Judgment of the Constitutional Court of Latvia as of 16.10.2006 in case No. 2006-05-01; para. 18.

The NEPLP is constituted by **five members, elected directly by Saeima** (the Parliament). The NEPLP is financed from the state budget, but as a derived state institution it is not included in the hierarchy of public institutions subordinated to the Cabinet of Ministers. The main functions of the NEPLP include the issuing of broadcasting and retransmission permits, monitoring and controlling the activities of electronic media, approving the strategy for the development of electronic media, as well as acting as a shareholder of public broadcasters (approving their articles of association, electing the management board).<sup>20</sup>

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

The Law on the Press and other Mass Media provides specifically for the freedom of the media and their right to obtain information from state and non-governmental institutions<sup>21</sup>, the safeguards for journalistic activity, the prohibition of censorship, and interference with the activities of the media (*cf.* Report on Latvia 2004, point 1.3.). In 2011 this law was supplemented by an explicit statement of the editorial independence:<sup>22</sup> the editor and the editor-in-chief is liable for the contents of the published information, but is editorially independent. Hence, the editors themselves must decide what information should be published and what not.

The freedom and independence of editorial activity is stipulated also by the EML, stating that this freedom applies to the producing and distributing of programmes and may be limited only as provided by the law.<sup>23</sup>

The EML provides the following complaint procedures: the rights to request a revoking of false information, and the rights to reply<sup>24</sup>. If any electronic medium refuses to revoke the information or to provide the rights to reply, the complainant may request this through the court. Similar provisions are included in the Law on Press and Other Mass Media, which applies also to printed media. The general Civil Law provides for a right to request a compensation for defamation, and, if the defamatory and false information was published in press, it also has to be revoked in the press.<sup>25</sup>

- Specific positive content obligations

Media subject to Latvian jurisdiction must provide a Latvian translation of all broadcasts, including films, if they are not originally in Latvian.<sup>26</sup> This does not apply to retransmitted programmes.

- Funding schemes for specifically desired content

A funding for specifically desired content (production of news and current affairs programmes and providing information to general public) is granted within the public remit scheme. According to the EML, the public remit is mainly provided by the public

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<sup>20</sup> Articles 60-62 of the EML.

<sup>21</sup> Article 5.

<sup>22</sup> Amendments to the Law on Press and Other Mass Media, adopted on 22.09.2011, in force as of 20.10.2011. See also IRIS 2011-10:1/32.

<sup>23</sup> Article 24, part 1 of the EML.

<sup>24</sup> Articles 50-52 of the EML.

<sup>25</sup> Article 2352.<sup>1</sup> of the Civil Law.

<sup>26</sup> Article 28, parts 3 and 4 of the EML.

service media, however, the NEPLP may entrust also commercial media with a certain part of the public remit.<sup>27</sup> This option, however, has not been used in practice yet.

- **Political advertising and/or broadcasting time**

The political advertising and related issues, such as broadcasting time to be offered to parties and candidates, is regulated by the laws "On pre-election campaign before the *Saeima* elections and elections to the European Parliament"<sup>28</sup> and "On campaign in radio and television before the municipal elections"<sup>29</sup>. The respective laws have faced many amendments to ensure a smooth and transparent regulation of pre-election campaigns.<sup>30</sup> A certain amount of free broadcasting time in the programmes of the public service media, Latvian Radio and Latvian Television, is granted to the registered candidates.<sup>31</sup> In addition, the candidates may use paid political advertising, but the payer for such advertising must be clearly indicated. The broadcasting organisation has a duty to publish its tariffs for broadcast political advertising, and these tariffs must be applied in a transparent and non-discriminatory manner.<sup>32</sup> Also, the political advertising in printed media must take place according to a transparent and non-discriminatory tariff, and it must be clearly indicated that a certain publication is a political advertisement, and who has paid for it.<sup>33</sup> The observation of the relevant rules is monitored by the NEPLP (regarding electronic media only), as well as by the Corruption Prevention and Combating Bureau (regarding all media, but this control is limited to the monitoring of compliance with the political advertising rules).

- Codes of conduct and their organisational framing

In addition to the regulatory enactments (The Law on the Press and other Mass Media and the EML), the Latvian journalists should adhere to the Code of Ethics of the Latvian Union of Journalists, adopted in 1992 (cf. Report on Latvia 2004, point 1.3). Alleged violations of the Code are reviewed by the association's Ethics Committee. However, this code is not formally binding, and there is no efficient mechanism for the monitoring of compliance. The most severe sanction for a violation is exclusion from the Union.

- The role and functioning of regulatory authorities in these respects

The functions of the NEPLP include a duty to review complaints received from the public on the activities of electronic media, including the contents of their programmes. The NEPLP may request explanations from the respective electronic medium, as well as records of the programme in order to control whether the applicable laws have been observed.<sup>34</sup> In case of the breach of the EML or the Advertising Law the NEPLP may apply a warning or an administrative penalty in the amount of up to LVL 10,000 (approx. EUR 14,124).<sup>35</sup>

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<sup>27</sup> Articles 64-71 of the Electronic Communications Law.

<sup>28</sup> *Par priekšvēlēšanu aģitāciju pirms Saeimas vēlēšanām un Eiropas Parlamenta vēlēšanām*, adopted on 09.08.1995, in force as of 12.08.1995.

<sup>29</sup> *Par aģitāciju radio un televīzijā pirms pašvaldību vēlēšanām*, adopted on 31.03.1994, in force as of 20.04.1994.

<sup>30</sup> See also IRIS 2009-3:15/24.

<sup>31</sup> Article 2 of the law On pre-election campaign before the Saeima elections and elections to the European Parliament, Article 2 of the law On campaign in radio and television before the municipal elections.

<sup>32</sup> Article 7 of the law On pre-election campaign before the Saeima elections and elections to the European Parliament.

<sup>33</sup> Article 25 of the of the law On pre-election campaign before the Saeima elections and elections to the European Parliament.

<sup>34</sup> Articles 60 and 61 of the EPL.

<sup>35</sup> Article 21 of the EPL; Article 201.<sup>5</sup> and 215.<sup>9</sup> of the Code of Administrative Violations.

- Distribution Aspects
  - Access to frequencies

Where the frequencies are limited, the broadcasting licences are issued on basis of the tender results. The radio frequencies are controlled by the state institution Electronic Communications Office, which shall inform the NEPLP on the available frequency allotments.<sup>36</sup>

As of 1 December 2011 a full transfer to digital terrestrial television transmission has been completed. The digital terrestrial transmission is organised by a company, which has been selected by the Cabinet of Ministers on the basis of a tender. The company has its exclusive rights until 31 December 2013. Until this date the Cabinet of Ministers must develop and submit to the Saeima (Parliament) a legislative proposal providing conditions on which as of 1 January 2014 electronic media will be able to choose the entity, which will ensure the distribution of their programmes, or to ensure the digital broadcasting of their programmes by their own means.<sup>37</sup>

- Access to distribution networks and control of actual conditions

The distribution and circulation instruments of the printed press are not regulated by the law, and are organised on basis of private agreements between the publishing houses and distribution companies.

- Must-carry/must-offer rules for electronic media

The EML provides for a must-carry obligation to the cable operators retransmitting television programmes of other broadcasters. The cable operators must include in their retransmission the programmes of Latvian public service media, as well as the programmes of those national broadcasters whose programmes are available free-to-air within terrestrial transmission.<sup>38</sup>

There is a legislative proposal to partially abolish the must-carry principle, applying it only to programmes of public broadcasters, but the outcome is still unclear. The proposal is advocated by the two national commercial broadcasters TV3 and LNT who would prefer charging a fee for the inclusion of their programmes in the cable retransmission packages. On 7 June 2012 the Saeima (the Parliament) approved these amendments in the first reading.<sup>39</sup>

- Role of platform operators

The infrastructure for the digital terrestrial transmission, as well as for the remaining analogue transmission of radio broadcasters, is ensured by the state company Latvian State Radio and Television Centre.<sup>40</sup>

A company selected by the Cabinet of Ministers has the sole right to organise the digital terrestrial transmission until 31 December 2013.<sup>41</sup> The company has rights to charge a

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<sup>36</sup> Article 15, part 7 of the EML.

<sup>37</sup> Transition provisions of the EML, paragraph 12.

<sup>38</sup> Article 19, section 6 of the EML.

<sup>39</sup> Proposal on the amendments to the EML, submitted to the Saeima, approved in the first reading on 07.06.2012.

<sup>40</sup> Article 13 of the EML.

fee for the digital transmission from the broadcasting companies whose programmes it is transmitting, calculated according to the order set by the Cabinet of Ministers<sup>42</sup> (so far the Cabinet of Ministers has not set this order, as according to the Transition Provisions of the EPL this rule will be applicable only as of 1 January 2014). Currently, the selected company is SIA Lattelecom, however, its operation has caused several complaints by private broadcasters and has resulted in an investigation by the Competition Council, which did not find any abuse due to the lack of facts, but indicated deficiencies of the selection procedure.<sup>43</sup>

- The role and functioning of regulatory authorities in these respects

The Cabinet of Ministers has to decide how to organize further the digital terrestrial transmission of television programmes, as the existing regulations cover the situation only until 31 December 2013. On 8 December 2011 the Ministry of Transport approved a Concept Paper on the Distribution of Digital Terrestrial Television after Year 2014 and submitted it to the Cabinet of Ministers, which has to decide, which of the four proposed options to select.<sup>44</sup> The EML currently in force provides that the transmission of digital terrestrial television is organized by only one company, selected in the tender, however, the draft concept papers proposes also an option where this could be done by several companies.

On 10 May 2012 the Cabinet of Ministers issued an order on this issue<sup>45</sup>, approving the option 2 of the Concept Paper. The approved option provides that the state owned company VAS "Latvijas Valsts radio un televīzijas centrs" will ensure the distribution of the free-to-air national and regional television programmes, as well as will provide a conditional access service to pay television operators according to the tender regulations approved by the Cabinet of Ministers. The Ministry of Transport must draft the relevant amendments to the EML in cooperation with the NEPLP and the Competition Council.

- On 12 June 2012 the Cabinet of Ministers approved the draft amendments to the EML. The draft amendments provide that the NEPLP will set criteria for the pay television programmes, which may be distributed by the means of the VAS "Latvijas Valsts radio un televīzijas centrs" and based on these criteria will approve a list of such programmes. The draft amendments leave open the issue how many operators will be entitled to distribute the pay television programmes via digital terrestrial television, as this is left to be determined by the tender regulations approved by the Cabinet of Ministers.<sup>46</sup> The draft law now is being prepared for submission for the review by Saeima (the Parliament).

- Transparency of media ownership situations

An important safeguard for the preservation and promotion of diversity is the amendment to the Law on Press and Other Mass Media, adopted on 22 September 2011,

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<sup>41</sup> Regulations of the Cabinet of Ministers No. 714 as of 02.09.2008. "The Order how the Digital Broadcasting of the programs of electronic mass media is introduced", in force as of 27.09.2008.; will lose its force on 31.12.2013. See also IRIS 2008-10:15/24.

<sup>42</sup> Article 72, part 5 of the EML.

<sup>43</sup> See IRIS 2010-4:1/33; IRIS 2011-10:1/33.

<sup>44</sup> Draft Concept Paper "On the distribution of digital terrestrial television after year 2014", approved by the Committee of the Cabinet of Ministers on 26 March 2012 and decided to review the paper in the Cabinet of Ministers.

<sup>45</sup> Order No.216 as of 10.05.2012. of the Cabinet of Ministers "On the Concept "On distribution of digital terrestrial television programmes as of year 2014, in force as of 10.05.2012.

<sup>46</sup> Draft law „Amendments to the Law on Electronic Media“, approved by the Cabinet of Ministers on 12 June 2012, minutes number 42.



which requires these owners of mass media who are capital companies to reveal their beneficial owners.<sup>47</sup>

The Latvian Commercial Law requests that legal entities registered in Latvia must inform the Commercial Register about their true beneficial owners. The duty applies to persons holding at least 25 % of shares in the company for the benefit of another person.<sup>48</sup> However, this new rule does not provide a real transparency of media ownership situations, as it is not media specific and does not request the revealing of final beneficiaries if there are several levels of shareholders.

- **Accountability of public service media**

Due to the fact that the public service media are mainly financed by the state budget subsidy for the purposes of providing a public remit,<sup>49</sup> therefore they are accountable for the appropriate use of this subsidy to the NEPLP.<sup>50</sup>

- Freedom of information laws

The freedom of access to information is covered by the above mentioned Art. 104 of *Satversme* and by the EML<sup>51</sup>. In addition, there is a Freedom of Information Law applicable to state and municipal institutions, listing, which information is generally accessible and to which there is a restricted access, as well as stipulating the institutions' duty to provide information and the order in which it has to be provided.<sup>52</sup> The Law on Submissions regulates the procedure of how the public bodies must respond to submissions produced by private persons.

- Accessibility of products/services and distribution networks

The Latvian law does not contain specific provisions on the access to products/services and distribution networks (such as right to install or aid schemes to purchase reception devices). The law provides that the company, which is providing the digital terrestrial broadcasting must ensure a free-to-air access to certain programmes, the list of which is approved by the NEPLP<sup>53</sup> (currently: the programmes of Latvian public service media and the programmes of two national commercial broadcasters). The relevant broadcasters may not request a fee from the cable operator for the retransmission rights.<sup>54</sup>

The only exemption from the broadcasting license fee is applicable to public service and non-commercial media.<sup>55</sup>

A universal service obligation for electronic communications providers is stipulated by the Electronic Communications Law<sup>56</sup>. The universal service obligations are imposed by the Public Utilities Commission,<sup>57</sup> which also has adopted relevant regulations.<sup>58</sup>

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<sup>47</sup> Amendments to the Law on Press and Other Mass Media, adopted on 22.09.2011, in force as of 20.10.2011. See also IRIS 2011-10:1/32.

<sup>48</sup> Article 17.<sup>1</sup> of the Commercial Law.

<sup>49</sup> Article 70, section 1, part 1 of the EML.

<sup>50</sup> Article 62, section 6 of the EML.

<sup>51</sup> Article 24, section 1.

<sup>52</sup> Freedom of Information Law (*Informācijas atklātības likums*), adopted on 29.10.1998, in force as of 20.11.1998.

<sup>53</sup> Regulations of the Cabinet of Ministers No. 714 as of 02.09.2008. "The Order how the Digital Broadcasting of the programs of electronic mass media is introduced", para. 7.

<sup>54</sup> Article 19, section 6 of the EML.

<sup>55</sup> Regulations No. 1238 of the Cabinet of Ministers as of 28.12.2010. "Regulations on the state fee for the issuing of the broadcasting permit, retransmission permit and registration of service providers providing on-demand electronic media services" adopted on 30.12.2010, in force as of 01.01.2011.



Print media may offer commercially reduced rates for subscription on their own initiative.

- “Have a Say on ...”
  - Complaint procedures, “Ombudsmen”

There is no “Ombudsmen”.

- Participation in media operators/(self-)regulatory bodies

There are no viewers’ or listeners’ councils.

The EML only provides an establishment of a Public Advisory Council - an advisory institution established by the NEPLP with the task of ensuring the participation of the public in the process of elaboration of the public service remit and the national strategy for the development of the electronic mass media sector. Decisions of the Public Advisory Council are of a recommendatory nature. The Council is composed of representatives of associations, foundations, professional institutions and other organisations active in the field of the mass media, education, culture, science and human rights.<sup>59</sup>

#### 2.2.15.2. Main Players in the Media Landscape

In general, the Latvian media landscape may still be characterised by two linguistically and culturally separate markets: Latvian and Russian language media. Although the percentage of ethnically Russian population has decreased<sup>60</sup>, the Russian language media are still a separate market of their own, influenced by widely available retransmitted programmes from Russia (*cf.* Report on Latvia 2004, point 2).

##### 2.2.15.2.1. Radio

The public service broadcaster *Latvijas Radio* has five stations, four of them broadcast on national level, one (LR5) in Riga region (LR 1 – general; LR2 – Latvian music; LR3 – classical music; LR4 – linguistic minorities; LR5 – youth/ student).

There are five commercial national radio programmes (*cf.* only two according to Report on Latvia 2004, point 2.1), listed in the table below. The largest are *Radio SWH* owned by Communicorp Group Ltd., an Irish media holding, and *Star FM* owned by the MTG Broadcasting AB, a Swedish media holding.

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<sup>56</sup> Electronic Communications Law (*Elektronisko sakaru likums*), adopted on 28.10.2004, in force as of 01.12.2004.

<sup>57</sup> *Sabiedrisko pakalpojumu regulēšanas komisija*, webpage: [www.sprk.gov.lv](http://www.sprk.gov.lv).

<sup>58</sup> Decision of the Public Utilities Commission No.152 as of 30.05.2007 "On the Regulations on the Universal Service in the Electronic Communications".

<sup>59</sup> Article 63 of the EML.

<sup>60</sup> Data of the 2010 census, available at [www.csp.lv](http://www.csp.lv). The number of ethnical Russians has decreased from 29.6% in year 2000 to 26.9% in year 2011.

**Table 86 LV: Main Radio companies (national coverage)<sup>61</sup>**

Broadcaster	Ownership <sup>62</sup>	Programmes	AQH Share 2011 Summer, % <sup>63</sup>	Audience Reach 2011 Summer, %
VSIA Latvijas Radio	Public service broadcaster; state owned company	Latvijas Radio 1 Latvijas Radio 2 Latvijas Radio 3 (Klasika) Latvijas Radio 4 (Doma laukums) Latvijas Radio 5 (Studentu radio Naba) – Riga region coverage only	LR 2: 22.8 LR 1: 11.3 LR 4: 5.2 LR 3: 0.9 LR 5: 0.2	LR 2: 25.9 LR 1: 15.4 LR 4: 8.6 LR 3: 3.3 LR 5: 1.1
AS Radio SWH	Communicorp Group Ltd. (Ireland)	Radio SWH, Radio SWH Plus, Radio SWH Rock, Radio SWH Plus Rēzekne (Rēzekne region coverage) Radio SWH Plus Liepāja (Liepāja region coverage)	Radio SWH: 5.3 Radio SWH Plus: 2.8	Radio SWH: 12.2 Radio SWH Plus: 6.8
AS Super FM	Super FM group, owned by two local physical persons	Eiropas Hitu Radio	5.0	11.4
SIA Star FM	MTG Broadcasting AB (Sweden)	Star FM	3.0	8.7
SIA Latviešu Radio	Super FM group	Super FM	1.8	4.6
SIA Vārds & Co	Christian radio, owned by local Christian groups	Latvijas Kristīgais radio	1.4	3.8

### 2.2.15.2.2. Television

The structure of the television media is very similar to that described in the Report on Latvia 2004, point 2.2: the public service broadcaster *Latvijas Televīzija* with two national programmes (LTV1 and LTV2) and two national commercial programmes: LNT owned by AS Latvijas Neatkarīgā Televīzija (owned by a local natural person) and TV3 owned by MTG Broadcasting AB. MTG Broadcasting AB has proposed to acquire the LNT programme, and the Competition Council has cleared the merger subject to several binding commitments.<sup>64</sup> The commitments include the duty to remain in free-to-air

<sup>61</sup> Information from the webpage of the Electronic Media Council, as of 13 April 2012. The table does not include radio programmes with a high AQH and reach, which may be received only in Riga region. All the nationally receivable radio programmes are listed, in descending order based on their audience reach figures.

<sup>62</sup> Data on ownership in this and further tables is taken from public sources, such as webpages of radio companies; it does not have a legal reliability.

<sup>63</sup> Information on AQH and Reach from www.eradio.lv, data of TNS Latvia National Media Survey; summer: 16.05-17.08.2011).

<sup>64</sup> Decision of the Competition Council No.42 as of 11 May 2012, in case No. Nr.90/12/03.01./2.

broadcasting for both programmes at least until the end of year 2013, the duty to maintain in force the existing advertising contracts, price increases must be reported to the Competition Council, based on independently audited accounts; no bundled advertising conditions. Also, LNT and TV3 must maintain independent current affairs editorial boards, and the amount of current affairs broadcasts must not be decreased; editorial independence from the MTG group must be ensured; original contents produced in Latvia must be no less than 21%. The binding commitments are in force until the end of year 2017. Moreover, the Competition Council retains a right to apply structural commitments (alienation of certain assets) until the end of year 2017. In applying these commitments, the Competition Council has taken into account the NEPLP's unbinding opinion.<sup>65</sup>

According to the publicly available information the merger participants have accepted the commitments and the merger has been completed on 1 June 2012.<sup>66</sup>

There are 25 local television channels (*cf.* Report on Latvia 2004, point 2.2).<sup>67</sup>

**Table 87 LV: Main Television Companies (national coverage)<sup>68</sup>**

Broadcaster	Ownership	Programmes	Audience 2012 March, % <sup>69</sup>
VSIA Latvijas Televīzija	Public service broadcaster; state owned	LTV1 LTV7	8.6 4.4
AS Latvijas Neatkarīgā Televīzija	MTG Broadcasting AB	LNT	12.1
SIA TV3 Latvia	MTG Broadcasting AB	TV3	13.0

Programmes accessible only through satellite or cable are gaining an increasing popularity, as many of Latvian households are using one of these paid retransmission networks instead or besides the terrestrial television. For example, the Latvia-registered satellite television channel PBK (Russian language) had a 9.8 % audience in March 2012.<sup>70</sup> It is estimated that PBK is the most popular television channel within the Russian speaking audience in all Baltic countries, as it is partially retransmitting Russian channels (70% of contents, especially Russian programmes REN TV, TV1), and partially producing or ordering its own contents. PBK is owned by a media holding Baltic Media Alliance, which in turn is owned by two natural persons, Oļegs Solodovs and Aleksey Plasunov.<sup>71</sup>

The cable and satellite television programmes are assessed as having a competitive advantage over the terrestrial commercial channels, as the latter have to pay for the

<sup>65</sup> The full document of suggestions is available at [www.nrtp.lv](http://www.nrtp.lv), published on 11.04.2012.

<sup>66</sup> Public statement by MTG group, as displayed in [www.lrv.lv](http://www.lrv.lv) on 1 June 2012.

<sup>67</sup> Information from the webpage of the Electronic Media Council, as of 13 April 2012.

<sup>68</sup> All terrestrial televisions holding a national broadcasting permit are listed: the public service broadcaster and the only two commercial programmes broadcasted on national basis. Listed in no particular order.

<sup>69</sup> Data of TNS Latvia National Media Survey, March 2012, available on [www.emulators.lv](http://www.emulators.lv).

<sup>70</sup> Data of TNS Latvia National Media Survey, March 2012, available on [www.emulators.lv](http://www.emulators.lv).

<sup>71</sup> Information on PBK channel from the research of Re:Baltica *Russian Money in Baltics*, available at [www.rebaltica.lv](http://www.rebaltica.lv), published also in weekly magazine IR, No.15 (105), 12.-18.04, 2012.

digital terrestrial transmission, which is substantially more expensive than the use of cable and satellite platforms.<sup>72</sup>

#### 2.2.15.2.3. *Press and publishing*

The general structure of the press industry is similar as described in the Report on Latvia 2004, point 2.3, however, the ownership of main players has changed. The publishing house AS Diena is not owned by the Swedish Bonnier Group anymore, the current owners are not completely clear, but according to publicly available information the control is held by one local natural person.<sup>73</sup>

The publishing house Preses Nams is not existing anymore, but the papers published by it are now issued by SIA Mediju nams, recently repurchased by its management from the previous owner, an associated company of the AS Latvijas kuģniecība (the largest Latvian shipping company).<sup>74</sup>

Latvijas Avīze, published by AS Lauku Avīze, is still the daily newspaper with the largest subscribers' base.<sup>75</sup> (*cf.* Report on Latvia 2004, point 2.3).

A national publishing house AS Santa has gained the largest popularity in the sector of weekly and monthly life-style magazines.

The Petits Izdevniecības nams is still the largest Russian language publishing house (but with different owners), and the other company Fenster is also active (*cf.* Report on Latvia 2004, point 2.3). Baltic Media Alliance is operating also in the printed media market.

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<sup>72</sup> Precise numbers are not available, but according to the research of Re:Baltic, the national commercial channels TV3 and LNT are paying for the digital terrestrial broadcasting ca. EUR 700 000 annually.

<sup>73</sup> Information on the company web page [www.dienasmediji.lv](http://www.dienasmediji.lv).

<sup>74</sup> Information from public sources, [www.apollo.lv](http://www.apollo.lv), on 14 January 2010.

<sup>75</sup> Information on the company web page [www.la.lv](http://www.la.lv).

**Table 88 LV: Main Publishing Companies<sup>76</sup>**

Publishing company	Ownership structure	Main titles: daily	Main titles: weekly	Subscribers <sup>77</sup>	Circulation
<b>Latvian language titles</b>					
AS Lauku Avīze	Local physical persons	Latvijas Avīze	Praktiskais Latvietis	22,178 (Latvijas Avīze, year 2012) 12,329 (Praktiskais Latvietis, year 2012)	110,000 (Latvijas Avīze) 50,000 (Praktiskais Latvietis)
AS Diena	SIA „Rīgas tirdzniecības osta” (Riga Trading Port) <sup>78</sup>	Diena, Dienas Bizness	SestDiena, LD Biznesa žurnāls	21,625 (Diena, year 2012)	31,000 (Diena)
SIA Mediju nams	Local management, physical persons	Neatkarīgā	Māja, Vakara Ziņas	14,600 (Neatkarīgā, year 2010)	25,000 (Neatkarīgā) 30,000 (Māja) 44,000 (Vakara Ziņas)
<b>Russian language titles</b>					
SIA Izdevniecības nams Fenster IN	2 local physical persons	Vesti Segodna	Vesti	14,000 (Vesti Segodna, year 2008) 2,865 (Vesti)	25,500 (Vesti Segodna) 34,500 (Vesti)
SIA Izdevniecības nams Petits	"Lanchrome Limited" (Cyprus)	Chas	Subbota	6,100 (Chas) 4950 (Subbota)	10,000 (Mon-Thur) – 21 000 (Fri) (Chas) 29,000 (Subbota)
Baltic Media Alliance	2 physical persons	-	MK-Latvia	5,746	46,000

#### 2.2.15.2.4. Online media (non-linear audiovisual (media) services; websites)

The main online media are internet news portals: [www.delfi.lv](http://www.delfi.lv) (owned by Ekspress Grupp, an Estonian media holding); [www.apollo.lv](http://www.apollo.lv) (owned by Sanoma News, a Finnish media holding); [www.tvnet.lv](http://www.tvnet.lv) (owned by Schibsted, a Norwegian media holding). Also, popular internet news portals are run by the main daily newspaper publishing houses

<sup>76</sup> Listed in the descending order, based on the circulation figures for main daily titles, separately within each language group.

<sup>77</sup> Data obtained from various public sources, mainly the webpages of the publishing houses, as there is no unified list available.

<sup>78</sup> Acquisition transaction authorised by the Latvian Competition Council on 23 March 2012.

(www.diena.lv; www.db.lv). Some of these portals offer also non-linear audiovisual media services.

In addition, the public service broadcasting companies *Latvijas Radio* and *Latvijas Televīzija*, as well as two main commercial television broadcasters have their own webpages. The contents of these webpages varies from just general information on the programmes of the media up to an option to view selected programmes on-line in real time. For example, the public service television broadcaster *Latvijas Televīzija* offers an opportunity to watch most of its new programmes on-line on the site www.ltvzinas.lv. The site offers also archives of most of the broadcasts. Also, www.latvijaradio.lv enables to listen to the programmes of the public service radio broadcaster *Latvijas Radio* on-line.

Also, the commercial broadcaster LNT offers to watch selected programmes on-line or selected fragments from previous broadcasts on the webpage www.lnt.lv, similarly as the broadcaster TV3 at the webpage www.tv3.lv.

#### 2.2.15.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers

Similarly as described in Report on Latvia 2004, point 2.4, there are 59 cable operators in Latvia<sup>79</sup>, however, only 3 main players, which also offer a broadband internet access.

**Table 89 LV: Main cable TV operators**

Company	Ownership structure	Market Share in Riga, % <sup>80</sup>
Baltcom TV SIA	RPAX One S.A., owned by investment holding companies	<40
SIA Lattelecom	51% by Latvian state; 49% Telia Sonera, Swedish media holding.	<40
SIA IZZI	Contaq Latvia Cable Holding S.a.r.l, owned by investment holding companies	<20

The remaining many smaller cable operators are active mainly in specific locations within Riga City or outside Riga, and do not have significant market shares.

SIA Lattelecom is also offering IPTV service.

#### 2.2.15.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)

According to the data of the survey agency TNS Latvia regarding 2011, 97 % of Latvian households have at least one TV set. 62 % of households are subscribers to cable television (IPTV is included in this number). 25% are using only terrestrial digital television, and 16% satellite television.<sup>81</sup>

<sup>79</sup> Information from the webpage of the Electronic Media Council, as of 13 April 2012.

<sup>80</sup> Data of subscription are confidential and not publicly available. Below are displayed the market shares of the respective cable operators, as described in the decision of the Competition Council No. 18 of 13.11.2010.

<sup>81</sup> Data of TNS Latvia for October 2011, available on www.diena.lv.

The audiences for the most popular TV programmes are around 10 to 14 % of all inhabitants over 4 years of age. The average TV viewer spends 5.5 hours for TV watching.<sup>82</sup>

As regards radio, on average of 83% of Latvian inhabitants aged 12 to 74 are listening to a radio at least once a week, but 62% at least once a day. The average radio listener spends 4.5 hours for radio listening.<sup>83</sup>

According to the survey made in summer 2011, 92% of inhabitants aged 15 to 74 have read at least one printed publication (a newspaper or a magazine) within the survey period. The readership of daily newspapers is around 25%; of weekly magazines 17%; of monthly magazines 42%.<sup>84</sup>

66.2 % of Latvian inhabitants are using internet on regular basis (at least once a week).<sup>85</sup>

There are no publicly available data of the number of subscribers to services offered by internet service providers. It has to be noted that many internet service providers are simultaneously cable television operators, thus the high number of cable television subscriptions as mentioned above signifies also a considerable number of internet connections for households. In addition, mobile internet is gaining increasing popularity in recent years.

The below outlines the share of advertising revenue within the media sector in year 2011. In general, the media advertising market has grown for 5 % in comparison to year 2010, and the largest growth took place in the internet sector (by 17%).

**Table 90 LV: Advertising revenue and shares in the media sector in year 2011<sup>86</sup>**

Medium	Advertising revenue, LVL <sup>87</sup>	Market share %
Newspapers	5,129,000	11
Magazines	4,677,000	10
Television	21,823,000	45
Radio	5,121,000	11
Outdoors	4,518,000	9
Internet	6,890,000	14
Cinema	232,000	<1
Total:	48,390,000	

<sup>82</sup> Data of TNS Latvia for January – March 2012, available on the webpage [www.emulators.lv](http://www.emulators.lv).

<sup>83</sup> Data of TNS Latvia for Summer 2011, available on the webpage [www.emulators.lv](http://www.emulators.lv).

<sup>84</sup> Data of TNS Latvia, available on the webpage of the Latvian Press Publishers' Association, at [www.lpia.lv](http://www.lpia.lv).

<sup>85</sup> Data of the Central Statistics Office, available at [www.csb.lv](http://www.csb.lv).

<sup>86</sup> Data of the Latvian Advertising Association, available on [www.lra.lv](http://www.lra.lv).

<sup>87</sup> 1 EUR = 0.702804 LVL.



### 2.2.15.3. Conclusion and Recommendations

Generally, Latvian media landscape secures the media freedom and provides the main legislative and regulatory framework for free operation.

However, there are some deficiencies, which might be partially improved by more efficient and targeted legal regulation. The existing legal rules on revealing media ownership are not efficient, as they do not request the revealing of final beneficiaries if there are several levels of shareholders. Thus, in practice it is still not clear who are the beneficiary owners of several major printed media of Latvia.

The unrestricted cable retransmission of television and radio broadcasting programmes not only within the European Union, but also from third countries, notably Russia, has caused a situation in which there are two linguistically diverse media markets. As a result, the national commercial media must compete on the advertising revenue with media from third countries, whose programmes may be freely accessible in Latvia, but who are not subject to such positive contents obligation as a certain share of European works and translation of their broadcasts into Latvian language.

The transfer to the digital terrestrial television has been completed, but has proved to be too late and too expensive, as a result most of Latvian households are subscribing to either cable or satellite platforms. The national free-to-air commercial broadcasters are complaining of the high prices requested for the digital broadcasting and have publicly considered leaving the free-to-air market.

The printed media are struggling for audience within the framework of increasing competition from online media, signified by a large growth of advertising revenue within the online sector within the last years. The blossoming of life-style journals and weekly magazines signifies the readiness of the public to purchase high quality contents or design products.

This year and the next one may prove very important for the future development of the Latvian electronic media. The legal monopoly of the company currently providing digital terrestrial broadcasting is expiring at the end of year 2013, and the Cabinet of Ministers has approved a political concept paper how to approach this issue afterwards, which however leaves some issues open. The final solution should be adopted within this year.

Another pending issue is the development of must-carry principle, as the cable operators would prefer having the *status quo*, but national commercial broadcasters are lobbying its abolishment, as this would allow them to charge a fee from the cable operators for inclusion of their programmes in the packages.

Taking into account the above situation, the recommendations to the Latvian authorities would be as follows: (clear, detailed and practical)

- Media specific rules for revealing ownership structure must be developed.
- The further development of digital terrestrial television must be carefully implemented: the NEPLP must decide on criteria, which programmes will have to be distributed in the terrestrial package. The Cabinet of Ministers must develop the tender regulations, on basis of which pay television operators will have the conditional access to the digital terrestrial television service. It is still unclear whether it would be one operator or several, but for ensuring the best competition it may be argued that there should be several.

- The fee for the distribution of the programmes in digital terrestrial media should be fair and accessible, thus ensuring that terrestrial television is a viable alternative to cable and satellite broadcasting.
- It should be explored what can be done to unify the media landscape so that to diminish its clear divide by linguistic criteria. Although it is clear that the restriction of retransmission from third countries (outside the EU) would not be the best option, options must be thought how to make the Latvian media more attractive to linguistic minorities.
- The **new merged public broadcasting entity** should be developed in order to strengthen the public service media and ensure that the public financing is used in the best way possible.
- The must-carry rules must be revised to ensure a non-discriminating approach to all commercial media.

## LITHUANIA

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### 2.2.16. Lithuania

#### 2.2.16.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.16.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The provision on freedom of expression is enshrined in Article 25 of the Republic of Lithuania Constitution<sup>1</sup> (hereinafter, the Constitution), adopted by citizens of the Republic of Lithuania in the Referendum of 25 October 1992, which states:

- “1) The human being shall have the right to have his own convictions and freely express them.
- 2) The human being must not be hindered from seeking, receiving and imparting information and ideas.
- 3) Freedom to express convictions, to receive and impart information may not be limited otherwise than by law, if this is necessary to protect the health, honour and dignity, private life, and morals of a human being, or to defend the constitutional order.
- 4) Freedom to express convictions and to impart information shall be incompatible with criminal actions - incitement of national, racial, religious, or social hatred, violence and discrimination, with slander and disinformation.”

In addition, Article 4 of the Law on Provision of Information to the Public, as last amended on 20 December 2011, (hereinafter, the Law on Information)<sup>2</sup> reads: “Every person shall have the right to freely express his ideas and convictions and to collect, obtain and disseminate information and ideas. The right to collect, obtain and disseminate information may not be restricted otherwise than under the law where it is necessary to protect the constitutional system, a person’s health, honour, dignity, private life and morality.”

The Constitutional Court of the Republic of Lithuania (hereinafter, the Constitutional Court) construes the notion of the freedom of information, which is entrenched in the Constitution.

The Constitutional Court has held that freedom of information is an important pre-condition for the implementation of various rights and freedoms of the person, which are entrenched in the Constitution, since a person can implement most of his constitutional rights and freedoms in an all-sufficient manner only if he/she has the right to seek,

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<sup>1</sup> Valstybės žinios (Official Gazette), 1992, No.33-1014, available in English at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=275302](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=275302).

<sup>2</sup> Valstybės žinios (Official Gazette), available in English at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=417769](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=417769).

obtain and impart information unhindered. The Constitution guarantees and safeguards the interest of the public to be informed.<sup>3</sup>

Article 44 of the Constitution prohibits censorship of the public media and states that the State, political parties, political and public organisations, other institutions and persons may not monopolise the mass media.

Additionally, article 10 of the Law on Information prohibits any actions whereby an attempt is made to control the content of information to be published in the media before its publication, with the exception of cases provided for by laws.

It should be noted that not a single law provides for the definition of censorship in Lithuania. Therefore in order to avoid any interpretations the Constitutional Court in its Resolution<sup>4</sup> of 20 April 1995 provided for the definition of censorship as the following: censorship is the inspection of the content of the press, cinema films, broadcasts and telecasts, theatre performances and other public entertainment performances, for the purpose that certain knowledge and ideas would not be disseminated.

It is important from the standpoint of democracy that public opinion would freely develop. That means first of all that the establishment of the means of the mass media, as well as their functioning possibility must not depend upon the content of future publications or programmes. Prohibition of censorship however does not mean legally unrestricted freedom of mass information. Pursuant to paragraph 3 of Article 25 of the Constitution, freedom to obtain and disseminate information may be restricted by law in case it is necessary to safeguard the rights and freedoms mentioned in this norm of the Constitution, as well as for the protection of the Constitutional system. Dissemination of information is incompatible with criminal actions (paragraph 4 of Article 25 of the Constitution).

Article 6 of the Law on Information establishes what kind of information is not to be published or has to be restricted. Certain restrictions of dissemination of information are established in other laws as well. Everyone who disseminates information has to observe the restrictions established by laws, and not to abuse freedom of information. It is the publisher who is responsible for the disseminated information, therefore his/her or the editor's requirements and directions regarding the content of information as well as its dissemination, etc. are not considered to be censorship.

Under the jurisprudence of the Constitutional Court the legislator has a duty to legislatively regulate the relations linked with seeking, obtaining and dissemination of information so that, on the one hand, one of innate human rights, freedom of information (implying inter alia freedom of electronic media) would be ensured and that, on the other hand, in the course of implementation of freedom of information one would not violate constitutional values, that they would be protected and defended.

- Specific safeguards and rights for the media

The Constitutional Court by its Ruling<sup>5</sup> of 23 October 2002 noted that upon the consolidation of the right of the journalist to preserve the secret of the source of

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<sup>3</sup> Ruling of the Constitutional Court of 19 September 2005, Case No. 19/04, available at: <http://www.lrkt.lt/dokumentai/2005/r050919.htm>.

<sup>4</sup> Ruling of the Constitutional Court of 20 April 1995, available at: <http://www.lrkt.lt/dokumentai/1995/n5a0420a.htm>.

<sup>5</sup> Ruling of the Constitutional Court of 23 October 2002, available at: <http://www.lrkt.lt/dokumentai/2002/r021023.htm>.

information and not to disclose it<sup>6</sup>, in case the question arises whether the source of information should be disclosed, one must assess in every particular case whether by the non-disclosure of the source of information the values safeguarded by the Constitution would not be violated.

It also needs to be noted that the legislator, while establishing by law the powers of courts to decide the issue of disclosure of the source of information, has a duty to establish such legal regulation whereby the court has to decide whether the journalist must disclose the source of information only in the case that all other means of the disclosure of the source of information have been used.

The right of the journalist to preserve the secret of the source of information and not to disclose it is one of the conditions of the freedom of the media.

- Freedom to receive and to access information

Article 25 of the Constitution states that a citizen shall have the right to receive any information concerning him that is held by State institutions, according to the procedure established by law.

In addition, Article 5 of the Law on Information provides for the provision on these rights as well.

Article 6 of the Law on Information as well as a special Law on the Right to Obtain Information from State and Municipal Institutions and Agencies<sup>7</sup>, adopted on 11 January 2000, last amended on 13 May 2010, set the implementation rules of the freedom to access information.

- Safeguards on regulatory authorities

The Lithuanian Constitution does not hold stipulations in respect of the status, remit and/or powers of the regulatory authorities in the media or electronic communications markets.

- Safeguards on "universal service"

Aspects of "universal service" in terms of either content to be offered by the/specific media or with regard to technical coverage and reachability of networks and services necessary for accessing information (via the media) are not dealt with by the Constitution.

While the Constitution does not directly speak about the aspects of universal service in terms of either content or reachability, the Constitutional Court though, commenting on the importance of safeguarding the constitutional (art. 25 of the Constitution) rights of freedom of expression and information in its jurisprudence repeatedly stressed the obligation that those rights must be safeguarded and their implementation ensured disregarding the means and technologies of the provided information.

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<sup>6</sup> See for more on the ordinary-law fundamentals of these rights *infra* at 2.2.16.1.2.

<sup>7</sup> Valstybės žinios (Official Gazette), 2000, No.10-236, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=373811](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=373811).

The Constitutional Court's ruling of 19 September 2005<sup>8</sup> stated that due to the especially rapid development of the electronic communications and telecommunications sector the opportunities and means to seek, obtain and disseminate information expand by making use of electronic information technologies, naturally internet too. It has to be noted that therefore a need arises to establish such a legal regulation, which would not lack behind the progress of the informational technologies and which would take into consideration the specificities of the dissemination of information space, e.g. internet.

The Constitutional Court in the above mentioned ruling as well as in its whole jurisprudence points out continually that the legal regulation established in laws is of a general character, and this can create preconditions for appearance of such legal situations in the future, where due to insufficient legislative legal regulation freedom of information will not be ensured on the one hand, and, on the other hand, society and/or its individual members will not be protected from influence of the information whose dissemination or whose dissemination limitations are provided for by the Constitution, and due to uncontrolled (not disabled immediately) dissemination of such information various values entrenched in the Constitution, inter alia human rights and freedoms, will not be protected and defended.

Therefore in accordance with the jurisprudence of the Constitutional Court, the guaranteed by the Constitution rights of information and its dissemination are applied to the universal services as well to the degree they are related.

#### 2.2.16.1.2. *Media order (de lege lata and de facto)*

- "Market Entry"
  - Licensing schemes; remit psm; notification for print publications

In accordance with para. 2 of article 22 of the Law on Information all persons, except for the cases specified in this Law and other laws, may produce and/or disseminate information in the Republic of Lithuania.

Restrictions to engage in this activity are foreseen only for the state and municipal institutions and agencies (except for research and educational establishments), banks and political parties.

Even though the law prohibits the banks to be producers and disseminators of public information, it does not foresee restrictions for the enterprises established by the banks to engage themselves in the media market. The advantage was taken of this drawback in real life when a broadcaster *UAB Sporto komunikacijos*<sup>9</sup> was established, the controlling interest of which until 6 October 2010 belonged to *UAB Ūkio banko investicinė grupė* (a Lithuanian bank); or when 34 per cent of the shares of the company *Lietuvos Rytas*<sup>10</sup>, which publishes one of the most popular daily papers in Lithuania *Lietuvos Rytas* was controlled by a secondary company of the bank *Snoras* (which went bankrupt in December 2011), *UAB Snoras Media*.

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<sup>8</sup> Ruling of the Constitutional Court of 19 September 2005, Case No. 19/04, available at: <http://www.lrkt.lt/dokumentai/2005/r050919.htm>.

<sup>9</sup> RTCL decision No. KS-88 of 6 October 2010, available at: [http://www.rtk.lt/lt/lrtk\\_sprendimai/sprendimai/del\\_sutikimo\\_perleisti\\_uab\\_sporto\\_komunikacijos\\_akcijas](http://www.rtk.lt/lt/lrtk_sprendimai/sprendimai/del_sutikimo_perleisti_uab_sporto_komunikacijos_akcijas)

<sup>10</sup> Lithuanian Ministry of Culture, Ownership data on media organizations 2011 (*Duomenys apie žiniasklaidos priemonių savininkus*), available at: [http://www.rtk.lt/lt/lrtk\\_sprendimai/sprendimai/del\\_sutikimo\\_perleisti\\_uab\\_sporto\\_komunikacijos\\_akcijas](http://www.rtk.lt/lt/lrtk_sprendimai/sprendimai/del_sutikimo_perleisti_uab_sporto_komunikacijos_akcijas)

In accordance with para. 2 of article 22 of the Law on Information only legal persons or legal persons established in the states of the European Economic Area and organisations which have no legal personality as well as branches of such legal persons and organisations which have no legal personality established in the Republic of Lithuania and in other states of the European Economic Area may be engaged in licensed radio and/or television programme broadcasting and/or re-broadcasting activities in the Republic of Lithuania.

Persons who wish to engage in radio and/or television programme broadcasting and/or re-broadcasting activities (except for broadcasting of radio programmes by electronic communications networks the main purpose of which is not broadcasting and/or re-broadcasting of radio and/or television programmes as well as broadcasting carried out by natural persons for non-commercial purposes by such networks) must obtain broadcasting and/or re-broadcasting licences.

According to article 47 of the Law on Information, the **Radio and Television Commission of Lithuania** (hereinafter, RTCL) regulates and controls the activities of broadcasters and re-broadcasters of radio and/or television programmes and providers of on-demand audiovisual media services falling under the jurisdiction of the Republic of Lithuania.

RTCL issues the broadcasting and re-broadcasting licences in accordance with the Law on Information and the Rules for Licensing of Broadcasting and Re-broadcasting Activities<sup>11</sup>. These Rules are approved by Ministry of Culture on 1 April 2011 on the recommendation of the RTCL. Licences are issued by way of tender.

It should be noted that according to para. 6 of article 31 of the Law on Information radio and television programme broadcasting activities carried out by the LRT (Public Service Broadcaster) are not licensed. In order to ensure the broadcasting of the LRT radio and television programmes, the RTCL shall, without tender in order of priority issue authorisations granting the rights equivalent to those granted by the licences.

Article 40<sup>2</sup> of the Law on Information foresees that providers of on-demand audiovisual media services falling under the jurisdiction of the Republic of Lithuania must register with the RTCL in accordance with the procedure established by it prior to commencing the provision of on-demand audiovisual media services.

The Law on Information does not foresee any specific requirements for other kind of the media therefore general rules are applied for the press or internet web sites.

- Media pluralism/ownership; competition law aspects

The Law on Information does not include specific provisions on media concentration, but requires that when the owner of a controlling share package of a broadcaster changes or 10 per cent of a broadcaster's shares change hands, the broadcaster must get a written consent from the regulatory authority – the RTCL – article 22, Law on Information.

Article 29 of the Law on Information ensures fair competition and points out that the State shall create equal legal and economic conditions for fair competition among producers and disseminators of public information, except for producers and/or disseminators of productions of violent and erotic nature. The same provision of the mentioned Law on Information stipulates that "a dominant position in the field of

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<sup>11</sup> Valstybės žinios (Official Gazette), 2011, No.44-2096, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=396362](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=396362).



provision of information to the public shall be determined in conformity with the Law on Information and the Law on Competition”.

According to Article 3 section 11 of the Law on Competition<sup>12</sup>, as last amended on 29 September 2011, a dominant position means “the position of one or more undertakings in the relevant market directly facing no competition or enabling to make a unilateral decisive influence in such relevant market by effectively restricting competition”. No investigations of the media market have been conducted to date.

It should be noted that the Law on Competition is applicable for all individuals independent of their activities. It does not provide for any specific requirements for the media in the field of competition, therefore general provisions of the law are applied to concentration in the media market just as in any other sector.

The Constitutional Court in its 21 December 2006 ruling<sup>13</sup> stated that the legislator has a constitutional duty to establish such legal regulation and such restrictions that they would limit the possibilities of monopoly or too obvious domination in the media market. In doing this the legislator operates a wide range of various limitation means, e.g. to prohibit for one natural or legal person, who acts alone or with partners, to own a certain share of capital of public information means or a certain part of a territory or audience share; to limit the number of licences for broadcasting radio and television programmes and the market size of the electronic communications channels (this applies to a person separately or together with other persons), etc.

However, such ruling of the Constitutional Court did not initiate a revision of either the Law on Competition or the Law on Information regarding the limitation of concentration in the media.

- **Legal framework for psm**; ability to fulfill their tasks

The activity of the public service broadcaster Lithuanian National Radio and Television (hereinafter, LRT) is regulated by the Law on Lithuanian National Radio and Television<sup>14</sup> (hereinafter, Law on LRT), which the first time was adopted on 8 October 1996. It determines the rules of foundation, control, activity, reorganization and liquidation as well as duties, rights and liability of the LRT.

The remit of the Lithuanian public broadcaster is defined in the Law on LRT. The LRT is obliged to:

- collect and publish information on the world and Lithuania;
- acquaint the public with the diversity of the world’s and Europe’s culture and the foundations of the modern civilization;
- strengthen the independence and democracy of the Republic of Lithuania,
- create, cherish and protect the values of the national culture;

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<sup>12</sup> Valstybės žinios (Official Gazette), 2011, No.123-5815, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=407674&p\\_query=&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=407674&p_query=&p_tr2=2).

<sup>13</sup> Ruling of the Constitutional Court of 21 December 2006, Case No. 30/03, available at: <http://www.lrkt.lt/dokumentai/2006/n061221.htm>.

<sup>14</sup> Valstybės žinios (Official Gazette), new wording 2005, No.153-5639, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=404173](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=404173).

- develop tolerance and humanism, nurture culture of cooperation, thinking and language;
- strengthen the morality and public spirit of the society;
- develop the ecological culture of the country.

It has to be noted that the State has created more favourable conditions for the public broadcaster for its activity in comparison with the commercial ones.

In accordance with article 31.6 of the Law on Information the activity of LRT is not licensed. For safeguarding the broadcasting of LRT radio and television programmes, the RTCL issues authorizations without tender on the priority basis to broadcast radio and television programmes. Similar provision is laid down in the Law on LRT.

It is necessary to note that exceptional rights were secured for the LRT to get on the digital platform. In accordance with the Model of Implementation of the Digital Television<sup>15</sup>, adopted by the LR Government Resolution No. 1492 on 25 November 2004, all commercial broadcasters were to participate in the tender for the right to broadcast their programmes on the digital platform, while the LRT got the place there without tender on the priority basis for its two programmes.

In addition, the amendment of article 5 of the Law on LRT<sup>16</sup> adopted by the LR Seimas (Parliament) on 30 June 2011 ensured for the LRT the allocation of radio frequencies, necessary to form one national digital terrestrial network.

The mentioned amendment provides that the LRT itself has to announce a tender in order to choose the transmission provider for the digital transmission service to transmit the LRT programmes broadcast on the digital network. The tender has not yet been announced.

In accordance with the mentioned amendment the LRT shall have to refuse the two channels (frequencies) that had been allocated to it before on the common digital television platform.

Besides that, the State guarantees financing of the LRT remit from the State budget as well as grants the right for the LRT to earn some funds from advertising.

LRT being a part of a common media market, an issue has been raised not once by other participants of the market whether the exceptional rights the LRT enjoys does not infringe the principle of fair competition as it is embedded in the Constitution. In 2006 the Constitutional Court in its ruling<sup>17</sup> confirmed no conflict in providing of exceptional conditions for the implementation of the LRT remit with the Constitution.

In 2006, a group of members of the LR Seimas (Parliament) applied to the Constitutional Court with the question on constitutionality of LRT having a priority right to newly coordinated electronic communication channels (radio frequencies) for its programmes being broadcast without tender.

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<sup>15</sup> Valstybės žinios (Official Gazette), new wording 2011, No.155-7362, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=415129](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=415129).

<sup>16</sup> Valstybės žinios (Official Gazette), 2011, No. 91-4336, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=403303&p\\_query=&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=403303&p_query=&p_tr2=2).

<sup>17</sup> Ruling of the Constitutional Court of 21 December 2006, Case No. 30/03, available at: <http://www.lrkt.lt/dokumentai/2006/n061221.htm>.

The Constitutional Court ruled that the legal regulation which provides a priority right for newly co-ordinated radio frequencies (channels) on a non-tender basis for the LRT's programmes is not in conflict with the Constitution, because the state was obligated to create favourable conditions for the LRT activity as well as to safeguard the public interest. According to this reasoning, the Constitutional Court concluded that the named provisions are not in conflict with the Constitution.

The members of the Parliament also claimed that LRT's financing model (financed from the state budget and at the same time granted the right to engage in commercial activity) contradicts the principal of fair competition (Article 46 of the Constitution), and furthermore, that such legal regulation violates the principle of equality (Article 29 of the Constitution). They argued that state support is ensured only for one entity, whereas other entities (private broadcasters) that carry out the same activity, do not receive any support from the State.

The Constitutional Court pointed out that the State is under the constitutional obligation to ensure the activity of the LRT and to assign sufficient funding for it. Further, the Constitutional Court noted that the Constitution allows the legislator to choose the financing model of the LRT at its own discretion. The choice of the financing model was an issue of social, political as well as economical expediency depending exclusively on the competence of the legislator.

The Constitutional Court stated, in the ruling, that the legislator had the right to determine by law the authorisation of, as well as the restrictions on, advertising in the programmes of the LRT. The restrictions on advertising were a matter of legislation, and not subject to constitutional control. **The Constitutional Court noted that the legislator had the right to forbid advertising on the public service broadcaster only in the case where both public resources and financial potential made this possible, and if it did not affect the constitutional mission of the LRT.**

This ruling of the Constitutional Court, dated of 21 December 2006, is important for the Lithuanian audiovisual sector now too, because all the disputed legal norms still exist in the current Law on LRT.

- "Pursuit of Core Activity"

Article 9 of the Law on Information ensures the right to public criticism of the activities of the state and municipal institutions and officials. Under this provision every person has the right to publicly criticise the activities of the state and municipal institutions and agencies as well as officials. Persecution for criticism shall be prohibited in the Republic of Lithuania.

No one shall be forced to disseminate information relating to state or municipal institutions and agencies as well as other budgetary institutions, except for the cases specified by laws, as it is declared in para 2 of Article 5 of the Law on Information.

In accordance with article 7 of the Law on Information in order to ensure freedom of information, it shall be prohibited to exert pressure on a producer or a disseminator of public information, their participant or a journalist, compelling them to present information in the media in an incorrect and biased manner.

- Ordinary law safeguards for journalistic activity

Additionally, Article 11 of the Law on Information prohibits to persecute a producer or a disseminator of public information, their participant or a journalist for the published information if there has been no violation of the law in the course of production and dissemination thereof.

Article 8 of the Law on Information foresees the right of confidentiality of the source of information. According to this provision a producer or a disseminator of the public information, their participant or a journalist have the right to keep the confidentiality of the source of information and not to disclose it, except for the cases where, by a court decision, it is necessary to disclose the source of information for vitally important or otherwise significant public interests, also in order to ensure the protection of persons' constitutional rights and freedoms and the administration of justice.

Paragraph 5 of article 80 of the Code of Criminal Procedure of the Republic of Lithuania<sup>18</sup>, as amended on 28 June 2007, states that producers and disseminators of the public information and/or the owners of the disseminators as well as journalists may not be interrogated as witnesses due to the circumstances, which according to the Law on Information constitute the secret of the source of information, with the exception of the cases when those persons agree to witness themselves or by a court decision when it is necessary to disclose the source of information for vitally important or otherwise significant public interests, also in order to ensure the protection of persons' constitutional rights and freedoms and the administration of justice.

Article 80<sup>1</sup> of the mentioned Code (adopted on 28 June 2007)<sup>19</sup> foresees that only the court may adopt the decision on disclosing the source of information.

Only one case is known (the rulings of the court are not publicly available) when the court obliged the journalist L. V. to disclose the source of information. This happened at the end of 2011 when the journalist published her article in one of the biggest Lithuanian daily papers on the corruption in courts, breach of legal norms, subservience of the lawyers to prosecutors and authority members.

The Law on Information ensures the accreditation of journalists. According to Article 12 a producer and/or disseminator of public information has the right to accredit their journalists with state institutions, political parties, political organisations and associations as well as with other institutions by agreement between the parties.

A journalist may take part in the meetings and other events of the institution or organisation he has been accredited with; he shall be provided with verbatim reports, minutes and other documents or copies thereof subject to conditions established by mutual agreement.

Foreign journalists accredited with the Ministry of Foreign Affairs of the Republic of Lithuania shall have the same rights to collect and publish information as Lithuanian journalists.

In Lithuania an administrative liability for refusing to provide information to the representative of the mass media or for hindering to perform the journalist's professional

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<sup>18</sup> Valstybės žinios (Official Gazette), 2007, No.81-3312, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=301998](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=301998).

<sup>19</sup> In the same place.

duty is foreseen. Article 214<sup>3</sup> of the Code of Administrative Offences<sup>20</sup>, as last amended on 15 June 2006, foresees that a fine up to 1000 Lt (290 Euro) is applied to the heads of the state and municipality institutions and establishments in case they refuse to provide information, except the cases when the information is not meant to be published in accordance with the LR laws.

In accordance with para. 3 of article 42 of the Law on Information producers and disseminators of public information are obligated to provide persons with information (including the tapes of broadcast programmes) the publication of which, in the opinion of the aforementioned persons, degrades their honour and dignity or damage their professional reputation or other legitimate interests.

- Specific positive content obligations

The positive content obligations are intended for broadcasters only. Positive content obligations include minimum quotas of European and independent works in the programme's content, limitations on the exclusive rights for sports and other major events (article 38 of the Law on Information), and the right of reply in case of personal harmful or offensive reports (article 15 of the Law on Information).

Without the mentioned ones, the Law on Information foresees that when RTCL issues broadcasting and re-broadcasting licences, priority shall be given to persons who undertake to produce original cultural, informational and educational programmes, ensure accurate and impartial presentation of information, respect a person's dignity and right to privacy and etc.

- Funding schemes for specifically desired content

There are no obligations regarding this issue.

- **Political advertising and/or broadcasting time**

Dissemination of political advertising in the media is regulated by the Law on Funding of and Control over Funding of Political Parties and political campaigns (the new wording adopted on 15 September 2010).<sup>21</sup>

In accordance with the Law on National Radio and Television (Article 5) LRT provides time during election campaigns for the candidates to the post of the President of the Republic of Lithuania, political parties and candidates to the Seimas (Parliament) or Municipal councils in accordance with the conditions and procedure established by the Laws on the Elections to the Seimas (Parliament) and Municipal Councils.

It has to be noted here that the rules on publishing political advertising in the media were changed not once during the last years.

In accordance with the amendments of the Law on Funding of Political Parties and Political Campaigns, and Control of, which were adopted on 10 June 2008, the broadcasters under the Lithuanian jurisdiction could not broadcast video and audio advertising clips and films about political parties in their radio and television programmes at all, until on 18 May 2010 the LR Seimas (Parliament) adopted a new wording of the

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<sup>20</sup> Valstybės žinios (Official Gazette), 2006, No.73-2759, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=279167](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=279167).

<sup>21</sup> Valstybės žinios (Official Gazette), 2010, No.63-3091, available in English at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=416346](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=416346).

Law on Funding of Political Parties and Political Campaigns, and Control of Funding, and under this amended law the broadcasters could broadcast video and audio advertising clips about political parties in radio and television programmes again. Video and audio advertising clips, where the political campaign participants introduce their political programmes or comments on topical questions to the society shall not be shorter than 90 minutes of duration.

The amended provisions state that political advertising shall be marked in accordance with the procedure laid down by the law by indicating the source of funding and shall visibly be separated from other disseminated information during the period of the political campaign only, whereas the previous Law required the political advertising to be marked any time it was broadcast not relating it to the period of political campaign.

It should be noted that in comparison to the former law (of 2008) the amended law liberalizes the requirements for the dissemination of the free of charge political advertising. In accordance with the provisions of the amended law it is allowed to disseminate political advertising free of charge any time, except during the political campaign period. However, one exception is allowed, according to which political advertising could be disseminated for free in the debates programmes. Whereas the former law stated total prohibition of the dissemination of the political advertising for free.

- Codes of conduct and their organisational framing

The norms of professional ethics, which have to be adhered to by producers and disseminators of public information and journalists are defined in the Code of Ethics of Lithuanian Journalists and Publishers (hereinafter – the Code)<sup>22</sup>, adopted by the meeting of the representatives of journalists and publishers' organizations in April 2005.

The Code is comprised of 7 chapters: General provisions; Independence of Journalists and publishers. Transparency of their activities; Protection of personal honour, dignity and privacy; Professional solidarity and fair competition; Mutual Obligations of Journalists and managers of editorial boards (Public information organizers); Responsibility for Violations of the Code of Ethics of Journalists and Publishers; Relations of this Code to other Codes of Professional Practice in the Field of Public Information.

The Code states:

“Respecting the human right to obtain truthful information, the journalists and public information organizers shall propagate true and correct news as well as a full range of opinions. News and opinions shall be clearly identified as such. The journalists and public information organizers have to ensure that an opinion is presented fairly and ethically, without any distortion of facts or data (Articles 3, 4).”

The journalists and public information organizers shall assess their information sources in a critical way, scrutinize facts with due diligence on the basis of several sources. When it is impossible to verify the truthfulness of information in a proper manner, the journalist and public information organizer may publish such information exclusively in cases when delayed publication thereof would cause damage to the public, provided that the unverified nature of the published information is indicated (Articles 6,7).

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<sup>22</sup> The Code is available at: [http://www.lzs.lt/lt/teises\\_aktai/etikos\\_kodeksas.html](http://www.lzs.lt/lt/teises_aktai/etikos_kodeksas.html).

The journalist and public information organizer should identify the source of his information. For this reason he has to obtain permission to refer to the informant's name. If the source of information requests a journalist not to disclose his/her name, the journalist and public information organizer has no right to disclose it. In this case the journalist and public information organizer shall assume legal and moral responsibility for the published information (Article 15).

When inserting information, the journalist and public information organizer select the information, the publishing of which is indeed justified by the public interest and information which satisfies human curiosity only (Article 16).

The journalists and public information organizers shall rectify the mistakes and inaccuracies they have made that might insult particular persons without waiting for the insulted individuals to so request (Article 20).

Every journalist and public information organizer shall be free and independent.

The journalist shall refuse to carry out assignments of a public information organizer and/or his superior if such assignments contradict the national law, journalism ethics and journalist's beliefs. While carrying out their activities, the journalists have no right to assume any other liabilities but professional obligations to the public information organizer (Articles 24, 25).

The journalist shall not have the right to publish facts about an individual's private life without his/her consent, except when they are related to a public person and these facts are important to society or criminal actions are envisaged. The journalist and public information organizer shall uphold the presumption of innocence. An individual may be accused exclusively on the basis of an effective judgment or ruling of a court (Articles 36, 37).

The journalist and public information organizer must respect human rights and freedoms even in cases when an individual does not know or is unable to understand his/her rights. The journalist and public information organizer shall not abuse the weaknesses and immaturity of an individual, non-understanding of his/her rights and freedoms, provoke individuals to commit humiliating acts or behaviours, or portray them in situations humiliating to human dignity (Article 57).

Article 71 of the Code foresees that the producer or disseminator of public information for the violation of the provisions of this Code could be assigned to category of public information organizers who do not adhere to their professional ethics by the Ethics Commission of Journalists and Publishers (hereinafter, the Commission of Ethics) .

The decisions of the Commission of Ethics are public<sup>23</sup>. It is a collegial self-regulatory body of producers and disseminators of public information. The Commission of Ethics as a self-regulatory body performs the following functions: it ensures the cultivation of professional ethics of journalists and examines violations of professional ethics committed in the course of provision of information to the public by journalists, producers of public information or responsible persons appointed by their participants as well as examines disputes between journalists and producers or publishers of public information regarding violations of the Code. All persons may apply this Commission of Ethics with complaints (46 Article of Law on Information).

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<sup>23</sup> Decisions of the Commission of Ethics are available at its website, <http://www.lzlek.lt/index.php?lang=1&sid=371>.



The Commission of Ethics in its decision of 16 May, 2011 acknowledged the UAB "Tele-3", a commercial television broadcaster, as a producer of public information not observing professional ethics.

The broadcaster appealed to the Court against the Commission's of Ethics decision. Vilnius Regional Administrative Court refuted the appeal with the note that the Commission of Ethics had the right to assign the broadcaster to the category of producers of public information, who are not observing professional ethics. The Court justified this right of the Commission of Ethics because the Commission of Ethics is a self-regulatory institution, which safeguards self-regulation in the community of producers and publishers of public information. The provision of article 71.1 of the Code is a means of moral effect for the media and a signal of an activity, which is in conflict with professional ethics.

The described case was not the only one. In 2010 the Commission of Ethics had acknowledged two daily newspapers "Lietuvos žinios" and "Šiaulių naujienos" as producers of public information, who are not observing professional ethics.

The means of public information is acknowledged as the one, which is not observing professional ethics, when it violates the Code not less than twice in one year's period.

The provided examples show that the mechanism of self-regulation works in Lithuania and that self-regulatory institution is active in supervising the compliance with the provisions of the Code.

- Distribution Aspects
  - Access to frequencies

The Communications Regulatory Authority shall submit to the RTCL information about the coordinated radio frequencies (channels) which, in accordance with the plan for the assignment of radio frequencies for broadcasting and transmission of radio and television programmes, are assigned to broadcasters and/or re-broadcasters of radio and/or television programmes in possession of licences issued by the RTCL granting them the right to set up and operate own electronic communications networks together with information about the basic conditions of operating electronic communications networks required to issue broadcasting and/or re-broadcasting licences. Upon receiving the aforementioned information, the RTCL by the way of tender or without it shall issue broadcasting and/or re-broadcasting licences in accordance with the procedure and terms established by the Law on Information and the Rules for Licensing of Broadcasting and Re-broadcasting Activities.

Access to frequencies for terrestrial transmission of broadcasting services is foreseen by the Law on Information and the Law on Electronic Communications, adopted on 15 April 2004.<sup>24</sup>

- Access to distribution networks and control of actual conditions

The Postal Law establishes that the provider of the universal postal services shall ensure that the universal postal services (including the distribution of the press) shall be

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<sup>24</sup> Valstybės žinios (Official Gazette), 2004, No.69-2382, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=415040](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=415040).

provided continually for all the users of the universal postal services under the same conditions every working day and not less than five days a week.

Article 8.5 of the Postal Law<sup>25</sup>, as amended on 20 December 2011, provides that the tariffs of the universal postal services and the delivery tariffs of the periodical press to the inhabitants of the rural areas must be based on the expenditure of the provided service, transparent, non-discriminatory and available to all users of the postal services. In case the Government establishes the amount of those tariffs less than the expenditure of the provided services, the difference between the amount of the tariff and the service cost shall be covered by the Government in accordance with the set rules from the State budget once in every six months. The provider of the universal postal services must submit a report on delivery costs and expenditures of the periodical press to the subscribers of the rural areas to the Ministry of Communications and the Communications Regulatory Authority covering the six months and artificial year period.

- Must-carry/must-offer rules for electronic media

In September 2010, the LR Parliament adopted the amendment to the Law on Information, which established that from 1 July 2011 only all the encoded national television programmes of the LRT remained on "must-carry" status.

The RTCL may take a decision to exempt from the obligation to re-broadcast the encoded national television programmes of the LRT specified in para. 1 of article 33 of the Law on Information, where such a decision does not limit the possibilities of the user to view these programmes by the available technical means.

At the request of the broadcaster and upon establishing the cultural or public value of a special television programme broadcast, the RTCL may grant it the must-carry programme status and provide that re-broadcasters of programmes must re-broadcast it free of charge. Only special cultural, educational, scientific, news, sports or regional television programmes shall be recognised as must-carry television programmes. When taking such a decision, the RTCL shall define the scope of re-broadcasting.

- Role of platform operators

Preparation for digital switchover began in 2003 when the Lithuanian Government adopted the Strategy for Distribution of Radio Frequencies and the Strategy of Allocation of Radio Frequencies for Broadcasting and Transmitting Radio and Television Programmes (hereinafter - the Strategy on Spectrum Allocation)<sup>26</sup>, which foresaw a tender to allocate digital frequencies. Thus, by the way of tender four national multiplexes were formed. Analogue switch-off is scheduled for 29 October 2012. So, at present there are four multiplexes: two owned by a private telecommunications company *Teo LT*, and two owned by *Lietuvos radijo ir televizijos centras*, the state-owned transmission network operator. Each multiplex has ten channels.

The competition for spectrum environment changed recently, when on 30 June 2011, the LR Parliament amended the Law on LRT.<sup>27</sup> Specifically, section 5 of paragraph 5 was changed, stating that LRT should be granted radio frequencies (channels) sufficient for

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<sup>25</sup> Valstybės žinios (Official Gazette), 2011, No.161-7618, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=415501](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=415501).

<sup>26</sup> Valstybės žinios (Official Gazette), 2003, No. 32- 1333, available at: [http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc\\_l?p\\_id=207608](http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=207608).

<sup>27</sup> Valstybės žinios (Official Gazette), 2011, No. 91-4336, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=403303&p\\_query=&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=403303&p_query=&p_tr2=2).

one terrestrial digital television network of national coverage. Such a network can be used only for broadcast of radio and television programmes produced by LRT, and it is forbidden to use it for other commercial activity, or retransmission of alternative radio and television programmes.

The number of programmes is fixed by the RTCL according to the request presented by the Board of the LRT. No other channel besides LRT will have its own digital broadcasting network.

- Access to Information
  - Transparency of media ownership situations

It should be noted that there are certain provisions requiring transparency of the ownership of the media, i.e. media organisations must report about their owners and governing bodies. Article 24 of the Law on Information requires that producers and disseminators of public information (not including those licensed by the RTCL) shall submit to the governmental institution (Ministry of Culture) annual data<sup>28</sup> regarding shareholders or co-owners of the enterprise who have the right of ownership or administer at least 10 per cent of all the shares or assets.

Similar provision of the Law on Information requires that the President of the Republic of Lithuania, members of the Seimas (Parliament) and the Government, members of the municipal councils, civil servants of political (personal) confidence as well as heads of the state and municipal institutions and agencies must submit to the institution authorised by the Government according to its established procedure the data about the legal persons who are publishers of local, regional and national newspapers and magazines or managers of the information society media of which they are participants. The institution authorised by the Government (Ministry of Culture) shall publish the received data on its website.

Producers and/or disseminators of public information and their participants must publish in their media information about any sponsorship received if it exceeds the amount of ten base social benefits (in total 1300 Litass/377 euro), specifying the amount and provider of the sponsorship.

- Accountability of public service media

The Law on LRT states that the LRT Council annually accounts of its activity to the public in the press, while the Council chairman annually presents a report of LRT activity at a Plenary sitting of the *Seimas* (Parliament).

- Freedom of information laws

The Law on the Right to Obtain Information from State and Municipal Institutions and Agencies guarantees access of information to the citizens of the Republic of Lithuania, citizens of the states of the European Economic area, foreigners having the permission of residence in the Republic of Lithuania, Lithuanian republic legal persons or organisations registered in the states of the European Economic area or their agencies and affiliates established in Lithuania.

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<sup>28</sup> Available at: [http://www.lrkmlt/go.php/lit/Visuomenes\\_informavimo\\_politika/206/6/179](http://www.lrkmlt/go.php/lit/Visuomenes_informavimo_politika/206/6/179).

- Accessibility of products/services and distribution networks

Analogue broadcasting in Lithuania will be switched-off on 29 October 2012. The owners of digital networks (multiplexes) are technically ready for digital switch-over and are already broadcasting some of the programmes digitally. However, not all households are equipped with television sets able to receive digital programmes.

The Programme for the Analogue Terrestrial Television Switch-off and the Development of Digital Television (hereinafter - the Programme, adopted by the LR Government on 24 September 2008)<sup>29</sup>, requires that 95 per cent of the households with access to television are able to see programmes delivered by cable or digital terrestrial television. Another task was to ensure that the public's expenses related to the switch-over are effectively reimbursed and that 95 per cent of the households are technically ready to access digital television.

On 20 January 2010 the Government of the Republic of Lithuania adopted a Resolution on the order of remuneration – not bigger than 100 Litas (29 Euro)<sup>30</sup> for purchasing the equipment necessary for receiving digital television.

In accordance with the mentioned Resolution of 20 January 2010, only families and persons of low income will acquire the right to get the remuneration for purchasing the equipment (set top boxes) for receiving digital television.

The right for such remuneration will acquire only those families and persons, whose monthly income is less than 525 Litas (125 Euros) per capita.

The means for remuneration will be allocated from the State budget and the people will get them from the local Municipality administration.

A person, who applies for the remuneration has to provide the Municipality administration with the income certificate, the request for the remuneration and the documents of purchasing the digital television reception equipment.

The remuneration process will start 6 months prior to the analogue television switch-off date (i.e. 29 April 2012) and will end after 3 months of the analogue television switch-off date (i.e. by 29 January 2013).

The Law on Electronic Communications<sup>31</sup> (chapter 5), as last amended on 28 June 2011, foresees the regulation of the universal services. According to the provisions of the Law the following universal services shall be provided in the territory of the Republic of Lithuania: publicly available telephone services at a fixed location; publicly available telephone services provided over pay telephones; publicly available directory enquiry services; accessibility of electronic communications services for disabled users.

The Communications Regulatory Authority of the Republic of Lithuania (RRT) sets the rules for the provision of universal services regulating their scope, quality of service requirements, the procedure and conditions for providing such services, the procedure, conditions and cases for imposition of universal service obligations on providers of

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<sup>29</sup> Valstybės žinios (Official Gazette), 2008, No. 116-4416, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=386199](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=386199).

<sup>30</sup> The Resolution of the Government of the Republic of Lithuania of 11 January 2012, Valstybės žinios (Official Gazette), 2012, No. 8-263, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=416690&p\\_query=&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=416690&p_query=&p_tr2=2).

<sup>31</sup> Valstybės žinios (Official Gazette), 2004, No. 69-2382, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=415040](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=415040).

electronic communications services as well as the procedure, conditions and cases for compensation of losses incurred in connection with the provision of services.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

Article 49 of the Law on Information, as last amended on 30 September 2010, indicates that the Inspector of Journalist Ethics (hereinafter, the Inspector of Ethics) acts as Ombudsman. The Inspector of Ethics is appointed for a five-year term of office by the Seimas (Parliament) on the recommendation of the Commission of Ethics. The main functions of the Inspector of Ethics are following: 1) investigate the complaints (applications) of the persons concerned whose honour and dignity have been degraded in the media; 2) examine the complaints (applications) of the persons concerned in relation to violation of their right to protection of privacy in the media; 3) examine the complaints (applications) of the persons concerned in relation to violation of processing of their personal data in the media; 4) exercise, within the scope of his competence, supervision over implementation of the provisions of the Law on the Protection of Minors against the Detrimental Effect of Public Information; 5) assess compliance with the principles of provision of information to the public set forth in this Law and other laws and legal acts regulating the provision of information to the public in providing information to the public; 6) on the basis of the conclusions of experts (groups of experts), assign press publications, audiovisual works, radio and television programmes or parts of programmes, the information society media or other media and/or their content to the categories of information of erotic, pornographic and/or violent nature and inform the State Tax Inspectorate under the Ministry of Finance about press publications of erotic and/or violent nature; 7) on the basis of the conclusions of experts (groups of experts), establish whether public information published in the media incites discord on grounds of sex, sexual orientation, race, nationality, language, origin, social status, belief, convictions or views.

The problem is that the Inspector of Ethics acts only on the grounds of received complaints, because the law does not obligate the Inspector of Ethics to start an investigation regarding the allegedly violated rights of a person on his/her own initiative.

- Participation in media operators/(self-)regulatory bodies

According to Article 47 of the Law on Information, the RTCL (who is the regulatory body for the activities of broadcasters and re-broadcasters of radio and/or television programmes and providers of on-demand audiovisual media services) consists of 13 members: one member is appointed by the President of the Republic, three members are appointed by the Seimas (Parliament) on the recommendation of the Committee on Education, Science and Culture and the Committee on the Development of Information Society and one member is appointed by each of the following: the Lithuanian Artists' Association, the Lithuanian Filmmakers' Union, the Lithuanian Composers' Union, the Lithuanian Writers' Union, the Lithuanian Theatres' Union, the Lithuanian Journalists' Union, the Lithuanian Journalists' Society, the Lithuanian Bishops' Conference and the Lithuanian Periodical Press Publishers' Association. Only a citizen of the Republic of Lithuania of good repute may be appointed as member of the RTCL.

Under Article 46 of the Law on Information the Commission of Ethics (who is a collegial self-regulatory body of producers and disseminators of public information) consists of 15 members: with one member delegated by each of the following: the Lithuanian Centre for Human Rights, the Lithuanian Psychiatric Association, the Lithuanian Bishops'

Conference, the Lithuanian Periodical Press Publishers' Association, the Lithuanian Radio and Television Association, the Lithuanian Cable Television Association, the Regional Televisions' Association, the Lithuanian Journalists' Union, the Lithuanian Journalists' Society, the Lithuanian Journalism Centre, the National Radio and Television of Lithuania, the National Association of Creative Journalists, the National Association of Publishers of Regional and City Newspapers, the Association of Communication and Advertising Agencies and the Association of Internet Media. The members of the Commission of Ethics are appointed for a term of three years.

Under the Law on LRT the Lithuanian public service broadcaster has its own administrative and regulatory body, the Council, representing the public interests. It is comprised of twelve members who are prominent individuals in the social, scientific and cultural spheres: four council members are appointed by the LR President for a term of six years; four members are appointed by the Seimas (Parliament) (two members shall be appointed from the candidates of the opposition parliamentary groups); the following organisations appoint four members as their own representatives (one each) for a term of two years: Lithuanian Science Council, Lithuanian Education Council, Lithuanian Creative Artists Association and the Lithuanian Bishops' Conference.

Thus, from the composition of the self-regulatory institutions it is obvious that all of them are comprised of various public organizations and in this way the participation of the public in the activity of those institutions is ensured.

#### 2.2.16.2. Main Players in the Media Landscape

The Lithuanian media market consists of over 160 radio and television companies engaged in broadcasting and re-broadcasting activities.

##### 2.2.16.2.1. Radio

The picture in the radio sector has been quite stable during a few years' period with the *VsI Lietuvos Nacionalinis Radijas ir Televizija* (LRT), the public service broadcaster (PSB) with its 3 radio programmes being a clear leader among almost 50 private radio stations in Lithuania.

The public service broadcaster operates three radio channels: LR1, *Klasika* (cultural/educational) and Opus 3 (since 2006). All radio channels are broadcast by the Internet and are available at [www.lrt.lt](http://www.lrt.lt).

Besides the public service broadcaster, there are 47 commercial radio broadcasters, which operate 51 radio channels. For several years in succession the most popular commercial radio channels were the following: M-1, *Lietus*, *Radiocentras* and *Ruskoje Radio Baltija*. It should be noted that all the top ones (M-1, *Lietus*, M-1 plus – national scope) are broadcast by the broadcasters, which are owned by the same owners (natural persons). These persons also own two local radio broadcasters, which broadcast radio channels *Laluna* and *Raduga*.

*UAB Radiocentras* controls the third popular national radio channel *Radiocentras* and local radio channel *Clasic Rock FM*. This company also is the owner of the following broadcasters: *UAB Muzikos topai*, which broadcasts radio channel ZIP FM, *VsI Kwartole*, which broadcasts radio channel Relax FM, and *UAB Rimtas radijas*, which broadcasts



radio channel *Ruskoje Radio Baltija*. Radio channel *Ruskoje Radio Baltija* is the most popular channel within the citizens of the capital Vilnius with a 15,6% audience share.<sup>32</sup>

**Table 91 LT: Main radio companies**

Company	Ownership Structure*	Programme(s)	Market Share 2010 autumn**	Market Share 2011 autumn***
VsI Lietuvos nacionalinis radijas ir televizija	State – 100 %	LR1 Klasika Opus 3	18,5 %	23 %
UAB M-1	Ramunė Grušnytė – 100 %	M-1 M-1 Plius	12,9 %	14,8 %
UAB Radijo stotis Ultra Vires	R.Grušnienė 90,5 % G.Grušnytė 9,5 %	Lietus	14.2 %	13,3 %
UAB Radiocentras	UAB Trust Achemos grupė – 90,3 % Mindaugas Pleskevičius – 7,6 %	Radiocentras Classic Rock FM (local)	5,3 %	7,9 %
UAB Rimtas radijas	UAB Radiocentras - 100 %	Ruskoje Radio Baltija	9,2 %	7 %

\* RTCL, [http://www.rtk.lt/lt/radijas\\_ir\\_televizija/radijo\\_programos](http://www.rtk.lt/lt/radijas_ir_televizija/radijo_programos)

\*\* Data of the Research Company TNS LT, available at <http://www.tns.lt/lt/naujienos-radijo-auditorijos-tyrimas-2010m-ruduo>

\*\*\* Data of the Research Company TNS LT, available at <http://www.tns.lt/lt/naujienos-radijo-auditorijos-tyrimas-radijo-auditorijos-tyrimas-2011-m-ruduo>

#### 2.2.16.2.2. Television

In the television sector there are 28 commercial television broadcasters, who broadcast 38 television channels. It should be noted that the Lithuanian public service broadcaster LRT has three national channels (LTV and LTV2) and LTV World (available via satellite). According to the data of the Research Company TNS LT in December 2011 the PSB market share was about 10,8%. The Public Service Broadcaster LRT receives 70% of financing from the state and the rest from commercial revenues.

The two biggest commercial channels TV3 and LNK have been competing for the top position in recent years, while the public service broadcaster LRT and another commercial channel, BTV, compete for the third and fourth position in the rankings.

*Lietuvos rytas.TV*, which entered the market in 2008 and broadcasts both via digital and analogue platforms, is also picking up and in December 2011 its market share was 2,9 %.<sup>33</sup> The *Lietuvos rytas.TV* owner is UAB *Lietuvos Rytas*, which also owns one of the biggest and most popular daily papers in Lithuania, *Lietuvos rytas*.

The most popular channel TV3 is owned by the Modern Times Group Broadcasting AB (Sweden) and has an audience share of 21 % (December 2011). The same group also owns TV6 (available in Vilnius and via cable) with the audience share 2,9 %.

<sup>32</sup> TNS Lt, <http://www.tns.lt/lt/naujienos-radijo-auditorijos-tyrimas-radijo-auditorijos-tyrimas-2011-m-ruduo>.

<sup>33</sup> Source: TNS LT, <http://www.tns.lt/lt/naujienos-tv-auditorijos-tyrimas-tv-auditorijos-tyrimo-rezultatai-2011-m-gruodis>.



LNK was previously owned by the Swedish Group Bonnier, but since 2003 the owners have changed to MG Baltic Media (80 % shares) and 20 % belongs to Amber trust S.C.A. (Luxembourg). LNK had over 17,2 % of the audience share (December 2011).

**Table 92 LT: Main Television Companies**

Company	Ownership Structure*	Programme(s)	Total Market Share 2010 December**	Total Market Share 2011 December***
UAB Tele-3	MTG Broadcasting AB	TV3 TV 6	24,6 % 2,7 %	21 % 2,9 %
UAB Laisvas ir nepriklausomas kanalas	UAB MG Baltic Media - 80 % Amber Trust S.C.A. - 20 %	LNK TV1 Info TV LIUKS!	18,9 % 1,9 % 0,2 % 0,3 %	17,2 % 2,3 % 0,4 % 0,5 %
VsĮ Lietuvos nacionalinis radijas ir televizija	State - 100 %	LTV LTV2	10,4 % 0,3%	10,8 % 0,6 %
UAB Baltijos televizija	UAB Trust Achemos grupė	BTV	5,3 %	5 %

\* RTCL, [http://www.rtk.lt/lt/radijas\\_ir\\_televizija/tv\\_programos](http://www.rtk.lt/lt/radijas_ir_televizija/tv_programos)

\*\* TNS LT, <http://www.tns.lt/lt/naujienos-tv-auditorijos-tyrimas-tv-auditorijos-tyrimo-rezultatai-2010m-gruodis>

\*\*\* TNS LT, <http://www.tns.lt/lt/naujienos-tv-auditorijos-tyrimas-tv-auditorijos-tyrimo-rezultatai-2011-m-gruodis>

### 2.2.16.2.3. *Press and publishing*

The situation in the press media market is similar to the television market: two front-runners – *Lietuvos rytas* and *Vakaro Žinios* – and other dailies competing for their place among the top five.

It is obvious that the rapid growth of internet penetration and the development of the digital television platform have had an impact on the media business models. The last five years indicate the migration of print media to the internet. It is only natural that the competition between the Internet and the traditional print media will continue to increase in the future, thus the print media has to search for new ways to retain its audience.

**Table 93 LT: Main publishers of newspapers**

Publishing companies	Ownership Structure*	Title(s)	Circulation 2011 II half-year**	Readership 2010 autumn***	Readership 2011 autumn****
UAB Lietuvos rytas	UAB Snoras Media - 34 % G.Vainauskas - 25,47 % V.Strimaitis - 13,07 %	Lietuvos Rytas Laikinoji sostinė (weekly)	55696 21541	33, 2 %	30,4 %
UAB Naujasis aitvaras	UAB Ateities dizainas - 75 % J.Tomkus - 15 % R.Tomkus - 10 %	Vakaro žinios	53231	31,4 %	25,6 %
UAB Respublikos leidiniai	Vitas Tomkus - 75 % Justinas Tomkus - 15 % Rytis Tomkus - 10 %	Respublika Respublika (Russian version)	21962 6584	9 %	11 %
UAB Diena Media News	UAB Baltijos įmonių finansai - 50,15 % UAB Stomas - 49,85	Kauno diena Klaipėda Klaipėda (Russian version) Vilniaus diena	21324 5659 5987 4131	7,9 %	6,7 %
UAB Šiaulių kraštas	UAB Ateities dizainas UAB Respublikos investicija	Šiaulių kraštas	12428	5,2 %	5,4 %

\* Data on the owners of the media means is published on the web site of the LR Ministry of Culture,

[http://www.lrkm.lt/go.php/lit/Visuomenes\\_informavimo\\_politika/206/6/179](http://www.lrkm.lt/go.php/lit/Visuomenes_informavimo_politika/206/6/179)

\*\* Data on the newspaper circulation is published on the web site of the LR Ministry of Culture, [http://www.lrkm.lt/go.php/lit/Visuomenes\\_informavimo\\_politika/206/6/179](http://www.lrkm.lt/go.php/lit/Visuomenes_informavimo_politika/206/6/179)

\*\*\* TNS LT, <http://www.tns.lt/lt/naujienos-nacionalinis-skaitytoju-tyrimas-populiariausiu-2010-rudens-periodo-leidiniu-penketukai>

\*\*\*\* TNS LT, <http://www.tns.lt/lt/naujienos-nacionalinis-skaitytoju-tyrimas-tns-lt-populiariausiu-2011-m-rudens-periodo-leidiniu-penketukai>

#### 2.2.16.2.4. *Online media (non-linear audiovisual (media) services; websites)*

The past five years saw rapid development of the Internet. Between 2005 and 2010, the number of internet subscribers in Lithuania almost doubled, from 34,3 per cent to 63,6 per cent of the population (2,065,000 people). In 2011 over 51,6 per cent of all householders has access to broadband Internet.<sup>34</sup>

It is obvious that the penetration of the Internet has an impact on the development of the online media. The online media market indicates different growth trends compared to the traditional media. Media sites have steadily increased their audience. They also gradually introduced interactivity and new forms of news delivery, such as video and audio reports and video conferences. As a result of these developments, by February 2012 five news portals were on the top among other most popular websites in Lithuania.

<sup>34</sup> Data of the Lithuanian Department of Statistics, available at: [http://www.stat.gov.lt/lt/catalog/list/?cat\\_y=2&cat\\_id=1](http://www.stat.gov.lt/lt/catalog/list/?cat_y=2&cat_id=1)

**Table 94 LT: Most popular websites in Lithuania\***

Website	Average of visitors per week (during the period from 1 January to 5 February 2011/2012)	Average of visitors per day (workday) (during the period from 1 January to 5 February 2011/2012)
delfi.lt	1,006,727/1,287,133	382,567/471,976
lrytas.lt	695,534/845,703	240,396/286,634
15min.lt	502,917/749,169	156,687/235,638
balsas.lt	420,876/626,664	96,249/167,661
alfa.lt	466,6813/594,345	134,235/146,595

\* Data of the Research Company TNS LT, of 6 February 2012 available at <http://www.tns.lt/lt/ziniasklaidos-tyrimai-interneto-tyrimas-tns-metrix-duomenys-lietuvos-tinklapiu-savaites-unikaliu-lankytoju-skaicius>

There are not many VOD service providers in Lithuania. According to the RTCL data of 9 February 2012 there are only four registered VOD service providers: *UAB Mikrovistatos TV*, *UAB Penkių kontinentų komunikacijų centras*, *Teo Lt*, AB and *UAB Kavamedia*. The list of the VOD service providers is available on the RTCL website [www.rtk.lt](http://www.rtk.lt).

#### 2.2.16.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers

In 2011 there were 46 cable operators, 3 MMDS operators (multipoint microwave distribution system), and 19 broadband operators (IPTV) in Lithuania.<sup>35</sup>

With the rapid development of the broadband networks more companies expressed the will to re-broadcast programmes via such networks. 15 IPTV operators were already providing this service in 2010 and 19 in 2011.

The analysis of the distribution of the cable TV subscribers, who amount to 372,249 in Lithuania<sup>36</sup>, makes it evident that the leading service providers in this field are *UAB Vinita* with 17 % of the market, *UAB Balticum TV* with 15 % and *UAB Mikrovistatos TV* – 10 %.

It has to be noted that a tense competition can be remarked in this field which forces the operators to expand their services, therefore a number of them provide universal services to the users as well.

<sup>35</sup> Source: RTCL, <http://www.rtk.lt/lt/transliuotojai>.

<sup>36</sup> RTCL annual Report 2010, [http://www.rtk.lt/lt/komisija/ataskaitos\\_seimui](http://www.rtk.lt/lt/komisija/ataskaitos_seimui).

**Table 95 LT: Cable/Satellite network operators, IPTV&Internet Access Providers**

<b>Cable/Satellite network operators, IPTV &amp; Internet Access Providers</b>	<b>Services</b>	<b>Ownership Structure*</b>	<b>Market Share 2010**</b>
UAB Vinita	Cable Internet Fixed telephone services	P. Živatkauskas – 50 % UAB „Init“ – 50 %	17 %
UAB Balticum	Cable Internet Fixed telephone services	5 local shareholders	15 %
UAB Mikrovisatos TV	Cable , MMDS IPTV Internet Fixed telephone services	2 local shareholders	10 %

\* RTCL, [http://www.rtk.lt/lt/komisija/ataskaitos\\_seimui](http://www.rtk.lt/lt/komisija/ataskaitos_seimui)

\*\* RTCL, [http://www.rtk.lt/lt/komisija/ataskaitos\\_seimui](http://www.rtk.lt/lt/komisija/ataskaitos_seimui)

#### *2.2.16.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

The advertising market in media changes permanently. Data of the Annual Review Media Surveys 2010<sup>37</sup>, which was prepared by the Research Company TNS LT, indicate that there is a great competition among the advertising media players.

Similarly to the previous year advertising in TV and press accounted for the major asset share of the market – 47 % TV and 29 % printed press (18,5 % newspapers, 10,5 magazines). Advertising in radio amounted to 8 % in 2010.

The volume of the television advertising has increased by 19,9 % when comparing the results of the year 2010 to 2009, as well as radio advertising by 10,9 %. In 2010 the advertising income of the Internet increased by 29,9 % compared to 2009.

The situation in the print media was different. There was a decrease in the volume of advertising in the print media. In 2010 advertising space shrank by 10,7 % in both newspapers and magazines.

<sup>37</sup> TNS LT, <http://www.tns.lt/lt/ziniasklaidos-tyrimai-metine-ziniasklaidos-tyrimu-apzvalga>

**Table 96 LT: Real Income of Media channels advertising in LTL million/ Factual advertising revenues of the media players<sup>38</sup>**

Channel	2009	2010	Change 2009 vs 2010	Share 2010
TV	145	153	5.5%	47.1%
Newspapers	72	60	- 16.7%	18.5%
Magazines	36	34	-5.6%	10.5%
Radio	28	26	- 7.1%	8.0%
Outdoor Advertising*	23	22	- 4.3%	6.8%
Internet	20	25	25 %	7.7%
Cinema	1,1	0.9	- 18.2%	0.3%
Indoor TV Advertising**	4.5	3.7	- 17.8%	1.1%
Total:	329,6	324,6	- 1.5%	100%

\* including outdoor video and billboard advertising

\*\* indoor TV advertising – screens at shopping centres and filling stations

### 2.2.16.3. Conclusion and Recommendations

Considering the legal environment and the possible influence of political powers on the Lithuanian media, the conclusion can be drawn that the Lithuanian media is free. This is also confirmed by the index of the international freedom of the press published in 2012 by the NGO "Freedom House", according to which Lithuania is in the 40<sup>th</sup> to 42<sup>nd</sup> position.

Having this conclusion of the „Freedom House“ in mind, it should nevertheless be noted that concrete actions have still to be taken in order to ensure and enhance the freedom of media.

The general legal environment is favorable for the freedom of expression in Lithuania. Legislation and regulation ensures fair competition for all types of media. Licensing policy is fair and transparent; decisions taken by the regulators may be disputed in courts. The existing legislation has been applied to new types of media and in general it guarantees the conditions for the independent information and dissemination.

However, despite that, there still are certain fields, where legal regulation should be revised and amended accordingly in order to ensure the freedom of media even better.

One of the issues that has not been solved yet and which decreases the freedom of media ratings is the lack of restrictions on ownership and concentration of the media, which threatens the diversity of information content and pluralism of opinions. It should be noted, in this context, that there are no specific legal provisions that would limit media ownership or cross-ownership in Lithuania. Because of the lack of legal provisions regarding media ownership there is significant concentration in Lithuanian media, e.g., the Achema business group owns the television channel BTV (broadcaster *UAB Baltijos*

<sup>38</sup> Source: TNS LT, UAB.

TV), the daily *Lietuvos žinios* and the radio station *Radiocentras* (broadcaster *UAB Radocentras*); the *Lietuvos rytas media group* owns the daily *Lietuvos rytas*, the television channel *Lietuvos rytas. TV* (broadcaster *UAB Lietuvos rytas televizija*), the website *l.rytas.lt* and the printing-house.

So, the tendency towards horizontal, vertical and diagonal concentration in the media markets creates a threat for the media outlets being used as tools in promoting business interests instead of providing independent information and informational analysis. It should be noted that the Law on Information had not been revised in relation to the regulation of media ownership in the last five years.

Another aspect that might have a negative impact on the freedom of media is that the provisions regarding the restrictions to enter the media market are not working effectively enough. According to the existing legal regulation there are no restrictions to enter the media market for the banks' subsidiary companies. The fact that the bank *Snoras* obtained 34 per cent of the shares in the *UAB Lietuvos rytas*, which owns a daily and a television station, reflects the mentioned legal imperfection. This could be considered as a threat to diversity, as it is very likely that the news related to *Snoras* in all of the group's media will be covered less objectively, in a more favourable light than before the acquisition of the shares.

However the situation in the nearest future may change. The draft amendments of the Law on Information<sup>39</sup> concerning the restriction to enter the media market are already prepared. According to the draft provisions, a prohibition to enter the media market is applied to banks as well as to their owned or newly established companies. If this amendment is adopted by the Parliament, the provision shall be applicable, however, only for the companies, which are established after the amendment comes into force.

Still another issue is the lack of guarantees of the LRT's independence against the political powers. The funding of the LRT from the state budget should be linked with a certain economic index in order for this funding not depending on the political climate in the Parliament each time, and such attitude should be enshrined in the Law on LRT.

It should be noticed that the mechanisms of self-regulation in the Lithuanian traditional media work quite well; however, they are not sufficient in the field of Internet media. A closer co-operation is needed between the representatives of all kinds of media and self-regulatory institutions due to the fact that there is a growing tendency for the traditional media to move to the Internet space.

In the context of the given report, it needs to be noted that the legal regulation established in laws on the discussed issues is general and it can create preconditions for appearance of such legal situations in the future, where due to insufficient legal regulation freedom of information will not be ensured and human rights and freedoms, as entrenched in the Constitution, will not be protected and defended to a sufficient degree.

The media environment is changing very rapidly and it is obvious that changes in the media market are closely linked with the technological developments. So, from time to time it is necessary to revise the regulation of the media in order for the legislation not lacking behind the progress of informational technologies.

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<sup>39</sup> The draft of the amendments of the Law on information is available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=411889&p\\_query=&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=411889&p_query=&p_tr2=2).

## LUXEMBOURG

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### 2.2.17. Luxembourg

#### 2.2.17.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.17.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The Grand-Duchy of Luxembourg guarantees the freedom of expression to its citizens by virtue of Art. 24 of the Constitution, stating that<sup>1</sup>:

“Freedom of speech in all matters and freedom of the press is guaranteed, subject to the repression of offenses committed in the exercise of these freedoms. No censorship may ever be introduced.”

- Freedom to receive and to access information

No specific constitutional provision is mentioned in the Fundamental Law.

- Safeguards on regulatory authorities

The independence of regulatory authorities is not guaranteed by the Constitution as such, but the Regulations (Règlements Grand-Ducal) concerning the organisation of the bodies created by the Loi 1991<sup>2</sup> «Loi modifiée du 27 juillet 1991 sur les medias électroniques» (Law of 27 July 1991 on Electronic Media)<sup>3</sup> and based on this law as well as the Loi 1991 itself foresee the independence.

- Safeguards on “universal service”

There are no general safeguards on universal service for the media, but again only a specific provision concerning electronic communications in the law on electronic communication services of 2011 (see below).

##### 2.2.17.1.2. *Media order (de lege lata and de facto)*

- “Market Entry”
  - Licensing schemes; remit psm; notification for print publications

The Loi 1991 sets up different categories of broadcasters or – as it is formulated nowadays according to the revision of 2010 – audiovisual media service providers (Art. 9 to 23quater). The categories range from broadcast services with an international impact/reach, broadcast services aimed at a resident audience including different forms

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<sup>1</sup> Luxembourgish constitution, available from: [http://www.legilux.public.lu/leg/textescoordonnes/recueils/constitution\\_droits\\_de\\_lhomme/PAGE\\_GARDE.pdf](http://www.legilux.public.lu/leg/textescoordonnes/recueils/constitution_droits_de_lhomme/PAGE_GARDE.pdf) (in French).

<sup>2</sup> This law was amended by Loi du 08 avril 2011 (Mém. A – 69 du 12 avril 2011, p. 1120) and Loi du 17 décembre 2010 (Mém. A - 241 du 24 décembre 2010, p. 4024) and Loi du 08 juin 2004 (Mém. A – 85 du 08 juin 2004, p. 1202) and Loi du 02 avril 2001 (Mém. A – 42 du 17 avril 2001, p. 924).

<sup>3</sup> Link to all versions of the law under: <http://www.legilux.public.lu/leg/a/archives/1991/0047/1991A09721.html?highlight=medias>.



of radio providers depending on which technology they use for dissemination, satellite and cable systems and services as well as on-demand services.

Most of these providers (e.g. international broadcast services according to Art. 9) need a licence issued by the government after an obligatory consultation (however with the outcome being of a non-binding nature) of the *Commission indépendante de la radiodiffusion* (Independent Commission for Broadcasting (or, as in the report of 2004, Independent Broadcasting Commission)). The concession awarded is combined with a *cahier des charges* (book of obligations) which can define further obligations especially concerning reporting of ownership changes or specific programme requirements.

Some electronic media services are only under a notification duty, such as e.g. purely internet-based television services which are not disseminated by other means (cf. Art. 23bis) or on-demand services (Art. 23ter). Such a notification scheme also exists for audiovisual media services from third countries (i.e. outside the European Economic Area) that use a satellite uplink in Luxembourg or (under certain conditions) a Luxembourgish satellite capacity (Art. 23quater).

Concerning the question of public service media which only exist to a very limited extent this report refers to the answers concerning the concrete players below as there is no general framework foreseen for public service media in all fields in the constitution or the relevant media legislation.

There is one public service media provider installed, which is "Radio 100,7", the socio-cultural radio station in the sense of Art. 14 Loi 1991 with mission defined in a contract reaching over several years.

For television, unlike the radio sector, there is no public service entity, but the commercial broadcaster RTL (via the entity CLT-UFA) has contractually agreed with the state of Luxembourg in its licence to provide public service content for the citizens and population of Luxembourg (more details below).

Print publications can be produced and disseminated without notification to a public body.

- Media pluralism/ownership; competition law aspects

The original observation of the 2004 report (1.4) is still valid in that there are no media-specific competition law provisions dealing with concentration on the media sector. There used to be a provision in the old Loi 1991 (Law on the Electronic Media) before it was reformed in 2010, limiting ownership of more than 25% in any radio service disseminated via networks to one per concession holder (Art. 18 para. 2). With the amendment the provision was abrogated as this safeguard was no longer regarded to be necessary for enabling a competitive framework for local radio programmes (cf. p. 26 (concerning Art. 20 of the amending law) of the comments on the Projet de Loi 6145<sup>4</sup>). Also, the regular legislation on competition<sup>5</sup> does not contain any provisions with specific effect for the media sector. Evidently, the market surveillance rules (ex post control) for the electronic communications networks and services sector in transposition of the EU law rules apply, as the Loi 2011 provides.

For all licence holders the above-mentioned books of obligations that accompany the concessions can contain provisions on how certain information should be presented

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<sup>4</sup> <http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&id=6145#>.

<sup>5</sup> Loi du 23 octobre 2011 relative à la concurrence, Mém. A - 218 du 28.10.2011, p. 3756, <http://www.legilux.public.lu/leg/a/archives/2011/0218/a218.pdf#page=2>.

respecting “pluralism of ideas and freedom of information” (cf. Art. 10 para. 1 lit c) Loi 1991). In more general terms the Loi 1991 mentions as one goal to be reached by the law – by setting an adequate framework (cf. Art. 1 para. 2) – to highlight the culture of the country in the programmes.

- Legal framework for psm; ability to fulfill their tasks

There is only one specific public service media operator and that is the above-mentioned socio-cultural radio (Radio 100,7). Its remit and financing is – as requested by law – based on a multiannual contract between state and organisation (not published). The mission has been accomplished to date so the financing structure seems to function.

In addition, for the sector of television and radio, CLT-UFA, the original monopoly licence holder for television and radio in Luxembourg and now subsidiary of the RTL group S.A., has taken responsibility to disseminate certain content which equates to a public service offer. In concrete terms the company has accepted in a framework agreement<sup>6</sup> with the government (last prolonged in 2007 until 2020) to screen at least a daily radio and television programme, the latter with a special focus on information. The television service is not specifically produced for the whole length of 24 hours, but certain elements are included in order to fulfil the minimum programme requirements, such as e.g. a special news programme per day, a list of events with exceptional importance for society that have to be covered etc. There are further details laid down concerning what kind of information shall be delivered, that fundamental principles such as pluralism of opinions are to be respected, that the relevant issues for Luxembourgish life are to be portrayed etc.<sup>7</sup> The company does not receive specific funding (such as e.g. in form of a licence fee) to perform these duties, but it is a service offered in return to an advantageous framework set by the government that allows a sufficient income to be reached with the channels and for the company in total. As in reality granting the concession for the television programme results in a monopoly, because the market is not large enough for a competitor of noteworthy size (and consequently no other programme of a similar scope has been established with success) the advertising revenue possible for the television sector is directed to the RTL programme.

Also, as a form of public service broadcaster one can mention Chamber TV, a television programme in the responsibility of the parliament that is limited to disseminating the parliamentary debates and some additional political background information, so is of very limited scope.

- The role and functioning of regulatory authorities in these respects

The Luxembourgish Loi 1991 (Law on Electronic Media) creates in its institutional chapter (art. 29 et seq) five bodies, of which the following three are worth mentioning in this context<sup>8</sup>:

1. Service des médias et de l’audiovisuel (renamed later to Service des médias et des communications, SMC)

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<sup>6</sup> [http://www.mediacom.public.lu/medias/television/concessions\\_programmes/concession\\_2007/ReglesdebaseSP.pdf](http://www.mediacom.public.lu/medias/television/concessions_programmes/concession_2007/ReglesdebaseSP.pdf).

<sup>7</sup> [http://www.mediacom.public.lu/medias/television/concessions\\_programmes/concession\\_2007/Engagements\\_Services\\_Publics.pdf](http://www.mediacom.public.lu/medias/television/concessions_programmes/concession_2007/Engagements_Services_Publics.pdf).

<sup>8</sup> Further details can be found both in the Final Report as well as the Country Report for Luxembourg of the INDIREG-Study (based on contributions by the same expert as for this questionnaire; published under: [http://ec.europa.eu/avpolicy/docs/library/studies/regulators/final\\_report.pdf](http://ec.europa.eu/avpolicy/docs/library/studies/regulators/final_report.pdf) and [http://www.indireg.eu/wp-content/uploads/Annex\\_II-\\_CountryTables\\_Luxembourg.pdf](http://www.indireg.eu/wp-content/uploads/Annex_II-_CountryTables_Luxembourg.pdf)) as well as under [http://www.mediacom.public.lu/institutions/Institutions\\_nationales/index.html](http://www.mediacom.public.lu/institutions/Institutions_nationales/index.html).

This "service unit" is a part of the governmental administration working for the minister responsible for the media (currently the Minister for Communications and the Media). As such, it is staffed with state employees that provide assistance to the minister, but also for the other institutions created by the law in the field of the media. In addition, the SMC is in charge of maintaining international cooperation including the working groups on EU level. Although it is integrated into the regular administration, the SMC is regarded as having a special position by building bridges between the different parties involved in the media landscape. According to the Loi 1991 for certain concession holders there are government commissioners installed (Art. 29 para. 2 lit d), monitoring the activities of the companies. The SMC has "to assist the government commissioners charged with the monitoring of the holders of concessions or permits, the Independent Commission for Broadcasting created by Article 30 (...)". Although the law does not define what extent this assistance amounts to and whether an effective control of the obligations can be reached, in practice it is the SMC that is the government branch fulfilling the monitoring assistance competencies in addition to the commissioners themselves.

## 2. Commission indépendante de la radiodiffusion (CIR)

This independent commission (Art. 30) has inter alia responsibilities in the field of certain radio programmes as well as advising the government previous to any granting of licences to broadcasting programmes. It is fully competent to supervise the respect of the book of obligations under articles 15 to 18 so for radio service providers using low power transmitters, local radio stations and networks (cf. art. 30 (2)), however not for radio service providers using high power transmitters. For the first it is also the CIR that grants the licences or permits, other than in the majority of cases of electronic media in which it is the government. For all other licences issued, the CIR has to be consulted by the government before the competent minister issues in the name of the government a concession or permit to a media service provider. The CIR is composed of five members, one of whom is proposed by the Press Council. The nomination of the members comes in form of a so-called "arrêté grand-ducal" (which is a person-related form of a Règlement grand-ducal) and is valid for five years. The members receive an allowance covered by the state budget and fixed by the government.

## 3. Conseil national des programmes (CNP)

The organisation of the National Programme Council "*Conseil national des programmes* (CNP)", a body created by the Loi 1991 which is in charge of advising and assisting the government in the monitoring of the different categories of audiovisual media programmes as created by the law, is determined by Règlement 1992.<sup>9</sup> The autonomy of the CNP is already safeguarded by Loi 1991, which in Art. 31 para. 5 clarifies that the appointment of the president and two vice-presidents of the council remains in the hands of the members that choose them from within their circle; also, these may not be part of the governmental administration.<sup>10</sup>

CNP which is of special relevance here, has several functions in connection with television and radio programmes which will be detailed below. The CNP has a maximum of 25 members who are sent as delegates from organisations representing groups active in the

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<sup>9</sup> Règlement grand-ducal du 27 février 1992 fixant les dispositions sur le fonctionnement interne du Conseil National des Programmes, créé par l'article 31 de la loi du 27 juillet 1991 sur les médias électroniques, Mém. A - 13 du 19.03.1992, p. 657:

<http://www.legilux.public.lu/leg/a/archives/1992/0013/a013.pdf#page=3>.

<sup>10</sup> For more in-depth analysis cf. INDIREG-Study, published under: [http://ec.europa.eu/avpolicy/docs/library/studies/regulators/final\\_report.pdf](http://ec.europa.eu/avpolicy/docs/library/studies/regulators/final_report.pdf) and [http://www.indireg.eu/wp-content/uploads/Annex\\_II-\\_CountryTables\\_Luxembourg.pdf](http://www.indireg.eu/wp-content/uploads/Annex_II-_CountryTables_Luxembourg.pdf).

social and cultural life. The list of organisations entitled to send members to the CNP is fixed in a respective "arrêté grand-ducal", the actual nominated persons are confirmed in a "arrêté ministériel portant nomination des membres du Conseil National des Programmes", the last one dating from 17 September 2007. Some basic procedural rules, such as the question of valid majorities in decision-making are to be found in the Règlement which additionally grants the CNP the right to complement the Règlement with a set of internal rules that give more details on the way work is conducted.

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

The Loi 2004 («Loi sur la liberté d'expression dans les medias du 8 juin 2004») (Law on the freedom of expression in the media of 8 July 2004)<sup>11</sup> in its current version provides in Art. 1 and 6:

Article 1: "This law is intended to ensure the freedom of expression in the media."

Article 6: "(1) The freedom of expression referred to in Article 1 above includes the right to receive and seek Information, to decide how to communicate it to the public using a freely selected form and method and to comment and criticise it. (2) The public must be able to distinguish between the fact itself and the comment made on it." The Loi 2004<sup>12</sup> is mainly a law to safeguard the work of professional, i.e. registered journalists. One should point out that the registration as a journalist is not a prerequisite to work as a journalist, but it comes with a number of privileges that are only accorded to such registered professionals. Also, the registration process only foresees minimum requirements such as the applicant having to be of age, not been stripped of civil rights in Luxembourg according to the relevant laws and not be at the same time involved in companies or activities concerning publicity/advertising. In effect, the registration for being categorized as professional journalist constitutes no hurdle but in actual fact grants a strong status, both in view of the rights assigned as well as the public opinion as one can rely on a "checked" list of journalists that is also transparent.<sup>13</sup> The procedure for application of a journalist card, its handing out and withdrawal as well as other elements such as the drawing up of a code of conduct (see below) is transferred by the law to a self-regulatory body, the Conseil de Presse (Press Council, cf. further Art. 23 et seq. Loi 2004), which has civil personality.

The Loi 2004 provides various rights for the media and its professional journalists. Professional journalists can refuse to allow information to be published under their names if changes have been made without their consent. This refusal cannot constitute a reason for being dismissed (Art. 4). Art. 6 provides for the right to receive and seek information, to decide freely how to communicate it to the public in whatever form and method, as well as to comment and criticize it. Sources are protected widely under Art. 7, whereas Art. 9 specifically mentions that works of journalism are protected as intellectual property. In addition, the law creates a strong position vis-à-vis the publisher (Art. 4 and 5). There are some general rules on journalistic work contained in Loi 2004, such as the obligation to separate fact and comment (Art. 6 para. 2). The law further includes

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<sup>11</sup> Published in a consolidated version in Mémorial 69 du 30.04.2010 page 1325/  
<http://www.legilux.public.lu/leg/a/archives/2010/0069/a069.pdf#page=3>.

<sup>12</sup> This law was amended by: Loi du 27 juillet 2007 (Mém. A - 131 du 8 août 2007, p. 2330) and Loi du 11 avril 2010 (Mém. A - 69 du 30 avril 2010, p. 1324); Link to all versions of the law under <http://www.legilux.public.lu/leg/a/archives/2004/0085/index.html>.

<sup>13</sup> The list is available at <http://www.press.lu/journalistes/>, in addition an overview of the editors-in-chief [http://www.press.lu/redacteurs\\_chef/](http://www.press.lu/redacteurs_chef/).

obligations for journalists and in Art. 21 Loi 2004 a provision creating liability if these provisions are violated. The provisions aim at safeguarding presumption of innocence, private life, protection of honour, protection of minors and due diligence in research. However, for each of them there are exceptions that clarify that a person is not in breach, e.g. concerning information about private life, if *inter alia* it is a quotation by another person and the publication of this quotation is in the public interest. Also, there is no "culture" of claiming severe damages for reputation damages that would lead to a silencing of journalistic work. Finally, in recent years the data protection law has been amended to include a privilege for the press in Art. 9 Data Protection Law.<sup>14</sup> This provision safeguards the journalistic processing of data which is exempt from the strict limitations under the General Data Protection Law.

The provisions of the Loi 2004 formulate the obligations in a way that the published media has to contain certain information. The definitions of Art. 3 no. 8-11 and no. 3 clarify that all media that are published periodically or non-periodically are under responsibility of a publisher/editor as defined by no. 3. The liability provision of Art. 21 clarifies this responsibility of the editor so the requirement to publish information applies to all media that are made available to the public by a publisher, both on physical and non-physical media, both periodical and non-periodical (although for the latter limited to the obligation of Art. 62). Only media published by a concession or permit holder according to Loi 1991 are exempt from the information obligations (Art. 69), although they are also required to have the information mentioned in the previous articles available at any time for disposal to the public. What exactly this means is somewhat unclear, especially as there is no jurisprudence available; a clarification on whether keeping available is the flipside of making available on request would be helpful. In a similar vein, the exact impact of the provision of Art. 6 Loi 2004 remains unclear. As was argued in the report 2004 (under 1.2) the introduction of this provision and the emphasis on the importance of access to information for the work of journalists makes it potentially applicable in disputes concerning an arbitrary decision to keep information on hold. As far as information on its application is available, this remains unclear until today as it has not been argued in this sense before courts.

- Specific positive content obligations

The Loi 1991 foresees the possibility for the government to include in the book of obligations that accompanies licences certain minimum content obligations, such as e.g. foreseen by Art. 10 para. 1 lit. c), d) and e). It therefore depends on each individual concession agreement whether or not content obligations of more general or specific nature are included. As mentioned, this is the case concerning the RTL radio and television programmes that have a minimum content requirement concerning Luxembourgish issues, thereby fulfilling a public service remit. In addition, for the radio sector Art. 14 para. 3*bis* authorizes the state to conclude a multi-annual agreement with the socio-cultural radio institution (Radio 100,7) defining exactly its public service mission.

An example for a specific content obligation can be seen further in the book of obligations of DOK T.V., which is a television station open to all the public to use it for dissemination

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<sup>14</sup> Loi du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel (General Data Protection Act of Luxembourg), Mém. A -91 du 18 Aout 2002, p. 1836, last amended by Loi du 28 juillet 2011, Mém. A - 172 du 10.08.2011, p.2938 ; after the previous amendment of 2007 a consolidated version was published/  
<http://www.legilux.public.lu/leg/a/archives/2007/0131/a131.pdf#page=11>

of their own documentaries, and which is obliged to screen programmes of quality, with a cultural, information and diversity orientation and respecting the specifics of the Luxembourg public e.g. in moral terms (cf. Art. 3 cahier des charges DOK T.V.).

- Funding schemes for specifically desired content

Concerning the print sector there is a specific law on aid granted to the printed press if certain conditions are fulfilled (Law of 3<sup>rd</sup> August 1998).<sup>15</sup> The aim of the law is to reach the whole population (language aspect) and to promote specific content (information) that covers national and international politics as well as economic, social and cultural issues, under a certain limitation in the amount of advertising revenue generated by the publication. Also, the radio and television content requirements agreed with RTL for the specific programmes with a public service content cover these topics. However, for the latter there is no specific funding scheme. In addition, the government can request from RTL to transmit certain additional content on television, such as specific events, which then has to happen on the cost of the government.

- Political advertising and/or broadcasting time

Both for the radio and television programmes offered by RTL on behalf of the public service agreement between the government and CLT-UFA such provisions are foreseen. In the radio and television programmes time is reserved to be filled by the political parties and in their responsibility especially in pre-election times.

- Codes of conduct and their organisational framing

The Loi 2004 introduces a framework for self-regulation according to which a press council is established that – inter alia – sets up a “Code de déontologie” (Code of conduct) with indications of rights and obligations of journalists<sup>16</sup>. The underlying organisational framework is the creation of a Press Council according to Art. 23 et seq. of Loi 2004. One of the obligations of this Press Council is to create a code of conduct and ensure its publication, as well as introducing a complaints procedure in which complainants can also refer to issues covered by the code and not only the law.

- The role and functioning of regulatory authorities in these respects

Concerning the fulfillment of the public service obligations both of CLT-UFA and the socio-cultural radio the Loi 1991 empowers the above-mentioned National Programme Council (CNP) to monitor the content of these programmes also in view of their special commitments. The provision in Art. 31 Loi 1991 does not only assign the task of monitoring programme content but in the case of the socio-cultural radio also to propose how a balanced content in the programme of that radio can be reached. The monitoring function of the CNP concerns all content of the programmes, however not the other issues of the broadcasts such as advertisements, as follows from the procedure for sanctions in Art. 35, namely para. 2 and *2bis*. For the latter as well as generally for assisting the CNP as well as the government Commissioners in their work, the Loi 1991

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or [http://www.cnpd.public.lu/fr/legislation/droit-lux/doc\\_loi02082002mod\\_fr.pdf#pagemode=none](http://www.cnpd.public.lu/fr/legislation/droit-lux/doc_loi02082002mod_fr.pdf#pagemode=none) which is also available as unofficial English translation at [http://www.cnpd.public.lu/fr/legislation/droit-lux/doc\\_loi02082002\\_en.pdf](http://www.cnpd.public.lu/fr/legislation/droit-lux/doc_loi02082002_en.pdf).

<sup>15</sup> Texte coordonné du 30 avril 2010 de la loi du 3 août 1998 sur la promotion de la presse écrite (Mém. A - 81 du 23 septembre 1998, p. 1592), Mém. A - 69 du 30 avril 2010, p. 1337, <http://www.legilux.public.lu/leg/a/archives/2010/0069/a069.pdf#page=15>.

<sup>16</sup> Attached since the reform of the Loi 2004 as an annex to this law: <http://www.legilux.public.lu/leg/a/archives/2010/0069/a069.pdf#page=2> on p. 1339 et seq. or to be found at <http://www.press.lu/upload/manager/files/codedeontologie1.pdf>.



assigns in Art. 29 the task to the above-mentioned SMC, the responsible minister's specially created service. According to Art. 30 and 35 para. 1*bis* Loi 1991 the CIR has full responsibility of monitoring specific categories of radio programmes that fall under its scope.

- Distribution Aspects
  - Access to frequencies

The access to frequencies is regulated by Loi 1991 and a Grand-Ducal Regulation based on the law defining the list of available frequencies. Assignment of the frequencies happens with the granting of a licence so the permit holder receives the allowance to broadcast and also the technical means to do so. Therefore, the responsibility for granting access is with the government in the decision for a licence. Only for the allocation of frequencies for low-power transmitters the responsibility is assigned to the CIR.

- Access to distribution networks and control of actual conditions

Access to different forms of networks for dissemination of content, e.g. via cable networks, is regulated by the Loi 2011 in Art. 22 et seq. As this law transposes the EU framework for electronic communications networks and services in the version of 2009 it follows the usual regulation in this field, e.g. concerning the possibility for the Luxembourgish Institute for Regulation (Institut Luxembourgeois de Régulation (ILR) to react to a lack of competition in the market. There is no specific safeguard of dissemination means for printed press.

- Must-carry/must-offer rules for electronic media

There are no must-carry rules established for specific electronic media in Luxembourg. However, the government may in the book of obligations include the requirement of concession holders e.g. in the case of Luxembourgish international broadcast services according to Art. 9 Loi 1991 to broadcast programmes of the socio-cultural radio (cf. Art. 10 para. 1 lit. e)) or other programmes under conditions laid down in the book of obligations. Also, for the different categories of media services there is an obligation to place the facilities free of charge if the state requires so for the transmission of information e.g. relating to the security of human life. For the specific institutions concerned with public service content the above-mentioned must-offer obligations exist, which are partly not only formulated in general terms in the agreement between state and entity, but partly also in an explicit list such as the list of exceptional events to be covered in the Luxembourgish RTL programme.<sup>17</sup>

- Role of platform operators

The operation of platforms distributing electronic media content is also regulated by the Loi 1991 and based on a concession system. The law differentiates depending on the kind of platform concerned, e.g. whether it is a satellite operator or cable network provider. As part of this concession the concessionaire can choose to whom he assigns capacities, but there is an obligation to inform the government about the capacity holders and – illustrated for the example of a Luxembourgish satellite system – the government may

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<sup>17</sup> Included is e.g. the live transmission of the Te Deum, cf. [http://www.mediacom.public.lu/medias/television/concessions\\_programmes/concession\\_2007/ListeEvenements\\_Exceptionnels.pdf](http://www.mediacom.public.lu/medias/television/concessions_programmes/concession_2007/ListeEvenements_Exceptionnels.pdf).



oppose specific contracts in view of the identity of the capacity holder (Art. 20 para. 5). Also, the government has the right to include in the book of obligations of the satellite concessionaire an obligation that capacity is given to the government at request if needed for specific purposes (Art. 20 para. 7). For cable networks that have to comply with the requirements of Loi 2011 in general, there are specific provisions in Loi 1991 further detailing their obligations. According to Art. 22 para. 4 and 5 only television or radio services that either have a concession from Luxembourg or in the case of foreign services have not been explicitly prohibited may be carried by the network. In addition, a regulation can be passed requesting that certain Luxembourgish services are transmitted as priority. There is currently no such Règlement, but there is an executing regulation for cable services that lays down the elements that can be covered in the book of obligations accompanying the concession agreement. Articles 23*bis* and 23*ter* concern television broadcasts disseminated by other networks than satellite, cable or terrestrial as well as on-demand services. For these, only notification obligations exist.

- The role and functioning of regulatory authorities in these respects

For the field of electronic communications networks and services, regulated by the Loi 2011<sup>18</sup>, the independence of the regulator – ILR – is safeguarded following EU law requirements by the law establishing it<sup>19</sup>, namely in its Articles 1 and 2. This institution that is independent of the government and equipped with certain regulatory powers in the management of electronic communications networks and frequency management, plays a role concerning the use of content transportation means. However, it is not directly involved in the regulation or supervision of any audiovisual media services.

Concerning the dissemination of media services via these networks the supervision is assigned in parallel to the monitoring of the content services with a Luxembourgish concession, which means to the CNP and SMC. The role of the supervising CNP can be laid down in more detail in the book of obligations.

- Access to Information

- Transparency of media ownership situations

The Loi 2004 creates specific obligations of transparency concerning media ownership information which can be regarded as one form of access to relevant information.

The provisions of the law formulate the obligations in a way that the published media has to contain certain information. The definitions of Art. 3 no. 8-11 and no. 3 clarify that all media that are published periodically or non-periodically are under responsibility of a publisher/editor as defined by no. 3. The liability provision of Art. 21 clarifies this responsibility of the editor so the requirement to publish information applies to all media that are made available to the public by a publisher, both on physical and non-physical media, both periodical and non-periodical (although for the latter limited to the obligation of Art. 62). Only media published by a concession or permit holder according to Loi 1991 are exempt from the information obligations (Art. 69), although they are also required to

<sup>18</sup> Loi du 27 février 2011 sur les réseaux et les services de communications électroniques, Mém. A – 43 du 08.03.2011, p 610:  
<http://www.legilux.public.lu/leg/a/archives/2011/0043/a043.pdf#page=2>.

<sup>19</sup> Loi du 30 mai 2005 portant: 1) organisation de l'Institut Luxembourgeois de Régulation; 2) Mém. A – 73 du 07.06.2005, p. 1162, modified several times, complete overview at <http://www.legilux.public.lu/leg/a/archives/2005/0073/2005A11621.html?highlight=institut%22luxembourgeois%22regulation>; An unofficial consolidated version to be found at: [http://www.ilr.public.lu/ilr/legislation/Loi\\_du\\_30\\_mai\\_2005-organisation\\_ilr\\_texte\\_coordonne\\_version\\_interne.pdf](http://www.ilr.public.lu/ilr/legislation/Loi_du_30_mai_2005-organisation_ilr_texte_coordonne_version_interne.pdf) (last amendments of 2011 not included yet).

have the information mentioned in the previous articles available at any time for disposal to the public. What exactly this means is somewhat unclear, especially as there is no jurisprudence available; a clarification on whether keeping available is the flipside of making available on request would be helpful. In a similar vein, the exact impact of the provision of Art. 6 Loi 2004 remains unclear. As was argued in the report 2004 (under 1.2) the introduction of this provision and the emphasis on the importance of access to information for the work of journalists makes it potentially applicable in disputes concerning an arbitrary decision to keep information on hold. As far as information on its application is available, this remains unclear until today as it has not been argued in this sense before courts.

Concerning the actual ownership information that has to be disclosed the Loi 2004 establishes the following conditions: the requested information has to be contained in the non-periodical publication itself, though the place is not predefined (Art. 62). For periodical publications the rule is the same, i.e. it has to be available in every edition, with some additional information required (Art. 63). Art. 65 gives further precision that publications containing an index also have to include the place where to find the requested information in the index, too. The shareholder information in publications published by a legal entity has to be included in the first edition of every given year. No further details are given concerning the exact meaning of the requirement for the electronic media to have the same information available for the public, but obviously this requirement does not contain a specific disclosure on own initiative but on the contrary only on request by the public.

- Accountability of public service media

As mentioned above, the monitoring of the public service content is regulated by the Loi 1991 and the book of obligations or the agreements concluded between the state and the socio-cultural radio or CLT-UFA respectively. The CNP is charged with not only doing the usual programme monitoring but to specifically identify whether the special role of the socio-cultural radio is fulfilled and do proposals if a better way of fulfilment is possible. Disputes about these issues are to be arbitrated by the CIR (Art. 14 para. 5 phrase 3 Loi 1991). The agreement with CLT-UFA foresees that there are regular exchanges between the responsible persons of the entity with the government Commissioner concerning how the expectations are met. Also, regular studies can be commissioned by the government on this question and possible outcomes are to be respected by the company.

- Freedom of information laws

Art. 1 of Loi 1991 provides in its first paragraph that it "is intended to guarantee that the people of the Grand Duchy have unrestricted access, in the field of electronic media, to a multitude of sources of information and entertainment, guaranteeing freedom of expression and information, as well as the right to receive and transmit in the territory of the Grand Duchy any audiovisual media or sound services that conform to the legal requirements."

Luxembourg has not yet created a legal basis for general public access to documents of government and state institutions.

- Accessibility of products/services and distribution networks

Article 48 of the law on networks and electronic communication services of 2011 provides that every final user has the right to universal service in electronic communications, i.e.

the access to telephone services and related aspects, but – as foreseen in the EU framework – not covering mobile telephony or internet access.

In Luxembourg there is no legal basis for aid schemes to purchase reception devices, nor are there any public subsidies or commercially-offered reduced rates for subscription to print publications. A broadcasting license fee, like in Germany, does not exist in Luxembourg.

- “Have a Say on ...”
  - Complaint procedures, “Ombudsmen”

There is a specific complaints procedures laid down in Loi 1991 in case an individual is of the opinion that a media service is in non-compliance with the law or executing regulations or the book of obligation. There is a notification procedure to the SMC, but in practice also the CNP provides on its website a complaint form and follows up on issues brought to its attention by the audience.

- Participation in media operators/(self-)regulatory bodies

There is no specific form of public representation on bodies of media service providers foreseen in general. However, for the case of the public service radio station (Radio 100,7) the Conseil d’Administration is partly made up of representatives of the socials and cultural life of Luxembourg. Also, for different categories of electronic media service providers the Loi 1991 and the books of obligations that are agreed upon on granting the licence include provisions about government Commissioners that are appointed to assist the monitoring of the media service provider. These Commissioners typically participate with an advisory participation right in the relevant bodies of the companies. Although they are government-appointed, indirectly they can be seen as representatives of the society.

#### 2.2.17.2. Main Players in the Media Landscape

The following market shares are based on the TNS ILRES Plurimedia study Luxembourg 2010/2011, which was conducted by telephone among a random sample of 3,037 people, representative of the population residing in the Grand Duchy of Luxembourg, aged 12 years and more (15 years and more for the Press).<sup>20</sup>

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<sup>20</sup> Press release about the study including its main findings, available at [http://www.tnsilres.com/cms/\\_tnsNewsAttachments/Communique\\_de\\_presse\\_etudeplurimedia\\_2011.pdf](http://www.tnsilres.com/cms/_tnsNewsAttachments/Communique_de_presse_etudeplurimedia_2011.pdf).

2.2.17.2.1. *Radio***Table 97 LU: Main radio companies**

<b>Companies</b>	<b>Ownership structure</b>	<b>Main radio stations</b>	<b>Total market share 2010</b>
RTL	Private undertaking, part of RTL group	RTL Radio Lëtzebuerg	43%
RTL-Editpress	Private undertaking between RTL and Editpress (see below)	Eldorado	19.8%
Groupe Saint-Paul	Archbishopric of Luxembourg	DNR, Radio Latina	14%
PSB	Public undertaking	RSC 100,7	4.8%

Source: TNS ILRES Plurimedia study Luxembourg 2010/2011, [http://www.tns-ilres.com/cms/\\_tnsNewsAttachments/Communique\\_de\\_presse\\_etudeplurimedia\\_2011.pdf](http://www.tns-ilres.com/cms/_tnsNewsAttachments/Communique_de_presse_etudeplurimedia_2011.pdf)

2.2.17.2.2. *Television***Table 98 LU: Main television companies**

<b>Companies</b>	<b>Ownership structure</b>	<b>Main TV stations</b>	<b>Total Market share 2010</b>
RTL Group/ CLT-Ufa	Private undertaking; details to be found via German media concentration Commission KEK-website ( <a href="http://www.kek-online.de/db/">http://www.kek-online.de/db/</a> )	RTL Télé Lëtzebuerg, RTL	43.4%
ProSieben Sat1 Media AG	Private undertaking, programmes from Germany; further details at KEK, see above	ProSieben, Sat 1	20.2%
TF1	Private undertaking, programme from France	TF1	16%
ARD	Public undertaking in Germany	ARD	15%
ZDF	Public undertaking in Germany	ZDF	12.5%

Source: Ibid.

### 2.2.17.2.3. Press and publishing

In autumn of 2007, the company Editpress, together with the Swiss Media company Tamedia (amongst others publisher of the free Swiss newspaper 20 Minuten) published Luxembourg's first free newspaper called L'Essentiel. It is distributed in public transportation (train and bus stops). Groupe Saint Paul did the same a few months later with the newspaper Point 24. Both newspapers enjoy a strong market position, with 30% and 17.1% of market shares on the market for daily newspaper respectively.

**Table 99 LU: Main publishing houses**

Companies	Ownership structure	Main Titles	Total Market share 2010
Groupe Saint Paul	Archbishopric of Luxembourg	Luxemburger Wort, La Voix du Luxembourg, Point 24	66.5% (of which 17.1% for Point 24)
Editpress, Tamedia	private undertaking	L'Essentiel	30%
Editpress	OGB-L and FNCTT-FEL (trade unions)	Tageblatt, Le Quotidien	19.5%
Editions Lëtzebuenger Journal	Liberal Democratic Party	Lëtzebuenger Journal	2.4%
Luxembourg Communist Party	Luxembourg Communist Party	Zeitung vum Lëtzebuenger Vollek	0.7%

Source: Ibid.

2.2.17.2.4. *Online media (non-linear audiovisual (media) services; websites)***Table 100 LU: Companies and their websites, market shares**

Companies	Ownership structure	Main online media	Total Market share 2010
RTL Group	private undertaking	www.rtl.lu	13.9%
Groupe Saint Paul	Archbishopric of Luxembourg	www.wort.lu	8.2%
Public administration sites		www.etat.lu	7.9%
Editpress, Tamedia	private undertaking	www.lessentiel.lu	5.3%
RTL Group	private undertaking	RTL Télé Lëtzebuerg via Internet	1.7%

Source: Ibid.

2.2.17.2.5. *Cable/Satellite network operators, IPTV & Internet Access Providers*

Market shares are not available. A list of all Internet services providers that are registered with the IRL in accordance with the notification requirement is regularly updated and publicly available.<sup>21</sup>

**Table 101 LU: Providers of non-linear audiovisual media services**

Companies	Ownership structure	Main service
Entreprise des Postes et Télécommunications	Private undertaking, but with Luxembourg State as sole shareholder	IPTV - Télé vun der Post Internet access provider
Eltrona Interdiffusion SA	Private undertaking	VOD
Numericâble	Private undertaking	VOD
iTunes S. à r.l.	Private undertaking	VOD

Source: SMC, liste concessions février 2012, [http://www.mediacom.public.lu/medias/television/concessions\\_programmes/liste\\_concessions.pdf](http://www.mediacom.public.lu/medias/television/concessions_programmes/liste_concessions.pdf)

<sup>21</sup> [http://www.ilr.public.lu/communications\\_electroniques/registrepublic/operateurs130412.pdf](http://www.ilr.public.lu/communications_electroniques/registrepublic/operateurs130412.pdf).

2.2.17.2.6. *Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

With introduction of the Loi 1991 a Commission was set up that has the function of overseeing the impact the electronic media have on the “traditional” media markets by monitoring changes in the advertising revenues (Art. 34 para. 4). In order to fulfil this function the available advertising revenues and the division between the different media sectors are regularly established on behalf of the SMC.<sup>22</sup>

**Table 102 LU: Advertising market shares**

<b>Advertising (in billion EUR)</b>	<b>Total 2010 in EUR</b>	<b>Total Market share 2010</b>
Newspapers	€81,999	48.8%
Radios	€27,992	16.6%
Television	€14,764	8.8%
Weekly newspapers	€16,180	9.6%

Source: SMC, [http://www.mediacom.public.lu/medias/marche\\_publicitaire/index.html](http://www.mediacom.public.lu/medias/marche_publicitaire/index.html)

2.2.17.3. Conclusion and Recommendations

The Luxembourgish media landscape is characterized by a “natural” diversity that results in a remarkably wide offer of different media content to the population. This holds not only true for internationally accessible content via the internet like elsewhere but also for the traditional broadcasting market in which a significant share of audience both for radio and television directs itself at least in part to “incoming” signals especially from the offers in the neighbouring countries. For the press sector, the fact that there is more than one nationally significant publishing house involved – taking into consideration their political affiliation this is likely to remain so for the future – leads also to a selection of daily and weekly newspapers and journals with news content (in different languages) that one may not necessarily expect in view of the market size. Certainly, the subsidies for the press sector as well as the formal protection of “professional journalists” also play an important role for safeguarding this width irrespective of possible limitations in depth and broadness of topics covered due to limitations such as the size of the market including the closeness of relevant players on the political arena or the scale limitations for having international correspondent networks. Not taking into consideration the very limited scope of content in the daily free newspapers available, the establishment of two players in this area has further broadened the selection of sources used by the readers in Luxembourg. The presence of a large number of expats mainly in the capital contributes to an easy access to international press titles.

Evidently, and again accountable to the limited size of the national market, specifically produced content, e.g. in the national language Lëtzebuergesch, is limited and mainly available due to incentives created by the state, such as the multi-annual agreement with CLT-UFA to provide a public service content on its radio and television channels or by creating the public service radio programme. As a result of the assignment of a public service function to a commercial operator and in combination with the amount of licences for internationally broadcast programmes of the RTL group issued by Luxembourg, this

<sup>22</sup> Cf. the complete current tables at: [http://www.mediacom.public.lu/medias/marche\\_publicitaire/index.html](http://www.mediacom.public.lu/medias/marche_publicitaire/index.html).



operator continues to have a dominant position in the internal market of Luxembourg, but has to live up to the above-mentioned situation of a high competition of "incoming" broadcasts.

Whether the situation on the media market in general would be very much different if there had been specific competition law instruments previously, can be doubted, as the economic constraints of the market allow little space for additional activities, as can be seen by the failed attempt of setting up a national competitor in the broadcasting sector. Obviously, the limitations are not comparable in the online sector and here both specific on-demand services as well as numerous Luxembourgish information websites have been created.

In view of the legal framework, the past decade has seen significant changes, partly initiated by new or amended EU legislation, partly because of the enactment of a modernized press law in 2004 and its subsequent amendment in 2010. The latter change re-introduced the protection of the title "professional journalist" and the connected rights. Also, the work of the Press Council in the past years, though quite limited in numbers with roughly three dozen reported cases so far, has contributed to enhancing the Code of Conduct concerning the work of journalists. The Loi 1991 concerning electronic media (in view of the EU Audiovisual Media Services Directive) and Loi 2011 (in view of the original and reformed EU Framework for electronic communications networks and services) have set a completely overhauled regulatory approach for broadcasting and new media services including the networks. This will be further amended in the near future when a planned law on the reform of the supervisory structure will probably merge some of the bodies involved in the monitoring of electronic media.

The focus of the Luxembourgish government on creating competitive and advantageous surroundings for ICT companies will presumably continue to attract a diversity of players to the Luxembourgish market which in turn can also contribute to the diversity of content available. Certainly, the legislative framework and its application in practice takes into consideration the specifics of the Luxembourgish market and tries successfully to guarantee that existing content providers, which play an important role in the provision of information to Luxembourgish citizens and the population, can continue to do so in the future.

## MALTA

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### 2.2.18. Malta

#### 2.2.18.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.18.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

As already the study in 2004 indicated and extended, the Constitution of Malta contains a provision guaranteeing freedom of expression, including freedom to receive and to communicate ideas and information without interference, in Article 41.

The entire text of Article 10 of the ECHR has been incorporated into Maltese Law, respectively in Article 10 of the First Schedule to the European Convention Act, and is directly enforceable by Maltese Courts.

- Freedom to receive and to access information

Freedom to access information is not explicitly endorsed by the Constitution.

- Safeguards on regulatory authorities

In Article 118, the Constitution establishes the Broadcasting Authority and in Article 119 it sets out its functions.

- Safeguards on "universal service"

Neither the Constitution of Malta, nor the Maltese case-law contains any provision on universal service.

##### 2.2.18.1.2. *Media order (de lege lata and de facto)*

- "Market Entry"

In so far as the broadcasting media are concerned, Articles 10(1), 11(1)(a), 16I of the Broadcasting Act are relevant. Article 10(1) provides that 'Except as provided in this Act and in any other law, freedom to broadcast and to receive broadcasts is guaranteed'; article 11(1)(a) states that 'the principles of freedom of expression and pluralism shall be the basic principles that regulate the provision of broadcasting services in Malta' and Article 16I provides that 'Except as provided in this Act and in any other law, freedom to broadcast and to receive broadcasts is guaranteed.'

- Licensing schemes; remit psm; notification for print publications

The Broadcasting Act regulates the licensing/registration for commercial broadcasting stations, public service broadcasting stations, general interest broadcasting stations, and the providers of online services. The public service broadcaster's radio and television broadcasting stations are licensed by the Minister responsible for broadcasting.<sup>1</sup>

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<sup>1</sup> Article 10(4C) of the Broadcasting Act.

Commercial broadcasters are licensed by the Broadcasting Authority,<sup>2</sup> general interest objective broadcasting stations are licensed by the Broadcasting Authority (except with regard to stations owned by the public service broadcaster which continue to be licensed by the Minister responsible for broadcasting)<sup>3</sup> and the notification of providers of online services is made to the Broadcasting Authority.<sup>4</sup> In addition, the Broadcasting Authority also licences satellite radio<sup>5</sup> and satellite television<sup>6</sup> and community radio services.<sup>7</sup>

The Constitution of Malta, in Article 41 dealing with freedom of expression, provides that any person who is resident in Malta may edit or print a newspaper. However, the Constitution allows Parliament to enact laws:

- “(a) prohibiting or restricting the editing or printing of any such newspaper or journal by persons under twenty-one years of age; and
- (b) requiring any person who is the editor or printer of any such newspaper or journal to inform the prescribed authority to that effect and of his age and to keep the prescribed authority informed of his place of residence.”<sup>8</sup>

The Press Act further supplements the Constitution’s provision by allowing any person resident in Malta above the age of 18 years to edit a newspaper;<sup>9</sup> to register with the Press Registrar in the case of newspapers;<sup>10</sup> and obliges such person to deliver a free copy of a newspaper to the Press Registrar, Attorney General and Commissioner of Police.<sup>11</sup>

- Media pluralism/ownership; competition law aspects

There are no anti-concentration rules in Maltese Media Law which apply to the print medium or to the new media. In the latter two cases, the matter is regulated by competition law. Anti-concentration rules are found only in the Broadcasting Act, Article 10, with regard to the broadcasting media. This provision allows a company to concurrently own, control or be editorially responsible for more than one nationwide radio service and one nationwide television service, except in the following cases:

- (a) only one nationwide radio service may be licensed on the FM frequency to the same organization, person or company;<sup>12</sup>
- (b) not more than two generalist nationwide television services may be licensed to the same organization, person or company;<sup>13</sup>

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<sup>2</sup> Article 10(4A)(b) of the Broadcasting Act.

<sup>3</sup> Article 10(4A)(a) of the Broadcasting Act.

<sup>4</sup> Article 16O of the Broadcasting Act.

<sup>5</sup> Article 10(4)(d) of the Broadcasting Act.

<sup>6</sup> Article 10(4)(e) of the Broadcasting Act.

<sup>7</sup> Article 10(4)(c) of the Broadcasting Act.

<sup>8</sup> Article 41(3) of the Constitution of Malta.

<sup>9</sup> Article 34 of the Press Act.

<sup>10</sup> Article 35 of the Press Act. This requirement applies also to editors of broadcasting media even though these media might, in addition, need a licence from (or in the case of on-demand audiovisual media services to notify) the Broadcasting Authority.

<sup>11</sup> Article 37 of the Press Act. No such requirement is made for the broadcasting media or for on demand audiovisual media services as Article 43 of the Press Act does not extend the provisions of Article 37 of the same enactment to the broadcasting media/on-demand audiovisual media services.

<sup>12</sup> Article 10(6)(a) of the Broadcasting Act.

<sup>13</sup> Article 10(6)(b) of the Broadcasting Act.

- (c) the same organisation, person or company may not own, control or be editorially responsible for more than one nationwide radio or television service predominantly transmitting news and current affairs;<sup>14</sup>
- (d) the same organisation, person or company may not own, control or be editorially responsible for more than one community radio service;<sup>15</sup>
- (e) any organisation which owns, controls or is editorially responsible for a nationwide radio service or a nationwide television service or a satellite radio service may not own, control or be editorially responsible for a community radio service.<sup>16</sup>

On the other hand local councils may not own, control or be editorially responsible for any broadcasting service (including a community radio service).<sup>17</sup>

The ordinary competition law applies in so far as media ownership is concerned. There have been no cases of relevance to this study which can be reported upon.

- Legal framework for psm; ability to fulfill their tasks

There is no provision in the Broadcasting Act which establishes a legal framework for public service media operations, whether broadcasting or online. The Broadcasting Act does state that all government broadcasting should be carried out through a company owned by Government but stops short from setting out the terms of reference of such company.<sup>18</sup> It is the National Broadcasting Policy<sup>19</sup> which attempts to fill in these legal gaps by setting out Public Broadcasting Services Limited's remit as a public service broadcaster. This is done through an agreement, a public service obligation, entered into between the Minister responsible for broadcasting and the said company.

As to the ability to fulfil their tasks and their actual performance, one of the difficulties encountered by the public service broadcaster has been that it did not benefit from the fees received by way of television licence fees. Up till 31 December 2011, when such television licence fees were still levied by the Government, the proceeds of such fee used to be absorbed by the Government for non-broadcasting use: the Government used to retain these fees as part of its income without passing it on to the public service broadcaster. Since 1 January 2012, broadcasting licences fees have been abolished and therefore are no longer collected. As the finances given by the Government to the public service broadcaster are relatively small, the public service broadcaster has had to compete with private broadcasters for advertising revenue. On the other hand, private broadcasting stations have been critical of this move as the public service broadcaster is competing with them for advertising revenue. The public service broadcaster practically farms out all its programmes except its news bulletin and some current affairs programmes.

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<sup>14</sup> Article 10(6)(c) of the Broadcasting Act.

<sup>15</sup> Article 10(6A) of the Broadcasting Act.

<sup>16</sup> Article 10(6A) of the Broadcasting Act.

<sup>17</sup> Article 10(6D) of the Broadcasting Act.

<sup>18</sup> Article 10(4D) of the Broadcasting Act.

<sup>19</sup> Available at [www.ba-malta.org/file.aspx?f=682](http://www.ba-malta.org/file.aspx?f=682).

- The role and functioning of regulatory authorities in these respects

The Broadcasting Authority has been designated by law as the competent authority to license satellite radio and television broadcasting<sup>20</sup> and has been designated by law as the competent authority to licence digital radio broadcasting.<sup>21</sup>

The regulatory authority does not as a rule have a say on what information is provided by broadcasting media except in the case of the public service broadcaster where the Authority has to approve the programme schedule of the public service broadcaster's television station (Television Malta – TVM) and during the electoral campaign for EU Parliamentary elections, general elections and referenda where the Broadcasting Authority approves programme schedules of all broadcasting stations (radio and television) to ensure that during that four to five week campaign all stations respect the constitutional provision concerning due impartiality and balance in political broadcasting.

- "Pursuit of Core Activity"

- Ordinary law safeguards for journalistic activity

Journalistic activity is primarily carried out under the provisions of the Press Act. In Malta journalists are not a warranted profession. There is no register of journalists. Journalists are given a Press Card from the Department of Information. This Card simply gives them access to Government-held activities but can in no way be compared to a licence to exercise the profession of a journalist.

Journalistic activity is also carried out under the provisions of the Criminal Code and, in the case of broadcasting, also under the Broadcasting Act. There are certain privileges which these laws grant to journalists. For instance, the Criminal Code does not allow the Police to arrest a journalist without warrant<sup>22</sup> or to arrest a journalist for allegedly committing a contravention or a crime not subject to the punishment of imprisonment.<sup>23</sup>

The general provision regulating the protection of journalistic sources is found in Article 46 of the Press Act. It reads in the relevant part as follows:

"No court shall require any person mentioned in Article 23 to disclose, nor shall such person be guilty of contempt of court for refusing to disclose, the source of information contained in a newspaper or broadcast for which he is responsible unless it is established to the satisfaction of the court that such disclosure is necessary in the interests of national security, territorial integrity or public safety, or for the prevention of disorder or crime or for the protection of the interests of justice:

Provided that the court shall not order such disclosure unless it is also satisfied that in the particular circumstances of the case the need for investigation by the court outweighs the need of the media to protect its sources, due regard being taken of the importance of the role of the media in a democratic society."

Exceptions to this provision are found in the Criminal Code<sup>24</sup> and in special laws.<sup>25</sup>

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<sup>20</sup> Article 16C(1) of the Broadcasting Act.

<sup>21</sup> Consumer Protection Laws (Amendment) Act, 2006, Act No. XV of 2006, now Article 16B of the Broadcasting Act.

<sup>22</sup> See Article 355X(5) of the Criminal Code.

<sup>23</sup> See Article 355Y of the Criminal Code.

<sup>24</sup> Chapter 9 of the Laws of Malta.

Journalists are not afforded an absolute right to refuse to testify. On the contrary, there are laws which oblige any person, including a journalist, to testify.<sup>26</sup>

Searches are regulated by Article 355E of the Criminal Code which, in relevant part, reads as follows:

"355E. (1) Saving the cases where the law provides otherwise, no police officer shall, without a warrant from a Magistrate, enter any premises, house, building or enclosure for the purpose of effecting any search therein or arresting any person who has committed or is reasonably suspected of having committed or of being about to commit any offence unless:

- (a) the offence is a crime other than a crime punishable under the Press Act and there is imminent danger that the said person may escape or that the *corpus delicti* or the means of proving the offence will be suppressed; or
- (b) the person is detected in the very act of committing a crime other than a crime punishable under the Press Act; or
- (c) the intervention of the Police is necessary in order to prevent the commission of a crime other than a crime punishable under the Press Act; ..."

There are no provisions on the Statute book which allow a person to shut up the press through libel suits. This is because the consequences for libel are not of such a nature which bring about the closure of the medium concerned. Nor are the damages involved of an exorbitant and prohibitive nature as the maximum amount to be inflicted cannot exceed five thousand Euro.

Defamation is a criminal offence in terms of Article 252 of the Criminal Code:

- "252. (1) Whosoever, with the object of destroying or damaging the reputation of any person, shall offend such person by words, gestures, or by any writing or drawing, or in any other manner, shall, on conviction, be liable to imprisonment for a term not exceeding three months, or to a fine (*multa*).
- (2) Where the defamation consists in vague expressions or indeterminate reproaches, or in words or acts which are merely indecent, the offender shall be liable to the punishments established for contraventions.
  - (3) Where the defamation is committed by means of writings, effigies or drawings, divulged or exhibited to the public, the offender shall be liable to imprisonment for a term not exceeding one year.
  - (4) Where the defamation is directed against an ascendant, and the offence is punishable with imprisonment, the offender shall also be liable to a fine (*multa*)."

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<sup>25</sup> For a list of such laws see Kevin Aquilina, 'Protection of Journalistic Sources in Maltese Law: An Appraisal from the Viewpoint of the European Convention of Human Rights', *International Journal of Public Law and Policy*, Volume I, No. 3, pp. 245-263.

<sup>26</sup> Ibid.

- Specific positive content obligations

The Broadcasting Authority has produced several codes of conduct for broadcasters and advertisers known as Requirements as to Standards and Practice<sup>27</sup> in so far as broadcasters are concerned.

In so far as regulation of journalists and broadcasters is concerned, there are a number of standards and guidelines, very much similar to codes of ethics and codes of conduct/practice made by the Broadcasting Authority which apply however only to the broadcasting media. These comprise the following:

- (a) Requirements as to Standards and Practice applicable to News Bulletins and Current Affairs Programmes, Subsidiary Legislation 350.14;<sup>28</sup>
- (b) Requirements as to Standards and Practice applicable to Participation in Media Programmes of Vulnerable Persons, Subsidiary Legislation 350.15;<sup>29</sup>
- (c) Requirements as to Standards and Practice applicable to the Coverage of Tragedies in Broadcasting, Subsidiary Legislation 350.16;<sup>30</sup>
- (d) Requirements as to Standards and Practice applicable to Disability and its Portrayal in the Broadcasting Media, Subsidiary Legislation 350.17.<sup>31</sup>

- Funding schemes for specifically desired content

No such schemes exist.

- Political advertising and/or broadcasting time

Each time a general election, a referendum, a European Union Parliament election or a local council election are held, the Broadcasting Authority organises a scheme under its patronage of election/referendum broadcasts. In so far as general elections, referenda and European Union Parliament elections are concerned, the Authority organises an ad hoc scheme of political broadcasts for those elections/referenda. Normally the Authority does not organise an ad hoc scheme of political broadcasts for local council elections as these broadcasts normally form part of the Authority's Scheme of Political Broadcasts. All these political broadcasts are transmitted on the public service radio and television channels.

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<sup>27</sup> Requirements as to Standards and Practice exist on the following subjects: News Bulletins and Current Affairs Programmes (SL 350.14); Participation in Media Programmes of Vulnerable Persons (SL 350.15); Coverage of Tragedies in Broadcasting (SL 350.16); Disability and its Portrayal in the Broadcasting Media (SL 350.17); Family Viewing and Listening (SL350.18); Phone-in Programmes Aired on the Broadcasting Media (SL350.19); Crawls and Captions in Television Programmes (SL350.20); Various Types of Polls Broadcast on Radio and Television Services (SL 350.21); Conduct of Competitions and the Award of Prizes (SL 350.22); Promotion of Racial Equality (SL 350.26); Price of Telephone Calls and SMSs in the Broadcasting Media (SL 350.27); Programmes Involving the Participation of Certain Health Care Professionals in the Broadcasting Media (SL 350.30). These requirements are also supplemented by the Broadcasting Code for the Protection of Minors (SL 350.05); Broadcasting Code on the Correct Use of the Maltese Language on the Broadcasting Media (SL 350.10).

<sup>28</sup> Text available at

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10169&l=1>.

<sup>29</sup> Text available at

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10170&l=1>.

<sup>30</sup> Text available at

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10171&l=1>.

<sup>31</sup> Text available at

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10172&l=1>.



The Broadcasting Authority is responsible for organising schemes for political broadcasts. These comprise a general party political scheme and specialise schemes such as those for general elections, EU Parliament elections, local councils elections and referenda. Such scheme includes political spots which are allotted to all political parties participating therein. The Broadcasting Authority has not allowed, outside of its scheme of political broadcasts, the airing of political spots by civil society organisations. The Authority has been taken to court and has lost the case.<sup>32</sup> This notwithstanding, the Broadcasting Act has not been amended to be brought in line with the court's decision. The Broadcasting Act regulates such political broadcasting schemes in Article 13(4) and in paragraph 1 of the Third Schedule to the Broadcasting Act.

- Codes of conduct and their organisational framing

In so far as self-regulation is concerned, the Press Ethics Commission which is a self-regulatory structure, has its own *Code of Journalistic Ethics* which applies to journalists, irrespective of the medium upon which they publish their writings.<sup>33</sup>

This Code of Journalistic Ethics essentially deals with unethical behaviour, reporting of crime and court proceedings, character assassination, conscientious objection, respect for minors under the age of eighteen years as well as the sanctions which the Press Ethics Commission may impose on journalists for breach of the Code of Journalistic Ethics.

In so far as all media are concerned, complaints can be made by members of the public to the self-regulatory structure known as the Press Ethics Commission but this mainly deals with complaints against journalists.

There is also a complaints mechanism in place in so far as broadcasting is concerned where any person may complain directly to the Broadcasting Authority in so far as unjust and unfair treatment and infringement of privacy by a broadcasting station is concerned.<sup>34</sup> In terms of Article 21A of the Broadcasting Act affected third parties may also complain with the Authority seeking effective compliance by broadcasters with the provisions of the Broadcasting Act and any subsidiary legislation made thereunder.

- The role and functioning of regulatory authorities in these respects

In so far as the print and new media are concerned, there are no specific regulatory authorities which are established to regulate the media although in certain respects, mainly advertising, they can be regulated by a sectoral regulator. The Broadcasting Authority has lost a case before the Civil Court, First Hall, which has ruled that the Authority has not respected the principle of *nemo iudex in causa propria* when considering an administrative offence. It was decided on 7 February 2012 and may be appealed by the Authority.<sup>35</sup>

- Distribution Aspects

- Access to frequencies

Broadcasting frequencies are assigned by the Minister responsible for communications to the Broadcasting Authority in terms of Article 18 of the Broadcasting Act. The Authority then assigns these frequencies to broadcasters. The Minister is obliged by law to grant to

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<sup>32</sup> *Tony Zarb et. noe vs. Broadcasting Authority*, Constitutional Court, 3 November 2006.

<sup>33</sup> The Code of Journalistic Ethics is available at <http://www.maltapressclub.org.mt/ethics-new.htm>.

<sup>34</sup> Article 34 of the Broadcasting Act.

<sup>35</sup> *Smash Communications Limited vs. Broadcasting Authority et.*

the Authority such technical assistance it might require to carry out its duties in terms of the said provision.

- Access to distribution networks and control of actual conditions

The Broadcasting Authority does not licence distribution networks. Nor does it control actual conditions. The distribution networks for programme content come in the form of networks (platforms). In so far as distribution of television channels is concerned, networks enter into agreements with the television channels in question so that these television stations are carried on the platform's network. Such agreements are not regulated by the Broadcasting Authority but by competition law. The actual conditions imposed in these agreements are for the parties (the network operator and the television station in question) to decide and should there be a dispute between these parties the matter will have to be resolved through mediation, arbitration or court settlement.

However, in 2010 the Broadcasting Law was amended to make certain provisions concerning disputes with regard to one specific network operator: the general interest objective (GIO) station (and not the other network operators such as the cable television operator; the digital radio operator and the digital terrestrial television operator which continue to be regulated by competition law). Article 40 of the Broadcasting Act, in relevant parts, reads as follows:

"40. (1) The Authority shall appoint and license a network operator (hereinafter referred to as "the network operator") to run the general interest objective network licensed by the Malta Communications Authority in terms of the Electronic Communications (Regulation) Act.

(6) The Authority may make regulations to give better effect to the provisions of this article and may, without prejudice to the generality of the foregoing, make regulations in respect of the determination of disputes between the network operator and the general interest objective service, the regulation of the general interest objective network in order to ensure that the network operator abides by the provisions of this article and any regulations made thereunder and, generally to ensure that an uninterrupted service is provided by the network operator.

Provided that in the case of a dispute between the network operator and a general interest objective service licensee, such disputes shall be referred to a standing arbitral tribunal to be composed of one person appointed by the Broadcasting Authority who shall preside, one person appointed by the Malta Communications Authority and one person appointed in agreement between the Broadcasting Authority and the Malta Communications Authority. The said tribunal shall decide the complaint as expeditiously as possible and its decision shall be final."

So far no regulations have been made under Article 40(6) of the Broadcasting Act.

There are no distribution networks with regard to non-broadcasting media.

- Must-carry/must-offer rules for electronic media

General interest objective television services have to be carried by the GIO television network operator. It is the Broadcasting Authority which licences the GIO television services to be carried by the network operator on the latter's multiplex. These stations have to cater for a wide variety of programming which include news, current affairs,

education and cultural programmes amongst others.<sup>36</sup> Moreover, GIO television services have to offer, free to air and free of charge, their broadcasting content to such electronic communications networks as the Authority may direct.<sup>37</sup> The must-offer provision is thus limited only to GIO television services and does not extend to commercial television services such as teleshopping services or commercial televisions which are not of a GIO nature.

- Role of platform operators

The GIO is appointed and licensed by the Broadcasting Authority.<sup>38</sup> The conditions and fees imposed by the network operator upon the GIO television services have to meet the approval of the Authority.<sup>39</sup> Other platform operators exist for cable television and for digital terrestrial television<sup>40</sup> as well as for digital radio.<sup>41</sup>

- Access to Information

- Transparency of media ownership situations

Transparency of media ownership situations may be learnt through the shareholding of the companies owning the media. Such information can be obtained from the Registrar of Companies.

- Accountability of public service media

Public Services Broadcasting Limited (PBS Ltd.) is accountable to its sole shareholder – the Government of Malta – and is also accountable to the broadcasting regulator in terms of law. This is because the provisions of Article 119(1) of the Constitution of Malta and the Broadcasting Act (and the subsidiary legislation made thereunder) equally apply and bind the public service broadcaster. The public service obligation is a contract entered into between the Minister and PBS Ltd. Hence there are contractual obligations which the PBS Ltd. must respect vis-a-vis Government. The Minister responsible for broadcasting is individually accountable to Cabinet for the workings of the public service broadcaster<sup>42</sup> and, in turn, Cabinet is collectively accountable to Parliament in so far as the workings of the public service broadcaster are concerned.<sup>43</sup>

The public service broadcaster, although licenced by Government and not by the Broadcasting Authority, still has to comply with all the laws in force which apply to private broadcasting stations and, in addition, as a general interest objective station, has to comply with the criteria approved by the Broadcasting Authority for a GIO station.<sup>44</sup> It also has to comply with the National Broadcasting Policy<sup>45</sup> and certain provisions of the

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<sup>36</sup> Article 40(2) of the Broadcasting Act.

<sup>37</sup> Article 40(5) of the Broadcasting Act.

<sup>38</sup> Article 40(1) of the Broadcasting Act.

<sup>39</sup> Article 40(7) of the Broadcasting Act.

<sup>40</sup> Licensed under article 3(3) of the Broadcasting Act.

<sup>41</sup> Programme content on the digital radio is licensed by the Broadcasting Authority in terms of Article 16B of the Broadcasting Act.

<sup>42</sup> Article 82(1) of the Constitution reads as follows: 'Subject to the provisions of this Constitution, the President, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for any business of the Government of Malta including the administration of any department of government.'

<sup>43</sup> Article 79(2) of the Constitution reads as follows: 'The Cabinet shall have the general direction and control of the Government of Malta and shall be collectively responsible therefor to Parliament.'

<sup>44</sup> For the text of these criteria, see General Interest Objectives (Television Services) (Selection Criteria) Regulations, SL 350.32.

<sup>45</sup> See footnote 24 above for the text of the National Broadcasting Policy. The National Broadcasting Policy is referred to in Article 10(4E) of the Broadcasting Act.

Broadcasting Act which apply only to public service stations.<sup>46</sup> Whilst the Freedom of Information Act applies to records kept by the public service broadcaster, the same cannot be said for privately owned broadcasting stations.<sup>47</sup>

- Freedom of information laws

Freedom to access information is spread over a number of laws. The general law is contained in the Freedom of Information Act. This law is supplemented by the Press Act, the National Archives Act<sup>48</sup> and by special laws. The latter comprise Local Government,<sup>49</sup> environmental regulation<sup>50</sup> and regulation of registries and archives (Public Registry;<sup>51</sup> Land Registry;<sup>52</sup> Company Registry;<sup>53</sup> and Court Archives).<sup>54</sup>

Article 47 of the Press Act reads as follows:

"47. (1) The Government shall establish procedures to give representatives of the press the information which helps them fulfil their public tasks.

(2) Subarticle (1) shall not apply in the following cases:

- (a) where such information could foil, impede, delay or jeopardise the appropriate process of pending legal proceedings or where Government or another public authority would be legally entitled to refuse to grant such information in a court or other tribunal established by law;
- (b) where the granting of such information would entail the disclosure of information received by Government in confidence;
- (c) where such information would violate an overriding public interest or a private interest warranting protection;
- (d) where the information concerns matters related to national security or public safety;

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<sup>46</sup> Such is the case with Article 13(2)(f) proviso which does not allow the public service broadcaster to be partial in its programmes by bearing in mind what has been broadcast on private stations. This balancing out provision applies only to private stations and the public service broadcaster must always ensure impartiality in terms of Article 119 of the Constitution. The public service broadcaster's programme schedule requires in terms of Article 23(1) of the Broadcasting Act prior approval by the Broadcasting Authority. Hence, the provisions relating to the public service broadcaster are more onerous than in the case of other General Interest Objective services and commercial broadcasters.

<sup>47</sup> Article 2 of the Freedom of Information Act defines a 'public authority' as '(a) the Government, including any ministry or department thereof; (b) a Government agency established in terms of the Public Administration Act or any other law; and (c) any body established under any law, or any partnership or other body in which the Government of Malta, a Government agency or any such body as aforesaid has a controlling interest or over which it has effective control'. Public Broadcasting Services Limited, a Government wholly owned and controlled by Government, falls under the definition of a 'public authority'.

<sup>48</sup> Chapter 477 of the Laws of Malta.

<sup>49</sup> Information as to meetings of local government authorities is regulated by Article 45 of the Local Councils Act, Chapter 363 of the Laws of Malta.

<sup>50</sup> See the Environment and Development Planning Act, Chapter 504 of the Laws of Malta, in particular Article 64, and Freedom of Access to Information to Environment Regulations, 2005, Subsidiary Legislation 504.65.

<sup>51</sup> Chapter 56 of the Laws of Malta.

<sup>52</sup> Chapter 296 of the Laws of Malta.

<sup>53</sup> Article 401(1)(g) of the Companies Act, Chapter 386 of the Laws of Malta.

<sup>54</sup> See, for instance, regulation 11 of the Civil Procedure (Regulation of Registries, Archives and Functions of Director General (Courts) and Other Court Executive Officers) Regulations, 2004, Subsidiary Legislation 12.21 and regulation 6 of the Criminal Procedure (Regulation of Registries, Archives and Functions of Director General (Courts) and Other Court Executive Officers) Regulations, 2004, Subsidiary Legislation 9.09.

(e) when the gathering of the information requested would place a disproportionate burden on the public administration.”

The Press Act, in Article 47(3), contains a provision which ensures that the Government does not discriminate amongst certain sectors of the media when releasing information. It provides for a general obligation of considering all media on the same footing:

“(3) It shall not be lawful for Government to issue general instructions that prohibit the giving of information to any newspaper or licensed broadcasting service holding a particular view or to any specified newspaper or licensed broadcasting service.”

Although Malta has enacted in 2008 a Freedom of Information Act, the most important provisions which empower journalists to obtain access to Government held information will come in force on 1 September 2012.

The regulatory authority is exempt from having its records accessible to the public in so far as its constitutional functions of ensuring balance and impartiality in broadcasting are concerned.<sup>55</sup> No such blanket prohibition exists, however, in so far as the Authority's functions under ordinary law is concerned.<sup>56</sup> Hence, in so far as ordinary law is concerned (as opposed to the supreme law of the land, the Constitution of Malta), the Broadcasting Authority may refuse to grant access to its records only in those cases listed in the Freedom of Information Act.<sup>57</sup>

- Accessibility of products/services and distribution networks

There are no aid schemes in place to purchase reception devices. A viewer can have access free of charge to the general interest platform (there are currently 6 stations on offer) provided that viewers purchase at their own expense a set top box. Otherwise they can have access to these GIO stations through the cable television platform and the digital terrestrial television platform (which both carry the GIO stations in their lowest tier of subscription package, which is the case with the vast population of television viewers in Malta).<sup>58</sup>

The broadcasting licence fee used to be paid by any person in Malta who owned one or more television sets. Such annual fee was paid to the Government. However, with effect from 1 January 2012 this fee has been abolished except for the collection of arrears of revenue due to Government prior to 1 January 2012.<sup>59</sup>

Access to broadcasting services is affordable either because it is offered at a reasonable subscription price or even for free. In the case of analogue radio and digital radio the service is available free of charge. Digital terrestrial television and cable television is by subscription though at very affordable rates. Newspaper are sold at a cheap price. Hence information services are readily accessible and are reasonably priced.

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<sup>55</sup> The Broadcasting Authority's constitutional functions are set out in Article 119(1) of the Constitution of Malta. The latter provision reads as follows: 'It shall be the function of the Broadcasting Authority to ensure that, so far as possible, in such sound and television broadcasting services as may be provided in Malta, due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties.'

<sup>56</sup> Article 6(4)(g) of the Freedom of Information Act provides that the Freedom of Information Act does not apply to the Broadcasting Authority 'in so far as such documents relate to its functions under Article 119(1) of the Constitution'.

<sup>57</sup> Parts V and VI of the Freedom of Information Act, Chapter 496 of the Laws of Malta, which list those cases where the law does not allow access to public records.

<sup>58</sup> <http://www.dso.org.mt/assets/files/DSO%20May%202011%20Survey%20Results.pdf>.

<sup>59</sup> [http://finance.gov.mt/image.aspx?site=MFIN&ref=2012\\_Budget\\_Speech\\_English](http://finance.gov.mt/image.aspx?site=MFIN&ref=2012_Budget_Speech_English), p. 74.

I am not aware of any public subsidisation or commercially-offered reduced rates for subscription to print publications.

- “Have a Say on ...”
  - Complaint procedures, “Ombudsmen”

The Ombudsman cannot investigate complaints with regard to the Broadcasting Authority as the Ombudsman Act specifically states so, the reason being that the Authority is established as an independent body by the Constitution of Malta.<sup>60</sup> The Ombudsman does not even have jurisdiction over private broadcasting stations or other media except for the public service broadcaster.

Naturally, it remains always possible to take one’s case against the Authority or the media before the courts.

- Participation in media operators/(self-)regulatory bodies

There are no viewers’ and listeners’ councils in Malta but there is a Consumers’ Association which sometimes expresses itself on broadcasting matters, normally in so far as advertising rules on the broadcasting media are concerned. The Consumers’ Association is a non-governmental voluntary organisation.

As to co-regulatory bodies there are none and as to self-regulatory bodies there is mainly the Institute of Journalists. But there is no real affinity between the self-regulatory structure (the Institute of Journalists) and the regulatory structure (the Broadcasting Authority) except that for the last couple of years the Broadcasting Authority has been sponsoring on an annual basis the Malta Journalism Award relating to broadcasting organised by the Institute of Journalists.<sup>61</sup>

#### 2.2.18.2. Main Players in the Media Landscape

General figures on the main players and their shares in audience reach, subscription, etc., is provided below.

##### *2.2.18.2.1. Radio*

In Malta, there are thirteen nationwide analogue FM radio stations and four nationwide digital radio stations. Three radio stations are owned by the public service broadcaster (Radju Malta; Radju Parlament 106.6; Magic Radio); two radios are owned by the political parties (Radio 101 by the Nationalist Party and One Radio by the Labour Party); one radio is officially owned by the Catholic Church (RTK) and there is also a second Catholic radio operating in Malta (Radju Maria); one radio station is owned by the University of Malta (Campus FM); the remaining five radio stations are of a commercial nature (Bay Radio, Calypso Radio; Vibe FM; XFM; Smash Radio).<sup>62</sup>

##### *2.2.18.2.2. Television*

There are seven nationwide television stations in Malta. Two television stations are public service stations (TVM and Education 22); two television stations are owned by the political parties (NET TV by the Nationalist Party and One TV by the Labour Party); two

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<sup>60</sup> Ombudsman Act, Chapter 385 of the Laws of Malta, Article 12 and First Schedule, Part A.

<sup>61</sup> <http://www.ba-malta.org/prdetails?id=190>.

<sup>62</sup> <http://www.ba-malta.org/prdetails?id=222>.



television stations are of a commercial nature (Smash TV; Favourite TV); one is a music television station (Calypso Music TV). There is also one fully dedicated teleshopping television station (ITV).<sup>63</sup>

There are 16 satellite television broadcasting stations licensed by the Broadcasting Authority.<sup>64</sup>

#### 2.2.18.2.3. *Press and Publishing*

There are four daily newspapers published Monday to Saturday: *The Times of Malta*, *In-Nazzjon Taghna* (Our Nation) owned by the Nationalist Party, *L-Orizzont* (The Horizon) owned by the General Workers' Union, the largest trade union in Malta) and *The Malta Independent*. *The Times* and *The Independent* are owned by commercial interests.

There are four weekly newspapers published on a Sunday. These are: *The Sunday Times of Malta*, *The Malta Independent on Sunday*, *Il-Mument* (The Moment) published by the Nationalist Party, *Kulhadd* (Everybody) published by the Labour Party, *It-Torca* (The Torch) published by the General Workers' Union and *Malta Today* published by commercial interests.

*Business Today* and the *Malta Business Weekly* are published also on a weekly basis.

*Lehen is-Sewwa* and *Illum* are not mentioned in the 2004 report. *Lehen is-Sewwa* is owned by a Catholic Church organisation, Catholic Action, and has been in print since 1 September 1928. It is a weekly newspaper. *Illum* is also a weekly newspaper which goes back to 2006.

As to publishing, there are various books, magazines and leaflets published. A list of publishers is found at <http://www.ktieb.org.mt/>.

#### 2.2.18.2.4. *Online media (non-linear audiovisual (media) services; websites)*

There are two subscription based on-demand audiovisual media services in Malta, one provided by the cable operator, Melita p.l.c.,<sup>65</sup> and another operated by the digital terrestrial television operator, Go p.l.c.<sup>66</sup> There is also one free on-demand service provided by di-ve.com.<sup>67</sup>

Although no document could be traced which lists all Maltese owned websites or provides general information about them, all printed newspapers have their own electronic version of the newspaper on the web. All radio and television stations also have their own websites and some of them webcast the programmes on the world wide web. There is at least one portal which provides news information. Moreover, the Labour Party and the Nationalist Party have their own websites containing news items.

#### 2.2.18.2.5. *Cable/Satellite network operators, IPTV & Internet Access Providers*

There are four platform operators: the public service broadcaster PBS Ltd. in so far as the 6 general interest obligation television stations are concerned; one cable radio and

<sup>63</sup> <http://www.ba-malta.org/prdetails?id=222>.

<sup>64</sup> *Broadcasting Authority Annual Report 2010*, Broadcasting Authority, 2011, p. 13, available at [http://www.ba-malta.org/annual-report\\_2010](http://www.ba-malta.org/annual-report_2010).

<sup>65</sup> <http://www.melita.com/personal/bundles/entertainment-pack/video-on-demand/>.

<sup>66</sup> <http://www.gointeractivetv.com.mt/features.aspx?id=26>.

<sup>67</sup> [http://public.di-ve.com/streaming/on\\_demand\\_event\\_library.aspx?backUrl=streaming/live\\_radio\\_streams.aspx](http://public.di-ve.com/streaming/on_demand_event_library.aspx?backUrl=streaming/live_radio_streams.aspx).



cable television operator; one digital terrestrial television operator; and one digital radio operator. Whilst the GIO network and the digital radio network are accessible free of charge, the cable network and the digital terrestrial television are accessible via a subscription. The GIO network is also accessible via the cable network and the digital terrestrial television network at the cheapest tier of subscription.<sup>68</sup>

There is only one cable operator in Malta, Melita Cable p.l.c. It provides subscriptions to 155 digital and HD television channels and 61 digital radio stations. There is a vast array of programming covering news, documentaries, movies, sports, education, children's programmes, entertainment, fashion, travel, etc.

Go p.l.c. is the sole digital terrestrial television broadcaster in Malta. It provides subscription to 112 digital television channels.<sup>69</sup>

There is only one digital radio operator in Malta, Digi B Networks Ltd. The Broadcasting Authority has licensed 4 digital radio stations of local origin on the digital radio platform<sup>70</sup> in addition to 36 foreign digital radio stations and 11 simulcasted nationwide analogue radio stations.<sup>71</sup>

Although there is no registration system of internet service providers, it seems that there are around twelve internet service providers in Malta.<sup>72</sup>

#### *2.2.18.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

As to audience ratings, the radio total daily average audience for the period October/December 2011 was as follows: One Radio 18.86%; Calypso Radio 14.99%; Bay Radio 14.03%; Radio Malta 12.52%; RTK 8.43%; Radio 101 5.54%; Radju Marija 4.79%; Magic Radio 4.49%; Vibe FM 4.35%; Smash Radio 4.15%; all community radio stations 2.58%; all foreign radio stations 2.49%; XFM 1.70%; Campus FM 1.08%.

In the television market, the total daily average audience for the period October/December 2011 was as follows: TVM 36.96%; One TV 20.82%; Net TV 6.39%; Favourite Channel 0.94%; iTV 0.15%. The other stations – Smash TV, Education TV and Calypso Music TV all scored less than 0.1%.

Melita Cable had 100,000 subscribers on 27 October 2011.<sup>73</sup> Go p.l.c. had 40,000 subscribers on 6 August 2009.<sup>74</sup> As at end of September 2011, there were 137,561 in total for digital cable and terrestrial television subscriptions with Melita Cable p.l.c. and Go p.l.c. and 11,107 analogue television subscriptions with Melita Cable p.l.c.<sup>75</sup>

As to advertising market shares it is known that the public service broadcaster captures a significant part of the market. The Broadcasting Authority had commissioned Grant Thornton to report on the advertising market share of the broadcasting media. However this report is today dated and no reference continues to be made to it on the Broadcasting Authority's website.

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<sup>68</sup> €7.76c per month subscription with Melita Cable p.l.c. and €5.00c per month subscription with Go p.l.c.

<sup>69</sup> <http://www.gointeractivetv.com.mt/packages.aspx>.

<sup>70</sup> <http://www.ba-malta.org/prdetails?id=199>.

<sup>71</sup> <http://www.ba-malta.org/prdetails?id=130>.

<sup>72</sup> <http://aboutmalta.com/internet/Providers.htm> (Waldonet has recently ceased operations).

<sup>73</sup> <http://www.melita.com/100000-views-for-melita%e2%80%99s-video-on-demand-service>.

<sup>74</sup> <http://www.digitaltvnews.net/content/?p=9594>.

<sup>75</sup> [http://www.nso.gov.mt/statdoc/document\\_file.aspx?id=3195](http://www.nso.gov.mt/statdoc/document_file.aspx?id=3195).

### 2.2.18.3. Conclusion and Recommendations

When one compares the situation of the media in Malta in 2012 with that of 2004 as detailed at pp. 141 to 145 of the Final report of the study on “the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen’s right to be fully and objectively informed”, drawn up by the European Institute for the Media on 31 August 2004, the following noteworthy developments should be chronicled with regard to the media sector:

- satellite broadcasting is now regulated by the Broadcasting Act;<sup>76</sup>
- the enactment of a Freedom of Information Act, 2008;
- the transposition of the EU Audiovisual Media Services Directive;<sup>77</sup>
- the further liberalisation (though not complete removal) of the concentration provisions in so far as the broadcasting media are concerned;<sup>78</sup>
- the Press Ethics Commission is in the process of completing its revision of the self-regulatory Code of Ethics mentioned in paragraph 1.3 of the 2004 Report;
- changes have been made to the Broadcasting Act to remove the must-carry requirement in the said enactment and to restrict it only to general interest objective stations apart from obliging these stations to offer free of charge their programme content to the general interest objective platform operator;<sup>79</sup>
- the Broadcasting Authority has been very much prolific in establishing Requirements as to Standards and Practice and Requirements as to Advertising, Methods of Advertising and Directions which did not exist in 2004;<sup>80</sup>
- the Broadcasting Authority has lost another case before the Civil Court, First Hall, which has ruled that the Authority has not respected the principle of *nemo iudex in causa propria* when considering an administrative offence;<sup>81</sup>
- *Alternattiva Demokratika* (the Green Party) has, since 2004, sold its radio station. So the situation today is that only the two main political parties represented in *Parliament* (the Nationalist Party in Government and the Labour Party in Opposition) own a radio and television station (in addition to a newspaper, internet website and printing house). The Catholic Church continues not to own a television station;
- six television stations have been granted the status of a general interest objective television station by the Broadcasting Authority in terms of amendments made to article 40 of the Broadcasting Act in 2011.<sup>82</sup> These are TVM and Education 22 as the de facto GIO stations<sup>83</sup> because of their public service remit and One TV (owned by the Labour Party), Net TV (owned by the Nationalist Party), Smash TV (owned

<sup>76</sup> This has been regulated by Act No. VIII of 2009, the Broadcasting (Amendment) Act, 2009.

<sup>77</sup> Mainly through the Broadcasting (Amendment) Act, 2010, Act No. IV of 2010.

<sup>78</sup> Broadcasting (Amendment) Act, 2011, Act No. VIII of 2011.

<sup>79</sup> *Ibid.*

<sup>80</sup> See footnotes 44 and 45 above.

<sup>81</sup> See footnote 47 above.

<sup>82</sup> Act No. VIII of 2011 available at <http://www.doi.gov.mt/EN/parliamentacts/2011/ACT%20VIII%20XANDIR.pdf>.

<sup>83</sup> Article 40(2) proviso of the Broadcasting Act.

by a commercial non-political company) and Favourite TV (owned by a commercial non-political party);

- the television licence fee has been removed as of 1 January 2012.

Although the Maltese citizen is well served as to the quantity of information available in the public domain, the difficulty concerns more the quality of the information. First, political parties own too much media and unfortunately they have brought an element of divisiveness amongst the population especially during tense periods such as during an election campaign. Contrary to other states in the European Union, political parties own their own broadcasting media. It is therefore being proposed that the Broadcasting Act should be amended not to allow political parties to own their own broadcasting stations. Instead a general interest objective television station should be run by the Broadcasting Authority where political parties are provided airtime to express their views in terms of a programme schedule approved by the Authority to ensure that all political parties are given an opportunity to air their views.

Second, there are difficulties within the media sector to establish media-wide self-regulatory mechanisms. The current self-regulatory structures are limited and do not garner a wide support of all the media industry. In this respect Government, through the Ministry responsible for broadcasting, should be tasked with bringing together all media industries so that the latter may develop its own self-regulatory structures. The Government should also identify which functions performed by it or by the Broadcasting Authority should be devolved upon self-regulatory structures. It is highly recommended that Government should assist the media industry in developing such self-regulatory structures through providing financial assistance and expert advice.

Third, although Malta has enacted a Freedom of Information Act the provisions which give access to government held information will come into force as late as 1 September 2012. So no reference to case law can be made in this respect. Journalists should be trained as to the provisions of the Freedom of Information Act. This should be done by the Malta Institute of Journalists in collaboration with Government entities such as the Faculty of Laws within the University of Malta or the Staff Development Organisation within the Office of the Prime Minister or both.

Fourth, Malta does not have a whistle blowing act on the statute book even though there is a bill which has been pending in the House of Representatives for more than a year.<sup>84</sup> Parliament should therefore give precedence to the whistle blowing bill to have it enacted as law whilst the institutions mentioned in the previous point should afford training to public administration employees.

Fifth, politicians tend to be very sensitive to criticism aimed at them and institute a number of libel suits, normally during election campaigns. However, these cases are usually decided after the relevant elections are over and the libel suits, when decided, would thus become irrelevant. It is thus important to revisit the law on libel so that new provisions are written down into the law to ensure a more liberal interpretation of the libel provisions in Maltese Laws with regard to public figures. Whilst libel laws should be strict with regard to private persons, they should be more liberal with regard to public figures allowing more criticism of the latter category of persons.

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<sup>84</sup> Published in The Malta Government Gazette on 8 October 2010. For the text of the Bill, see: <http://www.doi.gov.mt/EN/bills/2010/Bill%2058.pdf>.

Sixth, there is no media court which can afford an expeditious hearing and determination of media related cases. It is thus recommended that a Media Court is established and all cases involving the media – whether of a criminal, administrative, disciplinary or civil nature – should be heard and determined by such court. This would bring about more specialisation, expeditiousness in the proceedings, decrease in courts, uniformity in sentencing and the development of a coherent and consistent body of case law.

Seventh, the law regulating political advertising needs to be amended to allow political advertising as the Maltese courts have held (basing themselves on ECHR case law). In this way, through amendments to the Broadcasting Act, the law regulating political advertising will be brought in line with Article 10 of the European Convention of Human Rights and the case law of the European Court of Human Rights.

Finally, administrative sanctions need to be revisited to be brought in line with the Council of Europe's Recommendation No R (91)1E of the Committee of Ministers to Member States on Administrative Sanctions adopted on 13 February 1991.<sup>85</sup> Appropriate legislation needs to be enacted to ensure that all sanctions of an administrative nature which may be imposed by the Broadcasting Authority (and eventually by the proposed Media Court) are in line with the said Recommendation.

All these measures would ensure that the information provided to the citizen is more accurate, less biased and, overall, more impartial, truthful and factually correct. This would be coupled with a more expeditious and human rights correct procedure which would implement the right to freedom of expression in a truly democratic society. Finally, it would ensure – through the establishment of a specialised Media Court – that the media sector is treated in a wholisitic and consistent manner.

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<sup>85</sup> For the text of the Council of Europe's Recommendation, see: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=34769&SecMode=1&Admin=0&DocId=392990>

## THE NETHERLANDS

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### 2.2.19. The Netherlands

#### 2.2.19.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.19.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The freedom of expression is enshrined in article 7 of the Dutch Constitution<sup>1</sup>, as indicated in the 2004 Country Report.

- Freedom to receive and to access information

The transparency of information has been an issue of concern in the Netherlands since the 1795 Declaration of Rights of Man, which stated: "everyone has the right to concur in requiring, from each functionary of public administration, an account and justification on his conduct." Article 110 of the Dutch Constitution states: "In the exercise of their duties government bodies shall observe the right of public access to information in accordance with rules to be prescribed by Act of Parliament."

No safeguards on Regulatory Authorities are stipulated by the Dutch Constitution.

- Safeguards on "universal service"

The Dutch Constitution contains no provisions with regard to "universal service".

##### 2.2.19.1.2. *Media order (de lege lata and de facto)*

- "Market Entry"
  - Licensing schemes; remit psm; notification for print publications

Broadcasters that provide radio or television programmes need to obtain a licence from the Dutch Media Authority, *Commissariaat voor de Media* (CvdM), to broadcast television and/or radio programmes. Only the national public broadcasters' licences are granted by the Minister. Whereas radio broadcasters can sometimes also obtain terrestrial radio frequencies, television broadcasters have to assign cable, satellite or IPTV network operators or buy airtime on an existing channel to transmit their programmes. Since the implementation of the Audiovisual Media Services Directive (AVMS Directive) in the Media Act 2008, providers of commercial on-demand media services are required to register with CvdM.

The remit of public service media is enshrined in section 2.1 of the Dutch Media Act 2008. On 1 January 2009 most elements of the so-called Multimedia Act<sup>2</sup> entered into

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<sup>1</sup> Constitution of the Netherlands, see: <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brochures/2008/10/20/the-constitution-of-the-kingdom-of-the-netherlands-2008/07br2008g109.pdf>.

<sup>2</sup> Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet (Mediawet 2008) (Act of 29 December 2008 to establish a new Media Act), Staatsblad (State Journal) 2008, 583.

force, which led to important changes for both public service and commercial media services. Many long-existing legal definitions were revoked or adapted in a substantial way. Since then, the Media Act 2008 no longer refers to the term *broadcaster* but uses the term *media service provider*. Also the long-standing distinction between a programme offer for general purposes and a programme offer for particular purposes (subscription programme) was abolished.<sup>3</sup>

One of the major changes was the abolishment of the principal distinction between, on the one hand, TV and radio programmes and, on the other hand, audiovisual content offered via platforms like digital thematic channels and websites. This was achieved by wording the definition of the public media remit in technically-neutral and platform-neutral terms, as laid down in section 2.1 Media Act. This section underpins the principle that public media service providers can serve their public remit through different media services and outlets, independently of platform or technique. Nevertheless, the media offer has to meet certain qualitative and quantitative requirements, which should guarantee the public nature of these services. Especially, it must be ensured that the public media services serve the democratic, social and cultural needs of society.

- Media pluralism/ownership; competition law aspects

For several years, the Netherlands had different rules limiting ownership in the broadcasting and the daily newspaper market and restrictions in granting broadcasting licences initially laid down in the Media Act. A single party with a market share of 25 percent in the national daily newspaper market or 50 percent in the local and regional market could not gain a licence for radio or television broadcasting. The government set up a Media Concentration Committee in order to investigate the necessity of implementing additional legislation to guarantee a minimal number of players in the media markets. In April 1999 the Media Concentration Committee examined the need for additional regulations with respect to concentration in the Dutch media sector and concluded that the existing regulations were sufficient to combat the adverse effects resulting from concentrations in the media sector. However, it recommended monitoring of media developments by an independent body. The Dutch Government commissioned this task, which became permanent in April 2003, to CvdM. Hence, the *Commissariaat* set up the monitoring system in May 2001 and produced since then every year an annual report.<sup>4</sup> The main objectives of the Dutch monitoring system are to provide insight into the public information supply, concentration developments, ongoing trends, as well as analysis of particular issues related to media pluralism on an incidental basis. In the early years the focus was primarily on the more or less traditional media markets of newspapers, radio and television. However, with the increased importance of the internet in opinion formation, the Mediamonitor now also includes all the media markets that are relevant to news provision and consequently opinion power in society. Moreover, the Mediamonitor also addresses free newspapers, news usage, press agencies, search engines, local newspaper editions and online news.

There is no limitation on the number of licences somebody may hold for commercial broadcasting, though the number of available terrestrial radio frequencies are limited, as long as a company complies with general Competition Law. In contrast, somebody cannot hold more than one public broadcasting licence. Publishers, supported by the Media Authority, called for relaxation of the 25 percent threshold in order to stimulate

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<sup>3</sup> Elementary for a "programme for particular purposes" was that the consumer had made a direct agreement with the programme service provider, but this did not reflect the situation in practice anymore.

<sup>4</sup> All reports are available on the website of the Mediamonitor, see: <http://www.mediamonitor.nl/content.jsp?objectid=309>



innovation in electronic means of distribution. With the Temporary Act on Media Concentration, *Tijdelijke wet mediaconcentraties*, entering into force in 2007 (this Act existed alongside the Media Act and the general Competition Act), a new cross-media ownership limitation was introduced with a specific threshold for the daily newspaper market.

First, the Act prohibited mergers that would lead to a market share of over 90 percent of at least two of the following markets collectively: daily newspaper, television and radio markets (where the three markets together count for 300 per cent) (note that only interests in one single company of 50 per cent or greater are counted). Market shares were calculated on the basis of circulation for daily newspapers and viewer or listener ratings for television or radio, respectively. If a media company's market share exceeded the stated thresholds due to autonomous growth, no measures would be taken. Second, the Act prohibited mergers that would lead to a market share greater than 35 per cent of the daily newspaper market. With this special rule for the daily newspaper market, the Act supported newspapers in providing a counterweight against the strong position of public broadcasting in the coverage of news and public affairs.

Given the ongoing increase of media concentration and the government's concern for the distribution of power in public opinion formation, the Temporary Act on Media Concentration was extended in December 2009 to January 2012, but then repealed with effect as of 1 January 2011. Since that date specific legislation on media concentration no longer exists in the Netherlands. Publishers had called for relaxation of the ownership rules. The 35 per cent threshold was argued to impede their cross-media development and it was supposed that daily newspaper titles would disappear if the thresholds remained in existence. Moreover, the ongoing increase of alternative news sources was argued to provide sufficient counterweight against the larger media companies. As for the prevention of dominant positions of suppliers, general competition law also applies to the media markets. This is not to say that the assessment for mergers and acquisitions has been relaxed; there have been cases where competition law has been stricter than the Temporary Act on Media Concentration. For example, the publisher *De Persgroep* was forced to sell its daily newspaper NRC after it took over its parent company PCM in 2009. Although this takeover was in accordance with the rules as set out in the Temporary Act, it could not be approved based on general competition law.

Proposed mergers or acquisitions should be notified to the *Nederlandse Mededingingsautoriteit* (NMa), which takes a decision, essentially within four weeks, as to whether the merger/acquisition in question should be licensed. Concentration supervision applies only to ownership changes in which the combined turnover achieved for the previous calendar year by the undertakings involved exceeded 113.5 million Euros, with at least two of the parties involved having realised at least 30 million Euros in the Netherlands (Article 29 of the Competition Act).

There are no legal limits on the market share. The NMa will have to investigate if there is an abuse of a dominant position on the relevant market and this depends on the behaviour of the parties.

In March 2000, the NMa has set conditions for the approval of the acquisition of the VNU's regional dailies by Wegener.<sup>5</sup> In order to prevent Wegener holding a dominant position in Gelderland and to guarantee competition in the region, Wegener was required

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<sup>5</sup> Besluit van de directeur-generaal van de Nederlandse mededingingsautoriteit als bedoeld in artikel 41, vierde lid, van de Mededingingswet, zaaknummer 1528/Wegener Arcade-VNU Dagbladen. See: <http://www.nma.nl/images/bcv1528-000322-155158.pdf>.



to sell the daily papers De Limburger and Arnhemse Courant. Wegener filed an appeal against the decision and the Court of Rotterdam granted the appeal in part. The outcome was that Wegener sold De Limburger to De Telegraaf group. In December 2001, after an appeal to the Trade and Industry Appeals Tribunal, the ruling was overturned implying that Wegener had still to fulfil the conditions set by NMa in the first place. In 2002, the NMa stipulated new requirements, namely that the regional editions of De Gelderlander must be maintained and Wegener must support new entrants.<sup>6</sup>

In 2010, the NMa imposed heavy fines on Dutch media company Koninklijke Wegener and on five of its executives.<sup>7</sup> The NMa imposed the fines for non-compliance with an instruction that the NMa in 2000 imposed on Wegener in connection with its acquisition of publishing company VNU Dagbladen in 2000. The instruction was actually put forward by Wegener itself in order for the NMa to grant approval to the acquisition of media company BN/De Stem. In the instruction, the NMa required that the independence of two regional newspapers would continue to be guaranteed; thereby not just ensuring that readers would continue to enjoy their freedom of choice, but also that price increases and reader selection reductions would be avoided. The NMa drew the conclusion that its trust had been violated. Its investigation revealed that there was a single news organization, where both the editorial and commercial policies were harmonized between BN/De Stem and PZC. Both regional newspapers appeared not to compete with one another. That is why the NMa decided to impose fines of more than 20 million Euros, on Wegener, plus personal fines on five Wegener executives for the role that these had played in the violation.

- Legal framework for psm; ability to fulfill their tasks

The Dutch approach to public service media is unique in the world, especially when it comes to the specific role of public service broadcasting associations, the so-called *omroepverenigingen*. These have the legal status of association or foundation, private organizations, though without the purpose of making profits. Each of them has hundred thousands of members and they are considered to represent certain groups and interests and thus together present a full-balanced picture of Dutch society.

At the moment there are eleven autonomous broadcasting associations active. As a consequence of the government agreement further elaborated in letters to Parliament<sup>8</sup> these associations have to merger in order to bring back the total number to six in 2016.

In addition there is the NTR<sup>9</sup> responsible for information, education and culture (like children and arts programming).

Furthermore there is the Dutch Broadcasting Foundation, *Nederlandse Omroep Stichting* (NOS), who provides mainly news and sports programming. Also there is variety of religious and spiritual media service providers who reflect a spiritual viewpoint or religious background. In future these organisations are expected to join one of the existing associations or the NTR and thus will lose their autonomous status as well.

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<sup>6</sup> See: [www.nma.nl/documenten\\_en\\_publicaties/archiefpagina\\_nieuwsberichten/nieuwsberichten/archief/2002/02\\_60.aspx](http://www.nma.nl/documenten_en_publicaties/archiefpagina_nieuwsberichten/nieuwsberichten/archief/2002/02_60.aspx).

<sup>7</sup> Besluit van de Raad van Bestuur van de Nederlandse Mededingingsautoriteit als bedoeld in artikel 79 van de Mededingingswet, zaaknummer 1528/894/Wegener. See: <http://www.nma.nl/images/1528BLD22-150949.pdf>.

<sup>8</sup> Ministerie van OCW, 3 December 2010, Kamerbrief Uitwerking regeerakkoord onderdeel media (Ministry of Education, Culture and Science, 3 December 2010, Letter to Parliament regarding the elaboration of the government agreement, media chapter).

<sup>9</sup> The abbreviation NTR follows from the names of the three public service broadcasters which in 2010 merged into NTR: NPS, Teleac and RVU.

All together they offer their programming on three main national TV channels and seven national radio channels. In addition there are several thematic TV channels and a large offer of websites. The scheduling of the whole programming is carried out by the Dutch Public Media Service, *Nederlandse Publieke Omroep* (NPO), who – as an ‘umbrella organization’ – is responsible for the coordination of all services and activities of the public service media.

As a consequence of the economic and financial crisis, also public service media are confronted with budget cuts of at least 200 million Euros. The need to reduce costs of public service media raised also discussions about the role of public service media and whether a small or broad programming should be provided. Some like the director of the NPO management board have warned that ongoing (political) discussions about the role and programming of public service media might even affect its independence and autonomy in the long run.

- The role and functioning of regulatory authorities in these respects

When it comes to assessment of public service content delivery, both the Minister of Education, Culture and Science and the Dutch Media Authority; *Commissariaat voor de Media* (CvdM), play a role here.

The CvdM performs an ex-ante role when it gives its comments to the 4 year annual budget plan (*Meerjarenbegroting*) of national public media. Together with these comments the annual budget plan will be sent to the responsible Minister. This procedure is taking place each year before 1 November. The Minister will decide on the budget in the end but takes into account the advises/comments by the CvdM and also the Council for Culture. In addition to that, each five years the national public media service releases its policy plan (*Concessiebeleidsplan*). By that occasion the NPO submits a new plan for its programme policy regarding TV, radio, digital thematic channels and services offered via Internet-based platforms. The CvdM will send its comments regarding these NPO plans to the Minister.

The CvdM has also an ex-post role when it comes to monitoring the performance agreement which has been concluded between NPO and the Minister. The current performance agreement covers the period 2010-2015. Here, the CvdM is involved in two ways.

- Firstly, by validating the way in which NPO will report. It is questioned whether the way of reporting is valid and reliable. In advance CvdM and NPO have to agree on what is a valid and reliable way of reporting, this is done once at the beginning of the period. *Validity* refers to the degree in which the test or other measuring device is truly measuring what NPO intended to measure. *Reliability* is synonymous with the consistency of a test, survey, observation, or other measuring device.
- Secondly, by verifying the achievement of the content provisions. This refers to the examination whether NPO met the requirements and achieved the aims and goals described. This is done every year before 1 June after having received the reports of the NPO. A base-line measurement will serve as a point of reference for verifying future developments.

If the NPO fails to comply it will be the Minister who can impose sanctions, except for specific aspects of the agreement dealing with audience reach targets (since the NPO cannot really influence this).

Since 1998, the Dutch Competition Authority (NMa) is responsible for implementing the Competition Act. As a consequence of the Temporary Act on Media Concentration the CvdM had to advise (NMa)<sup>10</sup>, on whether the market share limits were not exceeded in a certain case or a concentration in which one or more media companies were involved. The CvdM gave its opinion in six cases<sup>11</sup>:

- RTL Nederland and Radio 538 (6 July 2007);
- Koninklijke Wegener and Mecom Group (3 July 2007);
- Sky Radio Nederland and Telegraaf Media Groep (14 June 2007);
- PCM Uitgevers and De Persgroep (23 April 2009);
- HAL Investments and FD Mediagroep (23 December 2009);
- Egeria Private Equity Fund, Het Gesprek Media Holding and NRC Handelsblad (12 January 2010).

In all these cases the market thresholds as stated in the Temporary Act on Media Concentration have not been exceeded.

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

During the last years some issues have been raised about the right of non-disclosure of journalists in the Netherlands. Unlike many other countries the Netherlands have never opted for a legal foundation of this right. In absence of such a legal enshrinement, the Dutch courts granted this right to journalists, depending on specific circumstances of an individual case. After many critical comments and verdicts of the European Court of Human Rights (ECHR), government decided in 2009 to submit a draft amendment containing a legal right of non-disclosure but until now this proposal has not been passed by parliament.

Draft-legislation published by the Dutch Minister of Justice in 2008 has not been submitted to Parliament until now.<sup>12</sup> In the draft-proposal the Minister decided not to impose a strict definition of "journalist" and he stressed that there could be occasions when the public interest may outweigh the right to protect confidential sources and that a judge will have to make a ruling in these cases. This does not immediately answer the question what kind of public interest is important enough to outweigh the protection of sources and it will have to be examined on a case-by-case approach.

On 22 November 2007<sup>13</sup> the ECtHR ruled in the case Voskuil. The journalist Koen Voskuil working for the free daily sheet Sp!ts refused to reveal the identity of his source in 2000 when he wrote an article about the Amsterdam criminal scene. Because he insisted on not giving the name of the anonymous police officer, who was quoted in the press publications, he was put in detention for 18 days. The ECtHR ruled 7 years later that the

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<sup>10</sup> See: [http://www.nmanet.nl/en/Over\\_de\\_NMa/default.asp](http://www.nmanet.nl/en/Over_de_NMa/default.asp).

<sup>11</sup> See: <http://mediamonitor.nl/content.jsp?objectid=417>.

<sup>12</sup> See: [http://www.nvj.nl/docs/wetsvoorstel\\_bronbescherming.pdf](http://www.nvj.nl/docs/wetsvoorstel_bronbescherming.pdf).

<sup>13</sup> European Court of Human Rights judgement, Voskuil v The Netherlands, application no. 64752/01, 22 November 2007.

journalist's rights under article 10 of the European Convention of Human Rights<sup>14</sup> had been interfered. The Court was of the opinion that the Dutch authorities' interest in knowing the identity of the source in order to safeguard a fair trial of the accused was not sufficient to overrule Voskuil's right of non-disclosure. According to the Court the far-reaching measures of the Dutch authorities to learn the source's identity will discourage persons who have information in the general interest in future from coming forward and sharing their knowledge with the press. Furthermore the Court ruled that the Netherlands had infringed article 5 of the Convention; the right to liberty and security, because the legal requirements of the detention procedure had not been met.

In its ruling of 14 September 2010<sup>15</sup> the ECtHR again criticized the Netherlands authorities for a breach of article 10 of the Convention. Magazine *Autoweek* and publisher Sanoma were put in their right when they refused to hand over to police photographs of an illegal street car race. Sanoma held the view that the demand of the public prosecutor to surrender the photographs constituted an unlawful violation of the reporter's privilege of non-disclosure. The public prosecutor stated that the interests of its investigation outweighed this privilege. Moreover, since the race was held in public, the people who were in the photographs could not count on these photographs not being disclosed. In the eyes of the public prosecutor, Sanoma's reliance on the reporter's right of non-disclosure could therefore not hold. Again, the ECtHR disagreed with the Netherlands authorities. The Court once again confirmed that the right of journalists to protect their sources is a cornerstone of freedom of the press.

By arresting the chief editor of *Autoweek* for some time and threatening to seal and search all Sanoma editorial offices in case of not surrendering the photographic materials, the Netherlands has clearly breached article 10 of the Convention. Furthermore, this restriction of the freedom of expression lacked the statutory basis required by article 10, paragraph 2 of the Convention. The Court completely agrees with the publisher that there should always be prior judicial control with legal procedural safeguards before a public prosecutor can seize journalistic source material. The ECtHR ordered the Netherlands to pay Sanoma an expense reimbursement of 35,000 Euros.

Since the profession of journalist is not defined in law, the question who can be considered to be a journalist and gain a certain protection when it comes to disclosure of information has been addressed in several cases.

The Dutch Supreme Court, *Hoge Raad*, ruled on 25 November 2005<sup>16</sup> in the Lycos-case that the role of an internet service provider (ISP), although he facilitates the access to, and dissemination of, information is not completely similar to the role of the press in a free society. Therefore an ISP cannot claim the same degree of protection when it comes to disclosure of information.

From a recent verdict of the Supreme Court of 18 January 2008<sup>17</sup> in the case Van Gasteren/Hemelrijk it can be concluded that almost every publication on the internet can be considered to be comparable with a press publication and should deserve the same level of protection. The case was about an open letter written by a private person on a personal website aimed at a wide audience and therefore serving a general interest according to the Court.

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<sup>14</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights (ECHR)).

<sup>15</sup> European Court of Human Rights judgement, *Sanoma v. the Netherlands*, application no. 38224/03, 14 September 2010.

- Specific positive content obligations

Another important change for public media services was achieved by revoking the programme-content obligations. Before, national public media service providers had to broadcast certain minimum percentages of information, education and culture. Also a maximum percentage (25 per cent) for entertainment was laid down in the Media Act. Because there were often classification issues the content programme obligations have been replaced by more concrete goals regarding programme categories, audience reach and special target groups, which are laid down in performance agreements between the NPO, and the Minister of Education, Culture and Science.

For regional and local public media service providers the Dutch Media Act 2008 still contains such obligations and requires that at least 50 per cent of the programme of a local (or regional) public service broadcasting organization should consist of information, culture or education which has a particular relevance to the municipality (or province) for which the programme is intended.

- Funding schemes for specifically desired content

The Press Fund, *Stimuleringsfonds voor de Pers*<sup>16</sup>, has the aim to encourage innovation of the media landscape by funding. The Press Fund provides funding for print and digital media (like dailies, non-dailies, news magazines and news websites) which are journalistic in nature as well as for research into the press industry.

For newspapers there is no specific fund but a programme was recently launched to compensate newspapers for employing young journalists.

- Political advertising and/or broadcasting time

In the Netherlands political advertising on radio and TV is not prohibited. Nevertheless, in practice the possibility to buy advertising time is hardly used by political parties in our country because political parties already have the legal right to obtain broadcasting time on the national radio and TV channels of the public media. Following section 6.1 of the Dutch Media Act, broadcasting time is allocated to political parties which gained one or more seats in the House of Representatives or the Senate of the States General at the last elections and those political parties who are standing in all constituencies in an election for the Senate of the States General or in an election for the European Parliament.

- Codes of conduct and their organisational framing

As already mentioned in the 2004 report journalists in the Netherlands are committed to the Declaration of Principles on the conduct of Journalists as adopted by the International Federation of Journalists 1954.<sup>17</sup> In addition to that publishers, newspapers editors and the union of journalists respect individual editorial statutes which have the principal aim to guarantee editorial independence. The Press Council does not have real sanction powers like issuing fines or blames. The opinion will be published in the professional magazine for journalists and also be send to the national news agency, *Algemeen Nederlands Persbureau* (ANP), and to the media. The origin of the Press Council in the Netherlands leads back to 1948 when the Netherlands Union of Journalists founded the

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<sup>16</sup> LJN: AU4019, Hoge Raad, C04/234HR.

<sup>17</sup> LJN: BB3210, Hoge Raad, C06/161HR.

<sup>18</sup> See: <http://www.stimuleringsfondspers.nl/Internet/English/page.aspx/999>.

<sup>19</sup> See: <http://www.ifj.org/en/articles/ifj-declaration-of-principles-on-the-conduct-of-journalists>.

'Raad van Tucht', a disciplinary council, which functioned as a kind of Press Council until 1960. In that year the Press Council in its current form was founded. In addition to the Press Council, *Raad voor de Journalistiek*<sup>20</sup>, which can be considered as pure self-regulation, two types of co-regulation in can be distinguished.

A general code of conduct for journalists does not exist in the Netherlands, but in 2007 the Press Council published the so-called *Leidraad van de Raad van de Journalistiek*: a systematic and thematic overview of the standards as applied by the Council.<sup>21</sup>

Broadcasters are obliged by the Dutch Media Act 2008 to establish editorial statutes safeguarding editorial independence of their editorial employees. In the specific case of sponsored programmes a statute should also protect editorial staff from being influenced by commercial motives. Especially newsrooms also tend to have their own written codes of ethics, for instance to provide guidance on issues like how to deal with social media. Although not legally required, almost every Dutch newspaper also has an editorial statute as a consequence of an agreement between publishers and journalist unions.

- The role and functioning of regulatory authorities in these respects

Citizens and companies versus RA's: legal an natural persons have the right to lodge an internal appeal, and after appeal and higher appeal at the administrative court when they disagree with a decision of a RA. Further procedural rules are laid down in de General Act on Public Administration (Algemene wet bestuursrecht).

RA's versus central government: Decisions of RA's can only be annulled by minister in specific incidental cases of violation of law or the general interest. Further rules regarding independent functioning of autonomous administrative bodies are laid down in Framework Act autonomous administrative bodies (Kaderwet zelfstandige bestuursorganen).

- Distribution Aspects
  - Access to frequencies

Article 6.24, paragraph 1, of the Media Act 2008 states only one FM frequency or combination of FM frequencies shall be used to transmit the radio programme services of one and the same organisation. Exemptions from these requirements are only possible by, or pursuant to, an Order in Council if this is deemed desirable in connection with an efficient use of frequency space (article 6.24, paragraph 3, of the Media Act 2008).

To safeguard diversity, specific requirements for some of the frequencies determine what music style may be broadcast (article 6.23 Media Act 2008). Regional and local public radio are prioritized in granting frequencies following article 3.3 paragraph 2 and 3, of the Telecommunications Act but they have to comply with programming requirements that aim at securing a minimum amount of (regional or local) information, culture and education (article 2.70 Media Act 2008).

- Access to distribution networks and control of actual conditions

The purpose of communications markets regulation is to ensure that competitive markets develop. Consumers and customers will ultimately benefit from this. After all, to a

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<sup>20</sup> See: <http://www.rvdj.nl/?katern=15>.

<sup>21</sup> See: <http://www.rvdj.nl/rvdj-archive/docs/Leidraad%20RvdJ%20-%20september%202010.pdf>.



significant extent competition is capable of ensuring that qualitatively superior services are provided for an appropriate price. Analysis represents the first step of regulation; whether certain providers have significant market power. Such a party may pose an obstacle to the evolution of competition. The Independent Post and Telecommunications Authority (OPTA) then decides what remedies should apply in relation to such a party. This regulation occurs on the basis of market analyses which OPTA is required to conduct every three years. It is referred to as *ex ante* regulation because the rules to which market parties have to comply with are drawn up beforehand. In addition, OPTA monitors market parties' compliance with their obligations. It is through regulation that OPTA enforces European telecommunications legislation and its implementation at the national level in the Dutch Telecommunications Act. Under this Act, which came into effect on 15 December 1998, tasks were assigned to OPTA with respect to the supervision of broadcasting networks, particularly with regard to the settlement of disputes between cable network operators and programme providers. OPTA has also been given a supervisory role with respect to conditional access systems (decoder boxes).

In March 2009 OPTA published some rulings based on market analysis<sup>22</sup>. These rulings implied that the biggest Dutch cable operators (Ziggo, UPC, Delta and Caiway) had to open their networks and enable third parties to resell the analogue cable products (TV subscription packages). The ratio of the ruling of OPTA was to foster competition on the Dutch cable networks, a motivation which was supported by the European Commission as well. The cable network operators appealed the OPTA-decision and rather surprisingly the court, the Dutch Trade and Industry Appeals Tribunal, *College van Beroep voor het bedrijfsleven* (CBB), overturned the OPTA-decision<sup>23</sup>. The CBB's verdict has far-reaching implications for the Open Cable ruling in the Netherlands. Main reason for overturning OPTA's decision was that OPTA's analysis of the markets for distribution of TV signals, the basis of its decision, was not correct. The Tribunal agreed with the cable network operators' opinion that there is already enough competition between the various distribution platforms (cable, satellite, IPTV and DTT) in the Netherlands and that there was no need to force cable operators to open their networks for competitors. There are no further appeals possible following a ruling by the Tribunal. OPTA made a new decision which is in line with the motivation of the Tribunal's verdict.

- Must-carry/must-offer rules for electronic media

Public media service providers enjoy a must-carry privilege, and are therefore ensured of cable transmission (Article. 6.13 Media Act 2008; see section 2.2.1.2.5). Cable operators are legally bound to carry seven television and nine radio channels. These *must carry* channels - the Dutch and Belgian/Flanders public broadcasting channels - are part of the so-called "basic package" of 15 television and 25 radio programmes that should be transmitted in analogue subscription packages.

- Role of platform operators

In future there will be a new regime for access to cable networks and also other distribution platforms. This regime will have to be followed by all platform operators offering TV and radio channels, so not only cable network operators but also operators of DTT, satellite and IPTV. By that occasion the mandatory role of programme councils will

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<sup>22</sup> See: <http://www.opta.nl/nl/wat-doet-opta/markten/omroep/>.

<sup>23</sup> LJN: BN4243, College van Beroep voor het bedrijfsleven, AWB 09/536 tot en met 09/539 en 09/541 tot en met 09/548.



be terminated.<sup>24</sup> Main rule will be that a minimum of 30 channels should be included in a digital package, this including the must-carry channels.

DTT multiplexes have been allocated following a beauty contest (comparative test based on business plans of applicants). In addition there is also the instrument of benefit sharing. From 7 years after the license has been granted. KPN, the current incumbent owning the commercial multiplexes, pays a certain percentage of its turnover, above a certain level. The license has been granted in 2002 for a total period of 15 years, so it will expire in 2017. National public service media have are legally entitled to have a multiplex as well and its channels are included in the DTT package (brand name: Digitenne) offered by KPN. In each province the channels of the regional public service media, active in that specific province, are also included the Digitenne package.

- The role and functioning of regulatory authorities in these respects

The Radio Communications Agency, *Agentschap Telecom* (AT)<sup>25</sup>, grants frequency space to commercial parties on the basis of application order, auctions or a comparative testing (Article 3.3, paragraph 4, of the Telecommunications Act). Worth noting that the frequencies held by licence holders may change due to mergers or acquisitions.

The Independent Post and Telecommunications Authority, *Onafhankelijke Post en Telecommunicatie Autoriteit* (OPTA)<sup>26</sup>, regulates the communications markets in the Netherlands.

There is a close operation between the three authorities in overlapping cases/situations. Discussions have taken place between NMa, the CvdM and OPTA on problems regarding access to the cable network. Meetings were also held in 1998 between NMa and OPTA regarding conditional access. Finally, OPTA consulted with the NMa on the application of general rules of competition in drawing up OPTA's first consultation document 'Significant Market Power'.

NMa and OPTA work together according to the so-called Cooperation Protocol<sup>27</sup>, which was drawn up in 2004 and has been amended due to changes in the Dutch Media Act in 2005. Behaviour that is in violation of both the Dutch Telecommunications Act and the Dutch Competition Act is investigated by the OPTA first.

It is planned that from January 1, 2013 OPTA, NMa and the Dutch Consumer Authority will be merged in a brand new regulator called the Dutch Authority for Consumers and Markets (ACM).<sup>28</sup>

- Access to Information
  - Transparency of media ownership situations

Since 2001 the Mediamonitor section of the CvdM publishes an annual report about trends and developments in the media market (written press, TV, radio and new

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<sup>24</sup> Ministerie van Onderwijs, Cultuur en Wetenschap (5 december 2011). Brief aan de Tweede Kamer inzake Wijziging Mediawet i.v.m. distributie wettelijke minimumpakket radio en televisie, p.14. (Ministry of Education, Culture and Science, 5 December 2010, Letter to Parliament regarding the composition of the minimum packages in which digital radio and television broadcasting services are transmitted).

<sup>25</sup> See: <http://www.agentschaptelecom.nl/english>.

<sup>26</sup> See: <http://www.opta.nl/en/>.

<sup>27</sup> See: <http://www.opta.nl/en/news/all-publications/publication/?id=1366>.

<sup>28</sup> See: <http://www.opta.nl/en/news/all-publications/publication/?id=3487>.

media).<sup>29</sup> The report covers aspects like media ownership, market shares, ongoing trends and specific issues related to media pluralism.<sup>1</sup> There is no legal obligation for media companies to submit information to the CvdM which collects its information mainly by using public sources of information like annual reports, press releases, information provided through the websites of media companies, the information filed in the Trade Register of the Chamber of Commerce and press publications. The CvdM also asks the media companies covered in the reports to verify and check the information which it intends to publish.

The report is sent to the Minister of Media Affairs as well as the Parliament. It is also available for all interested parties (press, industry and public) and published on the website. The observations of the CvdM could give the legislature grounds for adapting new media (ownership) legislation. The publication of the yearly reports by the Mediamonitor section of the CvdM will obtain a legal basis in the Media Act.

- Accountability of public service media

In the Netherlands there are several moments when the national public service media have to account for their content and activities and their performance is assessed by the regulatory authorities.

First of all it exists an *ex ante* regulation: each year it announced its policy for the upcoming 4 years in its annual budget plan (Meerjarenbegroting) of PSB. The CvdM gives also its comments on this plan and together with these remarks of the CvdM the 4 year budget plan will be sent to Minister. This procedure is taking place each year before 1 November. The minister will decide on the budget in the end but takes into account the advises/comments by the CvdM and also the Council for Culture.

Secondly each 5 years when the PSB gives its comments to the policy plan (Concessiebeleidsplan) which are released every 5 years.

The CvdM has also an *ex post* role when it comes to monitoring the performance agreement which has been concluded between PSB and the Minister. The latest performance agreement covers the period 2010-2015. The CvdM is involved in 2 ways.

Firstly, by validating the way in which PSB will report. Is the way of reporting valid and reliable? In advance CvdM and PSB have to agree on what is a valid and reliable way of reporting, this is done once at the beginning of the period. *Validity* refers to the degree in which our test or other measuring device is truly measuring what we intended it to measure.

*Reliability* is synonymous with the consistency of a test, survey, observation, or other measuring device.

Secondly, by verifying the achievement of the content provisions. Did PSB meet the requirements and achieve the aims and goals described? This is done every year before summer after having received the reports of PSB. A *baseline measurement* will serve as a point of reference for verifying future developments.

If PSB fails to comply it will be the Minister who can impose sanctions.

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<sup>29</sup> This resulted from the Ministry of Education, Culture and Science asking the CvdM to monitor closely the impact of media concentration on media diversity and independence.

- Freedom of information laws

The Freedom of information legislation was first adopted in 1978 and replaced by the Government Information (Public Access) Act, *Wet Openbaarheid van Bestuur* (WOB) in 1991.<sup>30</sup> The act regulates how individuals can demand information on administrative matters contained in documents held by public authorities or companies carrying out work for a public authority. The authority in question has two weeks to respond.

In two verdicts of 19 January 2011<sup>31</sup> the Council of State, Division of administrative disputes, the highest administrative court in the Netherlands, confirmed that the application of the WOB has to be evaluated in the light of article 10 of the ECHR. It was for the first time a Dutch court took article 10 of the Convention explicitly into consideration when issuing a ruling about the application of the WOB in practice.

Several legal disputes have been raised about the question whether public authorities are entitled to charge citizens or journalists for providing information following a WOB information request. At the end of 2011 RTL News who refused to pay a fee for documents provided by the local government of Maastricht was put in the right by the administrative court. Public authorities may only request for compensation of copy costs, but nothing more.<sup>32</sup>

- Accessibility of products/services and distribution networks

The measures mentioned above are not applicable in the Netherlands. Access of hearing impaired people to TV programmes of both private and public service media is ensured by minimum percentages of subtitling.

Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services is implemented in the Telecommunications Act. Especially chapter 7 and 9 of the Telecommunications Act contain rules regarding access to universal services. The Netherlands has designated universal services to the incumbent KPN: connection, telephone service, telephone directory and subscriber information service. The designation for telephone boxes was terminated in 2009. Universal services must be offered at reasonable cost, without other tariff regulations. Further tariff regulations have been established for one component of telephone service, which is the so-called 'accessibility subscription' (relatively low subscription cost).

No universal service fund has been established to compensate for losses in offering universal services.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

Although very often discussed in the past, until now a national ombudsman for the press has never been appointed. But some newspapers have decided to install their own ombudsman for dealing with complaints and questions.

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<sup>30</sup> Act of 31 October 1991, see: <http://legislationline.org/documents/action/popup/id/6395>.

<sup>31</sup> LJN: BP1315, AB RvS 19/01/2011 & LJN: BP1316, AB RvS 19/01/2011.

<sup>32</sup> LJN: BU8432, Gerechtshof 's-Hertogenbosch, 11/00113.

- Participation in media operators/(self-)regulatory bodies

There are no such participation in bodies of media operators or in (self-) regulatory authorities/bodies.

2.2.19.2. Main Players in the Media Landscape

2.2.19.2.1. Radio

The national public media service NPO, operates seven main radio stations. FunX has been introduced in 2002 and Radio 6 in 2006 (formerly 747 AM). The composition of the channels is the responsibility of channel managers. Aside from the NPO, there are also 14 private radio stations owned by nine different suppliers. National public service radio channels account for 33.3 percent of the market share while the regional public service has 11.9 percent, a combined share of almost half the audience (44.9 percent). The other half is divided between the national and regional commercial channels. Regional commercial channels united in E-Power have a 4.8 percent share of the market. Sky Radio Group, owned by media company Telegraaf Media Groep, is with three commercial radio channels the largest player in the market after NPO. All radio channels of RTL Nederland (including the shortly owned Slam!FM) have been exchanged and partly sold to Talpa Media in 2011 as a consequence of Talpa's participation in television broadcaster SBS Nederland. Talpa Media has again become owner of Radio 538 and Radio 10 Gold with this transaction.

**Table 103 NL: Main radio companies**

Companies	Ownership Structure*	Main Radio Stations	Total Market Share 2010 (%)**	
Nederlandse Publieke Omroep	Public service (foundation)	Radio 1 Radio 2 Radio 3FM Radio 4 Radio 5 Radio 6 FunX	8.3 9.9 9.5 2.1 2.9 0.3 n.a .	33.0
Sky Radio Group BV	Telegraaf Media Groep NV 87.4%	Sky Radio Radio Veronica Classic FM	8.5 5.6 2.0	16.1
RTL Nederland BV	RTL Group / Bertelsmann AG 73.7%	Radio 538 Radio 10 Gold	10.2 2.6	12.8
De Persgroep NV		Q-Music	6.7	6.7
RadioCorp BV		100%NL	4.0	4.0
Slam!FM BV		SlamFM!	2.0	2.0
Arrow Media Groep BV		Arrow Classic Rock Arrow Jazz FM	1.1 0.4	1.5
FD Mediagroep BV		BNR Nieuwsradio	1.0	1.0

Note: Selection of 'main' radio companies: market share of 1 percent or larger per station.

\* Source: annual reports / Chamber of Commerce (www.kvk.nl).

\*\* Source: Dutch Media Authority (2011). *Mediamonitor: Mediabedrijven en mediamarkten 2001-2010*, pp. 88-89.

During the last years, radio broadcasters have been launching an increasing amount of digital radio stations, mostly online accessible. An experiment started with the main public radio stations via digital terrestrial radio Terrestrial Digital Audio Broadcasting (T-DAB) in 2011. Although already planned long time ago, no concrete date for an auction of frequencies for commercial service providers has been set. Because an increasing number of people listen digital radio via open internet some question whether there is need for a further rollout of T-DAB frequencies.

#### *2.2.19.2.2. Television*

The television sector is dominated by the activities of three strong suppliers: The NPO together with the biggest commercial operators RTL Nederland and SBS Nederland jointly control 76 percent of the market.

All broadcasting associations within the NPO share three nationwide television channels and six radio channels. At the regional level operates in each province at least one independent public service broadcaster. These broadcasters are independently organised and have joint market share of 1.7 percent in 2010.

The national commercial broadcasters in the Netherlands are part of large international corporations. RTL Nederland holds six commercial broadcasting licenses, which are used for providing the channels RTL4, RTL5, RTL7, RTL8 and the digital (thematic) channels RTL Lounge and RTL Crime. The media group Bertelsmann has 73.3 of the share capital of the Luxembourg-based RTL Group. The company was also involved in radio until 2011 (Radio 538, Radio 10 Gold and shortly Slam!FM before it was sold as described earlier in section 2.1). RTL Group is a leading television content producer and the largest independent distribution company outside the US (Fermantle).

SBS Nederland operates the channels SBS6, NET5 and Veronica. Moreover, the company owns the company that publishes the weekly television and radio guide Veronica Magazine, which is the largest weekly publication in the Netherlands, with a circulation of approximately 0.9 million. As of 2011, former mother company ProSiebenSat.1 sold SBS Nederland as well as the Belgium branch to Sanoma Group (67 percent share) and Talpa Media (33 percent share). The Finnish Sanoma Group is having a leading position in the Dutch magazine market for years and Talpa Media, owned by media tycoon John de Mol, is strong in the (international) television content production industry.

**Table 104 NL: Main Television Companies**

Companies	Ownership Structure*	Main Television Stations	Total Market Share 2010 (%)**
Nederlandse Publieke Omroep	Public service (foundation)	Nederland 1 21.5 Nederland 2 6.8 Nederland 3 6.5	34.8
RTL Nederland BV	RTL Group / Bertelsmann AG 73.7%	RTL4 14.4 RTL5 4.0 RTL7 4.6 RTL8 1.7	24.7
SBS Nederland BV	ProSiebenSat.1 Media AG 100%	SBS6 10.0 Net5 3.5 Veronica 3.1	16.6
MTV Networks BV	Viacom Inq 100%	MTV 0.8 TMF 0.5 Nickelodeon 1.8 Comedy Central 1.0	4.1
Discovery Communications Benelux BV	Discovery Communications Inq 100%	Discovery Channel 1.5 Animal Planet 1.0	2.5
Jetix Europe Channels BV	The Walt Disney Company	DisneyXD 1.6	1.6
NGC Network Ltd		National Geographic Channel 1.1	1.1

Note: Selection of 'main' television companies: market share of 1 percent or larger per station.

\* Source: annual reports / Chamber of Commerce ([www.kvk.nl](http://www.kvk.nl)) / Mavise database (<http://mavise.obs.coe.int>).

\*\* Source: Dutch Media Authority (2011). *Mediamonitor: Mediabedrijven en mediamarkten 2001-2010*, p. 81.

### 2.2.19.2.3. *Press and publishing*

As is the case with television, the daily paper sector is dominated by the activities of three strong suppliers. The principle of 'three is the rule' which refers to a situation where the three major publishers jointly control 90 percent of the market does however not apply to the newspaper market anymore: Telegraaf Media Group (TMG), de Persgroep and Koninklijke Wegener together control 70.3 percent of the market. It should be noted the daily newspaper sales in the Netherlands are for a large majority subscription-based (see section 2.6).

Telegraaf Media Group is a stock exchange listed (Euronext), independent Dutch media group that is primarily active in the market for daily newspapers, (mainly puzzle) magazines and door-to-door papers. The name Telegraaf Media Groep originates from the Dutch national daily De Telegraaf, which, introduced in 1893, grew to become the Netherlands' largest newspaper. TMG also publishes the free newspaper Sp!ts (launched in 1999) and several regional daily newspapers. Alongside the publishing activities, the group has also interests in broadcasting companies. The group is having 6 percent of the shares in ProSiebenSat.1, parental company of SBS Nederland until 2011. In addition, TMG is major shareholder of Sky Radio Group which is licence holder of the national radio stations Sky Radio, Radio Veronica and Classic FM. As for online activities, TMG has been

expanding its activities in this field for over the last years. The media group acquired, amongst others, weblog GeenStijl and social network site Hyves which is the Dutch version of international equivalent Facebook. TMG daughters De Telegraaf and GeenStijl were both involved in 2010 in the application for a public broadcasting licence. The licences were however granted under the condition that TMG would break its commercial connections with the two public broadcasting associations WNL and PowNed.

PCM Publishers was a large publisher of national daily newspapers between 1995 and 2009. Its five national titles were: de Volkskrant, Trouw, NRC Handelsblad, nrc.next and Algemeen Dagblad. In 2005, the latter was integrated into a joint venture with Wegener, creating the AD Nieuwsmedia company. From 2004 to 2009 the British investment company APAX Partners was the majority shareholder of PCM Uitgevers. Under APAX's ownership the publishers' capital shrank considerably and the debts grew significantly. Since 2009, PCM Publishers has been called *de Persgroep Nederland* BV (Persgroep Nederland), a subsidiary of the Belgian Persgroep NV that acquired the majority of the share. The titles NRC Handelsblad and nrc.next were sold to Lux Media by order of the Dutch Competition Authority, so that as of that date the newspaper portfolio of Persgroep Nederland consisted of AD, de Volkskrant and Trouw. Het Parool was added to the portfolio in January 2010. AD is a national and regional daily in one; the newspaper's editions come in with different regional sections.

At the regional level, one single publisher determines the offer in many parts of the country. Mecom holds with 51 percent of all regional dailies the strongest position on the regional market. In many provinces there is only one publisher dominating the market (from 60 to 99 percent of the market). Even in the province of Utrecht where four publishers supply regional titles, the market is highly concentrated due to de Persgroep's dominant position. In four towns there is no competition on the regional market. However, the provinces of North Holland, South Holland and Flevoland have several publishers operating their regional markets.

Since 2007, the exchange-listed Mecom Group plc (Mecom) owns 86.4 percent of the shares of the largest regional publisher in the country, Koninklijke Wegener NV (Wegener). Media Groep Limburg BV, publisher of the two Limburg newspapers, has been fully owned by Mecom since 2006. Mecom recently disposed of many international holdings and activities (amongst others in Poland) and is at this moment active in Denmark and Norway, in addition to the Netherlands. In total, the company operates more than 300 independent (daily) titles and 200 websites. Mecom has set itself the express objective of becoming a cross-media content company, primarily in regional and local markets. In spite of this, Wegener sold its share in AD Nieuwsmedia to PCM Uitgevers in 2009.



**Table 105 NL: Main Publishing Companies**

Main companies	Ownership Structure*	Main Titles/ Market Share 2010 (%)	Total Market Share 2010 (%)**
Telegraaf Media Groep NV		De Telegraaf 14.4 Sp!ts 7.3 HDC-dagbladen 5.5	27.2
Koninklijke Wegener BV/ Media Group Limburg BV	Mecom Group Plc 86.4%	Dagblad de Limburger / 4.0 Limburgs Dagblad de Gelderlander 3.4 de Stentor 3.0 Brabants Dagblad 3.0 De Twentsche Courant Tubantia 2.6 BN/DeStem 2.6 Eindhovens Dagblad 2.5 PZC 1.3	22.4
de Persgroep Nederland BV	De Persgroep NV 58.5%	AD-dagbladen 10.2 de Volkskrant 6.0 Trouw 2.5 Het Parool 2.0	20.7
Metro Holland BV	Metro International SA 100%	Metro 9.3	9.3
Lux Media BV		NRC Handelsblad 4.6 nrc.next 1.6	6.2
NDC Mediagroep BV		Dagblad van het Noorden 3.2 Leeuwarder Courant 2.1	5.3
Mountain Media BV		Dagblad De Pers 4.7	4.7
FD Mediagroep BV	HAL Holding BV 98,3%	Het Financieel Dagblad 1.4	1.4
Erdee Media Groep BV		Reformatorisch Dagblad 1.2	1.2

Note: Selection of 'main' publishing companies: market share of 1 percent or larger per title.

\* Source: annual reports / Chamber of Commerce (www.kvk.nl).

\*\* Source: Dutch Media Authority (2011). Mediamonitor: Mediabedrijven en mediamarkten 2001-2010, pp. 63-64.

**Table 106 NL: Concentration of regional dailies in geographical areas (market share 2010 (%))**

	Mecom Group plc	de Persgroep Nederland BV	Telegraaf Media Groep NV	NDC Mediagroep BV	Vereniging Friesch Dagblad	Koninklijke BDU Uitgevers BV
Groningen	0.0	0.3	0.0	99.1	0.6	0.0
Friesland	0.0	0.2	0.0	86.1	13.6	0.0
Drenthe	0.6	0.2	0.0	99.1	0.1	0.0
Overijssel	99.6	0.2	0.0	0.2	0.0	0.0
Gelderland	94.8	0.3	0.0	0.0	0.0	4.8
Utrecht	2.4	92.2	5.1	0.0	0.0	0.4
Noord-Holland	28.2	0.0	71.8	0.0	0.0	0.0
Zuid-Holland	0.0	88.9	11.1	0.0	0.0	0.0
Zeeland	99.9	0.1	0.0	0.0	0.0	0.0
Noord-Brabant	99.9	0.2	0.0	0.0	0.0	0.0
Limburg	99.9	0.1	0.0	0.0	0.0	0.0
Flevoland	59.9	26.7	6.2	5.2	1.9	0.0

\* Source: Dutch Media Authority (2011). Mediamonitor: Mediabedrijven en mediamarkten 2001-2010, p. 70.

**Table 107 NL: Concentration of the market of regional dailies**

Publishing Companies	Market Share 2010 (%)*
Mecom Group plc	51.0
De Persgroep Nederland BV	23.0
Telegraaf Media Groep NV	12.5
NDC Mediagroep BV	12.1
Vereniging Friesch Dagblad	0.8
Koninklijke BDU Uitgevers BV	0.6

\* Source: Dutch Media Authority (2011). Mediamonitor: Mediabedrijven en mediamarkten 2001-2010, p. 70.

2.2.19.2.4. *Online media (non-linear audiovisual (media) services; websites)*

The existing news suppliers, mainly those of national dailies, gained a solid position in the online news market during the early days of the internet. Yet in 2010, the majority of the news sites is still in the hands of the main publishing houses. Nevertheless, the website with currently the highest monthly reach is the internet-only news service nu.nl. The number two and three are the websites of national daily newspaper De Telegraaf and the public service broadcaster NPO.

**Table 108 NL: Online news media**

News site	Company	Reach 2010 (%)*
Nu.nl	Telegraaf Media Groep NV	38.2
Telegraaf.nl	Telegraaf Media Groep NV	32.6
Nos.nl	NPO	28.7
Ad.nl	De Persgroep BV	23.6
Volkskrant.nl	De Persgroep BV	16.6
Nieuws.nl.msn.com	Microsoft BV **	13.6
Trouw.nl	De Persgroep BV	11.2
Elsevier.nl	Reed Business BV	10.7
Nrc.nl	Lux Media BV	10.4
Teletekst.nos.nl	NPO	10.3
Nieuws.nl	Nort Groep BV**	10.1
Depers.nl	Mountain Media BV	9.6
Kranten.com	Netdirect BV	7.9
Deweekkrant.nl	Mecom Plc	7.4
Hetparool.nl	De Persgroep BV	6.9
Spitsnieuws.nl	Telegraaf Media Groep NV	6.5
Destentor.nl	Mecom Group plc	5.9
Gelderlander.nl	Mecom Group plc	5.5

Note: Only news sites with a monthly reach of more than 5 percent are displayed.

\* Source: Dutch Media Authority (2011). *Mediamonitor: Mediabedrijven en mediamarkten 2001-2010*, p. 97.

\*\* Data source: Web domain registration ([www.sidn.nl](http://www.sidn.nl))

2.2.19.2.5. *Cable/Satellite network operators, IPTV & Internet Access Providers*

The Netherlands have the highest penetration of cable TV services in Europe and one of the highest in the world. The distribution of analogue radio and television is mostly transmitted via cable whereas digital broadcasting services make use of cable, terrestrial (DVB-T), satellite, glassfiber and telephone networks (DSL).

Although cable is still the most dominant infrastructure for carrying television and radio programmes competition has substantially increased over the last years: the market shares of the four cable network operators Ziggo, UPC, Delta and Caiway started declining after 2002.<sup>33</sup> With the analogue switch off, Caiway already stopped offering analogue television to new subscribers in 2010 and Ziggo announced to stop transmitting

<sup>33</sup> TNO. (2011, December). *Marktrapportage Elektronische Communicatie*. Delft: TNO, p. 23. (Netherlands Organisation for Applied Scientific Research (2010, September). *Market report Electronic Communication*, p. 23).

analogue broadcasting services in 2013. However, Ziggo already started reducing the number of transmitted analogue channels despite the complaints of consumers and negative advices of the *programme councils*.<sup>34</sup> These Programme councils advise on the composition of the transmitted radio and television broadcasting services in so-called 'packages', which must represent the viewers and their preferences in the geographical market of a network operator. The CvdM can be requested by a programme council or programme provider to intervene in conflicts and evaluate serious reasons for which the cable operator wants to deviate from the advice on the basis package. Furthermore a programme provider whose programme is not included in the advice is able to ask the CvdM to evaluate the advice of the programme council.

The most dominant player of the cable network operators, Ziggo, resulted from a merger of @Home, Casema and Multikabel in 2007 (see table 109). As the technological developments have evolved, the main cable and telecommunication network operators have entered into each other's markets by offering 'double' or 'triple play packages' including broadband internet, telephony and broadcasting services. KPN, a former state-owned company with a (traditionally) strong position in the telecommunications market, transmits broadcasting services (mostly) via its DSL network. Reversely, both cable network operators Ziggo and United Global Com (UGC) entered the market of broadband internet (table 110). UGC is part of the American media group Liberty Media which operates in many European countries as well as Australia. This leading international cable operator is in the Netherlands also represented by its daughter company Chellomedia which owns the premium TV-channels Film1 and Sport.

In the field of pay-TV satellite services, the one and only provider in the Netherlands is CanalDigitaal. Together with TV Vlaanderen in Flanders, TélÉSAT in French speaking Belgium and AustriaSat in Austria is CanalDigitaal part of the Luxembourg M7 Group.

The category 'other non-cable' of table 109 includes, among others, Reggefiber Group which started in 2005 with building a fibreglass network in the Netherlands. Reggefiber Group agreed on a joint venture with KPN which gained a 41 percent share in the company in 2008. Due to heavy investments during the last years, ten percent of the Dutch households is currently able to access the fibre network.

**Table 109 NL: Cable, satellite and IPTV operators of digital radio and television**

Company	Ownership	Distribution technique	Total Market Share 2010 (%) *
Ziggo Bond Company BV/ Zesko Holding BV		Cable	33.2
Koninklijke KPN NV		Terrestrial , DSL, fibreglass	22.4
UPC Holding BV	Liberty Global Inc. 100%	Cable	16.7
CanalDigitaal	M7 Group SA 100%	Satellite	14.6
Other non-cable			7.5
Other cable			5.6

Source: Dutch Media Authority (forthcoming 2012). Mediamonitor: Mediabedrijven en mediamarkten 2011.

<sup>34</sup> See: <http://www.kabelraden.nl/nieuws/ni/16024/aanpassing-analoge-tv-pakket--ziggo-negeert-zwaarwegend-advies-programmaraad-ziggo-friesland/>.

**Table 110 NL: Broadband internet access providers**

Company	Ownership	Total Share (%)*	Market 2010
Koninklijke KPN NV		41	
Ziggo Bond Company BV/ Zesko Holding BV		24	
UPC Holding BV	Liberty Global Inc. 100%	13	
Other		22	

Source: Dutch Media Authority (forthcoming 2012). Mediamonitor: Mediabedrijven en mediamarkten 2011.

#### 2.2.19.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)

The annual circulation of national and regional dailies in the Netherlands decreased over the last ten years with 11.5 percent to 1,330 million in 2010. Publishers saw the number of subscriptions going down: the share of subscriptions relative to the total annual circulation dropped from 76 percent in 2001 to 69 percent in 2010. Simultaneously, the free newspapers consolidated their position in the newspaper market and became a serious competitor for publishers' newsstand sales which have gradually been going down as well.

As opposed to readership (expressed in terms of circulation), the average time spent on television viewing and radio listening is still growing in the Netherlands. The Dutch watch 24 minutes per day more television than they used to do ten years ago. Radio listening increased with 11 minutes per day on average. Large sports events tend to cause fluctuations in viewing behaviour. It should also be noted that the measurement techniques have been improved over the years as well: television viewing of visitors became included (2005), as well as time shifted viewing (2008).

**Table 111 NL: Audience statistics**

	2001	2010
Annual circulation national and regional dailies (x million)	1,502	1,330
Television viewing (average minutes per day)	167	191
Radio listening (average minutes per day)	189	200

\* Source: Dutch Media Authority (2011). Mediamonitor: Mediabedrijven en mediamarkten 2001-2010, p. 97.

With an increase of 612 thousand internet connections in 2001 and 6,194 thousand in 2010, almost 87 percent of the Dutch with the age of 13 years or older access the internet from their homes.<sup>35</sup> Of those who go online regularly: 74 percent used the web in 2010 to gain information about news and public affairs.<sup>36</sup>

Advertising expenditures can be seen as an indicator of the ability to reach and influence a population in a particular country using a specific media type, and gives thus an indication of the importance of media types. As for 2010, 4,004 million Euros was spend

<sup>35</sup> TNO (2010, September). Marktrapportage Elektronische Communicatie. Delft: TNO. (Netherlands Organisation for Applied Scientific Research (2010, September). Market report Electronic Communication).

<sup>36</sup> Centraal Bureau voor de Statistiek (Statistics Netherlands), see: <http://statline.cbs.nl/statweb/>.

on advertising expenditures in the Netherlands, with newspapers and magazines together accounting for almost half of it (43 percent). The Netherlands is a print country where a relative small proportion of money is spent on radio and television. Note that advertising, as opposed to some other European countries, is not prohibited on public broadcasting in the Netherlands. Since the rise of online advertising, 2009 was the first year in which a larger proportion of advertising expenditures derived from the Internet than from television. This development continues with 21.9 percent and 25.2 percent from respectively television and internet advertising expenditures in 2010. The growing importance of online ads in the Dutch advertising industry cannot be ignored and is supposed to become a serious threat to newspapers.

**Table 112 NL: Share of advertising expenditures within the media sector**

Medium	In million Euros	Total market share 2010 (%)*
Newspapers	1.172	29,3
Internet	1.009	25,2
Television	877	21,9
Magazines	548	13,7
Radio	246	6,1
Other	152	3,8
Total	4.004	100,0

\* Data source: European Audiovisual Observatory (2012). Yearbook 2011: Trends in European television, p. 54, 61.

### 2.2.19.3. Conclusion and Recommendations

The Dutch authorities have recently been condemned twice by the European Court of Human Rights for violations of the European Convention (article 5 and 10). Despite the previous government's intention, the right of non-disclosure has not been incorporated in law so far. Although in specific cases Dutch courts will – depending on the specific circumstances – back the right of journalists to protect their sources, many would welcome a legal statement providing more legal certainty and outlining the main principle that journalists have a legitimate right in disclosure of their sources.

The chairman of the NPO management board said at several occasions there is an increasing reflex of politicians to interfere with public service media on a too detailed level. This is for instance illustrated by critical comments of individual MP's regarding the quality of programming of public service media. He warned this trend – stimulated by the wish to reduce public expenditures and impose budget cuts – can imply a threat to the editorial independence and autonomy of public service media.

Freedom House, a foundation supporting democratic developments and monitoring freedom of speech as well as the press, reports about the Netherlands: "Despite high ownership concentration, there are a variety of opinions expressed in the media. The state allocates public radio and television programming to political, religious, and social groups according to their membership."<sup>37</sup> The most serious threat to media diversity in the Netherlands is at the regional level: the gradual destruction of regional newspapers is threatening local democracies. The news market consists in some communities of only

<sup>37</sup> See: <http://www.freedomhouse.org/report/freedom-press/2011/netherlands>.

one local public broadcaster and a free sheet but no (paid) regional daily. The two largest publishers of regional dailies, TMG and Wegener, are forced to cut costs due to the current economic climate despite their efforts to combine their forces. A joint distribution process seemed to have paid off: both could reduce their distribution costs in 2011. The next step the publishers are making is a collaboration in selling advertisement space. On the digital side, the need to invest in the development of new ways to sell content to news consumers has become more and more urgent with the (faster than expected) adoption of tablets and smart phones last year on the one hand and the ongoing decline of both advertising and subscription revenues on the other hand. The income fostered by online activities is still a minor percentage in relation to the incomes generated by print divisions. Despite the great challenge publishers are facing, those operating in the smaller geographical areas in particular, have launched during the last two years several so-called 'hyper local' websites. These sites provide local news based on an aggregation<sup>38</sup> or combined model of professional and citizen journalism<sup>39</sup>. With the repeal of the Temporary Act Media Concentration as of the first of January 2011 in the Netherlands, no longer specific rules exist to restrict ownership, or opinion power, in the different media markets. Also the CvdM's role of advising the competition authority (NMa) in case of intended mergers or acquisitions of media companies has come to an end as a consequence. Hence, general competition law applies to mergers and acquisitions as described earlier in this chapter.

Media concentration policies are traditionally a national concern. At European level there is no regulation specifically aiming to ensure media diversity. The media environment is rapidly changing, national or even European boundaries are disappearing. Internet serves as a global platform and dominant global players as Apple, Google, Facebook and Amazon cannot be regulated by national rules on media ownership. In many countries ownership restrictions exist for particular media types, newspapers, magazine, radio and television. For newspapers circulation criteria are in use, for television audience measures, or the maximum number of licenses is limited. Within the internet such restrictions, e.g. number of websites, hardly can be applied. Nevertheless, Italy, and to a certain extent Germany, seem to be ahead with their platform-independent approaches of an 'integrated media system' and a 'media-relevant related market', respectively, which also consider advertising and all kinds of online activities, for example. We consider that an exclusive platform approach is not sufficient and that alternatives are lacking because the national boundaries are disappearing.

In relation to the supply chains of the media production process, various types of media concentration that may occur in media markets can be identified, namely: a) supplier concentration, b) editorial or programming concentration, c) concentration of media content, and d) audience concentration. Restrictions of media ownership can only regulate supplier and editorial concentration, but it is assumed that low supplier concentration leads to low editorial concentration and that both imply a diverse media offer. Nevertheless we doubt whether regulation on media concentration in Europe will always safeguard media diversity. Whereas concerns about media pluralism have been strongly focused on diversity of suppliers, there seem to be more reasons for establishing a demand-oriented approach. Such an approach considers the diversity of sources to which one is exposed; in other words, the variety of sources an individual consumer uses in gaining news and information, also referred to as 'exposure diversity'.

From this point of view, the internet's easy accessibility plays an important role as a platform for the dissemination of information. Anyone, either a company or an individual,

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<sup>38</sup> See for an example of TMG's local news sites: <http://tilburg.dichtbij.nl/>.

<sup>39</sup> See for an example of Wegener's local news sites: <http://dichtbijbreda.nl/>.



is able to establish a media service; the Internet is presumed to always ensure a minimum number of suppliers. This, however, does not necessarily imply the absence of concerns about the centralization of power in opinion formation. The internet has already shown how large players can exercise considerable influence, even though there is an abundance of choice. Consider, for example, how Google has consolidated an incredibly strong position in the search engine market. Consumers themselves have a certain responsibility in finding their way among all the available content and consulting different 'voices' rather than using a few popular sources. If consumers predominantly choose one or two main sources, a powerful position might be created for those content suppliers. Additionally, it could be questioned whether users are actively seeking information and whether they are able to find specialized information. Hence we need to address the issue of media pluralism from a different angle; the stimulation of media pluralism could, for example, also focus on the individual media users.

Because ownership of the new dominant global players is hardly to restrict on national or even European level and assuming that media will also in the future tend to expand to new media markets and, by doing so, create a growing diverse supply we suggest to monitor supplier concentration, editorial concentration and comparing the supply and demand on media markets, the match between media offered and users' preferences.

A few years ago the Dutch Media Monitor invited colleagues from monitoring departments of different European regulators to work on a pilot of a European monitoring programme. As the European Commission started with the initiative to define "Indicators for Media Pluralism in the Member States", we cancelled our programme. The problems with the indicators, already developed, is that they are hardly feasible and that a comparable European monitoring is still missing. Based on our experience we suggest to start a discussion with different regulators about the use of a selection of easy to access indicators to guarantee reliability between countries.

Media outlets no longer solely offer general content as newspapers, general television channels and radio channels do. Nowadays we find, especially on the internet, an increasing amount of content serving particular functions. Already in 2005, the Scientific Council for Government Policy of the Netherlands suggested a future-proof functional approach in its report "Media policy for the digital age". Instead of a media type-driven policy which is continuously challenged and finally outdated by reality – and therefore of limited use – the Council has taken a different approach by asking the question: what is the role or function that media play now and are expected to play in our society in the coming decade? The Council suggests a new policy paradigm that takes functions as a strategic starting point, and has defined the different functions:

- News and opinion (including current affairs and debate);
- Special information;
- Culture, arts, education;
- Entertainment;
- Advertisements, persuasive information and other forms of commercial communication.

The Council reached the conclusion that diversity and independence of news is most important for the society. Research shows that news media have a strong impact on public opinion; what is not in the news, is not part of the public opinion. For these

reasons, we suggest focusing the monitoring on offer and use of professional news content in particular.

To conclude:

We think that specific media ownership rules will lose their significance. What we need is a centrally organized European-wide monitoring with national data collection. For theoretical reasons we suggest to focus on news media to monitor on opinion power and for practical reasons we suggest to use fewer indicators which are easier to assess and measure. A less extensive monitoring design might improve the willingness to participate and enhances the reliability and comparability of the national results and will enable a longitudinal monitoring.

## POLAND

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### 2.2.20. Poland

#### 2.2.20.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.20.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media
  - Specific safeguards and rights for the media

Since 2004 the main constitutional provisions on the freedom of expression and the freedom of the media have remained unchanged. Both freedoms are protected in the Constitution of 1997 in Article 14 which declares the freedom of the press and other means of social communication and in Article 54 which ensures to everyone the freedom to express opinions, to acquire and to disseminate information, forbids preventive censorship in the media and licensing of the press, but permits statutory requirements of a licence to operate radio or TV station.<sup>40</sup> The constitutional guarantee of freedom of expression (in Art. 54.1 read in conjunction with Art. 14) - according to the Constitutional Court - constitutes *one of the foundations of the democratic society, a condition for development thereof and for self-actualization of individuals*.<sup>41</sup>

The limitations of the freedom of expression and the freedom of the media are subject to proportionality test provided for in Art. 31 para. 3 of the Constitution, which stipulates that such limitations may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons, sets any limitations which. Such limitations shall not violate the essence of freedoms and rights. The Constitutional Court has applied this proportionality test in evaluation of constitutionality of different provisions restricting the freedom of expression and the freedom of the media, in particular penal provisions in the Press Law.

The Constitution does not include any specific provision on journalists' rights and freedoms, but there is no doubt that their activity is covered by Articles 14 and 54.

- Freedom to receive and to access information
  - Specific rights for the citizens

Art. 61 of the Constitution continues to constitute the fundamental basis for the right to information on the activities of organs of public authority and persons holding public functions or mandates. The Law of 6 September 2001 on Access to Public Information implements this constitutional right. Recently the revision of this law principally aimed at implementation of the Directive 2003/98/EC on the re-use of public sector information, provoked a controversy over the excessive limitation of the right of access to public

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<sup>40</sup> Both provisions were literally quoted in the Final report of the study on "the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed", Prepared on behalf of the European Parliament by the European Institute for the Media, Düsseldorf, 31 August 2004, part II, Poland, p.154 (2004 Study). The English translation of the Polish Constitution is available at: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

<sup>41</sup> Judgement of 23.03.2006, K 4/06.

information. During the parliamentary works on the revision the Senate (upper house of the Parliament) added the provision for the purpose of restricting this right in order to protect public order, security and "important economic interests of the State" (so-called Rocki's amendment). In response to criticism expressed by civic society organisations, journalists, media and some politicians, the President referred the issue to the Constitutional Court, which in April 2012 decided on formal grounds that the Rocki's amendment is inconsistent with the Constitution.<sup>42</sup>

- Safeguards on regulatory authorities

Polish Constitution of 1997 safeguards the role of the National Broadcasting Council (KRRiT) - the regulatory authority in the field of radio and television. Under Art. 213 para. 1 the KRRiT shall safeguard the freedom of speech, the right to information and the public interest in radio and television broadcasting. Further provisions grant KRRiT competencies to issue regulations and adopt resolutions in individual cases, specify that its members shall be appointed by the Sejm, the Senate and the President, and delegates to the statute mode of work and organisation of the KRRiT, as well as detailed principles for appointing its members. According to the Constitutional Court KRRiT is a constitutional body placed beyond the scheme of the separation of powers, which is related to its purposes and its lack of formal subordination to any other State organs, including the Government. Consequently the Court declared as unconstitutional the amendment of 2005 to the Broadcasting Act conferring upon the President the power to appoint and dismiss the Chairman of KRRiT. The Court also found that the statutory provision shortening of the term of office of members of the Council without any valid reason, after the formation of the new majority in parliamentary elections of 2005, did not conform with the Constitution. This however did not prevent nor invalidate the expiry of mandates of members of KRRiT on the basis of the challenged law. In effect, at the end of 2005 KRRiT members were effectively replaced and composition of KRRiT reduced to 5 members (instead of 9).<sup>43</sup>

- Safeguards on "universal service"

Art. 213 para. 1 of the Constitution, and in particular the reference to the public interest in radio and television broadcasting, was interpreted by the Constitutional Court in 2004 as a basis for the remit of public service broadcasting and the responsibility of KRRiT for fulfilment thereof, in particular in the context of KRRiT competencies concerning the licence fee.<sup>44</sup> The Court consequently declares that the safeguarding of adequate and sustainable public funding of public service broadcasting constitute a task of the state. However, in the judgement of 2009 the Court interpreted Art. 213 para. 1 in rather narrow way as a mere norm of competence of KRRiT and ruled that the act that significantly broadened the scope of social exemptions from the licence fee is not inconsistent with this provision.<sup>45</sup>

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<sup>42</sup> Judgement of 18.04.2012, K 33/11. The press release on the Court's decision is available at: <http://www.trybunal.gov.pl/eng/index.htm>. The decision has been based, in accordance with the motion of the President, on formal grounds, that the Senat went beyond its powers in parliamentary proceedings set by the scope of the act adopted by the Sejm (the lower house). Thus, regrettably, the Court has not had a chance to check the compliance of the Rocki's amendment with the Art. 61 of the Constitution.

<sup>43</sup> Judgement of 23.03.2006, K 4/06. English summary of the judgement is available at: [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_4\\_06\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_4_06_GB.pdf).

<sup>44</sup> Judgement of 09.09.2004, K 2/03. English summary is available at: [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_2\\_03\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_2_03_GB.pdf).

<sup>45</sup> Judgement of 04.11.2009, Kp 1/08.

#### 2.2.20.1.2. Media order (de lege lata and de facto)

- “Market Entry”
  - Licensing schemes; remit psm; notification for print publications

The Broadcasting Act (BA) of 1992<sup>46</sup> continues to constitute the basis of media order in the field of radio and television and sets the licensing scheme for broadcasting of programme services, except for statutory programme services of public service broadcasters. Licences are still granted in the form of an administrative decision of the Chairman of KRRiT on the basis of a KRRiT's resolution. Television programme services transmitted exclusively in the information and communication systems (TV webcasting), as of May 2011, are subject to registration in the register kept by the Chairman of KRRiT<sup>47</sup>. Previously this field had been unregulated. The change, intended to make TV webcasting subject to general standards applicable to television, but within more relaxed regulatory procedure, was introduced by the act implementing the AMSD. Audio webcasting (Internet radio) is left beyond the scope of the BA. The registration system applies also, as of May 2011 – in the technologically neutral way, to retransmission of programme services (except those with must-carry status). Previously only cable retransmission was subject to registration, while satellite retransmission was subject to licencing.

On-demand services as such are not subject to any licencing or registration schemes. The proposal to make non-linear audiovisual media services subject to registration, was rejected at the final stage of parliamentary works in 2011 on the draft law implementing the AMS Directive, upon the pressure of protests of Internet activists and industry.

Public service media are regulated mainly by the provisions of the Broadcasting Act. Their remit is broadly defined in Art. 21 para. 1, added in 2004, that reads:

*Public radio and television shall carry out their public mission by providing, on terms laid down in this Act, the entire society and its individual groups with diversified programme services and other services in the area of information, journalism, culture, entertainment, education and sports which shall be pluralistic, impartial, well balanced, independent and innovative, marked by high quality and integrity of broadcast.*<sup>48</sup> Their programme services listed in the law are exempted from the licensing scheme. However the thematic programme services of public service media (PSM) are subject to *ex ante* licensing by KRRiT. The remit of PSM covers new services (services other than programme services) and they are subject to the same qualitative requirements as programme services, which corresponds to the assumption that the new services shall fulfil the same democratic, social and cultural needs of the society.

PSM have more extended content obligations, in particular their programme services and other services should: provide reliable information about the vast diversity of events and processes taking place in Poland and abroad, encourage an unconstrained development of citizens' views and formation of the public opinion, enable citizens and their organisations to take part in public life by expressing diversified views and approaches as well as exercising the right to social supervision and criticism, assist the development of

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<sup>46</sup> The Broadcasting Act of 29.12.1993, consolidated version: Official Journal („Dz.U.”) of 2011, No 43, item 226, with amendments. Unofficial English translation is available at: [http://www.krrit.gov.pl/Data/Files/\\_public/pliki/office/broadcasting-act\\_10-08-2011.pdf](http://www.krrit.gov.pl/Data/Files/_public/pliki/office/broadcasting-act_10-08-2011.pdf).

<sup>47</sup> Art. 41 and ff. of the BA as amended by the Act of 25.03.2011 (Dz.U. No 85, item 459), that entered into force on 23.05.2011.

<sup>48</sup> This definition is complemented by the list of detailed tasks and duties – Art. 21 para. 1a and 2.

culture, science and education, with special emphasis on the Polish intellectual and artistic achievements, serve to strengthen the family ties, advance the propagation of pro-health attitude, serve to promote and popularize sport, contribute to combating social pathologies, contribute to media education.<sup>49</sup>

Under the Press Law of 1984 publishing of a daily or periodical requires registration in a District Court, mainly understood as a formality related to protection of press titles. The case-law extends this obligation to some Internet publications, if they fulfil the definition of a "daily" or a "periodical", and of the "press". The definition of the press is broad, and makes the term an equivalent of "media", as it covers any periodic publications which do not form a closed, homogenous whole, appearing at least once a year, having a regular title or name, a current number and date, including any "media created in the course of technological progress, which disseminate periodical publications through printing, vision, audio or other technique". The Supreme Court in the decision of 2007 clarified that the obligation of registration concerns dailies and periodicals disseminated in the Internet both in case of electronic versions of printed press titles, as well as of such stand-alone electronic publications in the Internet.<sup>50</sup> However the provision of the Press Law on criminal sanctions for dissemination of dailies and periodicals without registration, was declared in 2011, with respect to printed periodicals, as unconstitutional by the Constitutional Court, as a disproportional limitation of the freedom of expression and the freedom of media. The Court however confirmed that the mere obligation of such a registration, in practice similar to notification, is in conformity with these constitutional freedoms. The Court also noted that the Press Law of 1984 is not adequate to present realities of media and suggested legislative changes.<sup>51</sup>

The attempt to introduce such changes was made even before. In 2010 the Government considered the broad amendments to the Press Law.<sup>52</sup> The draft included changes in the basic definitions ("press", "journalist", "editorial board") and an attempt to differentiate between press/media/journalistic content and non-media activities in the Internet (blogs, e-mails, website for UGC exchange, private website and internet forums), on the basis of (lack of) editorial treatment of content. The registration would be mandatory only for printed dailies and periodicals, and voluntary for those electronically published. The works on the draft after criticism from internet activists and some media were suspended. The idea of a broad revision of the Press Law, that would make the law more adequate for present realities and cover different issues (i.a. also reduction of penal provisions, changes with regard to an authorization of a interview and rectifications/replies) revived in 2012.

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<sup>49</sup> Art. 21 para. 2 of the BA.

<sup>50</sup> Judgement of the Supreme Court of 26.07.2007, IV KK 174/07. The decision concerned the criminal responsibility of persons disseminating periodicals in the Internet without registration. The decision met with rather critical reactions in the doctrine. With respect to criminalization of dissemination of unregistered printed periodicals the decision partly (as regards printed publications) lost its meaning due to the decision of the Constitutional Court declaring this criminal sanction as unconstitutional – see the footnote below.

<sup>51</sup> Judgement of the Constitutional Court of 14.12.2011, SK 42/09. The judgement is limited to the circumstances of the case, i.e. printed periodicals, and does not formally cover Internet publications. In the previous judgement of 20.02.2007, P 1/06, the Court found that the same provision of the Press Law (Art.45) criminalizing publication of a daily or a periodical without registration is in conformity with the Constitution (Art.31 para.3 – proportionality and Art.54 – freedom of expression) and with Art.10 of the European Convention on Human Rights and Fundamental Freedoms.

<sup>52</sup> For more detailed description of the draft and the debate around it – see: M.Pek, Poland – Amendment to the Press Law, IRIS 2010–6:1/37, available at: <http://merlin.obs.coe.int/iris/2010/6/article37.en.html>.

- Media pluralism/ownership; competition law aspects

The Broadcasting Act includes only limited anti-concentration rules, related to the licensing scheme. An achievement, by the broadcaster, of a dominant position in mass media in the given area or relevant market, constitutes the basis for a refusal and revocation of the broadcasting license, as well as for refusal of KRRiT's consent for transfer of rights under the broadcasting license in case of a merger, division or other transformations of commercial companies. Refusal of such a consent and revocation of the license may take place if another person takes over direct or indirect control over the activity of a broadcaster.<sup>53</sup> The practical experiences of KRRiT show difficulties in application of these provisions, related to lack of clear definitions and practical tools to apply them.<sup>54</sup>

The Broadcasting Act continues to uphold the foreign capital limits on the level of 49% in companies to which the broadcasting license may be granted, with the exception of persons having a seat or permanent residence in the European economic area (EEA) countries.

The Press Law does not include any anti-concentration rules nor limitations for foreign ownership in media.

The possible introduction of more detailed anti-concentration rules was practically frozen by the political scandal called "Rywin-gate" referred to in Polish report in 2004 Study.

- **Legal framework for psm**; ability to fulfill their tasks

As mentioned above public service media operate on the basis of law, in accordance with their remit as defined in Art. 21 para. 1 of the BA and complemented by the list of tasks and requirements.

In 2005 TVP (the Polish Television) adopted and published its mission statement - *The Principles Guiding the Fulfilment of the TVP Public Mission*.<sup>55</sup> Since 2005 PSM organisations have had a duty to prepare and make available to the public annual reports on the use of proceeds from licence fees for carrying out the public mission, with an indication of funds allocated for implementation of individual tasks.<sup>56</sup>

The revision of 2010<sup>57</sup> introduced the scheme of yearly financial and programming plans that should be agreed between a public service broadcaster and KRRiT.<sup>58</sup> The same revision changed the composition and the method of appointment of boards of management and supervisory boards, with extended competencies of the KRRiT in the process.<sup>59</sup> The changes included reduction of the number of boards' members, introduction of competitions for appointments and special scheme for nomination of candidates to supervisory boards by universities. According to the amendments members of supervisory boards may be dismissed by the authority that has appointed them on the grounds listed in the law, that include, besides a criminal conviction and

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<sup>53</sup> Art. 36.2.1, art. 38.2.3-4, art. 38a.3 of the BA.

<sup>54</sup> KRRiT, Strategia regulacyjna na lata 2011-2013 (Regulatory strategy for years 2011-2013), Warszawa 01.03.2011, p.62.

<sup>55</sup> <http://s.v3.tvp.pl/repository/attachment/3/5/a/35ac5b7ebf4e590d783cdac8fda7051e1223892790343.doc>

<sup>56</sup> Art. 31c of the BA added by the Licence Fee Act of 21.04.2005. In practice the annual reports are even broader as they cover the overall fulfilment of the PS remit. As an example – the report of TVP for 2011 (in Polish) is available at:

<http://s.v3.tvp.pl/repository/attachment/7/c/5/7c5f35d9f03c499fb4a53560fd5d10631331818152013.pdf>

<sup>57</sup> The Act of 05.10.2010 amending the Broadcasting Act and the Licence Fee Act, Dz.U. No 152, item 1023.

<sup>58</sup> Art. 21 paras 3 and 4 of the BA.

<sup>59</sup> Articles 27 and 28 of the BA.



inability to serve the function, vaguely formulated activity "to the detriment of the company". Formerly, the Constitutional Court in 1995 decided that, in the absence of explicit provisions in the BA on dismissal of the Supervisory Boards, they may not be dismissed, because of the principle of independence of public service broadcasting emanating from the constitutional freedom of expression and right to information.<sup>60</sup>

The official purpose of the reform was to make public service broadcasting more effective and accountable in spending public money (financial and programming plans; possibility to dismiss the Boards), further reduce political influence by more transparent appointment scheme for Boards, extend the supervisory powers of KRRiT. Some changes met however with criticism as reducing institutional autonomy of PSM. In practice, the new Boards appointment scheme was applied in 2011. In its annual report and information on key issues in broadcasting for 2011 KRRiT proposed some changes to the scheme.<sup>61</sup>

The reform of 2010 may be seen as a reaction to the lack of stability in the management of PSM in years 2006-2010, after the adoption in 2005 of the law<sup>62</sup> that shortened the term of office of the KRRiT and changed its composition, which resulted also in changes in the management of PSM. Due to different political constellations in 5 years (between 05.2006-05.2011) TVP had 9 Presidents (either regular or performing duties) of the Board of Management, while in previous 12 years there were only 4 holders of the post.

Earlier discussions on the PSM resulted in more radical and controversial draft law on Public Tasks in Media Services, adopted by the Parliament on 24.07.2009, but effectively vetoed by the President, after the strong criticism by creative community (authors, independent producers, journalists), human rights organisations and international organisations (OSCE, EBU). If adopted the law would abolish the broadcasting licence fee and replace it with the funding of PSM from the state budget, introduce the "programme licenses" for PSM and private programmes aspiring to public funding, further complicate the structure of PSM by creation of separate 16 regional public television companies.<sup>63</sup>

PSM, despite the crisis of management and public funding, have managed to keep strong market position and audience rates (in particular TVP). They also launched new thematic channels and some on-line services, although the market position of PSM in the Internet is rather weak. As PSM, and TVP in particular, are mainly financed by commercial revenues, the main channels are dominated by mass appealing programmes, which is often criticised. Recently, TVP has tried to overcome these tendencies, ex. by giving more importance to TV Theatre and documentaries, but this has deepened the financial difficulties of the public broadcaster.

Assuming that the management of PSM has been stabilized since 2011, the main problem of PSM, affecting their ability to fulfil their public service remit, is the fall of public funding.

<sup>60</sup> Resolution of 13.12.1995, W 6/95.

<sup>61</sup> KRRiT, Informacja o podstawowych problemach radiofonii i telewizji w 2011 r. (Information on Key Issues in Broadcasting in 2011), s. 63.

<sup>62</sup> [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/sprawozdania/spr2012/informacja\\_krrit\\_03\\_2012.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/sprawozdania/spr2012/informacja_krrit_03_2012.pdf)  
The Act on 29.12.2005 on Transformations and Modifications to the Division of Tasks and Powers of State Bodies Competent for Communications and Broadcasting, Dz.U. No 267, item 2258. The description of the act, circumstances and consequences of its adoption may be found in the English summary of the judgement of Constitutional Court of 23.03.2006, K 4/06 – available at:  
[http://www.trybunal.gov.pl/eng/summaries/documents/K\\_4\\_06\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_4_06_GB.pdf).

<sup>63</sup> More details: K.Jakubowicz, Poland, [in:] EMR, Public Service Media According to Constitutional Jurisprudence – The Human Rights and Constitutional Law Dimension of the Role, Remit and Independence, Saarbrücken, 02.07.2009, p.169-170.  
[http://www.ebu.ch/CMSimages/en/leg\\_EMR\\_PSM\\_study\\_tcm6-67510.pdf](http://www.ebu.ch/CMSimages/en/leg_EMR_PSM_study_tcm6-67510.pdf).

The main source of such a funding should be the licence fee, existing in Poland since 1924, to be paid by every household, business unit and institutions, for the use of radio and/or TV receiver. The legal basis for these fees is the Licence Fee Act adopted in 2005<sup>64</sup>, after the judgement of the Constitutional Court<sup>65</sup> that declared former rules mainly contained in the regulations by the KRRiT as not meeting constitutional standards that required statutory basis and regulation of principles for taxes and other public imposts. Besides statutory regulation the licence fee system remained broadly unchanged. In 2008 politically motivated revision of the Licence Fee Act significantly broaden social exemptions from the licence fee<sup>66</sup>.

In comparison to 2003 when licence fee funding of PSM amounted to 905,1 million PLN in 2011 revenues of PSM from this source amounted to 470,3 million PLN, and thus were nominally 48,9% and actually 59,5% lower than in 2003. In effect licence fee revenues constituted only 12% of the budget of TVP in 2011 (32,7 % in 2003), 58% percent in case of Polish Radio.<sup>67</sup> The low level of licence fee revenues is caused, besides low level of the fee and broad social exemptions, by enormous evasion of collection of the fees. This is the result of combination of causes: promises of politicians to abolish the licence fee, ineffective collection and lack of enforcement of the fees in case of non-payment. The situation has continued to exist despite the Constitution Court judgements highlighting the duty of the state to provide public funding to PSM, confirming legal feasibility of administrative enforcement of the fees under existing law and criticizing inactivity of state institutions in this field.<sup>68</sup> **This lack of adequate, stable and sustainable public funding of PSM negatively affects performance of their tasks and threatens their independence, and – in longer perspective – may endanger their very existence.**

- The role and functioning of regulatory authorities in these respects

The KRRiT as a constitutional regulatory authority remains to be regulated by the Broadcasting Act. Its competences include in particular licensing of programme services, holding the register of programme services disseminated exclusively in ICT systems and retransmitted programmes, control of broadcasters' activities as regulated by the BA, appointing/dismissing of boards in PSM organisations, approving of financial and programming plans of PSM, analyzing their financial reports, deciding on the level of licence fees and splitting the revenues from the fees among PSM organisations.

Composition of the KRRiT was changed in 2006, when the term of office of their members was terminated by the law, number of its members was reduced from 9 to 5 persons, and the rule that every 2 years term of office of 1/3 of members should come to the end was abolished. Newly elected members of KRRiT were mostly seen as related to the political parties forming governmental coalition then in power. In 2010 after the rejection of the annual report of KRRiT by the Sejm, the Senate and the President, term of office of all the members of the KRRiT expired and new members were appointed. Certain criticism was expressed that the candidate of the main opposition party did not

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<sup>64</sup> The Act of 21.04.2005 on Licence Fees, Dz.U. No 85, item 728, with amendments.

<sup>65</sup> Judgement of 09.09.2004, K 2/03. English summary:  
[http://www.trybunal.gov.pl/eng/summaries/documents/K\\_2\\_03\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_2_03_GB.pdf).

<sup>66</sup> The Act of 13.06.2008 amending Licence Fees Act, Dz.U. of 2010, No 13, item 70. The amendment was sent by the President to the Constitutional Court, which however did not find it incompatible with the Constitution, given the broad competence of the law-maker to decide on scheme of public funding of PSM, and on specific elements thereof, including social exemptions from licence fees – judgement of 04.11.2009, Kp 1/08.

<sup>67</sup> KRRiT, Informacja o podstawowych problemach radiofonii i telewizji w 2011 r. (Information on Key Issues in Broadcasting in 2011), p. 65-66.  
[http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/sprawozdania/spr2012/informacja\\_krrit\\_03\\_2012.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/sprawozdania/spr2012/informacja_krrit_03_2012.pdf)

<sup>68</sup> In June 2012 the Ministry of Finance has publicly declared that in conformity with the judgement of the Constitutional Court tax authorities shall enforce unpaid licence fees.

get the post. The newly appointed Council had to apply new scheme for appointing of boards in PSM organisations. It is also worth noting that the new KRRiT adopted and published its regulatory strategy for 2011-2012, where it declared more action in support of the freedom of expression in media and media pluralism.

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

Regular access to public information, not limited to journalists, is safeguarded under the Act on Access to Public Information. Safeguards for journalistic activities are contained mainly in the Press Law, which grants journalists the right to claim information (going beyond general rules on access to public information as it covers also non-public institutions, businesses and not-for-profit entities), forbids obstructions to information gathering and press criticism, protects journalistic confidentiality. The protection of journalistic confidentiality is however not the absolute one. The Code of Criminal Procedure sets the conditions for releasing a journalist from a duty to keep it. This may not however, except information concerning most serious criminal offences, lead to identification of an author of a press material, letter to editor or similar material, or of an informant, who claimed anonymity.<sup>69</sup>

Despite strong criticism of human rights organisations, journalists and media, Polish Penal Code still treats a defamation as a criminal offence<sup>70</sup>, which, if happens in mass media, including in Internet<sup>71</sup>, is even punishable by custodial sentence of a maximum period of one year. It is however worth noting that in 2010 penal sanctions for a defamation were relaxed.<sup>72</sup> In 2006 the Constitutional Court decided that the criminalisation of defamation is in conformity with the constitutional freedom of media and freedom of expression in conjunction with the proportionality principle.<sup>73</sup> In another judgment the Court however broadened the exemption from this liability in case of true statements concerning persons holding public functions, by declaring that the additional requirement of "*servicing the defence of legitimate public interest*" in such cases was unconstitutional.<sup>74</sup> In consequence, the provision was amended, and now whoever raises or disseminates true allegations concerning a conduct of a public person or serving the defence of public interest - does not commit a defamation.<sup>75</sup> Also an insult is criminalized, and if it is committed through mass media - the sanctions include custodial sentence.<sup>76</sup> The Penal Code still treats as "special" criminal offences public insult of the President of Poland<sup>77</sup> and public insult or humiliation of a constitutional body of Poland<sup>78</sup>. However criminalization of an insult of public functionary (or his assistant) was limited only to insulting actions in the course of and (instead of "or" as before) in connection

<sup>69</sup> Art. 180 the Code of Criminal Procedure.

<sup>70</sup> Art. 212 of the Penal Code.

<sup>71</sup> Decision of the Supreme Court of 07.05.2008, III KK 234/07.

<sup>72</sup> The act of 05.11.2009 amending the Penal Code and other laws, Dz.U. No 206, item 1589. The amendment entered into force on 08.06.2010. In case of a basic type of defamation (non-media) it abolished punishability by custodial sentence, thus the sanctions include now only fine and limitation of liberty. In case a defamation in mass media all 3 sanctions remained, but maximum period of custodial sentence was reduced from 2 years to 1 year.

<sup>73</sup> Judgment of 30.10.2006, P 10/06. Summary in French is available at: [http://www.trybunal.gov.pl/fr/resumes/documents/P\\_10\\_06\\_FR.pdf](http://www.trybunal.gov.pl/fr/resumes/documents/P_10_06_FR.pdf).

<sup>74</sup> Judgment of 12.05.2008, SK 43/05.

<sup>75</sup> Art. 213 § 2 of the Penal Code – as amended by the Act of 05.11.2009, in force since 08.06.2010.

<sup>76</sup> Art. 216 of the Penal Code – the sanctions are similar as in case of defamation.

<sup>77</sup> Art. 135 § 2 of the Penal Code. The Constitutional Court ruled that this provision conforms with Art. 54 para.1 (freedom of expression) in conjunction with Art. 31 para. 3 (proportionality) of the Constitution, as well as with Art. 10 of the ECHR. The judgement of 06.07.2011, P 12/09.

<sup>78</sup> Art. 226 § 3 of the Penal Code.

with his performance of public duties<sup>79</sup>, after the Constitutional Court decided that previous scope of this criminal offence was too broad and constituted a disproportional limitation of the freedom of expression.<sup>80</sup>

The legitimacy of criminalization of an insult of the President, normally rarely used, has been discussed again after actions of the Agency of Internal Security (ABW) against the website with contents insulting the President Komorowski. The owner of the website first decided to close it, but then reopened it from the server in the USA. In April 2012 he was charged with insulting of the President and other criminal offences.

The Press Law has regulated also the right of rectification and reply<sup>81</sup>, with penal sanctions in case of evasion to publish it<sup>82</sup>. In 2010 the Constitutional Court decided that these provisions, due to lack of precision, are contrary to the constitutional principles of rule of the law and statutory basis for penal sanctions, but deferred abolition of questioned provisions until June 2012.<sup>83</sup> The works on new provisions on rectification and/or reply, provoked controversies and protests of the press, when draftsmen in the Senate decided to remove the rectification from the law and leave only newly (more broadly) regulated right of reply. Finally, in response to the criticism, another idea prevailed – to provide only for rectification defined as *ad rem* and facts concerning statement, including a negation or correction of untrue or imprecise press information. In case of evasion to publish it no penal sanction is proposed. The remedy would be a motion to the court to order publication of a rectification. In the moment of writing the final outcome of legislative works is not yet known.

Another controversial issue in the Press Law is the right of authorisation in case of literally quoted statements that has not been published yet, if a person providing information wishes so. The Constitutional Court decided that provisions on authorization and related criminal sanctions are in conformity with the constitutional freedom of expression in conjunction with the proportionality principle.<sup>84</sup> However, the European Court of Human Rights found that these provisions constitute disproportional limitation of the freedom of expression (Art. 10 ECHR), as they allow, on pain of penal sanctions, to refuse or defer authorisation of statements required for lawful publication of an interview, and thus have a chilling effect.<sup>85</sup> Both cases concerned the interview for a local newspaper with Member of Parliament, who having obtained the shortened version of the interview for authorisation, refused the consent for publication. The newspaper published fragments of the interview and editor-in-chief was (rather symbolically) punished by the criminal court.

After the judgment of the ECtHR the General Public Prosecutor called for changes in the Press Law. Government officials declared that the criminal sanctions for infringement of duties related to an authorization will be removed from the Press Law.

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<sup>79</sup> Art. 226 § 1 of the Penal Code as amended by the Act of 09.05.2008.

<sup>80</sup> Judgement of 11.10.2006, P 3/06. The Court declared that the criminalization of an insult of public functionary with regard to actions outside the course of his/her performance of public duties is contrary to Art. 54 para. 1 (freedom of expression) and Art. 31 para. 3 (proportionality) of the Constitution.

<sup>81</sup> Art. 31 of the Press Law.

<sup>82</sup> Art. 46 of the Press Law.

<sup>83</sup> Judgement of 01.12.2010, K 41/07.

<sup>84</sup> Judgement of 29.09.2008, SK 52/05. The Court confirmed also the constitutionality of provisions in the Press Law obligating journalists to obtain a consent of informant to disseminate audio and/or visual fixations his information, and providing for penal sanctions in case of infringement of this obligation.

<sup>85</sup> Judgement of ECtHR of 05.07.2011, 18990/05, Wizerkaniuk v. Poland.

- Specific positive content obligations

The Press Law provides for limited content obligations. It requires free of charge publications of official announcements by certain state or local self-government bodies sent for compulsory publication by the spokesperson of the relevant body, as well as – in case of dailies – paid publications of final courts' decisions and announcements of courts or other public bodies.<sup>86</sup>

Specific positive content obligations are provided for mainly in the Broadcasting Act. They include quotas for TV programmes produced originally in Polish language (33%), songs performed in Polish in radio programme services (33%), European works (50%), European works produced by independent producers (10%)<sup>87</sup>.

More specifically PSM are obliged to facilitate direct presentation and explanation of the State policy by supreme State authorities, enable political parties, trade unions and employers' organisations to present their position with regard to major public issues, enable public service organisations to inform about their services, transmit electoral and referendum programmes - in accordance with the law and procedures determined by KRRiT in regulations.<sup>88</sup> Other specific content obligations of PSM concern programme services for abroad and educational programmes.<sup>89</sup>

The Act on Introduction of Digital Terrestrial Television provides for obligations of (public and private) television broadcasters of analogue terrestrial programme services to broadcast at their own costs information with regard to digital switchover.<sup>90</sup>

- Funding schemes for specifically desired content

Funding schemes for specific content exist with regard to public service remit of PSM (that include news/current affairs programmes) and cinematographic productions. The BA provides also for the budgetary funding of PSM programme service for Poles living abroad and educational programmes. There is no statutory funding scheme specifically designed for news and current affairs programmes or other information media services.

- Political advertising and/or broadcasting time

Rules for broadcasting of electoral programmes were codified in the Electoral Code of 2011.<sup>91</sup> The Code attempted also to restrict political advertising by forbidding in the course of the electoral campaign electoral paid political advertisements/announcements in public and private radio and television programme services.<sup>92</sup> The Constitutional Court decided however that these bans constitute disproportional limitation of the freedom of expression<sup>93</sup>, and the relevant provisions lost their force. In consequence political advertising is not specifically regulated, neither in the course of election campaigns or outside these periods, neither in the written press, Internet, out-door communications or broadcasting (private or public), and thus is deemed to be generally allowed. Broadcasting time to be offered to parties or candidates is regulated by the Electoral Code. Electoral committees, whose candidates have been registered, have the right to

<sup>86</sup> Articles 34 and 35 of the Press Law.

<sup>87</sup> Articles 15 and 15a of the BA.

<sup>88</sup> Articles 22, 23, 23a and 24 of the BA.

<sup>89</sup> Art. 25 of the BA.

<sup>90</sup> Articles 12-15 of the Act of 30.06.2011 on Introduction of Digital Terrestrial Television, Dz.U. No 153, item 903.

<sup>91</sup> The Act of 05.01.2011, Dz.U. No 21, item 112.

<sup>92</sup> Also certain outdoor political advertising was to be banned.

<sup>93</sup> Judgement of 20.07.2011, K 9/11.

broadcast free of charge electoral programmes in programme services of PSM (and at their cost) within 15 days before elections. The detailed rules of broadcasting of such programmes, including broadcasting time, are determined by the KRRiT, by way of regulation. In addition TVP is obliged to broadcast debates between representatives of different electoral committees in elections to Sejm and European Parliament in Poland, and between candidates in presidential elections.

- Codes of conduct and their organisational framing

As mentioned in 2004 report, there are two major Codes of Journalistic Ethics/Conduct – adopted by The Polish Journalists Association and Association of Journalists of the Republic of Poland respectively.<sup>94</sup> In addition Media Ethics Charter was adopted by organisations of journalists, editors and broadcasters. The Media Ethics Council makes sure that the Charter is followed, with the power to make statements about media ethics, but no right to sanctions. Some media have their own code of ethics and internal structures to supervise their fulfilment, ex. PSB – TVP – has its “Rules of Journalistic Ethics in TVP – news, current affairs, reporting, documentaries, education”, and the Committee of Ethics.

- The role and functioning of regulatory authorities in these respects

Journalistic codes of ethics/conduct are treated as a field for self-regulation, rather than for competencies of regulatory authorities. This was confirmed by the Constitutional Court, which declared that the amendment to the BA of 2005 granting the KRRiT the new task of protection of journalistic ethics did not conform with the principle of legality with regard to state authorities (as rules of professional ethics are non-legal criteria) and rule of law in conjunction with the freedom of expression.<sup>95</sup>

- Distribution Aspects

- Access to frequencies

The BA safeguards frequencies required to transmit statutory programme services of PSM.<sup>96</sup> Access to frequencies for terrestrial transmission of other programme services is on the one hand related to the granting of broadcasting licenses by the KRRiT<sup>97</sup> and on the other to competencies of the President of the Office of Electronic Communication (UKE) with regard to frequency management<sup>98</sup>. The later organ is in charge of determination of the frequency management plan, which in relation to frequencies intended for broadcasting of radio and television programme services should be done in agreement with the Chairperson of KRRiT. The President of UKE grants general exclusive frequency licenses, in the case of frequencies for broadcasting - in agreement with the Chairperson of the KRRiT. These licences, in the absence of sufficient frequency resources, is granted to entities appointed by means of a contest, that is carried out by the President of UKE, but conditions with regard to obligations and tasks concerning programme contents, including must-carry, are specified by KRRiT on the motion of the President of UKE. This body may also change an entity holding a general exclusive frequency licence for the broadcasting purposes in agreement with KRRiT.

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<sup>94</sup> See: 2004 Report, p.154-155.

<sup>95</sup> Judgement of 24.03.2006, K 4/06, point 2. English summary: [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_4\\_06\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_4_06_GB.pdf)

<sup>96</sup> Art. 26 para. 5-6 of the BA.

<sup>97</sup> Articles 31-40b of the BA.

<sup>98</sup> Articles 111-125 of the Act of 16.07.2004 the Telecommunications Law, Dz.U. No 171, item 1800, with amendments.



The system of competencies of state regulatory authorities, respectively for broadcasting (KRRiT) and telecommunications (UKE, formerly URTiP), was significantly changed by the revision of 2005, with reduction of KRRiT tasks mainly to content related ones. Further changes were made recently in 2011 by the Act on Introduction of the Terrestrial Digital Television, which partly fine-tuned competencies of UKE and KRRiT, in accordance with transport/content dichotomy.

- Access to distribution networks and control of actual conditions

Access to distribution networks is regulated generally for telecommunications services in provisions on telecommunications access<sup>99</sup> with the regulatory and controlling competencies of the President of UKE, as well as more specifically for radio and television programme services, in the context of must-carry/must-offer rules, duties of (terrestrial) multiplexes operators and access to multiplexes, as well as certain obligations with regard to radio and television digital broadcasts.

In the context of launching DVB-T the allocation of places in multiplexes provoked some controversies. This year KRRiT has been criticized by right-wing politicians and media for refusal of granting the place in the DVB-T multiplex for TV Trwam (religious channel by *Lux Veritatis* Foundation - broadcaster of Radio Maria), which is called by the applicant and its supporters "discrimination of catholic media", but explained by KRRiT as a result of non-compliance with procedural and financial requirements<sup>100</sup>

Circulation of the press is not specifically regulated, except the (outdated) provision in the Press Law (Art. 3) that forbids "employers" of printing and distribution entities to limit and/or make difficult printing or acquisition of dailies, periodicals and other press publications, accepted by the enterprise for printing and distribution, because of their editorial line or contents. Such a behaviour constitutes a criminal offence (art. 49 of the Press). Refusal to accept the press for printing or distribution, may moreover constitute a practice restricting competition under (public) competition law<sup>101</sup> and/or constitute a tort of unfair competition as an impediment of access to the market<sup>102</sup>.

- Must-carry/must-offer rules for electronic media

Must-carry rules<sup>103</sup> were significantly revised and supplemented with must-offer element - in 2011 by the Act on the Introduction of the Digital Terrestrial Television. The must-carry rules became technologically neutral and they now cover any retransmission, including by cable networks (as before) and satellite bouquets. The following programme services have a must-carry status: TVP1, TVP2, TVP regional channel - TVPInfo (in case of regional/local retransmissions - relevant for a given area), as well as channels transmitted on 10.08.2011 on the basis of a licence for analogue terrestrial broadcasting by listed companies, which in practice concerns: Polsat, TVN, TV4, TV Puls. Also the periodic review clause was added, under which the Chairperson of KRRiT should assess the fulfilment of the must-carry rules every two years and submit the results of the assessment to the Minister of Culture, who then should take actions to ensure proportionality and transparency of these rules, which in practice could mean a submission of a draft revision of the law to the government. The criteria of assessment

<sup>99</sup> Articles 26-45 of the Telecommunications Law.

<sup>100</sup> On 25.05.2012 the administrative court upheld KRRiT's decision, but in the time of writing still a cassation is possible.

<sup>101</sup> The Act of 16.02.2007 on the Protection of Competition and Consumers, Dz.U. No 50, item 331, with amendments.

<sup>102</sup> Art. 15 of Act of 16.04.1993 on Unfair Competition, consolidated text: Dz.U. of 2003, No 153, item 1503, with amendments.

<sup>103</sup> Articles 43-43a of the BA.



include social interest with regard to provision of information, ensuring access to culture and art, facilitating access to learning, sport and scientific achievements, as well as dissemination of civil education. The must-offer component of the new system lies in the rule that a broadcaster of a programme service with must-carry status may not refuse a retransmitting operator the consent for the retransmission of this programme service and may not make such a consent conditional upon payment of any remuneration, including in particular any fee for the award of a licence for the use of the broadcast. Moreover a broadcaster shall make a programme service in question accessible free of charge on an application of the retransmitting operator. The Chairman of KRRiT may request the broadcaster to do so. The retransmitting operator is obliged to retransmit and offer the relevant programme service and inform that it is available for universal and free of charge reception, also by the digital terrestrial transmission.

KRRiT in early 2012 made a first assessment of the new rules and declared that they unnecessary fixed the channels with must-carry status and petrified oligopolistic structure of the television market. On the other hand new rules do not specify in which package of the operator must-carry channels should be offered. According to KRRiT in every package including the basic one. KRRiT sees the need for legislative changes with regard to must-carry rules, which should provide for more flexibility for the regulator to determine the actual list of must-carry programme services.

- Role of platform operators

The Act of 2011 on the Introduction of the Digital Terrestrial Television regulated duties of DVB-T multiplexes (I and II) operators, and added to the Telecommunications Law the provisions on operators of multiplexes and access to a multiplex. Obligations of multiplexes operators include transmission of programme services licensed for a given multiplex, granting of access to broadcasters with relevant licences on equal and non-discriminatory terms. The President of UKE is empowered with competencies to ensure fulfilment of these duties.

- The role and functioning of regulatory authorities in these respects

The role and functioning of the regulatory authorities were mentioned above in this chapter.

- Access to Information

- Transparency of media ownership situations

Media ownership, including transparency, is still regulated in a rather fragmented way<sup>104</sup>. Under the BA (Art. 14a), in accordance with the AVMS Directive the broadcaster is obliged to ensure an easy, direct and permanent access to information that allows to identify the programme service and its broadcaster to the recipient, including the name and the seat of the broadcaster. Similarly, under the Press Law (Art. 27) every copy of periodic prints shall include name and address of the editor. These duties do not include however ownership structure.

- Accountability of public service media

PSM have a duty to make available to the public their yearly reports on the use of public funds and fulfilment of the public service remit. PSM also deliver their financial-

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<sup>104</sup> See 2004 report.

programme reports to KRRiT and this information is reflected and available to the public in yearly reports of KRRiT.

- Freedom of information laws

The Act on Access to Public Information provides for making public information, including official documents, available in the Bulletin of Public Information (special internet service), access at individual requests, public announcements and the entrance to meetings of collective public authorities appointed in general elections, as well as by making available of materials, including audiovisual ones, from these meetings.

- Accessibility of products/services and distribution networks

The Telecommunications Law, as amended by the Act on the Introduction of Digital Terrestrial Television, stipulates that public telecommunications networks used for the digital radio and television transmissions, as well as digital receivers and other pieces of equipment used for reception of such transmissions should ensure interoperability of these transmissions, in particular through application of an open interface of the application software. Moreover digital receivers should make possible to receive non-encoded digital TV transmissions and to decode by uniform algorithm of encoding digital TV encoded transmissions, as determined by the regulation. The enterprises selling digital receivers may sell such receivers that do not fulfil these conditions only if a buyer has been adequately informed about it. The law also provides for other duties of sellers of digital receivers, broadcasters and authorities related to the information campaign on digital switch-over.

Certain form of public aid exist under the provisions of the BA exempting social broadcasters from the fee for broadcasting licence (Art. 39 para. 2).

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

Media, including PSM, often offer their public possibilities to interact, comment or complain on contents. Complaints may also be sent to KRRiT, which is obliged to deal with it in accordance with the Code of Administrative Procedure. In KRRiT structure there is a specialized unit dealing with complaints and a contact-complaint form is available on the website of KRRiT.

There is no media-specific "Ombudsman", but general Ombudsperson deals also with complaints with regard to the freedom of expression. For example, recently Ombudsperson intervened against too restrictive, in her view, also from the point of view of journalistic confidentiality, provisions on data retention in Poland.

- Participation in media operators/(self-)regulatory bodies

Structures of PSM include programming councils, that consist of 15 members, appointed by the KRRiT, 10 – represent parliamentary parties, 5 – are appointed among persons with achievements and experience in culture and media.

## 2.2.20.2. Main Players in the Media Landscape

### 2.2.20.2.1. Radio

Public service radio stations are produced by Polskie Radio (Polish Radio) comprising 18 broadcasting companies which operate as separate legal entities in the form of state-owned companies. One of them, Polskie Radio S.A., which runs four domestic-oriented networks and one external service, operates at a national level. The remaining 17 companies are regional broadcasters producing regional channels. Additionally, seven regional public broadcasters produce local channels.

Private broadcasters also operate at both national and local levels. Some of them operate as groups with strong capital ties. Among the largest media groups are the following: the RMF Group, EUROZET, Agora and TIME. The RMF Group and EUROZET operate national stations: RMF FM and RADIO ZET, respectively. Besides, these two groups run a number of specialized local stations. The scope of Agora and TIME is also nationwide, but technically they operate through a network of specialized local stations.

The difference in terms of the technical broadcasting *modus operandi* (concentrated, national broadcasting vs. dispersed broadcasting i.e. local stations grouped into a network) is significant, because it may create a number of advantages in terms of advertising revenues. Nationwide broadcasters which operate through a network of local stations across the nation have an additional business advantage compared to those operating in a concentrated manner. Alongside advertising revenues generated across the entire domestic market they enjoy surplus advertising revenues stemming from local markets.

Polskie Radio S.A., as a countrywide broadcaster which technically operates in a concentrated manner, is not allowed to exploit such a window of opportunity.

Many broadcasters, also considered commercial from the formal point of view, form another grouping. One hundred and sixteen dispersed, independent small and local broadcasters, confronted with the effects of the consolidation processes which take place among dominant commercial groups: RMF, EUROZET, TIME and Agora, maintain financial stability<sup>105</sup>. Nevertheless, consolidation processes which lead to capital concentration may occur thanks to the present high cost of entering the radio market. This fact regarding Poland's media ownership structure has been officially recognized by the President of the Office of Competition and Consumer Protection: *In previous years, a clear segmentation of the radio broadcasting market occurred. The market was divided into local, supra-regional and national markets. At present national broadcasters tend to build networks of local stations based on tried and tested formats to fully and rationally tap the potential of their networks. Due to the lack of available frequencies, capital groups acquire stations on local markets through a takeover of companies that already have a broadcasting licence.*<sup>106</sup>

Last but not least, it is worth mentioning social media which operate in the radio market. Compared to the diverse 295 radio stations that exist in Poland<sup>107</sup>, they form quite a homogenous group. All of these social media (or, as they are often defined, citizens' media) which function as non-profit companies produce religious channels. Radio Maryja

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<sup>105</sup> Information on Key Issues in Broadcasting – supplement to the Annual Report of the National Broadcasting Council, Warsaw March 2012.

<sup>106</sup> The stance of the President of the UOKiK on Poland's media ownership structure (<http://orka2.sejm.gov.pl/IZ6.nsf/main/51363E5A>).

<sup>107</sup> Information on Key Issues in Broadcasting, op.cit.

is a nationwide broadcaster, while the other seven, owned by individual dioceses of the Roman Catholic Church, operate on the local level.<sup>108</sup>

The resulting radio market diversification is a visible sign of media fragmentation. One might say that this description provides evidence of the “long tail” theory<sup>109</sup>. On the other hand, it seems necessary to confront changes which are occurring in the radio market with changes in other media markets and their consequent economic impact on the condition of all media players. In previous years a clear segmentation of the radio market was evident in local markets, the supra-regional market and the national market. At the moment, national broadcasters are aiming at building networks of local stations based on successful formats to fully and rationally tap their potential. Due to the lack of available frequencies, capital groups acquire local stations through takeovers of companies that are already licensed to broadcast. Most entrepreneurs involved in radio broadcasting in local markets currently operate within ownership, programming and advertising structures controlled by powerful media groups<sup>110</sup>

The strongest national stations are both commercial stations: RMF FM and Radio ZET. Over the last ten years, RMF FM has increased its share (by almost 6.8 percentage points compared to 2001), while Radio ZET has decreased its share (by 1.4 percentage point). Next in line are two national public stations: Polish Radio One and Polish Radio Three. Polish Radio One which enjoyed an 18.8-percent market share in 2000, on a par with that of Radio ZET, has lost 6.9 percentage points. The results of overall radio competition in terms of market share are outlined in table 113.

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<sup>108</sup> Ibidem.

<sup>109</sup> A phrase originally used by Chris Anderson in an article published in Wired magazine (October 2004).

<sup>110</sup> A reply to parliamentary question No. 3717 concerning the media ownership structure in Poland by the President of UOKiK on the authority of the Polish Prime Minister based on KRRiT report of 28 April 2009, <http://orka2.sejm.gov.pl/IZ6.nsf/main/51363E5A>.

**Table 113 PL: Main Radio companies – ownership structure, main stations and market share (15+age group) in year 2011**

Company	Ownership Structure*	Main Radio Stations/Channels	Funding **	Market Share ***
RMF	Bauer Media Invest GmbH	RMF FM	A	26%
EUROZET	Eurozet sp. z o.o. controlled by Lagardere Active Radio International and Holding B.V.	Radio ZET	A	16.2%
Polskie Radio S.A.(PSB)	Joint stock company owned by the Treasury	Polish Radio One (PR 1) Polish Radio Two (PR 2) Polish Radio Three (PR 3) Polish Radio Four (PR 4)	P/L/A P/L/A P/L/A P/L/A	11.9% 0.6% 8.2% 0.4%
Polskie Radio Regional Broadcasters (PSB)	Joint stock companies owned by the Treasury	17 separate regional stations	P/L/A	5.6%
TIME	ZPR S.A.	Radio Eska (network of 38 stations) Radio Eska Rock	A A	7.6% 1.4%
Agora	Agora Holding, BZ WBK AIB Asset Management, BZ WBK AIB Towarzystwo Funduszy Inwestycyjnych S.A., Arka BZ WBK FIO	Radio TOK FM Golden Hits /Złote Przeboje (network of 19 stations)	A	1.3% 2.9%
Radio Maryja	The Redemptorist Fathers of the Warsaw Province	Radio Maryja	D	2.1%

\* Sources: company websites and Annual Reports for the Year 2011

\*\* Funding: P=Public funds; D=Private donations; L=License fee; A=Advertising; S=Subscription

\*\*\* Source: *Radio Track SMG/KRC*, March 2012

The results of market competition, in terms of listeners in the so-called commercial group, are slightly different (see Table 114). Needless to say, they have clear implications for the levels of advertising revenues.

**Table 114 PL: Main Radio Stations – market share (16-49 age group) in year 2011**

Main Radio Stations/Channels	Market Share *
RMF FM	30.6%
Radio ZET	17.9%
Polish Radio One (PR 1)	4.4%
Polish Radio Two (PR 2)	0.3%
Polish Radio Three (PR 3)	7.9%
Polish Radio Four (PR 4)	0.6%
17 separate regional stations (PSB)	3.3%
Radio Eska (network of 38 stations)	10.5%
Radio Eska Rock	2.1%
Radio TOK FM	0.8%
Golden Oldies /Złote Przeboje/ (network of 19 stations)	2.6%
Radio Maryja	0.9%

\* Source: *Radio Track SMG/KRC*, March 2012

#### 2.2.20.2.2. Television

Public service television channels are solely produced by Polish Television (Telewizja Polska S.A., TVP S.A.). The public broadcaster has two nationwide terrestrial channels (TVP 1 and TVP 2), six specialized channels distributed *via* satellite and one information channel (TVP INFO) produced in cooperation with 16 local branches. The six channels include TVP Polonia dedicated to Poles living abroad, TVP Kultura, TVP Sport, TVP Historia, TVP Seriale offering mainly domestic TV series and Belsat TV (produced in the Belarusian language) aimed at audiences in neighbouring Belarus.

The two major competitors of public television stations operating in the commercial sector are Polsat Group and TVN. The Polsat Group, via the Telewizja Polsat SA company, produces three terrestrial channels (Polsat, TV4, TV6) and 14 satellite channels: Polsat 2, Polsat Play, Polsat Café, Polsat News, Polsat Sport, Polsat Sport News, Polsat Sport Extra, Polsat Futbol, Polsat Film, Polsat Jim Jam, TV Biznes and Polsat Crime & Investigation.

A sign of ongoing concentration is the recent takeover of ITI (TVN) by Canal+, and of cable operator ASTER by UPC. The TVN Group broadcasts two terrestrial channels and 13 channels also distributed *via* satellite: (TVN 24 – a round-the-clock news channel, TVN Style, TVN Turbo, TVN CNBC, TVN Meteo, iTVN directed to Polish communities abroad, nSport, Mango 24 – teleshopping, nFilm HD, nFilm HD2 and Show 3D).

When it comes to minor players, one channel is produced by TV PULS and eight local channels are available only for two hours a day. They are produced by Telewizja ODRA, TVT, Studio Lubań – Bolesławiec and Niezależna Telewizja Lokalna Radomsko (Radomsko Independent Local Television).

Apart from channels produced by television stations and distributed terrestrially, Polish viewers have access to 85 specialized theme channels distributed via cable networks and digital satellite platforms.

**Table 115 PL: Main Television Companies - ownership structure, main stations and market share in the year 2011**

Company	Ownership Structure*	Main Television Stations/Channels	Funding **	Market Share ***
Telewizja Polska S.A.	Polish treasury	TVP 1 TVP 2 TVP INFO	P/L/A P/L/A L/A	17.4% 13.3% 4.2%
Cyfrowy Polsat S.A. Capital Group	Pola Investments Ltd.(controlled by Solorz-Żak) and others	TV Polsat TV 4	A A	14.5%
TVN Capital Group	Polish Television Holding, Cadizin Trading&Investment (both controlled by ITI Holding S.A.) N-Vision B.V.	TVN TVN 7	A A	15.0% 1.8%
Lux Veritatis	Lidia Kochanowicz Mańk, Jan Król, Tadeusz Rydzyk	TV Trwam	D	0.1%
Others		.		29.4%

\* Sources: companies Annual Reports for the Year 2011

\*\* Funding: P=Public funds; D=Private donations; L=License fee; A=Advertising; S=Subscription

\*\*\* Source: data published by Nielsen Audience Measurement quoted in: *Information on Key Issues in Broadcasting, in the Year 2011 – supplement to the Annual Report of the National Broadcasting Council*, Warsaw March 2012

The top two stations in terms of audience within the commercial group of viewers (aged 16-49), TVN and TV Polsat, are both commercial stations.

**Table 116 PL: Main Television Stations – market share (age group 16-49) in the year 2011**

Main Television Stations/Channels	Market Share *
TV Polsat	16.5%
TVN	16.1%
TVP 1	13.6%
TVP 2	11.9
TV 4	2.8%
TVN 7	2.2%

\* source: *TVN Capital Group Annual Report for the Year 2011*

TV channels are broadcast terrestrially in analogue and in digital format. In September 2009, following a dozen rounds of consultations between KRRiT and UKE, the main TV market players on others, Multiplex 1 (MUX 1) was launched, followed by Multiplex 2 in September 2010 and Multiplex 3 in October of that year. The following channels are to be included in MUX 1: TVP1, TVP2, TVP INFO (regions), Eska TV, TTV, Polo TV and



Rozrywka. The launch of the MUX 3 multiplex will take place in three stages. By end-2012 (stage 3) at least 95% of Poland's population is to be able to receive its digital TV signal. Digital terrestrial MUX 2 will encompass 8 channels: Polsat, TVN, TVN7, TV4, TV Plus, TV6 and Polsat Sport News. MUX 3 will include Polish Television channels: TVP1, TVP2, TVP INFO (regions), TVP Kultura, TVP Polonia and TVP Historia.

This list highlights the fact that the multiplexes will be dominated by the existing chief market players.

For the time being, digital terrestrial television is essentially only available in major cities. It is expected that all of Poland is to be covered before the end of 2013. Analogue terrestrial TV is to be switched off by end-2013.

Last but not least, it is worth highlighting the links between major television companies and VOD services. Polsat owns Ipla, TVN - TVN Player, TVP SA - VP VOD.

#### *2.2.20.2.3. Press and publishing*

As it was pointed out in section 2.2.1.1.1, the Press Law does not include any anti-concentration rules or limitations concerning foreign media ownership. So it is worth noting that it was mentioned in an earlier version (2004) of the respective report, namely: *Hence, there was a major influx of foreign capital and foreign interest into this market from the beginning of the market liberalisation, notably also in the magazine sector (...).*<sup>111</sup>

Nowadays, almost every case of merger or acquisition which will bring capital concentration, has to be approved by the President of the UOKiK<sup>112</sup>.

Agora, the owner of two radio stations: TOK FM and Złote Przeboje (Golden Oldies) publishes Poland's second largest national daily newspaper *Gazeta Wyborcza*.

ZPR S.A., which is among the most dynamic investors in the radio and television market, owns the *Murator* publishing company with many popular press titles, especially the *Super Express* tabloid focused on the needs of the man in the street. However, the most popular daily newspaper is *Fakt Gazeta Codzienna* published by Ringier Axel Springer Polska. *Fakt Gazeta Codzienna* has outpaced all other newspapers in terms of daily circulation. According to many opinions (the same opinion was expressed in the previous edition of this report) *Fakt* is a twin paper of the top selling German tabloid *Bild*.

*Rzeczpospolita* owned by Presspublica is an opinion-forming daily newspaper very popular and respected in business circles. Next in rank after *Rzeczpospolita* are *Dziennik Gazeta Prawna* and *Puls Biznesu*, which specialise mainly in covering legal and economic issues.

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<sup>111</sup> Final report of the study on "the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed" Düsseldorf, 31 August 2004, p.159.

<sup>112</sup> According to regulations of the Competition and Consumer Protection Act, the intention of concentration requires approval of the President of the Office in the case when the combined worldwide turnover of entities involved exceeds EUR 1,000,000,000 or EUR 50,000,000 in case of combined turnover of entities operating in Poland.

**Table 117 PL: Chief publishers of selected newspapers\* in the year 2011**

Publisher	Shareholders**	Dailies	Daily Circulation (printed and e-edition)***	Share of Daily Market**	Seasonal Cycle Readership****
Ringier Axel Springer Polska	Ringier Axel Springer Media AG	Fakt Gazeta Codzienna	400,074	0.88%	12.39%
Agora SA	Agora Holding, BZWBK AIB Asset Management S.A. ING OFE Open Pension Fund	Gazeta Wyborcza	278,280	0.61%	13.03%
Murator SA	ZPR S.A.	Super Express	181,928	0.41%	5.58%
Presspublica	Gremi Media, Polish Treasury	Rzeczpospolita	90,025	0.19%	3.72%
Infor Biznes	Infor PL, Ringier Axel Springer Polska	Dziennik Gazeta Prawna	67,908	0.14%	2.40%
Bonnier Business Polska	Bonnier	Puls Biznesu	13,031	0.02%	0.35%

\* Selected titles devoted to political/economic/cultural issues

\*\* Publisher websites and/or informal information

\*\*\* "Daily Market" category encompasses all daily newspapers excluding those that are distributed free of charge. Source: Press Circulation Audit Association (ZKiDP) <https://www.teleskop.org.pl>

\*\*\*\* Source: *Polish Readership Study (Polskie Badania Czytelnictwa –PBC General)* – report drafted by Millward Brown SMG/KRC (Figures: research period October 2011–March 2012; N= 24 224) <http://www.pbc.pl>

Among political and social weeklies, *Polityka*, which is owned by a co-operative established by well-known journalists (who worked for the magazine before 1989), and *Wprost* have been the most popular for a long time. The publisher of the *Polityka* magazine, *Polityka* cooperative is also a minor shareholder in Radio TOK FM, which is regarded as a very influential broadcaster. The highest growth dynamics in terms of market share (weekly circulation) and popularity (average issue readership) has been achieved by the *Uważam rze* magazine, a real market newcomer. In terms of topics covered and profile, this weekly magazine is very close to the *Rzeczpospolita* daily newspaper. Both are owned by Presspublica.

To many observers, the fact that the *Gość Niedzielny (Sunday Visitor)* weekly published by the Metropolitan Diocese of Poland's Roman Catholic Church enjoys the highest circulation among periodicals might seem quite incomprehensible. Due to expressive opinions on many social issues and a clear-cut profile this magazine is often characterized as a confessional one.

The coloured and specialized magazine sector is dominated by foreign companies: German publishers Wydawnictwo Bauer, Gruner+Jahr Polska, Polskapresse, Ringier Axel Springer, Edipresse, Hachette Fillipacchi Polska, and Marquard Media Polska, and also Burda Media Polska.

**Table 118 PL: Main Publishers of selected weekly magazines\* in the year 2011**

Publisher	Shareholders	Title	Weekly Circulation**	Share of Weekly Market**	Average Issue Readership***
Gość Niedzielny Publishers (Wydawnictwo Gość Niedzielny)	Metropolitan Diocese of the Roman Catholic Church in Poland	Gość Niedzielny	152,270	0.35%	3.76%
Polityka	Polityka Cooperative	Polityka	144,171	0.33%	6.16%
Ringier Axel Springer Polska	Axel Springer AG, Ringier AG	Newsweek Polska	109,128	0.25%	8.50%
Presspublica	Gremi Media, Polish Treasury	Uważam rze	129,246	0.29%	2.91%
Publishing and Advertising Agency Wprost	Point Group SA (80%)	Wprost	92,754	0.21%	6.51%
Presspublica	Gremi Media, State Treasury	Przekrój	31,171	0.07%	2.95%

\* Selected titles devoted to political/economic/cultural issues

\*\* Publisher websites and/or informal information

\*\*\* "Daily Market" category encompasses all weekly magazines; source: Press Circulation Audit Association (ZKiDP) <https://www.teleskop.org.pl>

\*\*\*\* Source: *Polish Readership Study* (Polskie Badania Czytelnictwa –PBC General) – report by Millward Brown SMG/KRC (Figures: research period: October 2011 – March 2012; N= 24,224) <http://www.pbc.pl>

#### 2.2.20.2.4. *Online media (non-linear audiovisual (media) services; websites)*

Among market analysts in Poland, the view prevails that in the audiovisual services market a fragmentation of the hybrid television market is noticeable. This is ascribed to the lack of TV set interoperability and the use of different standards.<sup>113</sup>

Meanwhile, in the non-linear services market, content delivered by Polish suppliers is the most popular. According to fragmentary data chiefly based on estimates, as of end-2011 ipla.tv interactive television ranked the highest, followed by iplex and tvn player *video-on-demand* services. Next comes public television's *video-on demand* service, followed by the only *audio* service in the ranking: Tuba.fm offered by Agora.

In terms of the popularity of web services grouped according to category (culture and entertainment, news and current affairs, new technologies and business, finance and law), the number of *real users* and reach were the following:

<sup>113</sup> Information on Key Issues in Broadcasting, op.cit., p.22.

**Table 119 PL: Popularity of web services (selected categories) in Poland**

Selected service categories	Real users	Reach
Culture and entertainment	19,209,883	99.56%
News and current affairs	18,279,905	94.74%
New technologies	15,598,058	80.84%
Business, finance, law	13,726,887	71.14%

Source: Megapanel PBI/Gemius survey – report drafted by PBI/Gemius – report drafted by Millward Brown SMG/KRC (Figures: research period February 2, 2012; target group: all we users; N=13,639)

**Table 120 PL: The popularity ranking of portals (websites) in descending order includes**

Wirtualna Polska - Orange
Onet.pl
Wirtualna Polska
Interia.pl
Wirtualna Polska
Grupa Gazeta.pl
Murator
TVN
TVN-tvn24.pl
Polskapresse
Gazeta.pl-wyborcza.pl
TVP
Polskie Radio

Source: Megapanel PBI/Gemius survey – report drafted by PBI/Gemius – report drafted by Millward Brown SMG/KRC

#### 2.2.20.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers

According to detailed data concerning the pay TV market contained in a report by the President of the UOKiK, services in this area are provided by digital satellite platforms, cable TV and IPTV operators<sup>114</sup>.

Digital satellite platform operators have won the highest number of users (6 million, i.e. over 60% of pay TV audiences). In 2011 5 digital satellite platforms operated in the Polish market: Canal+ Cyfrowy, Cyfrowy Polsat, Telewizja „n”, Telewizja na Kartę and Neostarda’s Livebox using satellite delivery.<sup>115</sup>

Canal+ Cyfrowy is licensed to carry out wireless delivery of TV channels and radio stations. It also holds 10 licences for channels distributed via satellite. The company’s shareholders are: Groupe Canal+ SA (France) and LGI Ventures B.V. (Holland). Cyfrowy Polsat SA holds a licence for wireless distribution via satellite of TV channels and radio stations. The shareholders of the company are Polaris Finance B.V. (Holland), Zygmunt

<sup>114</sup> Report on a survey of the pay TV services market, UOKiK, Warsaw, August 2011.

<sup>115</sup> Op.cit., p.12.

Solorz-Zak and remaining shareholders. The majority stakeholder of Polaris Finance B.V. is Zygmunt Solorz-Zak. ITI Neovision holds a licence for wireless satellite delivery of TV channels, 3 licences for TV channels distributed by satellite and 2 licences for radio stations distributed by satellite. The sole shareholder is Neovision Holding B.V. (Holland).

Telekomunikacja Polska SA holds a licence for wireless satellite distribution of TV channels and radio stations and a licence for a TV channel distributed via satellite. Its shareholders are France Telecom SA (France), Capital Research and Management Company (US fund), Polish Treasury and remaining shareholders.

Between them, more than 660 cable TV operators, who provide analogue and digital services, have 4,6 million users, mainly in urban areas. The Polish CATV market is Europe's third largest in terms of size. Owing to the high cost of building cable networks, the growth of the cable subscribers base in the rural countryside is far slower. The urban market is all but saturated, thus considering the high cost of cable infrastructure development, the countryside is witnessing an expansion of satellite platforms. As a result, in many local markets satellite platforms do not compete with cable.

In addition to the above, the Office of Electronic Communications (UKE) report reveals that the number of households being hooked up to broadband with the use of the DSL technology keeps growing, but the growth dynamics is lower and lower. Evidence of this is a stable share of individual fixed-line technologies, while the share of mobile access keeps growing by leaps and bounds, partly as a result of aggressive marketing policies. This growth is believed to stem from the possibility to avoid existing fixed-line bottlenecks, the rising sales of laptops and other devices that allow mobility and fads, especially among the younger generation<sup>116</sup>.

The least widespread means of pay TV delivery is IPTV, i.e. Web services using IP protocol. In Central and Eastern European countries, the share of IPTV is still low<sup>117</sup>. Although the number of IPTV subscribers in Poland grows steadily year by year, supply of this kind of services can still be regarded as marginal. In 2009 just four supra-regional cable operators offered IPTV. The providers' inability to offer adequate broadband capacity appears to be the main stumbling block. Besides, the overall high TV market saturation resulting from the popularity of other successful modes of television delivery puts the prospects of IPTV in Poland in doubt.

It is also interesting to note the growing share of telecoms in the media, and the other way round. Polkomtel mobile operator was recently taken over by Polsat, while telecom operators are branching out into the audio and video markets.

#### *2.2.20.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

An analysis of changes in advertising markets worldwide reveals that between 2006 and 2009 the share of web advertising grew, the share of TV advertising remained unchanged, while radio and press advertising budgets went down. In the Polish market in 2010-2011, only press advertising experienced a downward trend, while a modest increase was registered in the remaining markets.

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<sup>116</sup> Telecommunication market in Poland in the year 2010, report drafted by UKE in June 2011 <http://www.uke.gov.pl/>.

<sup>117</sup> Op.cit.

**Table 121 PL: Changes in advertising revenues within the media sector in Poland - 2008-2011**

Years	2008 (mln zlotys)	2009 (mln zlotys)	2010 (mln zlotys)	2011 (mln zlotys)	2011/2010 (%)
Television	3,827.8	3,3371.5	3,859.4	3,880.9	100.5
Press	1,695.7	1,418.3	1,334.9	1,246.7	93.3
Internet	802.4	874.9	1,021.7	1,214.1	118.8
Radio	623.5	522.1	528.9	561.3	106.1

Source: Information on Key Issues in Broadcasting( (2010; 2012)

Nationwide television stations have experienced a decline in advertising revenue, while theme channels keep increasing their share of the TV advertising market. Year on year, in 2011 a 3.2 percentage point growth was registered. Just like in the previous year, advertising revenue of magazines, daily newspapers and outdoor advertising went down, while the Internet and radio managed to secure a larger share of the cake.<sup>118</sup>

The need for the publishers of print media in Poland to take on the Internet following the arrival of the first tablet produced a seeming paradox. The sales of most dailies and weeklies declined (with the notable exception of the „Gość Niedzielny” whose circulation actually went up). Press advertising revenue went down, clearly as a result of pressure being exerted on publishers to offer discount rates in the face of the economic downturn. However, although the readership of individual press titles went down, in the opinion of experts from the Polish Chamber of Press Publishers a newspaper which maintains high standards is still regarded by the majority of Polish readers as the best source of information and opinion.<sup>119</sup>

Each day Polish readers devote some 20 minutes to newspapers, while magazines can count on 24 minutes of their time. For the sake of comparison, an average Pole spends some 230 minutes a day in front of the TV. The internet takes up about 117 minutes a day, while radio listening accounts for 80 minutes.<sup>120</sup>

Year by year, the share of radio listening in all age groups is on the decline. Over the past decade, the average time devoted to the traditional consumption of this medium declined by 30%. To the largest extent this holds true about listeners in the 15-24 age group who increasingly opt for web streaming or pick niche stations which are only available online. It is also interesting to note that some 10% of online listeners follow their favourite stations with the use of mobile devices.

In terms of Polish television audiences, women prevail. Those living in major cities prefer public TV stations, while those living in smaller towns favour commercial stations.

Another trend evident in the context of changes in media consumption highlighted by analysts of Poland's National Broadcasting Council on the basis of data gathered by the European Audiovisual Observatory is the fragmentation of information sources. As new technologies offer more and more reception options, and by the same token as access to individual media improves, in Poland, just like in Lithuania and Hungary, the

<sup>118</sup> Ibidem.

<sup>119</sup> Ibidem pp.11, 23.

<sup>120</sup> Information on Key Issues in Broadcasting, quoting TGI Report, 2011 (Figures: research period January 2010–December 2010; N=17844 (newspapers readers), 29061 (magazines readers), PBI/Gemius Report, Radio Track SMG/KRC, and AGB Nielsen Media Research, 2010.

fragmentation of information finds expression in a growing preference for foreign media among local users.<sup>121</sup>

#### 2.2.20.2. Conclusion and Recommendations

The freedom of expression and freedom of media have the growing importance in public debate in Poland, in particular in the context of the Internet, where fundamental rights and freedoms are often treated as points of reference in discussions, as could be seen most manifestly during recent debates and protest in Poland on ACTA.

The scope of the freedom of expression and freedom of media has been progressively broaden since 2004 by the jurisprudence of the Constitutional Court, which eliminated some disproportional statutory limitations of these freedoms, in particular certain penal provisions with regard to journalists and media activities. However the criminalization of a defamation and insult, although recently slightly relaxed, still exists in Poland and even its constitutionality has been confirmed by the Court. The right of every individual to access public information is strongly constitutionally protected and implemented with concrete safeguards in the statute.

Recommendation: Penal provisions applicable to journalists and media, as well as individuals performing their freedom of expression, should be further reduced, in particular penal provisions of Articles 45-49a of the Press Law, should be reviewed and partly abolished and/or replaced with non-penal sanctions. The same applies to provisions of the Penal Code criminalizing a defamation and insult, in particular regarding an insult of the President and state organs.

The legislation concerning media, in particular the Press Law (of 1984, amended in 1990) and Broadcasting Act (of 1992) is characterized by relative stability. Proposals for their revisions often provoke controversies, which block reforms. Recently attempts to update both acts by extending their scope to certain new *on-line* media activities failed to be adopted, as allegedly limiting freedom in the Internet. There is however pressing need for the reform of both laws: in case of the Press Law due to its partial inadequacy to new media environment, and in case of the Broadcasting Act related to necessity to regulate non-linear audiovisual media services, in line with the AMS Directive.

Recommendation: The Press Law should be adapted to the new media environment. In particular clarification is needed as to which on-line activities constitute media and to what extent registration applies. A new, more precise, regulation of rectifications and/or replies is needed. Also the provision on authorizations of interviews should be reviewed and relaxed. In both cases, criminal sanctions should be replaced with the civil law responsibility.

Recommendation: Non-linear audiovisual media services shall be urgently regulated in accordance with the AMS Directive, preferably by the revision of the Broadcasting Act.

The lack of adequate public funding of public service media threatens their independence and abilities to fulfil public service remit. This may seem paradoxial, given the relatively stable legal framework for PSM, their important position on the market, as well as constitutional case law confirming a duty of the state to secure adequate funding for PSM and enforceability of the present public funding scheme.

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<sup>121</sup> Information on Key Issues in Broadcasting, op.cit., p.12.



Recommendation: A more effective collection and enforcement of the licence fee by state authorities in accordance with the law in force is essential. The public funding from the licence fees should be complemented, as already provided for under the Broadcasting Act, by the funding from the state budget. In the longer term, a new scheme for public funding is needed. However, the complete replacement of the licence fee with the funding from the state budget is not recommended, as it may endanger the independence of PSM. Rather, a new type of a household audiovisual fee should be introduced, but without the outdated connection of a fee with the use or possession of a radio and/or TV receiver.

Although the safeguards for transparency and accountability of PSM in the law (including the definition of the public service remit, reporting duties, making available of yearly reports, financial-programming plans), have been improved since 2004, there is still a need to modernize this regulation according to the role of PSM in the information society.

Recommendation: The provisions on the remit and obligations of PSM should be updated, in particular more detailed provisions on new media services of PSM in the Broadcasting Act are needed. More involvement of civil society in PSM is also recommended, which could be achieved by changing the composition of programming councils of PSM; the latter should consist more of civil society instead of representatives of parliamentary parties.

Different kinds of media concentration processes take place on the Polish media market: horizontal (networking of local radio stations by big radio groups, practical oligopoly in traditional TV market, consolidations in cable TV and satellite platforms market), vertical and cross-media (ownership of press and broadcasting services), cross-sector (ex. media and telecommunications) and international.<sup>122</sup> These processes are dealt with mainly by measures of competition law. Media law means are rather insufficient and relate only to broadcasting.

Recommendation: Coherent and evidence-based public policy on media pluralism is recommended. The provisions on the media ownership transparency should be added to the Press Law and the Broadcasting Act. Media law provisions preventing excessive media concentration of different kinds should be developed and more effective practical application thereof should be achieved in particular through better cooperation of authorities competent for media (KRRiT), competition (UOKiK) and telecommunications (UKE). Recently changed must-carry/must-offer rules should be revised again, so as to play their role of flexible safeguards of media pluralism and cultural diversity, rather than fixing an oligopolistic structure of the TV market. The list of must-carry programme services, other than statutory public service channels, should preferably be determined, within the limits of statutory provisions, by way of a regulation by KRRiT. Initiatives to promote media pluralism at the EU level could also be of importance from Polish perspective.

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<sup>122</sup> KRRiT Strategia regulacyjna na lata 2011-2013 (Regulatory Strategy for years 2011-2013), s.14-15.

## PORTUGAL

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### 2.2.21. Portugal

#### 2.2.21.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.21.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

In Portugal, the general concept of freedom of expression and information is enshrined in the Constitution of the Portuguese Republic (hereinafter "Constitution"), under article 37.

Additionally, the Constitution establishes as well other freedoms less generic such as the freedom of the press and the media<sup>1</sup> and the rights to broadcasting time, of reply and of political response<sup>2</sup>.

- Specific safeguards and rights for the media

The freedom of media involves three specific characteristics: plurality of addressees, principle of maximum dissemination and use of adequate means (press, radio, television, Internet, etc.).

- Freedom to receive and to access information
  - Specific rights for the citizens

Provisions establishing the right to access information are included in the Constitution in its article 268<sup>3</sup> since the date of its approval.

- Safeguards on regulatory authorities

The fundament for the design and remit of a regulatory authority – today: the *Entidade Reguladora para a Comunicação Social* (media regulatory authority, ERC) is foreseen in article 39, 1 of the Constitution. Its jurisdiction extends to all media organizations, both public and private. Its duties express the democratic constitutional order of the media present in the fundamental principles and rights set out in Articles 37, 38 and 41 of the Constitution.

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<sup>1</sup> Article 38 of the Constitution.

<sup>2</sup> Article 40 of the Constitution.

<sup>3</sup> "1. Citizens have the right to be informed by the Administration, whenever they so request, as to the progress of the procedures and cases in which they are directly interested, together with the right to be made aware of the definitive decisions that are taken in relation to them. 2. Without prejudice to the law governing matters concerning internal and external security, criminal investigation and personal privacy, citizens also have the right of access to administrative files and records. 3. Administrative acts are subject to notification of the interested parties in the form laid down by law, and when they affect rights or interests that are protected by law, must be based on express and accessible grounds. 4. Citizens are guaranteed effective jurisdictional oversight of those of their rights and interests that are protected by law, particularly including the recognition of the said rights and interests, the impugnation of any administrative act that harms their rights and interests, regardless of its form, the issue of positive decisions requiring the practice of administrative acts that are required by law, and the adoption of adequate provisional remedies. 5. Citizens also have the right to challenge administrative norms which have external force and harm those of their rights or interests that are protected by law. 6. For the purposes of paragraphs (1) and (2) the law shall lay down a maximum time limit for responses by the Administration."

- Safeguards on “universal service”

The existence and operation of a public service of radio and television<sup>4</sup> is an institutional guarantee of media’s own freedom and pluralism itself, in other words, the constitutional goal that radio and television activities are not subjected to economic or political interests. In addition to the institutional guarantee, the Constitution also defines a special status for the public sector of the media, i. e. to assume defining and performing public service obligations (specifically in terms of information, education, culture, entertainment, promotion and defense of the Portuguese language).

#### 2.2.21.1.2. *Media order (de lege lata and de facto)*

- “Market Entry”
  - Licensing schemes; remit psm; notification for print publications

Directives No. 97/36/EC and No. 2007/65/EC orient this sector, such as the Laws No. 5/2004, No. 27/2007 and No. 8/2011. Also applicable to the audiovisual services on demand are the rules on the information society services and electronic commerce contained in the Decree-Law No. 7/2004.

Laws No. 27/2007 and No. 8/2011 contain the steps to be followed for the granting of the license and authorization for the television activity and its exercise as well as offering to the public audiovisual services on demand.

The television activity is subjected to licensing by public tender opened by Government decision.

It is incumbent upon the media regulatory authority to grant, renew, amend or revoke the licenses and authorizations for television broadcasting. As a condition of licensing for television activity which consists in the provision of generalist national scope programme the coverage of the whole national territory, including the Autonomous Regions, is foreseen.

With regard to the activity of the press the principle of freedom of the foundation prevails contrary to what happens to the radio and television broadcasters. Newspapers and any other publications can be founded without any prior administrative authorisation.

Law No. 54/2010 of 24 December is the Radio Law and contain the steps to be followed for the granting of the license and authorization for the radio activity.

- Media pluralism/ownership; competition law aspects

The Television Law of 2007, which replaces the previous Television Law of 2003 and implements the Directive No. 89/552/EEC of the Council, dated of 3 October 1989, as amended and codified<sup>5</sup>, refers to competition and concentration in this sector. This law states that the general regime of promoting competition is applicable also to the television. Any case of an alleged concentration situation between television operators is subject to the intervention of the Competition Authority and, dealing with the situation, the ERC must necessarily issue an opinion, which shall be binding in case of violation of

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<sup>4</sup> Article 38, 5 and 6 of the Constitution.

<sup>5</sup> Amended by Directive No. 97/36/EC, of the Parliament and of the Council, dated of 30 June 1997 and by Directive 2007/65/EC of the Parliament and of the Council, dated of 11 December 2007; codified by Directive 2010/13/EU.

freedom of expression. This law also determines that no person, legal or natural, may held, directly or indirectly, namely through a domain relationship, more than 50% of the service licences for national free-to-air television programmes existent for similar programmes in the same operating domain<sup>6</sup>.

Law No. 18/2003, as amended by Decree-Law No. 219/2006 of 2 November refers to concentration and merger in the media sector. Article 57 establishes the necessary cooperation between the Competition Authority and ERC. This article, as well as article 4ºB of the Television Law, in the version brought about by Law No. 8/2011 of April 11, states that in the matter concerning concentrations and mergers in the media sector, the Competition Authority's decisions are subject to a binding prior opinion of ERC, who shall evaluate if such operation has a negative impact on freedom of expression and diversity of opinion. Yet, looking at the Portuguese media sector we can notice that it has evolved through a growth of four major companies, carrying their activities across a range of media sectors (telecommunications, broadcasting, press and publishing, production, distribution, advertising and new media) – as already mentioned in the 2004 report, and not so much through the merging of companies. In fact, this was driven by the fact that in Portugal there are no restrictions on cross-media ownership. Presently, the media landscape in Portugal is no longer dominated by those four initial actors but instead by several and powerful company groups<sup>7</sup>, which maintain the trend of operating in a wide branch of media areas. We cannot find restrictions on foreign ownership of the media, as well.

According to the Press Law<sup>8</sup>, there are no limitations to the ownership of periodical publications, which can be held by any publishing companies or individual.

- Legal framework for psm; ability to fulfill their tasks

The public television service is ruled by the Television Law<sup>9</sup> where it is stipulated that it must safeguard its independence from the Government, the Public Administration and other public authorities, and as well as ensuring the possibility of expression and confrontation of different points of view.

The public service of radio is regulated by the Law No. 54/2010, that states that the State ensures the existence and operation of a public radio service, on a concession basis; the remaining radio operators shall cooperate among themselves in the pursuit for the values of human dignity, the Rule of Law, the democratic society, the national cohesion and the promotion of language and Portuguese culture<sup>10</sup>.

- The role and functioning of regulatory authorities in these respects

The ERC was created, as an independent body, by Law No. 53/2005 of 8 November, which extinguished the former regulatory authority, the Alta Autoridade para a Comunicação Social. In order to achieve its main purpose – the regulation and supervision of all media entities operating in Portugal – the ERC was incorporated as a legal entity under public law, endowed with administrative and financial autonomy and given its own assets, and as an independent administrative body.

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<sup>6</sup> Article 4B of Television Law.

<sup>7</sup> <http://www.erc.pt/pt/transparencia/grupos>

<sup>8</sup> Law No. 19/2012, dated of May, 8, in *Diário da República* No. 20, Série I.

<sup>9</sup> Article 5 and Chapter V of Television Law.

<sup>10</sup> Articles 5 and 6 of Law No. 54/2012.

The ERC comprises a Regulatory Board, responsible for defining and implementing regulatory action, an Executive Board, responsible for managing the services and for the administrative and financial management, an Advisory Council, advisory and participation body in defining the general lines of action of the ERC, and an Auditor, who controls the legality and efficiency of the financial and property management.

The Portuguese Competition Authority was created in January 2003<sup>11</sup> as an independent and financially autonomous institution<sup>12</sup>. Derived from its genesis, its aim is to strive for, and promote, modernization and competitiveness of the Portuguese economic life. It shall ensure the respect for competition rules, with a view to the efficient functioning of the markets, the efficient allocation of resources and the interests of consumers. The general competition regime applies also to the media sector.

- “Pursuit of Core Activity”
  - Ordinary law safeguards for journalistic activity

In the Journalists Statute, No. 1/99, amended by No. 114/2007 of December 20, we note that the following are the journalists’ fundamental rights: freedom of expression and creation; freedom of access to sources of information; the guarantee of professional secrecy, the guarantee of independence and participation in the orientation of the respective body of information<sup>13</sup>.

The Press Law<sup>14</sup> guarantees the fundamental right of Freedom of the Press in a similar way to article 38 of the Constitution. The “right to information, the freedom of the press, the independence of the mass media from political and economic powers, opportunities for expression of, and challenges to, different line of opinion and exercise of the right to broadcasting time, the right of reply and the right of political argument” shall be guaranteed by an independent regulatory authority, pursuant to the terms of article 39 of the Constitution.

To all those who exercise, as primary occupation, permanent and paid, the editorial capacity roles of research, collection, selection and treatment of facts, news and opinions through text or sound, by radio or television or any other electronic means of diffusion, the Journalists Code of Ethics is applicable, that states as follows:

- The journalists have the duty to report the facts with accuracy and in an exact manner, and to interpret them honestly. Facts must be checked by interviewing all parts involved in the case;
- The journalist must fight censorship and sensationalism and consider accusations without proof and plagiarism as serious professional errors;
- Journalists must fight all restrictions to the access to sources of information and all attempts of limitation of freedom of expression and of the right to inform. It is the duty of the journalist to report those offenses;
- Journalists must use honest means to obtain information, pictures or documents, and shall never abuse one’s good faith. The identification as a journalist is mandatory except for those situations of unquestionable public interest;

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<sup>11</sup> Decree-Law No. 10/2003, dated of 18 January, in *Diário da República* No. 15, Série I-A.  
<sup>12</sup> <http://www.concorrencia.pt>.

<sup>13</sup> Article 6, of the Journalists Statute No. 1/99, amended by No. 14/2007, of 20 December.

<sup>14</sup> Law No. 2/99 dated of 13 January, in *Diário da República* No. 10, Série I-A.

- The journalist must take responsibility for all of their works and professional acts, and correct any information proved to be false or inaccurate. The journalist must oppose to all actions and behaviour that violates his/hers conscience;
- The identification of sources is a fundamental criteria that a journalist must comply with. The journalist must not reveal, not even in court, their confidential sources, except when the information provided proves to be false. Opinions must always mention its author;
- Journalists must respect the presumption of innocence until the court case is finished. The journalists must not identify, directly or indirectly, the victims of sexual crimes and juvenile criminals, nor humiliate people or disturb their pain;
- The journalist must always avoid discrimination, based on colour, race, nationality or sex;
- Journalists must respect citizens' private life except for unquestionable public interest situations or when the behaviour of the person concerned goes clearly against the values and principles that publicly promotes. The journalist shall always respect serenity, responsibility and freedom of the subjects involved in its gather of information;
- The journalist must reject demands, assignments and benefits that may question their independent status and professional integrity. The journalist must not use his professional status to obtain personal benefits.
  - Specific positive content obligations

The free-to-air channels must provide: eight hours per week of programmes, fictional or documentary, with subtitles between the hours of 8am and 2am; three hours of informational, educational, cultural, recreational or religious interpretation programmes using sign language, on a weekly basis; the interpretation (signing or subtitling) of a full-service news of the night and thirty minutes per week of fictional or documentary programmes with audio description.

Pay-TV channels must provide two hours a week of information programmes with interpretation (signing or subtitling), including, also on a weekly basis, full interpretation of one of the news services.

Free-to-air channels implemented this in two stages between July 2009 and December 2011.

For the public service broadcasters, the obligations are included in the public service contract in 2010 for national services, and they were equal to those of the private channels.

- Funding schemes for specifically desired content

There are no legally fixed funding schemes.

- Political advertising and/or broadcasting time

It is forbidden that television operators grant broadcasting time to political propaganda, except in the following cases<sup>15</sup>: the Article 40 of the Constitution foresees the right to broadcast, response and political reply. In the same vein, the Television Law provides for the right to broadcast<sup>16</sup> and the right to political reply<sup>17</sup>.

- Codes of conduct and their organisational framing

In Portugal, as in many other countries, there is no comprehensive codified source of Media Law. The main relevant Portuguese legislation of the media is composed by several separate laws, such as: the Press Law<sup>18</sup>, the Television Law<sup>19</sup>, the Radio Law<sup>20</sup>, the Journalists Statute<sup>21</sup>, and the Journalists' Code of Ethics of the Portuguese Union of Journalists.

- The role and functioning of regulatory authorities in these respects

The media regulatory authority is presently the ERC, having further the following purposes: to ensure the right to free information<sup>22</sup>; the non-concentration of the ownership of the media<sup>23</sup> the independence from political power and economic power (both political and economic power)<sup>24</sup>; the respect for the rights, freedoms and guarantees<sup>25</sup> and also freedom of expression<sup>26</sup> and the exercise of the rights to broadcast and response<sup>27</sup>.

- Distribution Aspects

- Access to frequencies

Decree-Law No. 237/98, of August 5, which establishes the regulation for the granting of licences and authorisations for exercising television activity, provides, in number 1 of article 17, the setting, by Administrative rule, from the member of government responsible for the communications sector, of the technical standards to which terrestrial, cable and satellite television broadcasts must comply.

The applicable technical standards must therefore be made known, in accordance with the provisions of Directive nr. 95/47/ of the European Parliament and of the Council of 24 October, on the use of norms for the transmission of television signals. Thus:

The Government decrees, via the Minister for Equipment, Planning and Territorial Administration, in the terms of and for the purposes set down in the provisions of point 1 of article 17 of Decree-Law no. 237/98, of August 5, that:

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<sup>15</sup> Article 31, Law No. 2/99 dated of 13 January, in *Diário da República* No. 10, Série I-A.

<sup>16</sup> Article 59 of Television Law, Law No. 027/2007, dated of 30 July, modified by Law No. 8/2011, dated of 11 April, in *Diário da República* No. 71, Série I.

<sup>17</sup> Article 64 of Television Law, Law No. 027/2007, dated of 30 July, modified by Law No. 8/2011, dated of 11 April, in *Diário da República* No. 71, Série I.

<sup>18</sup> Law No. 2/99 dated of 13 January.

<sup>19</sup> Law No. 27/2007, dated of 30 July, modified by Law No. 8/2011, dated of 11 April.

<sup>20</sup> Law No. 54/2010 dated of 24 December.

<sup>21</sup> Law No. 1/99, dated of 13 December, modified by Law No. 64/2007, dated of 6 November.

<sup>22</sup> Article 39, 1, a) of the Constitution.

<sup>23</sup> Article 39, 1, b) of the Constitution.

<sup>24</sup> Article 39, 1, c) of the Constitution.

<sup>25</sup> Article 39, 1, d) of the Constitution.

<sup>26</sup> Article 39, 1, f) of the Constitution.

<sup>27</sup> Article 39. 1, g) and Article 40 of the Constitution.



1. Terrestrial (Hertzian), cable and satellite television broadcasting must comply with the following technical standards:
  - a. PAL (Phase Alternation Line) standards B and G, approved by Administrative rule n.º 936/91 of October 28, format 4:3, for wholly analogue television signals;
  - b. D2-MAC (Multiplexed Analogue Component) standard, approved by Administrative Rule No. 1155/91 of November 7, format 16:9 or 16:9, totally compatible with the PAL system, for wide screen and 625-line formats where the television signal is not wholly digital;
  - c. HD-MAC (High Definition Multiplexed Analogue Component) standard, for high-definition, but not wholly digital, television signals;
  - d. Standards developed by a recognised European standards organisation, for wholly digital television signals, viz. standards DVB-MPEG2.

- Access to distribution networks and control of actual conditions

Regarding cable networks, there are some specificities, the basic principle being full accessibility, i. e. the exploration is opened to all entities that meet the technical requirements to operate their network contained in the document elaborated by the Government. The requirements regarding the coverage area and the typology of the programme services to be offered must obtain express foundation in the text of the regulation, taking into account the principles of optimal management of radio spectrum and of the public interest they aim to safeguard.

Concerning to the press distribution's control, in Portugal it is one area having a self-regulation as framework. The *Associação Portuguesa para o Controlo de Triagem e Circulação* - APCT - is the name of the Portuguese Association for the Control of Circulation and Distribution, that was incorporated in May 1986 with the objective of verifying and certifying the number of copies distributed, geographic presence and stability in the market. The data collected by APCT are available and published every two months.

- Must-carry/must-offer rules for electronic media

"While the Universal Service Directive sets out clear requirements for must-carry policies - transparency, review procedures and need for consultation -- these are not well reflected in Member States policies and very few reviews have been carried out. The report therefore calls for a clear identification of the general interest objectives relevant to the selection of must-carry programming, and publication of the criteria for must-carry selection. It explains the rationale behind must-carry provisions and the problems that can arise when there are too many broadcasters with must-carry status or when programming of narrow appeal uses up valuable capacity"<sup>28</sup>.

In May 2009, ERC introduced rules on access services for the first time. They will be implemented over two time periods between July 2009 and December 2012.

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<sup>28</sup> Study on the regulation of broadcasting issues under the new regulatory framework, December 22, 2006.

The governing body of the ERC also recommended that broadcasters continue efforts to adopt new technologies particularly with regard to digital platforms<sup>29</sup>.

- Role of platform operators

The digital terrestrial television platform – DTT – offers four television programme services in standard-definition (SD) from a single multiplex as well as some services such as an electronic programme guide. The first multiplex was licensed by ANACOM to Portugal Telecom. Several conflicts among these entities have provoked the intervention of the Portuguese Parliament having this one remembered PT about its obligations by Resolution No. 11/2012, February 6th.

Meanwhile, by Decision of 24 June 2010 following Resolution of Council of Ministers No. 26/2009, published on March 17th, ANACOM has approved the detailed plan for the cessation of terrestrial analogue transmissions (switch-off plan), associated with the introduction of digital terrestrial television (DTT) in Portugal.

The DTT currently offers viewers access to free-to-air television programme services from one multiplex. The current process of switching off analogue television signals in Portugal is proceeding according to the approved national switch-off plan.

- The role and functioning of regulatory authorities in these respects

ANACOM<sup>30</sup> (Communications Regulatory Authority) is the regulatory agency that supervises the electronic and postal communications sector in Portugal. In the telecommunications sector, access of operators to networks and interconnection between networks and services are ANACOM's privileged areas of intervention, in its component of market regulation. Decree-Law No. 309/2001 establishes a wide number of assignments for this regulatory entity, namely: promote measures in order to accomplish technical standardization and to guarantee the respect of constitutional principles in this ground<sup>31</sup>. Among other duties: ensuring the existence and availability of a universal communications service; ensuring effective competition in the communications market; promoting consumers awareness; granting titles of the exercise of the postal and telecommunications activities and manage and supervise the market and sanction the market players<sup>32</sup>.

ANACOM promotes competition and protects the interests of citizens, ensuring transparency and information providing concerning matters such as tariffs and service use conditions.

- Access to Information

- Transparency of media ownership situations

Article 16 number 2 of the Press Law establishes transparency requirements that must be complied with such as the obligation of report and disclose the information concerning owners and shares held in publishing companies to the competent regulatory authority (meaning: ERC). Additionally, publishing companies must publish annually in their best

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<sup>29</sup> Jurisdictional Review and Regulatory Development regarding Access to Audiovisual Media Services for People with Disabilities, September 2009.

<sup>30</sup> Autoridade Nacional de Comunicações.

<sup>31</sup> Article 6 e Article 7 of Decree-Law No.º309/2001.

<sup>32</sup> Articles 7, 9 and 10 of Decree-Law No.º309/2001.

selling newspaper the details of annual accounts and shareholder interests (Article 16 number 3).

In Television Law is set out, in Article 4, the transparency of ownership of broadcasters and their management, being mandatory the indication of all the information, in a clear manner, on the owners and shareholders of the broadcasters. In radio, this same requirement is in the Article 3 of the Radio's Law, Law No. 54/2010 of December 24.

In Article 38, 3 of the Constitution we find the prediction of the mandatory disclosure of the ownership and financing of media social communication.

- Accountability of public service media

In Television Law is expected that operators jointly liable with those responsible for the transmission of previously recorded material, with the exception of the reported under the right to broadcast, the political reply, response and rectification or during interviews or debates staged by people that are not contractually bound to the operator<sup>33</sup>.

- Freedom of information laws

Concerning transparency and access of information issues, the new Law of Access to Administrative Documents (LADA) was passed in 2007<sup>34</sup> and establishes as basic principles to access and reutilization of administrative documents the principles of publicity, transparency, equality, justice and impartiality. This law, as its ancestor, allows citizens to make written requests for access to administrative documents (of any type) held by state authorities, public institutions, associations and foundations, state owned enterprises, local and regional authorities and, in general, all entities that develop administrative functions or have public powers<sup>35</sup>. The authorities must respond within 10 days of receiving a request<sup>36</sup>.

- Accessibility of products/services and distribution networks

The installation of various satellite dishes on common areas without permission is illegal if certain issues are not respected, as stated in Decree-Law No. 59/2000 of April 19, which establishes the legal framework for the installation of telecommunications infrastructure on buildings and their connection to public telecommunications networks. We should also pay attention to Articles 1422 and 1425 of the Portuguese Civil Code in what to the limitations imposed upon tenants matters.

In Portugal, there are private institutions of social solidarity working throughout the country, in cooperation with Social Security and together with local authorities, helping communities through this process.

Meanwhile, the subsidy and reimbursement programmes had been extended by ANACOM, so that those who were unable to complete the migration earlier would not be lost out and would still be eligible to benefit from the assistance available, even when concluding the migration after the final switch off date.

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<sup>33</sup> Article 70 Television Law.

<sup>34</sup> Law No. 46/2007, dated as of August 24<sup>th</sup> that revoked the previous "LADA", Law No. 65/93, dated as of August 26<sup>th</sup>, modified by Law No. 8/95, dated as of March 29<sup>th</sup> and by Law No. 94/99, dated as of 16 July.

<sup>35</sup> Article 4 of LADA.

<sup>36</sup> Article 14 of LADA.

There is a subsidy available equivalent to 50% of the price of the set-top box (terrestrial or satellite), limited at 22 Euro. This subsidy can be claimed by low level of income citizens, with a monthly income not exceeding 500 Euro and by people with a level of disability equal to or greater than 60%.

ANACOM also set up a subsidy for the installation of aerials, including parabolic aerials, of 61 Euro. This subsidy is available to people aged 65 and over who live in situations of social preclusion and who have been referred by Social Security.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

The public service of television and radio is governed by a law which defines the status and attributions of a figure called "Listener and Viewer Ombudsman- *Provedor*"<sup>37</sup>.

The Status of the *Provedor* as well as their assignments and responsibilities are contained in Chapter V of Law No. 8/2007 of February 14, which restructured the concessionaire's public service of radio and television.

The *Provedor* of the Listener and Viewer has the following attributions:

- To represent and to defend, in contact with the public service Companies of Radio and Television, the perspectives of viewers and listeners on the radio and television offer.
  - To assume the reliability of the public service provided by the Radio and Television Stations of RTP, SA, as well as to promote the credibility and good image of all its professionals.
  - To encourage the fulfillment of professional ethics and deontological codes by all the professionals of RTP, SA.
  - To foster the indexes of receptiveness of the various agents, of the structures, involved in the production of content, given the comments from listeners and viewers.
  - To contribute to a culture of self-criticism and prevention of eventual corporatist attitudes inside the companies, but also by the citizens whom they represent.
- Participation in media operators/(self-)regulatory bodies

There is a Viewers Association, named *Associação de Telespectadores* (ATV) and a Media Consumers Association, named *Associação de Consumidores dos Media* (ACMedia).

#### 2.2.21.2. Main Players in the Media Landscape

In what concerns the Portuguese media landscape, it must be mentioned the evolution from a state-owned media to an independent media after the end of dictatorship in 1974. Until the early years of 2000, the media industry was controlled by four main players (PT/Lusomundo, Impresa, Grupo Media Capital and Impala).

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<sup>37</sup> Law No. 2/2006, dated of 17 April, in *Diário da República* No. 75, Série I-A.

Presently, at a national level, besides the State, we can identify 7 major media groups operation in Portugal: Cofina SGPS S.A., Controlinvest, SGPS, S.A., Impresa – Sociedade Gestora de Participações Sociais, S.A., Portugal Telecom, SGPS, S.A., Radio Renascença, Lda., Sonaecom, SGPS, S.A. and ZON Multimédia – Serviços de Telecomunicações e Multimédia SGPS, S.A.<sup>38</sup>

Media Capital is the only major holding owned by a non-Portuguese shareholder, Spanish Prisa, but all the others include foreign-held capital. In 2009 some important changes occurred within this group due to Prisa's economical difficulties and Ongoing's offer to purchase roughly 30 percent of the shares of Media Capital. Ongoing already owns 23 percent of Impresa, which runs SIC.

Besides these groups, there are two other important media owners, the State and the Catholic Church. Concerning the press sector, the State holds Lusa news agency.

Almost all of the great expansion media are part of large economic groups (large at a Portuguese level, but small in comparison with the rest of Europe), a trend which started in the middle 1980s, as the result of the introduction of liberal policies influenced by the European Union and the changes in property of the main newspapers from traditional families to those groups. This was due to two key reasons: (i) Internal media reasons, like the rise in production costs, the considerable investments needed, the open possibilities of offer enlargement and the advantages of large scale operations and group synergies; (ii) General reasons, like the integration of Portugal into the European Common Market, the re-privatization of companies which had been nationalized after the April Revolution of 1974, and the Governmental policies favouring concentration of the share capital.

Besides from the State and the Catholic Church, four other major groups rule almost everything related to press in Portugal. They are:

COFINA. Great influence on the press sector, owns the daily *Correio da Manhã*, *Jornal de Negócios* and *Record*, the complimentary newspapers *Destak* and *Meia-Hora* and the magazines *Sábado* (news magazine), *TV Guia* and several other specialized magazines.

CONTROLINVESTE. The only of the four main groups with presence in all media sectors: *Jornal de Notícias*, *Diário de Notícias*, *24 Horas*, *O Jogo*, *National Geographic* and several other specialized magazines and newspapers; *TSF* (informational radio) and *Sport TV* (cable).

IMPRESA. In the press, it holds: *Expresso*, *Visão*, *Jornal de Letras*, *Exame*, *Telenovelas*, *Caras* and half a dozen of specialized magazines.

SONAECOM. This branch of the holding Sonae, run by Belmiro de Azevedo, one of Portugal's most notorious entrepreneurs, owns the daily newspaper *Público* and holds assets in telecommunications and Internet.

#### 2.2.21.2.1. Radio

Traditionally, the main player in the radio sector has been the Catholic Church<sup>39</sup>, owner of Rádio Renascença, Lda. (also mentioned as "Grupo Renascença" or "Grupo R/com"), which has three national channels. It also owns, directly or indirectly, dozens of radio

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<sup>38</sup> <http://www.erc.pt/pt/transparencia/grupos>.

<sup>39</sup> 60% held by Patriarcado de Lisboa and 40% held by Conferência Episcopal Portuguesa.

stations and local and regional newspapers, including, in the North of the country, *Diário do Minho*.

**Table 122 PT: Main Radio Companies**

Companies/Channels	Ownership Structure*	Main Radio Audience Share*	Total Audience Share
Grupo r/com	Catholic Church	RFM: 19.9% Renascença: 10.3% Mega Hits: 4.0% R. Sim: 1.5%	35.7%
Grupo Media Capital Rádios	Grupo Media Capital	R. Comercial 15.6% Cidade FM: 5.0% M80: 7.8%	29.1
TSF	Controlinvest, SGPS, S.A.	TSF: 4.8%	4.8%
Grupo RTP	Public Service	Antena 1: 6.9% Antena 2: 3.7% Antena 3: 0.8	11.5
Others		17.3%	17.3%

\* Source: <http://www.erc.pt/pt/transparencia/grupos>

\*\* Fourth Trimester 2011; Source: Markttest Portugal

According to these results, Group r/com (or Group Renascença) has the highest audience shares, RFM being the radio station with most listeners, followed by Radio Comercial, of Grupo Media Capital.

Grupo Media Capital is presently the largest group operating in the media sector in Portugal. In what concerns television, Grupo Media Capital held TVI, the channel with highest audiences share<sup>40</sup> and is the second largest group in the radio sector, as stated above. It has interests in all media sectors, including internet, being the owner of "IOL" the second largest internet search engine in Portugal. The company has its own television production company, a music records company, a company for the organization of cultural and music events (Farol) and one for distribution of cinematographic rights (Castello Lopes Multimédia). Medial Capital shares were firstly sold in the stock market in March 2004. Presently, all Media Capital shares are traded at Euronext Lisbon. The major shareholder is Vértix, SGPS, S.A., owner of 84.69% of the share capital, the rest of the capital being held by PortQuay West B.V. (10.0%) and other scattered investors (5.31%).

The Public Service Broadcaster, *Radio e Televisão de Portugal S.A.*, of which are part the public television operators RTP, and RDP has three national radio channels (see table 1 above) and three regional channels (RDP Madeira – Antena 1, RDP Açores – Antena 3 and RDP Madeira – Antena 1) as well as international channels (RDP Internacional and RDP Africa).

#### 2.2.21.2.2. Television

The free-to-air television market consists of two important commercial channels, SIC, owned by Impresa (with 23.6% of audience share in the first semester of 2011) and TVI (with 26.4%), competing with the main Public Service Broadcaster channel, RTP1 (with 22.6%)<sup>41</sup>. The Public Service Broadcaster has another national channel, RTP 2, with its

<sup>40</sup> Source: <https://www.erc.pt>.

<sup>41</sup> Source: <https://www.erc.pt>

focus in culture, art and nature, and no advertisement (except for institutional advertisement).

SIC television channel, which used to have the highest audience shares, is part of the Impresa Group, a multimedia company group that evolved from a company set up in 1972 by a Portuguese business man, Francisco Balsemão. It was the first private television in Portugal and its first broadcasting took place on 6 October 1992. Impresa Group also has a very important position in the media sector in Portugal, being the owner of several main newspapers (such as the iconic "*Expresso*"), magazines (such as "*Visão*") and cable channels (such as "*SIC Notícias*", the cable television channel with the highest audience shares – 4.4%)<sup>42</sup>.

During the first decade of the 2000's the cable channels became more important in the market, and the major sector companies launched specialized channels. Presently, both TVI and SIC have a 24-hour television news channel. There are channels specifically aimed at women, children and young people and also a substantial number of so-called thematic channels which mostly broadcast TV series or sports events, etc. These cable channels audience grow shares each month.

**Table 123 PT: Main Television Companies**

Broadcasters	Ownership Structure*	Main TV Stations	Total Audience Share**
SIC – Sociedade Independente de Comunicação, S.A.	SOINCOM – SGPS, S.A. – 51,0% IMPRESA DIGITAL – Produção Multimédia (Media Zoom), Lda. – 30,65% SOLO – Investimentos de Comunicação, SGPS, S.A. – 18,35%	SIC	23.6%
RTP – Rádio e Televisão de Portugal S.A.	Public Service	RTP1: 22.6% RTP2:4.5%	27.1%
TVI – Televisão Independente	Grupo Media Capital	TVI	26.4%

\* Source: <http://www.erc.pt/pt/transparencia/grupos>

\*\* First Trimester 2011; Source: Marktest Portugal

When compared to other countries in Europe, digital television was launched rather late in result of continuous postponements. Although planned to be introduced in 2002, digital television was only implemented in 2008. Currently, in Portugal, digital television is provided through the following means: cable, satellite, fixed wireless access, xDSL/IP (digital subscriber line) or UMTS (third generation mobile service system).

The public tenders for the introduction in Portugal of Digital Terrestrial Television (DTT) were launched in February 2008. DTT is an alternative platform for access to digital television, which differs technologically from analogue terrestrial TV and is presently run by the Public Service Broadcaster RTP and the commercial channel SIC, in co-operation.

<sup>42</sup> Ibid.



### 2.2.21.2.3. Press and publishing

The written press has endured a deep crisis throughout the last years, with loss of readers and advertising. Notwithstanding, new editorial projects still come about occasionally.

In a country historically associated with weak newspaper reading habits and persistent illiteracy, the crisis affecting the written press has been especially harsh also due to the downsizing of paid circulation, the increasing preference for online media, especially among younger people, the fierce competition of complementary newspapers, and the decrease of ad revenues due to the economic recession.

The national newspapers list has been recently enlarged with new publications, both daily and non-daily. A remarkable point as far as the written press' evolution in the last years is concerned, is the acquisition by Ongoing, a media group.

According to *Associação Portuguesa para o Controlo de Tiragem e Circulação* (APCT), *Correio da Manhã* has the leadership among the dailies and *Expresso* among the non-dailies. *Visão* is the main news magazine. Regarding the specialised editorial segments, it must be noticed: the increasing circulation within the economic, business and management publications (justified by the economic crisis context) and the decreases within sports newspapers, free periodicals and women and fashion, male and social magazines. Thematic press, such as women, society and TV magazines are still publications of great circulation, despite this decrease in the average circulation.

**Table 124 PT: Daily Newspapers**

News Papers	Readership (number of copies)*
Correio da Manhã	122,207
Jornal de Notícias	103,165
Público	43,642
Diário de Notícias	41,333
24 Horas	38,476

\* Source: Associação Portuguesa para o Controlo de Tiragem e Circulação (APCT) Average circulation in 2008

*Jornal de Notícias*, *Correio da Manhã* and *24 Horas* are newspapers with "popular" features the last being the closest to a tabloid editorial format in the Portuguese national daily press. The other two listed above are known as "quality" newspapers.

In Portugal, the free-of-charge press first was born in 1996, with *Jornal da Região*, which lost some of its importance with the conversion of *Destak* into a daily newspaper and the launching of the Portuguese edition of *Metro* and other free papers. In 2008 the four daily free papers *Destak*, *Global Notícias*, *Meia-Hora* and *Metro* reached an average circulation of 590,000 copies per edition.

Portugal counts approximately 650 local and regional newspapers, mainly with a weekly periodicity. The Catholic Church is, directly or indirectly, the main owner of regional and local press. Advertising revenues come predominantly from local institutions and enterprises and from public institutions.

2.2.21.2.4. *Online media (non-linear audiovisual (media) services; websites)*

The most of the newspapers have online version. On the other hand, there are some available only in digital edition like the “Diário Digital”, “Jornal Digital” and the website “Notícias Lusófonas”.

There are also several websites that bring together regional television and alternative publications from several areas (economical; cultural and others).

2.2.21.2.5. *Cable/Satellite network operators, IPTV & Internet Access Providers*

Cable television services were launched in Portugal in 1994. Combined with the licensing of commercial channels, this new distribution platform had a major impact in the Portuguese audiovisual landscape. TV Cabo (now integrated in the holding Zon Multimédia) and Meo (Portugal Telecom) are the two major players in subscription cable television. According to ANACOM, the Portuguese communications authority, in 2008 cable television services were subscribed by around 1.5 million customers, which represent a penetration rate of 26.4 percent of Portuguese households. Lisbon region concentrates 47.7 percent of the total number of subscribers, followed by North (25.7 percent), Centre (11.9 percent), Algarve (3.7 percent) and Alentejo (3.1 percent). Madeira gathered 4.8 percent of subscribers and Azores 3.1 percent.

In short, the penetration rate of subscription television services reached 40.9 percent at the end of 2008, with a total number of subscribers of 2.29 million, concentrated in Lisbon and North regions. The growth was leveraged by the appearance of a new cable service provider, Meo, which started a massive distribution in 2008, and the subscription of alternative subscription television platforms.

**Table 125 PT: IPTV**

*Market*

Operator	IPTV service name	Service offerings	Coverage	Technical Architecture				Number of subscribers
				Access ownership	Access technology	STB + DTT Tuner	STB +PVR	
Novis (Clix)	SmarTV	Triple play, live TV, VoD	Major cities	LLU from the incumbent	ADSL2+	STB only (in Portugal there is no DTT)	No	-

There is also a new triple play service offered by AR TELECOM since 2006, based on its own Tmax technology, a digital wireless technology with very high transmission capacity, based on standard DVB-T and standard IP<sup>43</sup>.

2.2.21.2.6. *Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

In 1997 the government removed advertising on the Public Service Broadcaster channel, RTP2, and restricted advertising on RTP1. The commercial channels were strongly involved in this change.

<sup>43</sup> Working Party on Communication Infrastructures and Services Policy IPTV: Market developments and regulatory treatment, OECD, 2007.

**Table 126 PT: Sale of advertising space by type of media (2004-2005; 2008-2009) (unit: € 1,000)**

	2004	(%)	2005*	(%)	2008	(%)	2009*	(%)
Total	2,792,741	10.0	2928480	100	1525092	100	1492907	100
Press	762,921	2.7	507919	17.3	261691	17.2	216122	14.5
Television	1,332,722	4.8	1700189	58.1	768448	50.4	748379	50.1
Terrestrial	-	-	1192270	40.7	599529	39.3	578323	38.7
Cable	-	-	507919	17.3	168919	11.1	170056	11.4
Radio	202,737	0.7	185092	6.3	92243	6.0	92400	6.2
Internet	17,323	0.1	15412	0.5	43176	2.8	56168	3.8
Outdoor	440,207	1.6	468140	16	289068	19	229866	15.4
Other	36,831	0.1	51728	1.8	70466	4.6	149972	10

\* Data from INE and OberCom on the totals of the advertising investment

\*\* Most recent available data from INE on the distribution of sale of advertising time or space on behalf of third parties, by type of advertising support

### 2.2.21.3. Conclusion and Recommendations

In the Portuguese legal system, the freedom of expression is enshrined and protected in several documents, and by the Constitution. The legal framework concerning the media is composed by several, scattered laws and states the importance of creating a "Code of the Media"; however, some point to the difficulty of this task considering the instability, heterogeneity and the lack of a legal doctrine that would be necessary to systematically organize the precepts.

The media sector is, as it has always been, dominated by a few main players. Nevertheless, in the last decade, new players appeared in the Portuguese media landscape and the trend seems to be the gathering of companies in great media groups with interests in various media sectors (cross-media ownership). Cofina, Controlinveste, Impresa and Sonaecom control the media and more often than acceptable the connection between political parties or groups and media groups jeopardizes the legal principles, namely in terms of control and independence.

A new regulatory authority has been incorporated, ERC (replacing the former *Alta Autoridade para Comunicação Social*), which, side by side with ANACOM, is responsible for controlling the compliance of legal provisions. Although the idea would be a non-partisan control, ERC's recent behaviour and decisions, or lack of them, show a serious disrespect and lack of concern of the transposed directives and, subsequently, for the citizens. The media groups, in particular those owning the TV channels, perform frequent violations of legally binding obligations, namely in marketing and advertising matters (time devoted to the broadcasting of commercials), without any intervention from ERC despite frequent complaints presented by viewers' associations.

In the press sector, as presented above, the economical crisis has visible effects. It should be highlighted the evolution in the market of complementary newspapers, though being somewhat ambiguous, as some of the editorial projects failed to survive and the average circulation tends to decrease..

The most important changes are taking place in the television sector. In the beginning of this year, the DTT has started replacing the analogue signal, the latter being progressively switched-off. Some major changes are yet about to happen. In its Programme, the Portuguese Government which took office in July 2011, has forecasted that one of the two State-owned TV channels would be privatized. The Working Group for the privatization of RTP suggested the sale by an international tender of one of the presently existing channels, while keeping under the State's control a broadcasting channel without commercial activity. Private broadcasting media groups are against this change. In April 2012 a serious scandal involving at least one of the major media groups that are eventually bidding and with a not yet explained intervention of political forces and intelligence services recommends a close control by the EU authorities of this tender. The privatization framework to be adopted as well as the outcome at the remaining state-owned televisions are yet to be defined when the present country report has been drafted.

## ROMANIA

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### 2.2.22. Romania

Romania joined the European Union on 1 January 2007, the country was not included in the 2004 study. Therefore, in the present report no comparisons will be made between the actual and previous situation of media.

#### 2.2.22.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.22.1.1. Human rights/Fundamental freedoms

- Freedom of expression/Freedom of the media

The freedom of expression is enshrined in the Chapter II, Fundamental rights and freedoms, of the Constitution of Romania (*Constituția României*), Article 30<sup>1</sup>, according to which the freedom of expression of thoughts, opinions, beliefs, and the freedom of any creation are inviolable. Censorship is prohibited. Freedom of media involves also free setting up of publications. An organic law may require the media companies to reveal their sources of funding. At the same time, the freedom of expression should not harm the dignity, honour, person's privacy, the right to one's own image. All national, racial class, religious hatred, discrimination, territorial separatism, public violence, obscenity are prohibited. The liability for the information incurs to the authors, producers, medium owners. The regulation on offences by the media ("press crimes") shall be reserved to an act of ordinary law.

There are no constitutional provisions with regard to rights of journalists not to disclose their sources, to refuse to testify or to have a larger access to information than the rest of the population.

- Freedom to receive and to access information

The freedom of information is stated in the Chapter II, Fundamental rights and freedoms, of the Constitution of Romania, Article 31<sup>2</sup>, according to which the right of access to any information of public interest cannot be restricted. The public authorities are obliged to provide correct information to citizens in public affairs, and matters of personal interest; the right to information has to do no harm to the protection of young people or national security. The public and private mass media have to provide correct information to the public.

- Safeguards on regulatory authorities

The Constitution of Romania does not hold specific regulations regarding the remit of any regulatory authorities in the media sector.

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<sup>1</sup> Constitution of Romania, Chapter II, Fundamental rights and freedoms, Article 30, English version, [http://www.cdep.ro/pls/dic/site.page?den=act2\\_2&par1=2#t2c2s0a30](http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#t2c2s0a30).

<sup>2</sup> Constitution of Romania, Chapter II, Fundamental rights and freedoms, Article 31, English version, [http://www.cdep.ro/pls/dic/site.page?den=act2\\_2&par1=2#t2c2s0a31](http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#t2c2s0a31).

- Safeguards on “universal service”

In respect of “Universal Service” the Constitution of Romania does not contain any specific safeguards, besides the provision that the public broadcasters, which are autonomous, under parliamentary control, have to give broadcasting time to any important social and political group.

#### 2.2.22.1.2. *Media order (de lege lata and de facto)*

- “Market Entry”
  - Licensing schemes; remit psm; notification for print publications

The Chapter 5 of the Audiovisual Law holds provisions for granting broadcasting licenses, analogue and digital (multiplexes), by the National Audiovisual Council (*Consiliul Național al Audiovizualului* - CNA), or by the National Communications Regulatory Authority (*Autoritatea Națională pentru Administrare și Reglementare în Comunicații* – ANCOM), respectively (a contest is required for commercial stations in case of terrestrial broadcasting, but not for public service broadcasters). Furthermore the term of 9 years license validity are regulated, as well as the conditions to start, to delay or to stop broadcasting, the infringements of the law and the conditions for the revocation of the license (Articles 50-69).

There are no specific provisions for registering a newspaper/periodical publication or an online journal. Natural and legal persons can both register a print or online publication, observing the legislation for setting up firms and for trade mark. For the print media it is necessary an ISSN (International Standard Serial Number) from the National Library of Romania.

- Media pluralism/ownership; competition law aspects

There are no legal provisions with regard to print and online media ownership. As for audiovisual media, Chapter 4 of the Audiovisual Law regulates the media ownership and the competition policy (ownership concentration, dominant position, rules of transparency, audiences measurement, etc.) The ownership rights can be transferred without harming the rights/obligations stipulated in the license(s). If a person should hold more than 10% of the shares it must send a notification to the CNA within one month. The shares can be only nominal. The CNA monitors all the holders of more than 20% of shares (direct or indirect) and all broadcasters which have average market shares above 30% of the relevant market to determine the dominant position in shaping public opinion. If a dominant position occurs or anti-competition practices are found, the CNA can take any legal action to correct it, including to diminish the participation quotas/number of licenses held or to issue sanctions. The Chapter 5 of the Audiovisual Law also has provisions with regard to ownership, free competition, anti-concentration measures, infringements of the competition rules, situations of license revocation.

Furthermore, according to the Law No. 41/1994, republished, concerning the organisation and operation of the public broadcasters *Societatea Română de Radiodifuziune* (Romanian Radio Broadcasting Corporation - SRR) and *Societatea Română de Televiziune* (Romanian Television Corporation - SRTV),<sup>3</sup> Article 43, SRR and

<sup>3</sup> *Legea nr. 41/1994 de organizare și funcționare a Societății Române de radiodifuziune și a Societății Române de Televiziune, republicată* (Law No. 41/1994 on the organisation and operation of the Romanian Radio Broadcasting Corporation and of the Romanian Radio Broadcasting Corporation, republished), Romanian version, <http://www.cna.ro/LEGE-Nr-41-din-17-iunie-1994,2196.html>.

SRTV are allowed to make associations with third parties without modifying the legal statute of the public services.

There are no specific legal provisions on cross media ownership and foreign ownership, nor specific provisions with regard to mergers, but the texts can be applied for this purpose, due to the fact that they have clear links to ownership concentration and dominant position.

The Competition Law<sup>4</sup> republished has no provisions for mass media, but the free competition principles are stated for all economic activities. According to the above mentioned Law, the economic concentrations where the aggregate turnover of the undertakings concerned exceeds 10 million Euro and there are at least two undertakings involved in the operation to achieve, each in part, on the Romanian territory, a turnover exceeding 4 million Euro are subject to control and must be notified to the Competition Council, the watchdog and the regulation authority in the field. The economic concentration shall not be put into effect until the Competition Council makes a decision. The economic concentrations realized through the merger of two/several undertakings must be notified by each of the involved parties; in the other cases, the notification must be made by the individual, the undertaking or undertaking who gain control over one or several undertakings or over part of them. When an individual participates with fraudulent intent and in a decisive way to the conceiving, organization or realization of any of the practices prohibited under the Law, this participation shall be considered a criminal offence and shall be convicted to jail from 6 months to 4 years or shall be fined. The smaller breaches of the law deeds constitute offences and may be sanctioned with a fine of up to 1% of the aggregate turnover of the financial year prior to the sanctioning or up to 10% for more severe deeds.

- **Legal framework for psm**; ability to fulfill their tasks

The freedom of expression and the freedom of information are enshrined in the Article 8 (1), (2) of the Law No. 41/1994, republished. According to Articles 1 and 2, SRR and SRTV are public services of national interest, editorially autonomous, under parliamentary control. They are protected by law against any interference from public authorities, political parties, unions, economic groups or pressure groups.

The articles 4-5 of the Law 41/1994 republished state that the general objectives of the public services are linked to information, education and entertainment. They are obliged to present objectively and impartially the facts, to ensure the correct information of citizens on public affairs. The public radio and TV have to promote competently and exactly the values of: the Romanian language, the national minorities, the democratic, civic, moral, sports values. They are bound to militate for Romania's national unity and independence, for human dignity, truth and justice. The programmes are not allowed to make any defamation of the country/nation, nor to serve to religious hatred, incitation to discrimination, territorial separatism, public violence, propagation of obscene manifestations. The programmes shall not prejudice to the dignity, honour or private life of persons, or the right to their own image. The programmes which could threaten the psychical or moral development of children and youth, can be only broadcast from 24.00 to 05.00 a.m. The minors with adverse behaviour or the persons presumed to have infringed the law shall be presented in such a way that the images should not allow their identification. At the same time, the public broadcasters have to offer airtime to the parliamentary political forces, including national minorities, up to 1% of their total weekly

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<sup>4</sup> Competition Law, English version, [http://www.consiliulconcurentei.ro/uploads/docs/concurenta/I21\\_1996\\_mod\\_en.pdf](http://www.consiliulconcurentei.ro/uploads/docs/concurenta/I21_1996_mod_en.pdf).



transmission time, according to the number of MP seats. On the other hand, the PBS are obliged to air with priority and free of charge official statements or messages of public interest received from Parliament, Romania's President, the Supreme Council of National Defence and the Government. According to Art. 34 (4) of the Audiovisual Law, sponsorship of programme services as a whole, as well as that of news programmes and programmes on analysis and debates on political and/or current economical topics is forbidden for all the market (PBS and commercial broadcasters).

The Board of Administration/Management of SRR/SRTV supervises the observance of the way in which the corporation fulfills its obligations assumed under the programme schedule and the broadcasting licences issued by the National Audiovisual Council, takes measures for the extension or the restriction of the activity of the corporation, for the setting up or the suppression of certain autonomous operating activities and presents the annual report to the Parliament, along with any other reports requested by the standing competent committees of the Parliament (Art. 27).

- The role and functioning of regulatory authorities in these respects

According to Art. 10 the National Audiovisual Council is entitled to act for the pluralism of information sources of the public, favoring free competition, a fair balance between national coverage radio broadcasting services and local, regional or thematic services, the transparency of organising, operating and financing audiovisual mass media, the encouragement of co-regulation and self-regulation in the audiovisual field.

Art. 16 stipulates that the Council establishes the conditions, procedure and criteria for the granting of analogue and digital audio-visual licenses, the procedure for the granting of the retransmission authorization, issues audiovisual licenses and retransmission authorizations for radio and TV program services, along with audiovisual authorization decisions.

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

The access to public information is guaranteed through the Law No. 504/2001 with regard to the access to information of public interest (*Legea nr. 544/2001 privind liberul acces la informațiile de interes public*)<sup>5</sup>, whose Chapter II Section 2 provisions with regard to the access of mass media to public interest information. Art. 15 is to be the vault key:

- (1) The access of mass media to public interest information is guaranteed;
- (2) The activity of collecting and broadcasting public interest information, done by the mass media, represents the put in practice of the citizens' right to have access to any public interest information.

Articles 7-9 of the Audiovisual Law provision with regard to disclosure of sources and the protection of the journalists by local authorities: confidentiality is guaranteed, disclosure of sources can be only decided by court, with clear motivation. Journalists have to use only legal/moral ways to get information. A protection of journalists and headquarters/offices of broadcasters is granted by local authorities, upon request, in case they are subject to pressures or threats that could effectively impede, restrict or affect

the exertion and the development of their profession or activity. This protection cannot anyway become a pretext to prevent or restrict the exertion of profession or activity. Searches at broadcasters' head offices or precincts shall neither prejudice the free expression of journalists nor be a means to suspend programme broadcasting. The Law No. 41/1994 republished provides similar provisions on this matter, in Art. 14.

On the other hand, Romania has not a legal regulatory frame for print media, so our references are taken mainly from the audiovisual field.

The Criminal Code<sup>6</sup> decriminalized in 2006 (Law no. 276/2006) the libel and defamation, an major modification of the law for the journalistic activity, which became better protected against "silencing" libel and defamation.

The Romanian Constitution clearly states individual freedom and security of a person are inviolable and that search, detainment, or arrest of a person are permitted only in the cases and under the procedure provided by law (Art. 23<sup>7</sup>). At the same time, the Art. 27 provisions about the inviolability of domicile and that searches shall only be ordered by a judge and carried out under strict legal terms. Searches during the night shall be forbidden, except for crimes in flagrante delicto. The Criminal Procedure Code<sup>8</sup> provisions in the articles 100-111 the conditions and the limits for domiciliary or corporal searches (domiciliary search during criminal investigation or trail, time for making the search, search procedure, performing domiciliary and corporal search, identifying and keeping objects, official report for search and confiscation of objects and writings, measures regarding confiscated objects, conservation or use of confiscated objects). All these provisions can be in favour of the journalistic activities.

- Specific positive content obligations

The public broadcasters have to promote and encourage the Romanian audiovisual creations (Art. 7 of the Law 41/1994 republished). In 4 years after the entering into force of the Law, they were bound to reserve to the European creations a majority percentage of their airtime, excepting informative and sports transmissions, games, advertising, and teletext service. Out of the European creation, at least 30% has to be Romanian creation, including creations specific to national minorities. Out of the Romanian creation, at least 35% has to be cultural creation and the PBS are also obliged to reserve at least 10% of their airtime to the creations of independent producers, from Romania or from abroad.

It is worth mentioning that the President of Romania sent back to the Parliament beginning of February 2012 a law for the modification and completion of the Audiovisual Law which intended to oblige the broadcasters to air a certain amount of minutes of cultural news weekly, saying this is a limitation of press freedom and that the educational/cultural role is intrinsic to the broadcaster's existence.

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<sup>5</sup> *Legea nr. 544/2001 privind liberul acces la informațiile de interes public* (Law No. 504/2001 with regard to the access to information of public interest), Romanian version, [http://legislatie.resurse-pentru-democratie.org/544\\_2001.php](http://legislatie.resurse-pentru-democratie.org/544_2001.php).

<sup>6</sup> The Criminal code, Romanian version <http://legeaz.net/cod-penal-actualizat-2011/>.

<sup>7</sup> Constitution of Romania, Chapter II, Fundamental rights and freedoms, Article 23, English version, [http://www.cdcp.ro/pls/dic/site.page?den=act2\\_2&par1=2#t2c2s0a23](http://www.cdcp.ro/pls/dic/site.page?den=act2_2&par1=2#t2c2s0a23).

<sup>8</sup> Criminal Procedure Code, English version, [https://www.google.ro/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2F81.12.220.82%2Fdoc%2FCriminal\\_Procedure\\_Code2.doc&ei=MbSRT-2IASnetAaz8dXcBA&usg=AFQjCNEA-Es2p-25apFi0IZD6A\\_\\_JBUe\\_g&sig2=mnHIPXToeB9HUFzM2sCC2A](https://www.google.ro/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2F81.12.220.82%2Fdoc%2FCriminal_Procedure_Code2.doc&ei=MbSRT-2IASnetAaz8dXcBA&usg=AFQjCNEA-Es2p-25apFi0IZD6A__JBUe_g&sig2=mnHIPXToeB9HUFzM2sCC2A).

- Funding schemes for specifically desired content

There are no subventions or other funding schemes for news/current affairs and information/service.

- **Political advertising and/or broadcasting time**

In Romania, the electoral campaigns last 30 days for all types of votes. 24 hours before elections (which take place on Sundays) all media are forbidden to broadcast or distribute electoral campaign contents. According to the Audiovisual Law, Art. 26<sup>1</sup> the broadcasters are obliged to cover the election campaigns in a fair, balanced, unbiased way, according to CNA compulsory norms.

The electoral laws (for local, parliamentary, presidential, European elections) provision for the electoral campaign coverage in mass-media. The Audiovisual Code provisions (Articles 139-140) that political advertisement, which is allowed only during election campaigns, can be inserted only in separate, adequately marked blocks, and the responsibility for the contents has to be explicitly assumed by candidates.

According to Articles 37-38 the Law No. 35/2008<sup>9</sup> for the election to the Chamber of Deputies and the Senate and for the amendment and completion of Law No. 67/2004 for the election of local public administration authorities, during the electoral campaigns the competitors and the citizens can express their opinions freely and without any discrimination, by protests/gatherings, and through making use of the mass media. The competitors have free-of-charge access to the public audiovisual services proportionally to the number of final candidatures, according to the geographical coverage of the medium. The commercial audiovisual media have to practice the same tariff per show/time unit for all electoral competitors and the airtimes offered to competitors must be proportional to those offered by the public stations.

The access to public media is equal and free of charge for all candidates standing for President. The electoral campaign through audiovisual media, public and private, must serve the general interests: of the electorate (to receive accurate information, to exercise their right to vote with full knowledge of the fact), of the candidates and their supporting political forces (to present their platforms, political programmes or electoral offers), of broadcasters (to exercise their profession's rights and duties). The broadcasters are obliged to ensure an equitable, balanced and fair electoral campaign for all candidates. Candidates benefit from free access to public and private radio and television services. The private radio and television stations shall offer the candidates airtime proportional to that offered by the public stations.

The legislation for local elections has similar provisions as above. Though there are some differences and much more stipulations to ensure a correct electoral competition through media (Articles 64-69):<sup>10</sup> during the electoral campaign, the information concerning: election system, voting procedure, electoral campaign calendar, political programmes, opinions and messages with electoral content shall be presented only in news bulletins, electoral shows (where candidates may present their political programmes/electoral

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<sup>9</sup> *Lege nr. 35/2008 pentru alegerea Camerei Deputaților și a Senatului și pentru modificarea și completarea Legii nr. 67/2004 pentru alegerea autorităților administrației publice locale, a Legii administrației publice locale nr. 215/2001 și a Legii nr. 393/2004 privind Statutul aleșilor locali, cu modificările și completările ulterioare, English version*, <http://www.roaep.ro/ro/getdocument.php?id=4682>.

<sup>10</sup> *Lege 67/2004 actualizată 2012 pentru alegerea autorităților administrației publice locale. Emitent: Parlamentul României. Publicată în monitorul Oficial 333/17.05.2007, Romanian version*, <http://www.model-de.ro/Legea+alegerilor+locale+2012+actualizata-p18-510.htm>.

campaign activities) and electoral debates. The private radio/television stations, including cable television, may include in their programme schedule shows of the above mentioned type, but they shall not be deemed electoral publicity. 20-30 seconds' publicity videos (spots) that urge voters to vote for a candidate/list may be broadcast only within the shows stipulated above. Buying broadcast time with a view to broadcasting electoral videos/shows is forbidden. The access to public media is free.

Non-parliamentary competitors to local elections have free access to territorial radio/television only if they submit candidates' lists in at least 50% of the constituencies in a county that is covered by territorial studios. If they submit full lists of candidates in at least 50% of the constituencies in 15 counties they shall have access to national public media services. The competitors belonging to national minorities have access to territorial/national public media if they participate with candidates' lists in the constituencies in the counties and in proportion to their coverage in the total population of that county, and that of Romania, respectively. The access of political competitors to private radio/television, including cable television, is free only during electoral shows. Buying airtime for publicity purposes or the transfer of airtime to candidates is prohibited. The airtime is granted Monday to Friday and each independent candidate has 5 minutes of airtime for the entire electoral campaign. During an electoral campaign, the candidates/representatives of competitors may not be producers, directors or anchors of audiovisual shows. The broadcasters are obliged to cover the electoral campaign in an equitable, well balanced, unbiased manner. Candidates who are already in public positions may appear in news bulletins strictly in matters related to the exercise of their position. If the news bulletins present special facts/events of public interest, besides the authorities' point of view, an opposite point of view must also be presented. The electoral shows/debates must ensure equal conditions to all candidates as regards the freedom of expression, pluralism of opinions, equal distance; the directors/anchors of electoral shows/debates have to be impartial, to ensure the balance during the show, to formulate questions clearly, without bias/partiality, to intervene whenever guests behave wrong or breach the electoral law.

As for the European elections, the differentiating provisions are included in the article 18:<sup>11</sup> the access of political competitors to public radio and television is free. The private audiovisual media will practice the same charge per show/unit of time for all competitors, and the offered airtime should be proportional to that of the public stations. The public media establish the timetable for the electoral campaign coverage and the allocation of air time for access of political competitors, taking into consideration the following rate of allocated air time: 4/5 of the airtime are distributed equally to competitors which have members in the European Parliament and which take part in elections, and as well as political/electoral alliances between them. 1/5 of the airtime are divided equally to the competitors which do not have members within the EP which participate in elections and to the independent candidates.

There are no provisions for print/online only media in electoral matters.

- Codes of conduct and their organisational framing

There is not a law with regard to the press in Romania, even though there were many initiatives, discussions and attempts to submit to the Parliament a draft law. The civil society and most of the politicians considered such a law is not necessary and that the

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<sup>11</sup> Law no. 33/2007 regarding the organisation and the development of the elections for the European Parliament, English version, <http://www.roaep.ro/en/getdocument.php?id=409>.

best for journalists is to regulate their activity themselves. Codes of conduct were adopted by different professional organisations/associations.

The *Convenția Organizațiilor de Media* (Convention of Media Organisation - COM), composed of more than 40 media associations and houses, adopted on 24 October 2009 a for a 6-year term Single Code of Conduct (*Cod Deontologic Unic*) for media<sup>12</sup> with 16 articles, which stipulates, among others, there is a conflict of interests if the journalist is a special services agent under cover, member of a party or mixes the media activity with business activities. The journalists should hand annually an interests' declaration to the media institution's management and this declaration should be made public. The fields regulated by the Code cover the following issues: who is a journalist, what means mass media, integrity, conflict of interests, gifts, sponsorships and other benefits, correctness, how to verify information, rectification of errors, how to dissociate facts and opinions, private life, protection of victims, protections of minors, how to deal with morbid details, discrimination, assumption of innocence, protection of sources, special techniques to collect information. This Code replaced a Conduct Code adopted by the same umbrella organisation in July 2004. The COM also set up a Group for Journalistic Best Practices, intended to improve the journalistic work quality through making publicly known any deontological side-slip. The Group was meant to give media organisations a *Certificat de Bune Practici Jurnalistice* (Good Journalistic Practices Certificate)<sup>13</sup>, but these certificates only remained an intention. The *Uniunea Ziaristilor Profesioniști din România* (Union of Professional Journalists from Romania - UZP) also has a similar 15 articles Deontological Code<sup>14</sup>, even if UZP is member of the COM.

The *Clubul Român de Presă* (Romanian Press Club - CRP), another media umbrella organisation including about 25 press companies, NGOs and about 20 individual journalists also adopted a Deontological Code of the Journalist<sup>15</sup> composed of 10 articles. The specific provisions in comparison to other Conduct Codes are that the professional journalist has as main occupation and source of revenues his/her activity for the mass media, and has a minimum seniority of one year in the field. Due to the freedom of expression, the journalist has the right to criticize both Power and Opposition, by considering as single facts' judgement criteria the laws and the moral principles.

The public radio<sup>16</sup> and TV<sup>17</sup> also issued Statutes of journalists/Conduct Codes. The Radio Statute of journalist provisions with regard to the journalist in the public broadcasting service, roles and responsibilities, ethics and editorial standards, ethics and conduct code, training and professional competition, the Council of Honour. The TV Conduct Code includes many of the provisions of the Law 41/1994 republished. On 15 May 2012 entered into force the Council of Honour of Radio Romania, after the election of 5 members by the journalists and the nomination of 2 member by the Board of Administration. The Council of Honour has to analyze and mediate the conflicts in the

<sup>12</sup> *Cod Deontologic Unic adoptat la reuniunea Conventiei Organizațiilor de Media 23-24 octombrie 2009*, Romanian version <http://www.organizatiimedia.ro/index.php?p=3>.

<sup>13</sup> *Certificatul de Bune Practici Jurnalistice, Romanian version*, <http://www.activewatch.ro/uploads/FreeEx%20COM%20Doc%20de%20autoreglementare/certificatul%20de%20bune%20practici%20jurnalistice.pdf>.

<sup>14</sup> *Codul deontologic al Uniunii Ziaristilor Profesioniști din România, Romanian version*, <http://www.uzp.org.ro/docs/codul.deontologic.uzp.pdf>.

<sup>15</sup> *Codul deontologic al ziaristului adoptat de Clubul Român de Presă, Romanian version*, [http://clubulromandepresa.ro/?page\\_id=322](http://clubulromandepresa.ro/?page_id=322).

<sup>16</sup> *Statutul jurnalistului de radio din cadrul Societății Române de Radiodifuziune, Romanian version*, <http://www.srr.ro/files/CY1923/CA%20-%20CD/NOV/HotarareaConsiliuluideAdministratielnr.65din31octombrie2011.pdf>.

<sup>17</sup> *Cod de conduită pentru angajații și colaboratorii TVR, Romanian version*, [http://www.tvr.ro/articol\\_organizatie.php?id=116799](http://www.tvr.ro/articol_organizatie.php?id=116799).

editorial field and to be the watchdog of the observance of audiovisual editorial and ethical norms.

The Romanian Association for Audiovisual Communications (*Asociația Română de Comunicații Audiovizuale* - ARCA) also issued in September 2011 a Conduct Code<sup>18</sup>, posted by the most important commercial broadcasters on their website. The Code gathers provisions and principles from more similar regulation/self-regulation documents, including from all the above mentioned Conduct Codes/Journalists Statutes. The Code provisions with regard to the level of self-regulation, journalistic principles, editorial standards, promotion of good understanding of the audiovisual legal frame, the correct information vs. opinions and one's own judgements, the independence and impartiality, the editorial responsibility, the public interest and protection of person's rights, how to deal with violent scenes. The ARCA Code also uses provisions from the European Convention of Human Rights and from the jurisprudence of the European Court of Human Rights. ARCA, founded in 1990, is an NGO and non-for-profit association of audiovisual broadcasters owners.

*Europe Development International-R*, the owner of the radio station *Europa FM*, one of the main market players, issued its own professional conduct code<sup>19</sup>, using numerous provisions from the Audiovisual Law, and the Audiovisual Code.

- The role and functioning of regulatory authorities in these respects

According to Articles 10 and 11 of the Audiovisual Law, the CNA) is the regulatory authority of the audiovisual market. CNA is made up of 11 members, assigned by the Parliament for a 6-year term, following the recommendations made by the Senate (upper Chamber) for 3 members, the Chamber of Deputies for 3 members, the President of Romania for 2 members, the Government for 3 members). The Council is a public autonomous authority under Parliament's control and the warrantor of the public interest in the field of audiovisual communication.

The Council issued in 2011 a total of 249 sanctions for audiovisual legislation breaches. The Council issued 112 fines worth of 2,170,500 lei (app. EUR 500,100). The most frequently sanctioned were breaches with regard to: protection of human dignity and the right to one's own image, protection of children, insuring correct information or pluralism, advertising, teleshopping and sponsoring, must-carry principle, political advertisement.<sup>20</sup> The most severe CNA's decision was to revoke the audiovisual license of a TV station six months before its normal term of expiration.

The freedom of information and its limits are also provisioned in the secondary legislation *Codul Audiovizual - Decizia nr. 220/2011 privind Codul de reglementare a conținutului audiovizual cu modificările și completările ulterioare* (Audiovisual Code – Decision No. 221/2011 with regard to the regulatory Code for the audiovisual content, with further modifications and completions)<sup>21</sup>, and they refer to private life and private image prevailing over the need for information, the minors' protection, the limits of the public interest, the distinction between facts and opinions, the parameters of information:

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<sup>18</sup> *Cod deontologic ARCA, septembrie 2011* (ARCA Conduct Code, September 2011), Romanian version, <http://www.audiovizual.ro/CODdeontologic.doc>.

<sup>19</sup> *Cod de conduită profesională Europa FM* (Europa FM Professional Conduct Code), Romanian version, <http://www.europafm.ro/&files/cod-de-conduita-profesionala.doc>.

<sup>20</sup> Report with regard to the sanctions imposed to the central stations in the year 2011, <http://www.cna.ro/Situa-ie-privind-sanc-iunile,4714.html>.

<sup>21</sup> *Decizia nr. 220/2011 privind Codul de reglementare a conținutului audiovizual cu modificările și completările ulterioare* (Decision 220/2011 on the Code of regulation for the audiovisual content), English version, <http://www.cna.ro/Decision-220-of-24-Februarz-2011.html>.



correct, verified, presented unbiased and in good faith, respect for human dignity and fair competition.

The CNA issued in April 2011 a Decision which obliged the providers of audiovisual media services to publish on their websites their Conduct Codes (if they had this documents), along with CNA's identification data, and data about the ownership and management of the medium.<sup>22</sup> The Decision was in line with the EC's and EP's Audiovisual Services Directive 2010/13/EU and took into account the possible impact of mass media in forming the public opinion altogether with the necessity of public access to editorial values recognised and assumed by authors.

- Distribution Aspects
  - Access to frequencies

Articles 68-69 of the Audiovisual Law are stipulating in this matter, as follows: the CNA annually revises the strategy for covering the national territory with audiovisual programme services.

ANCOM - which is the body that regulates the Romanian electronic communications sector and protects the interests of the communications users in Romania, by promoting competition in the communications market, ensuring the management of scarce resources and encouraging innovation and efficient investments in infrastructure - forwards the proposal for frequency allocation for multiplexes, in keeping with the results from international frequency coordination.

- Access to distribution networks and control of actual conditions

The Competition Council<sup>23</sup> sanctioned more times different breaches of the Competition Law with regard to distribution networks for media services and to mass media control. In 2004 *SC Romania Data Systems SA*, actually the biggest Romanian distribution networks player under the name of *RCS&RDS*, was sanctioned twice with app. EUR 3,000 (at April 2012 exchange rate Leu/Euro) because the company did not notified the Competition Council about 11 economic concentrations operations. A Romanian investor, *Vasile Turcu*, was sanctioned in 2004 for a similar breach, with app. EUR 690. Another Romanian investor, *Dan Grigore Adamescu*, was sanctioned in 2006 with a fine of app. EUR 44,200, altogether with the company *OST Holding GmbH*, which was fined with app. EUR 6,000 because they omitted to notify the Council about the economic concentration they operated at a big Romanian print media society, *SC "R" SA*, and at *SC Grupul de Presă Român*. The biggest case related to mass media was until now an investigation with regard to market domination and abuse of a dominant position. The biggest players in the market of cable TV and satellite TV services, *SC RCS&RDS SA* and *SC UPC Romania SA* were severely sanctioned in 2006 for breaching the Art. 5 (1) c) of the Competition Law, through the conclusion and putting into practice of an anti competition agreement for splitting between them the cable TV programmes services in Timisoara, big Romanian city in Western Romania. *SC UPC Romania SA* was fined with app. EUR 1,657,000 and *RCS&RDS* with app. EUR 184,300. At the same time, *SC UPC Romania SA* and *SC Cablevision of Romania SRL* were sanctioned for abuse of dominant position through imposing bigger subscriptions, without any reasonable motivation. *SC UPC*

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<sup>22</sup> Decizie nr. 286 din 14 aprilie 2011 privind publicarea codurilor de conduită profesională adoptate de furnizorii de servicii media audiovizuale, Romanian version, <http://www.cna.ro/Decizie-nr-286-din-14-aprilie-2011.html>.

<sup>23</sup> Consiliul Concurenței. Decizii Serviciu, Romanian version <http://www.consiliulconcurenței.ro/ro/documente-oficiale/concurența/decizii/decizii-ds.html>.



*Romania SA* was fined with app. EUR 4,020,000 and *SC Cablevision of Romania SRL* with app. EUR 62,500. Another notorious case was a 2009- 2011 investigation of the Competition Council with regard to possible breaches of the Art. 5 (1) of the Competition Law and of the Art. 81<sub>2</sub> (1) of the European Community Treaty by the Romanian Football Association Federation and the Romanian Professional Football League with regard to the common selling of the commercial rights for the football competitions. The Federation and the League issued more self-assumed measures, to avoid sanctions from the Competition Council. These measures, accepted by the Council, are compulsory and apply for the radio and TV broadcasting rights, including Internet, mobile telephony, the rights for advertising for more domestic football and Futsal competitions for 2012-2014/2015. The measures were meant to liberalise and ease the competition for the broadcasting rights among the market players and to give to the general public a wider access to sports events broadcasting.

In the area of the print media, the biggest domestic journals and periodicals distributors, *SC Network Press Concept SA* (formerly *SC Rodipet SA*) is practically in bankruptcy. The company entered in insolvency in 2009. The Libanese businessmen brothers *Awdi*, the owners of the former state owned print media distribution network *Rodipet*, privatized in 2003, are accused of more criminal offences and a prejudice of app. EUR 35,500,000 and judicial procedures are still underway. In turn, the owners sued repeatedly Romania at the International Court for Settlement of Investment Disputes.

- Must-carry/must-offer rules for electronic media

According to Art. 82 of the Audiovisual Law, each provider, retransmitting program services through electronic communications networks, have to observe the principle must-carry. The obligation is to include in the regular offer all programmes of the public service television, next to the mandatory channels, as established through international agreements (TV5) and also programmes of commercial stations (free-to-air), all up to 25% of the total number of distributed programme services. In areas where a national minority represents more than 20% of the population, distributors shall also provide for the free reception of programs in the language of the respective minority. The selection criteria for commercial broadcasters is the order of decreasing annual index ratings. If possible, the providers have to carry the programmes of the public radio broadcaster and of two commercial radio channels, one with national and one with local coverage.

- Role of platform operators

According to Art. 1 (1) pct. 35 of the Audiovisual Law, a radio/television multiplex operator is a Romanian or foreign, legal or a moral person, holding a digital broadcasting license and having the right to operate a network, a radio or television broadcasting stations, with a view to broadcasting a programme or a package of radio or television programmes, multimedia services and associated data of identification, multiplexed.

- The role and functioning of regulatory authorities in these respects

The CNA and the ANCOM regulate the fields and impose sanctions/correction measures.

The Council issued in 2011 a total of 249 sanctions for breaches of the audiovisual legislation. The distribution services providers were sanctioned with 7 fines and 27 public warnings for breaches of the provisions with regard to the modification of the rebroadcast notification and for breaches of the must-carry principle.

The CNA cut three times, by half, during Spring 2012 the remaining validity of the audiovisual license of the populist/tabloid commercial TV station OTV, almost 10 months before its normal expiration, on 1 April 2013. The sanctions, the most severe ever taken by the CNA, were due to OTV's repeated and continuous breaches of the audiovisual legislation with regard to political advertisement. The owner of OTV, Dan Diaconescu, is the founder of a Romanian populist party, Partidul Poporului - Dan Diaconescu (People's Party - Dan Diaconescu, PP-DD), with good chances to enter the Parliament in the next general elections.

- Access to Information
  - Transparency of media ownership situations

In line with Art. 48 of the Audiovisual Law, with regard to transparent access of the public to information about audiovisual media services providers, CNA issued on 14 April 2011 the Decision No. 286<sup>24</sup>, which obliged the audiovisual broadcasters to publish on their website, at least the following data – name, legal status, social headquarter, name of legal representative, structure of significant shareholders (more than 20%), editorial and trade management responsible of the social capital or of the voting rights of a company holding audiovisual license, contacts of media, list of publications edited by the legal person/list of the other programme services that it provides, regulatory/supervision authorities, and other categories of data regarding service operation.

- **Accountability of public service media**

The Board of Administration/Management of the Romanian Radio Broadcasting Company and respectively of the Romanian Television Broadcasting Company has to present an annual report to the Parliament, along with any other reports requested by the competent parliamentary committees (art. 27 u) of the Law No. 41/1994, republished. The annual report has to be submitted until 15 April for the previous year, together with the budgetary execution account. Failure to submit the document in due term or the rejection of the report triggers the dismissal of the Board's Chairman and of the Board. The execution accounts of the audiovisual media budgets are submitted to the Parliament together with the annual activity reports [art. 39 (4)]. The use of funds by the public radio and TV is subject to the control of the bodies authorized by law, according to the source of the funds (art. 44).

- Freedom of information laws

The freedom of information of citizens, from Romanian and European services providers, the interdiction of censorship, of interference in the editorial independence of audiovisual media, in contents, form and presentation of programmes are stated also in Articles 4, 5 and 6 of the Audiovisual Law No. 504/2002 with further modifications and completions (*Legea audiovizualului nr. 504/2002 cu modificările și completările ulterioare*)<sup>25</sup>. Furthermore, Articles 83-84 provision the limits of the exclusive rights (anyone is entitled to receiving information through audiovisual services on issues/public interest events; the extension of exclusive rights is limited by other broadcaster's right to short reports,

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<sup>24</sup> Decizie nr. 286 din 14 aprilie 2011 privind publicarea codurilor de conduită profesională adoptate de furnizorii de servicii media audiovizuale, publicată în Monitorul Oficial nr. 297, din 29.04.2011 (Decision no. 286 of 14 April 2011 with regard to the publication of the professional conduct codes adopted by the audiovisual media services providers, published in the Official Gazette of Romania No. 297 of 29.04.2011), Romanian version <http://www.cna.ro/Decizie-nr-286-din-14-aprilie-2011.html>.

on a fair, reasonable and non-discriminatory basis, with source identification and without prejudices for the author/exploitation rights owner).

- Accessibility of products/services and distribution networks

The listeners/viewers have to pay a monthly license fee for the public broadcasters, or a monthly subscription to the cable networks providers. The alternative to cable is the satellite reception, with one's own equipment.

The ANCOM and the Ministry of Communications and Information Society (*Ministerul Comunicațiilor și Societății Informaționale* - MCSI) intend to include in the future tenders for digital TV multiplexes, in view of the digital switchover, some conditions with regard to how to offer free reception devices for the households.

The Law No. 41/1994 republished contains in Art. 40 (2) provisions about the financial resources of the public broadcasters: allocations from state budget, license fee for radio and television public services (collected on the electricity bill), own revenues (advertising, other sources). Since 2003, after changing the legislation, the public radio and television services license fee should have been paid by each Romanian household or Romania based company owning at least a radio and/or TV set. The monthly fee for radio is of 2,5 lei (approx. EUR 0,57) and for TV of 4 lei (approx. EUR 0,91) per household/micro-enterprises without employees. Firms also pay, as well, a monthly license fee on radio and television public services: for radio: 10 lei (approx. EUR 2,28) for micro-enterprises, 30 lei (approx. EUR 6,85) for the other enterprises and legal persons, for every working point/subsidiary; for TV: 15 lei (approx. EUR 3,42) for micro-enterprises, 50 lei (approx. EUR 11,41) for the other enterprises/legal persons, for every working point/subsidiary, 7,7 lei/room (approx. EUR 1,76) for tourism companies.

People who declare yearly that they do not have in house a radio or TV device are exempted from payment, as well as other categories stipulated by law. The following exemptions are provisioned by law, among others: poor families, poor people living alone (according to the Law of minimum guaranteed income), associations and non-for-profit foundations, foreign diplomatic missions, households for elder people, military and politic institutions, state education establishments (including orphans households), churches, retired agricultors, along with other social categories established through special laws. The level of the license fee, the ways to collect the fee, the exemptions, the penalties for delayed payments, the sanctions for incorrect filling in the exemption form are established through Government Decision, as well as the control, the regime of legal breaches, the sanctions for fraudulent non-payment of fee, along with other possible exemptions to the payment of the fee.

There is no public subsidisation for subscription to print publications. The private publishers (print or online) and distribution networks are free to use commercially-offered reduced rates.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

Concerning the press sector, the readers can complain directly to the publishers, or to the courts, if they consider they were prejudiced. As for audiovisual media, the public can

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<sup>25</sup> *Legea audiovizualului nr. 504/2002 cu modificările și completările ulterioare* (Audiovisual Law no. 504/2002, with further modifications and completions), English version <http://www.cna.ro/The-Audio->

complain to the National Audiovisual Council, which can impose sanctions, for breaches of the Audiovisual Law or of the Audiovisual Code.

The public television, *SRTV*, has established the Ombudsman (subordinated to the Ethics and Arbitration Committee) through the Statute of Journalists. The Ombudsman mediates between public and journalists and in in-house litigations. There are no other Ombudsmen for Romanian media.

- Participation in media operators/(self-)regulatory bodies

There are no viewers' and listeners' councils or alike in Romania. The bodies of the public broadcasters (Boards of Administration/Management) are mainly politically appointed. Only two members (out of 13) are elected by the specialist staff of *SRR* and *SRTV*. The members of the National Audiovisual Council are also politically appointed.

#### 2.2.22.2. Main Players in the Media Landscape

According to the National Council for Audiovisual, more than 5,320 audiovisual licences/rebroadcasting notifications were in force at 31 December 2011, of which more than 640 for radio (598 terrestrial, 35 satellite, 8 cable), app. 810 for TV (243 terrestrial, 141 satellite and 428 via cable) and about 3,870 for cable networks, in a total of ca. 1,150 companies, in about 9,800 cities/villages around Romania.<sup>26</sup>

An important part of Romanian media are owned by foreign companies, such as *SBS Broadcasting Media*, *Europe Development International – R*, *CME (Central European Media Enterprises)*, *Doğan Media International*, *Turner Broadcasting System Europe (Time Warner)*, *Ringier România*, *Sanoma Hearst Romania*, *OTE*, *Liberty Global, Inc. Group*, or *Orange* and *Vodafone* (for mobile Internet). At the same time, an increasing number of Romanian media are owned by Romanian companies, such as *Media Camina Group*, *Realitatea Media*, *Antena TV Group*, *Adevărul Digital Media*, *Mediafax Group*, *Cancan Media*, *Editura Evenimentul Zilei și Capital*, *Adevărul Holding*, *Editura Intact*, *RCS&RDS*.

##### 2.2.22.2.1. Radio

The radio landscape is rich, hundreds of radio stations appearing after the fall of the Communist regime, in December 1989. Before 1989 only the state radio was allowed. The radio market is an oligopolistic one, because the concentration ratio (the cumulated market shares) of the main four players (*Societatea Română de Radiodifuziune – public service*, *SBS Broadcasting Media SRL*, *Media Camina Group (G.M.C.) SRL*, *Europe Development International–R SA*) is bigger than 60% (70.2%, see Table RO 1). Radiolistening decreased constantly in Romania the last years, under the pressure and diversification from television and Internet. According to a study issued in November 2011 by the research institute *IRES*<sup>27</sup>, 37% of respondents do not listen to radio. According to a *CURS* institute 2009 research<sup>28</sup>, 60% of respondents listen daily to radio (31% more than 3 hours/day and 29% less than 3 hours).

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visual-Law, 1655.html.

<sup>26</sup> *Situație statistică, 31.12.2011, Romanian version:*  
<http://www.cna.ro/IMG/pdf/Statistica.pdf>.

<sup>27</sup> *IRES, Atitudini și obiceiuri de consum media. Percepții privind CNA 10.11.2011, Romanian version*  
[http://www.cna.ro/IMG/pdf/Raport\\_de\\_cercetare\\_-\\_IRES\\_-CNA\\_presa\\_final.pdf](http://www.cna.ro/IMG/pdf/Raport_de_cercetare_-_IRES_-CNA_presa_final.pdf).

<sup>28</sup> *59% dintre români, dependenți de televiziune, 2 decembrie 2009, Romanian version*  
<http://www.jurnalul.ro/special/59-dintre-romani-dependenti-de-televiziune-529077.htm>.

The national market leader (data as of May 2011<sup>29</sup>) is the public broadcaster. The audience is measured three times a year by *Asociația pentru Radio Audiență* (Association for Radio Audience - ARA<sup>30</sup>).

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<sup>29</sup> *Audiențe radio* (Radio Audiences), version:  
<http://www.audienta-radio.ro/userfiles/items/Audienta%20radio%20-%20Valul%20de%20primavara%202012.pdf>.

<sup>30</sup> *Asociația pentru Radio Audiență*, Romanian version [www.audienta-radio.ro](http://www.audienta-radio.ro).

**Table 127 RO: Radio main players total national market shares (05/2012):**

Broadcasters	Ownership structure	Main radio stations	Daily Reach	Market Shares	Total Market Share
Total			11,713,400		100.0
Societatea Română de Radiodifuziune (SRR)	Public service broadcaster	Radio România Actualități Radio România Regional Radio Antena Satelor Radio România Cultural	1,970,700 1,764,700 776,600 193,900	13.0% 10.2% 6.0% 0.8%	30.0%
SC SBS Broadcasting Media SRL	European Radio Investments Limited (UK) – 84,3786%, SBS Broadcasting (UK) Limited – 15,3526%, Romanian Broadcasting Corporation Limited (UK) – 0,2676% and P7S1 Finance BV (Netherlands) – 0,0012%.	Radio Kiss FM Radio Magic FM	2,861,000 740,600	14.2% 4.2%	18.4%
SC Pro TV SA	CME Media Enterprises B.V. (Netherlads) – 99,999995% and CME Investments B.V. (Netherkands) – 0,000005%.	Radio Pro FM	1,737,300	8.8%	8.8%
SC Grupul Media Camina (GMC) SRL	Voiculescu Camelia Rodica – 40%, Voiculescu Corina Mirela – 39%, The Industrial Group Voiculescu and Comp (Grivco) SA – 10%, Oancea Sorin – 10%, The „Dan Voiculescu Foundation for the Development of Romania (founding member and President – Dan Voiculescu) – 1%	Radio ZU	1,833,000	8.4%	8.4%
SC Europe Development International–R SA	Lagardere Active Radio International SA (France) – 99,86% and Lagardere Active Broadcast SA (Monaco, represented by Mr. Alain Lemarchand) – 0,14%	Radio Europa FM	1,535,300	8.2%	8.2%

Source: ARA, Copyright: ARA

The structure of the radio market for urban and Bucharest population (December 2011) is quite similar, with smaller market share for the public broadcaster than at national level (23.9%), followed by the same competitor, SBS Broadcasting Media SRL (20.0%). Europe Development International–R SA comes third (9.3%), switching positions with Media Camina Group (G.M.C.) SRL (8.6%) at urban level (Appendix RO 2).

### 2.2.22.2. Television

The TV market followed the same pattern as the radio market after 1989. TV was and remains the most important source of information for Romanians and the most „consumed” medium, according to the above mentioned study issued in November 2011 by the research institute IRES. 83% of the respondents watch daily TV and 10% more times per week. Only 0.4% of population does not watch TV at all. The most important reason for watching TV is for own information/to find out what happens (57%), 8% for entertainment/relaxation. Most people watch TV all week long (76%). The results are in line with a CURS institute 2009 research<sup>31</sup>, which found out 92% of respondents watch daily TV (59% more than 3 hours/day and 33% less). Another 2011 IRES study<sup>32</sup> shows that 82% of respondents consider that TV stations are ready to broadcast everything for the sake of rating, 76% that the televisions in Romania exaggerate all the topics, 65% that televisions manipulate and do not inform, 53% that it is not the stations’ fault they treat poor subjects, because the public requests these subjects. 60% of respondents consider the National Audiovisual Council should issue stricter rules for TV stations. The market leader is the commercial station *Pro TV*<sup>33</sup>. The audience is measured monthly by *Asociația Română pentru Măsurarea Audiențelor* (Romanian Association for Audiences Measurement - ARMA<sup>34</sup>).

**Table 128 RO: Television main players total national market shares (April 2012):**

Broadcasters	Ownership structure	Main TV stations	Ratings (Reach)	Market Shares	Total Market Share
SC Pro TV SA	CME Media Enterprises B.V. (Netherlads) – 99,999995% and CME Investments B.V. (Netherkands) – 0,000005%.	Pro TV Acasă Sport.ro Pro Cinema MTV România	667,000 138,000 39,000 29,000 9,000	15.9% 3.3% 0.9% 0.7% 0.2%	21.0%
Antena TV Group SA	Voiculescu Camelia Rodica – 41,780095%, Voiculescu Corina Mirela – 37,457653%, Lazăr Mihai – 8,644884%, Gheorghe Anca Raluca – 4,322442%, The „Dan Voiculescu Foundation for the Development of Romania (founding member and President – Dan	Antena 1 Antena 2 GSP TV Euforia	486,000 34,000 24,000 16,000	11.6% 0.8% 0.6% 0.4%	13.4%

<sup>31</sup> 59% dintre români, dependenți de televiziune, 2 decembrie 2009, Romanian version <http://www.jurnalul.ro/special/59-dintre-romani-dependenti-de-televiziune-529077.htm>.

<sup>32</sup> Evenimente mondene din România – percepții și interes, Romanian version [http://www.ires.com.ro/uploads/articole/ires\\_evenimente-mondene-din-romania-perceptii-si-interes.pdf](http://www.ires.com.ro/uploads/articole/ires_evenimente-mondene-din-romania-perceptii-si-interes.pdf).

<sup>33</sup> Audiențele stațiilor TV membre ARMA (Audiences of TV stations members of ARMA) [www.arma.org.ro/ro/audiente](http://www.arma.org.ro/ro/audiente).

<sup>34</sup> Asociația Română pentru Măsurarea Audiențelor (Romanian version) [www.arma.org.ro](http://www.arma.org.ro).



	Voiculescu) – 3,91666%, Grivco SA – 3,878266%				
Doğan Media International SA	Doğan Media International GMBH (Germania) – main shareholder – 79,9181% and Ringier (Nederland) B.V. (Netherlands) – 20,0819%	Kanal D	256,000	6.1%	6.1%
Societatea Română de Televiziune (SRTV/TVR)	Public service broadcaster	TVR 1 TVR 2	185,000 56,000	4.4% 1.3%	5.7%
Antena 3 SA	Voiculescu Corina Mirela – 48%, Oancea Sorin – 25%, Voiculescu Camelia Rodica – 21%, the „Dan Voiculescu Foundation for the Development of Romania (founding member and President – Dan Voiculescu) – 6%	Antena 3	222,000	5.3%	5.3%
SC SBS Broadcasting Media SRL	European Radio Investments Limited (UK) – 84,3786%, SBS Broadcasting (UK) Limited – 15,3526%, Romanian Broadcasting Corporation Limited (UK) – 0,2676% and P7S1 Finance BV (Netherlands) – 0,0012%.	Prima TV Kiss TV	156,000 25,000	3.7% 0.6%	4.3%

Source: Kantar Media Audiences, Copyright: ARMADATA SRL

Competition is more intense in the TV market, where the four main competitors (*Pro TV SRL, Antena TV Group SA, Doğan Media International SA* and the public broadcaster *Societatea Română de Televiziune*) gather only 47.5% of the market.

#### 2.2.22.2.3. Press and publishing

The press and publishing market skyrocketed after 1989, with thousands of print titles. The economic crisis severely affected after 2009 the print media, most periodicals and daily newspapers opting for the migration towards online, in order to reduce expenditures and losses due to the dramatic decrease of print issues circulation. Beginning 2012 only five quality/financial national coverage daily newspapers had print

issues, along with three tabloid national daily newspapers and two sports national daily newspapers.

The audience is measured through the *Studiul Național de Audiență* (National Audience Study – SNA), issued by *Biroul Român de Audit al Tirajelor* (Romanian Circulation Audit Bureau - BRAT), founded in 1998. On 29 March 2012 BRAT's shareholders' decided to change association's name to *Biroul Român de Audit Transmedia* (Romanian Transmedia Audit Bureau - BRAT). BRAT (228 members: print and online media publishers, out-of-home companies, advertisement agencies, advertisement customers as of end March 2012) measures and updates continuously the circulation, based on "circulation audit certificates" (verified by auditors, publishers and BRAT) and "spreading declarations" of the publishers. Data are consolidated twice a year in a catalogue published by BRAT. The universe of SNA were the citizens of 14-74 yo, living in a city with more than 50,000 inhabitants; the main indicator is the AIR (Average Issue Readership). SNA includes 149 titles.<sup>35</sup> BRAT issued mid-February 2012 the new SNA data collected through a modified system, due to European constraints: modification of data collection from PAPI (Paper and Pencil) to CAPI (Computer Assisted Personal Interview), extension of universe from public of 14-64 years to 14-74 years and decrease of universe with 16% due to the provisional results of the October 2011 national census (19,6 million people against 21,68 million in 2002)<sup>36</sup>.

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<sup>35</sup> *Biroul Român de Audit al Tirajelor, Romanian version*  
<http://www.brat.ro/index.php?page=prezentare>.

<sup>36</sup> *BRAT a lansat rezultatele de audiență ale SNA obținute cu noua metodologie a studiului, 14 februarie 2012, Romanian version:*  
<http://www.radardemedia.ro/2012/02/14/brat-a-lansat-rezultatele-de-audienta-ale-sna-obtinue-cu-noua-metodologie-a-studiului/>.

**Table 129 RO: Main newspapers/periodicals (Brut Circulation, decreasing order, data as of 31/12/2011):**

<b>Publisher</b>	<b>Title</b>	<b>Periodicity [Weekly (W)/Daily (D)]</b>	<b>Coverage [National (N)/Local (L)]</b>	<b>Type [Paid (P) /Free (F)]</b>	<b>Brut circula- tion</b>	<b>Total Sales</b>	<b>Total Spread</b>
Ringier România	Libertatea - Supliment Weekend	W	N	P	208,538	0	150,302
Adevărul Digital Media	Click	D	N	P	195,499	154,593	156,024
Ringier România	Libertatea	D	N	P	136,503	96,969	97,561
Adevărul Digital Media	Click! de Duminică	W	N	P	132,383	104,193	105,562
Adevărul Holding	Click! pentru femei	W	N	P	113,692	80,368	81,866
Ring Media Group	Ring	D	L	F	100,000	0	100,000
Ringier România	Libertatea pentru femei	W	N	P	99,183	76,015	76,855
Ringier România	Libertatea - Ediția de duminică	W	N	P	63,365	44,477	44,879
Convergent Media	Gazeta Sporturilor	D	N	P	57,824	33,314	33,891
Cancan Media	Cancan	D	N	P	55,671	32,745	33,413
Cancan Media	Cancan de Weekend	W	N	P	51,218	30,816	31,452
Media Gamma Publishers	România Liberă	D	N	P	43,986	37,118	37,586
Adevărul Digital Media	Adevărul	D	N	P	43,066	26,332	28,660
Media Gamma Publishers	Academia Cașavencu	W	N	P	40,417	14,958	15,206
Mediafax Group	PRO Sport	D	N	P	40,252	25,354	25,923
Editura Intact	Jurnalul Național	D	N	P	35,840	24,200	25,080

Source: BRAT

**Table 130 RO: Newspapers/periodicals CpA (average number of readers/issue from the universe, descending CpA order, 29 February 2012):**

Publisher	Title	Periodicity [Weekly (W)/ Daily(D)/Mont hly (M)]	Type of publication	Average number of readers/issue
Adevărul Digital Media	Click	D	Tabloid	770,000
Ringier România	Libertatea	D	Tabloid	592,000
Convergent Media	Gazeta Sporturilor de Duminică	W	Sport	545,000
Adevărul Digital Media	Click! de Duminică	W	Tabloid	496,000
Ringier România	Libertatea - Ediția de duminică	W	Tabloid	488,000
Adevărul Holding	Click! pentru femei	W	Women mass-market	461,000
Cancan Media	Cancan	D	Tabloid	454,000
Convergent Media	Gazeta Sporturilor	D	Sport	445,000
Ringier România	Libertatea - Supliment Weekend	W	Tabloid	417,000
Ringier România	Libertatea pentru femei	W	Women mass-market	377,000
Sanoma Hearst România	National Geographic	M	General culture	361,000
Mediafax Group	PRO Sport	D	Sport	360,000
Editura Reader`s Digest	Reader`s Digest	M	General culture	252,000
Adevărul Digital Media	Adevărul	D	Quality	230,000
Taifasuri Media	Taifasuri	W	Vulture	222,000
Adevărul Digital Media	Weekend Adevărul	W	Quality	194,000
Media Gamma Publishers	Academia Cațavencu	W	Satire	186,000
Editura Intact	Jurnalul Național	D	Quality	177,000
Editura Evenimentul Zilei și Capital	Evenimentul Zilei	D	Quality	159,000
Editura Evenimentul Zilei și Capital	Capital	W	Business	132,000

Source: BRAT – SNA

#### 2.2.22.2.4. Online media (non-linear audiovisual (media) services; websites)

The online media market bounced up after 2000. The Internet audience/traffic is measured in several ways, the most important being through the *Studiul de Audiență și Trafic Internet* (Internet Audience and Traffic Study – SATI), issued by BRAT<sup>37</sup>. The only Internet traffic measurement tool recognized by the advertisement industry is SATI.

<sup>37</sup> *Studiul de Audiență și Trafic Internet* (Internet Audience and Traffic Study), Romanian version <http://www.sati.ro/>

**Table 131 RO: Main mass media websites (April 2012, monthly decreasing views):**

Website	Publisher	Category	Views	Visits	Unique visitors
www.sport.ro	Pro TV	Sport	51.338.280	14.672.717	2.096.505
www.libertatea.ro	Ringier România	Tabloid	39.677.723	10.139.586	2.339.258
www.cancan.ro	Cancan Media	Tabloid	38.561.561	11.635.837	2.421.271
www.gsp.ro	Convergent Media	Sport	35.530.556	11.625.827	1.991.073
www.prosport.ro	Mediafax Group	Sport	33.221.793	11.563.733	1.942.932
www.antena3.ro	Antena 3	General news	24.320.045	6.144.960	1.621.063
www.realitatea.net	Q2M	General news	26.561.606	8.659.216	2.504.575
www.click.ro	Adevărul Holding	Tabloid	24.437.407	6.635.484	1.766.688
www.stirileprotv.ro	Pro TV	General news	24.610.382	10.821.566	2.652.169
www.adevarul.ro	Adevărul Holding	General news	19.863.826	6.953.735	2.235.156
www.ziare.com	Q2M	General news	19.157.734	5.161.308	2.146.786
www.gandul.info	Mediafax Group	General news	18.411.734	7.747.329	2.165.523
www.protv.ro	Pro TV	Entertainment	16.994.542	4.881.202	1.999.568
www.evz.ro	Editura Evenimentul Zilei și Capital	General news	15.516.275	5.177.777	1.410.662
www.showbiz.ro	Mediafax Group	Tabloid	14.473.635	1.341.892	622.738
www.hotnews.ro	Hotnews.ro	General news	12.750.422	4.917.549	1.207.808
www.a1.ro	Intact Interactive	General news	12.877.997	3.587.630	1.512.268
www.jurnalul.ro	Editura Intact	General news	7.406.716	2.629.169	1.019.734
www.acasatv.ro	Pro TV	Feminine Lifestyle	8.171.376	2.590.349	1.036.204
www.zf.ro	Mediafax Group	Economic & financial	6.209.974	2.356.825	721.897
www.profm.ro	Pro TV	Entertainment	7.071.538	2.224.551	685.964
www.acasa.ro	Acasă Media	Lifestyle	6.818.622	2.787.840	1.651.727
www.romanalibera.ro	Media Gamma Publishers	General news	4.971.192	1.390.127	624.699
www.mediafax.ro	Mediafax Group	General news	6.288.940	2.727.985	986.961
www.telegrafonline.ro	Telegraf Advertising	Local news	4.107.848	419.758	133.272
www.procinema.ro	Pro TV	Entertainment	6.584.509	2.241.808	906.305
www.emaramures.ro	Inserv Media	Local news	4.699.722	822.851	336.433
www.kissfm.ro	SBS Broadcasting Media	Entertainment	4.244.153	1.490.041	596.607

Source: BRAT

According to the ZeList Index<sup>38</sup>, the blogosphere activity decreased by 15% in 2011 against 2010 in terms of posts; meantime the Facebook activity raised by approx. 53%. The Twitter activity raised by 15%, whilst the online media grew with about 50%. More than 4,4 million Romanians had at end 2011 a Facebook account (83% more than end 2010).<sup>39</sup> More than one million accounts are in Bucharest.

#### 2.2.22.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers

According to ANCOM, there were in Romania, at 30 June 2011, 480 operational audiovisual programmes retransmission services providers (475 for cable networks, 3 through satellite – DTH, 3 through IP technology – IPTV; some of them offered combined services)<sup>40</sup>.

The main players on the market of cable TV, satellite TV services, and fixed Internet connections are the Romanian company *RCS&RDS* (market leader, about 3,5 million customers), *Romtelecom* (part the Greek *OTE* Group, about 2,2 million customers), and *UPC România* (part of *Liberty Global, Inc. Group*, more than 1,4 million customers).

The total number of audiovisual programme retransmission subscribers amounted to 5,70 million as of mid-2011, down by 0.6% as compared to end-2010, mainly because of the decrease by 7.6% of the number of DTH subscribers, which fell to 2,2 million. The number of subscribers to retransmission services provided on cable networks and to IPTV services grew in the first semester of 2011 by 4% and, respectively, 27.9% up to 3,46 million, respectively 0.038 million.

The penetration rate of audiovisual programme retransmission services per households reached 77.9%. As of mid-2011, the cable networks registered increases as regards both total number of subscribers (+4%) and number of subscribers to audiovisual programme retransmission services received in digital format, up by 85.1%. The growth of the number of cable subscribers in urban area (+4.2%) was superior to that registered in rural area (+3.4%). Thus, the rural area registered 0.78 million subscribers and a penetration rate which rose to 23.1%. In urban area, there were 2,68 million subscribers (approx. 78% of the total number of cable subscribers), with a penetration rate of 68%. Within the total number of cable subscribers, 21% are subscribers to audiovisual programme retransmission services received in digital format.

The market of broadband Internet access services maintains the ascendant trend on several segments, as the growth rates registered by mid-2011 exceed the increases reported in the second semester of 2010, according to the ANCOM.<sup>41</sup>

According to ANCOM, at 30 June 2011 there were in Romania 1,012 operational Internet services providers, of which 6 mobile points access services (through HSCSD technology, GPRS, EDGE, CDMA/EVDO, 3G) and 1,010 for broadband access at fixed points. The Romanian market has a big concentration ratio, of 2.866 (Herfindahl – Hirschman Index,

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<sup>38</sup> *ZeList: Retrospectiva social media pe 2011 arata ca blogurile personale pierd in favoarea Facebook, Capital, 24.01.2012, Romanian version* [http://www.newz.ro/stire/13\\_3446/zelist%3A-retrospectiva-social-media-pe-2011-arata-ca-blogurile-personale-pierd-in-favoarea-facebook.html](http://www.newz.ro/stire/13_3446/zelist%3A-retrospectiva-social-media-pe-2011-arata-ca-blogurile-personale-pierd-in-favoarea-facebook.html).

<sup>39</sup> *Aprope un sfert dintre romani au cont de Facebook, Romanian version* <http://www.finantistii.ro/social-media/aprope-un-sfert-dintre-romani-au-cont-de-facebook-69623/>.

<sup>40</sup> *Servicii de retransmisie a programelor media audiovizuale liniare furnizate utilizatorilor finali - raport de date statistice, Romanian version,* [http://www.ancom.org.ro/uploads/links\\_files/date\\_statistice\\_raport\\_sem\\_I\\_2011\\_cablu.pdf](http://www.ancom.org.ro/uploads/links_files/date_statistice_raport_sem_I_2011_cablu.pdf).

<sup>41</sup> *Servicii de acces la internet. Servicii de linii închiriate și transmisiuni de date – raport de date statistice – Romanian version* [http://www.ancom.org.ro/uploads/links\\_files/Raport\\_DS\\_sem\\_I\\_2011\\_internet13.pdf](http://www.ancom.org.ro/uploads/links_files/Raport_DS_sem_I_2011_internet13.pdf).

HHI) for broadband access at fixed points and of 4.536 for broadband access at mobile points.

The number of fixed broadband Internet access connections reached 3,13 million, up by 4.4% and double as compared to the growth rate registered in the second semester of 2010. The most significant increases were registered by the xDSL connections (+7% to 0,94 million connections) and UTP/FTP cable connections (+7% to 1,70 million connections). The coaxial cable connections decreased by 5%, to 0,4 million. The FTTx connections (2,75 million) account for 88% of the total fixed broadband Internet access connections. 12% are held by connections achieved on coaxial cable/twisted metallic wires/UTP/FTP cable/radio supports or other means.

The penetration rate of fixed broadband Internet access connections per 100 inhabitants reached 14.6% as of mid-2011; the penetration rate per 100 households increased to 38.7%. Moreover, the number of fixed connections installed to business users declined slightly (-1%), and the connections installed to residential users grew by 5%. Out of the 3,13 million fixed broadband Internet access connections reported by the middle of this year, 2,83 million were used by residential subscribers and 0,3 million connections were employed by business subscribers. 2,54 million users are in urban areas, whereas 0,59 million in rural areas. The transfer speed of 98% of the broadband Internet access connections was at least 2 Mbps, while 62% of these connections had a transfer speed of at least 10 Mbps.

According to data reported by the 6 providers of mobile Internet access services, the total number of mobile broadband Internet access connections amounted to 3,53 million, up by 18% as compared to end-2010. There were 2,56 million active mobile broadband connections achieved over mobile telephones and 0.97 million active mobile broadband connections achieved over modems/cards/USB. The total number of terminals/SIM cards allowing mobile Internet access over 3G (including 3G+), EV-DO, 4G or other technologies superior to 3G reached approx. 5,1 million as of 30 June 2011.

#### *2.2.22.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

Final data about advertising revenues in 2011, issued on 13 June 2012 by Initiative Media<sup>42</sup>, one of the biggest advertising agencies in Romania, showed that, because of the economic crisis, the advertising market continued to drop down, by 2% in 2011 against 2010, to approx. 309 million EUR (316 million in 2010). All media were affected, except for online, which grew by 30% and is expected to keep the ascending trend in 2012. The TV took the "lion's part", 64.7% of the ad spend market, with 200 million EUR (-4% against 2010). The print was the most affected medium, dropping 8% compared to 2010 (24 million EUR, 7.8% of the total ad market), followed by OOH (-7% against 2010, at 31 million EUR, meaning 10% of the Romanian ad market), and Radio (-5%, 20 million EUR, 6.5% of the market). The online net ad spend was of 34 million EUR in 2011, reaching 11% of the market (8.3% in 2010). Social networks continued to attract more and more users, contributing to the general growth of the online ad spend. For 2012 Initiative Media expects a general drop of 2% (to 303 million EUR), with decreases for all media except online, which could grow by 20%, mainly due to the so-called performance media (Facebook, Yahoo, Google). The TV is expected to decrease by 5%, the OOH by 3%, print by 6% and Radio by 5%, but at significantly lower rates than before.

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<sup>42</sup> Initiative Media – Media Fact Book 2012, English version:  
[http://mediafactbook.ro/ebook/wp-content/uploads/2012/06/MediaFactBook2012\\_Initiative.pdf](http://mediafactbook.ro/ebook/wp-content/uploads/2012/06/MediaFactBook2012_Initiative.pdf).



At the same time, the advertisement called by public authorities almost doubled in 2011 against 2010, to approx. 35 million EUR, as stated in the report issued in February 2012 by the NGO *Centrul pentru Jurnalism Independent* (Center for Independent Journalism - CJI).<sup>43</sup> The advertisers expect an increase of 5-10% in 2012 for the online advertisement. They bet more on non conventional advertisement vectors.

### 2.2.22.3. Conclusion and Recommendations

Mass media in Romania is diverse and rich, in terms of players and offers<sup>44</sup>, but the Press Freedom Index 2011/2012<sup>45</sup> issued by „Reporters without Borders”<sup>46</sup> places Romania on the 47th place out of 179 states<sup>47</sup>, next to the USA and Argentina, recognizing a little progress from Romania since 2010 (when ranked 52nd). Though Romania is included in the category of states with noticeable problems with regard to media. „Reporters without Borders” states Romania is struggling to provide media with a democratic environment in line with promises made when it joined the EU, but considers though badly needed, reforms relating to media rights were carried out without consultation with the main players in this sector, considerably reducing the scope for investigation and editorial freedoms.

According to the 2011 Freedom of the mass media in Romania Freeex report, issued on 3 May 2012 by the NGO ActiveWatch-Press Monitoring Agency<sup>48</sup>, the politicization of the media accelerated last year, with many politicians or political advisers becoming media owners or mass media managers, one year before the 2012 elections. The market remains dominated by businessmen who are interested in obtaining economic and political advantages and which are ready to invest much money for this purpose. At the same time, big international media corporations, such as the German WAZ, left Romania, accusing the economic crisis and the unfair competition. On the other hand, the politicians issued in 2011 other draft laws with regard to mass media freedom restriction and to intimidation of journalists.

Even if the freedom of expression is almost complete (some analysts consider this freedom is sometimes used beyond limits and democratic/legal ways of expression), the right to information has some limitations due, paradoxically, to the extremely large offer, but of poor or unreliable quality.

There is not a law with regard to the press in Romania, but most opinions were that the best for journalists is to regulate themselves their activity. More conduct codes were adopted by different professional organisations/association.

The trend of Romanian media (mainly TV and print) is towards sensational, tabloidization, superficial information, talk shows or reports full of personal opinions, assumptions, personal attacks. A big part of information is biased. The political fights are often replicated and magnified in media. The economic pressures are big, especially

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<sup>43</sup> "Publicitate publică: Acclerați!", Romanian version, <http://www2.cji.ro/userfiles/file/raport2012/Raport%20-%20Piata%20de%20publicitate%20publica%20din%20Romania.pdf>.

<sup>44</sup> Reporters without Borders, 2011-2012 World Press Freedom Index, [http://en.rsf.org/IMG/CLASSEMENT\\_2012/CLASSEMENT\\_ANG.pdf](http://en.rsf.org/IMG/CLASSEMENT_2012/CLASSEMENT_ANG.pdf).

<sup>45</sup> Reporters without Borders, Press Freedom Index 2011/2012, <http://en.rsf.org/press-freedom-index-2011-2012,1043.html>.

<sup>46</sup> Reporters without Borders, Freedom of the Press Worldwide 2012 Map: <http://en.rsf.org/IMG/jpg/carte2012-2.jpg>.

<sup>47</sup> Reporters without Borders, 2011-2012 Romania Country Profile: <http://en.rsf.org/report-romania,129.html>.

<sup>48</sup> Raportul Freeex – Libertatea presei in Romania 2011, Romanian version, [http://www.activewatch.ro/uploads/FreeEx%20Publicatii%20/Raport%20FreeEx%202012/2012\\_Raportul%20FreeEx%20-%20Libertatea%20presei%20in%20Romania%202011.pdf](http://www.activewatch.ro/uploads/FreeEx%20Publicatii%20/Raport%20FreeEx%202012/2012_Raportul%20FreeEx%20-%20Libertatea%20presei%20in%20Romania%202011.pdf).

during the crisis period, when most of print media have closed their print issues and have migrated on the Internet, with more visible effects on regional and local media. The public TV is continuously accused to obey to the ruling parties, the public radio is rather correct, the commercial media act as imposed by owners and are often biased.

We think a combination of actions and measures could solve more problems, and improve the quality of the Romanian media offer: more powerful conduct codes, which should sanction the low quality journalism and any deontological side-slip or corruption act; a better self-regulation of the press field is needed; we also recommend the improvement of media schools and faculties level; the freedom of exerting their job has to be guaranteed for journalists, who, on the other hand, should do their professional duty in good will; the National Audiovisual Council should issue more strict rules and significantly bigger sanctions for radio and TV stations for breaching the law (especially in connection with human rights, children rights, sensational subjects, pornography, human trafficking, violence and the glorification of violence or of fraudulent means of living, false moral models); the National Communications Regulatory Authority should liberalize more the market and the competition, and speed up the transition towards digital; the print and online media should issue their own conduct codes or observe existing codes (such as those adopted by the Convention of Media Organisations, the Union of Professional Journalists from Romania or the Romanian Press Club); the Law of the public radio and TV broadcasters should ensure an independent and strong financing of the bodies, in order to have real public media services, free of political influences and economic pressures; **the depoliticization of the SRR and SRTV is still wishful thinking**; the cultural and educational roles of mass media should be encouraged, as well as the promotion of positive examples of persons, behaviors and events, to boost consumption of quality media, without interfering with the editorial line; the free competition of media has to be encouraged, but the public media sector has to be sustained to become a real warrant of the general, equal, correct and unbiased access to information for all the citizens.

## SLOVAK REPUBLIK

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### 2.2.23. Slovak Republik

#### 2.2.23.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.23.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The Constitutional safeguards stated in Article 26 (§§ 1–4) on freedom of expression, the right to receive and disseminate information and freedom of media did not change since the completion of the first study in 2004, all the relevant provisions of the Constitution of Slovak republic remained unchanged.

In December 2009, the Constitutional Court of the Slovak republic stated that courts of first and second instance violated the freedom of expression of the weekly newspaper (*Plus 7 dní*) publisher. Press media often referred to this decision<sup>1</sup> as “groundbreaking” or as a decision that deserves its place in constitutional law textbooks. In its reasoning, the Constitutional Court recognized freedom of expression as a pillar of democracy and reminded that journalists are public watchdogs of democracy.

The significance of the abovementioned ruling is even increased by the fact that the Constitution of the Slovak republic does not contain any specific safeguards for the journalistic profession as such. Therefore, it is extremely important for the freedom of the media in the Slovak republic to have a reference to “written” opinion of such value.

- Freedom to receive and to access information

The Constitutional Court awarded journalists, in the above mentioned decision, an undisputed right and even a “social obligation” to “provide information and thoughts about every items concerning general public interest” and classified journalists as a “privileged society” regarding freedom of expression which grants them an increased level of protection.

- Safeguards on regulatory authorities

There are no specific references on media regulatory authorities in the Constitution. There is no “state” regulatory authority for the press.

- Safeguards on “universal service”

The Slovak Constitution does not contain stipulations on universal access.

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<sup>1</sup> [http://www.concourt.sk/rozhod.do?urlpage=dokument&id\\_spisu=334889](http://www.concourt.sk/rozhod.do?urlpage=dokument&id_spisu=334889).

### 2.2.23.1.2. *Media order (de lege lata and de facto)*

- “Market Entry”
  - Licensing schemes; remit psm; notification for print publications

The Council for broadcasting and retransmission<sup>2</sup> (hereinafter “CBR”) regulates radio and TV broadcasting and on-demand audiovisual media services as well as network (cable, satellite, IP etc.) operators. According to the Act on broadcasting and retransmission CBR is an independent body whose members are elected by parliament. Members of parliament, professional and citizen’s associations in the field of audiovisual works, mass media, culture, science and sport, registered churches and disabled citizen’s associations suggest candidates for CBR membership to the parliament. An elected member of the CBR can neither serve as a functionary in a political party nor act in its name or in its favor.

The Council of Radio and TV of Slovak republic<sup>3</sup> (hereinafter “PSB Council”) is an internal regulatory body whose members are elected by parliament. The PSB Council comprises nine members wherefrom three are experts in the field of radio broadcasting, three experts in the field of TV broadcasting and two economy experts as well as one legal expert. Expert is a person with full academic degree (not bachelor's degree) and 5 years experience in the given field and three years experience in a management position. Elected member of PSB Council can neither serve as a functionary in a political party nor work for a political party or act in its name or favor.

In Slovakia, the CBR issues broadcasting licenses. The CBR may grant analogue licenses (as regards TV for a period of 12 years and for radio for 8 years each with one possible extension) if all requirements laid down by law are fulfilled. There is a legal claim for a digital license (no time limitation) and for a registration of retransmission (no time limitation). A registration for retransmission is not needed if the retransmission take only place in one building or in a complex of buildings, and for non-commercial use, retransmission solely of PSB, or Internet broadcasting exclusively via Internet, or retransmission with less than 100 users. TV broadcasting exclusively via Internet and on-demand audiovisual media services require only a notification to CBR (enforceable by financial sanctions). Press publishers need to notify their activity to the Ministry of Culture, accompanied by some basic information (the obligation to notify is also enforceable by financial sanctions).

- Media pluralism/ownership; competition law aspects

The Act No. 308/2000 Coll., last amended by the Act No. 547/2011 Coll., on Broadcasting and Retransmission<sup>4</sup> includes rather detailed provisions on media concentration that have to be applied by the CBR when granting or revoking a license. These provisions did not change since the completion of the first study in 2004, and all data are still valid. These provisions are taken into account when issuing a license for analogue broadcasting under the Act on Broadcasting and Retransmission.

For issuing a license for digital broadcasting the provision on media concentration as contained in the Act No. 220/2007 Coll., last amended by the Act No. 204/2011 Coll., on

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<sup>2</sup> <http://www.rada-rtv.sk/en/>.

<sup>3</sup> [http://www.rtv.s.eu/sk/rada\\_rtv/s/o\\_rade\\_rtv.s](http://www.rtv.s.eu/sk/rada_rtv/s/o_rade_rtv.s).

<sup>4</sup> [http://jaspi.justice.gov.sk/jaspiw1/htm\\_zak/jaspiw\\_mini\\_zak\\_zobraz\\_clanok1.asp?kotva=k1&skupina=1](http://jaspi.justice.gov.sk/jaspiw1/htm_zak/jaspiw_mini_zak_zobraz_clanok1.asp?kotva=k1&skupina=1).

digital broadcasting<sup>5</sup> must be applied. A broadcaster applying for a digital license (hereinafter "digital broadcaster") cannot establish property or personal "link" with another digital broadcaster. Such "property link" is established when a person holds at least a 25% share of the issued capital of a second person, or a 25% share of the overall voting rights in the company. A "personal link" is established if a natural person participates in the executive or in control mechanisms of another legal person.

Further, a digital broadcaster cannot establish a property or personal link with the provider of a terrestrial multiplex. However, regional or local digital TV broadcasters, also regional or local digital radio broadcasters, can establish a property or personal link with a provider of one local terrestrial multiplex. A radio broadcaster can establish a property or personal link with a provider of terrestrial (only radio or only analogue) multiplex. A natural or legal person with a property or personal link to a national digital broadcaster cannot establish a property link with the provider of a multiplex (if linked to a regional digital broadcaster, he cannot establish a property link with more than one multiplex provider). A natural or legal person can establish a property link with more multiplex providers if their combined signal coverage does not exceed 50% of the population. These provisions do not apply to a multiplex provider who provides only for a local multiplex or only radio or analogue terrestrial multiplex.

One natural or legal person cannot operate local multiplexes with a signal coverage of more than 30% of the population. This also applies to the creation of the local multiplexes network.

The CBR is responsible for the application of these provisions. The law, however, does not state into what level the CBR should investigate legal entities. Standard practice of the CBR is to investigate only into the first level (meaning that if a member of a legal entity is another legal person it does not investigate into the organizational scheme of the latter). This practice is strongly criticized by one commentator.<sup>6</sup>

Overall, the legal status on revealing the actual owners of legal entities in the Slovak republic is certainly not satisfactory (e.g. because of a missing obligation to disclose the ultimate beneficiary in each case). It is certainly fair to question what needs to be changed – legislation, regulatory approach, or both.

- Legal framework for psm; ability to fulfill their tasks

According to the Act No. 532/2010 Coll., last amended by the Act No. 397/2011 Coll., on Radio and TV of Slovak republic<sup>7</sup> Slovak TV PSB and the Slovak radio PSB merged in 2011. PSB (Radio and TV of Slovak republic) operates now as one entity with a single director-general and one council (internal regulatory body). Lowering financial costs was the main argument pro merger. It is true that before Slovak TV PSB was in a catastrophic financial condition, and this was a continuous trend (according to that time government, the difficult situation was caused mainly by the then director-general). Besides being responsible for a poor financial condition of the institution, the director-general was also

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<sup>5</sup> [http://jaspi.justice.gov.sk/jaspiw1/htm\\_zak/jaspiw\\_mini\\_zak\\_zobraz\\_clanok1.asp?kotva=k1&skupina=1](http://jaspi.justice.gov.sk/jaspiw1/htm_zak/jaspiw_mini_zak_zobraz_clanok1.asp?kotva=k1&skupina=1).

<sup>6</sup> According to Mr. Tomas Czwitkovics, Editor-in-chief of [www.medialne.sk](http://www.medialne.sk), the most popular web site specialized in media, which is part of Trend holding – the publisher of the economic weekly "trend", "[t]he actual situation in anti-concentration rules for the media is unacceptable. There were obvious cases in the past where these rules were clearly circumvented and the CBR did not act referring to "first level check only". But I do not see in legislation any restriction to investigate deeper levels and in my opinion considering seriousness of the matter CBR did not invest sufficient effort into it."

<sup>7</sup> [http://jaspi.justice.gov.sk/jaspiw1/htm\\_zak/jaspiw\\_mini\\_zak\\_zobraz\\_clanok1.asp?kotva=k1&skupina=1](http://jaspi.justice.gov.sk/jaspiw1/htm_zak/jaspiw_mini_zak_zobraz_clanok1.asp?kotva=k1&skupina=1).

accused of strong "politicization" of Slovak TV PSB. Critics of the merger, however, stated that Slovak TV PSB had always been producing losses, and receiving "aid" from the state budget was common practice (regardless of who was in charge as director-general). Critics claimed that the measure of reorganisation was a way to replace the former director-general with somebody who is more in favor of the leading political force.

It is true that losses at Slovak TV PSB had reached an exceptionally high level and also the credibility of TV PSB in terms of ability to fulfill its remit was - in the view of the general public - substantially lowered. There were diverse opinions on the subject whether TV PSB favored any political party but there were little doubts about other indicators such as audience share or quality of the programmes. The new law also brought new mechanisms such as the director-general being elected by parliament (contrast to the previous system where it was elected by the Council of PSB), and later on a new system of financing PSB whereby subscribers' fees were replaced by an annual contribution from the state budget (0.142% of the GDP with a guaranteed minimum amount of EUR 90 Mio per year). These changes gained lot of criticism (mainly from political opposition) for decreasing the level of PSB independency. The new merged PSB is so far focusing on stabilizing its finance and trying to improve its all-time low audience shares. With the first one PSB seems to be on the right track, but for the latter it is too early to say.

The CBR only reviews compliance with ordinary obligations (almost the same as for commercial broadcasters). The only competent regulatory authority to supervise the fulfilment of the remit of PSB is its internal body, the Council of PSB. As already indicated, the previous Council of TV PSB was accused of failing to fulfil its duties, which led to the adoption of the new law and the establishment of a new PSB (and its council). The new Council has just started to work; therefore it is too soon to make an assessment of its performance.

- The role and functioning of regulatory authorities in these respects

The Telecommunications Regulatory Authority<sup>8</sup> (hereinafter "telecom office") of the Slovak Republic is the national regulatory and pricing authority in the sector of electronic communications. The Telecom office is presided by a chairman who is a statutory body and is elected and recalled by parliament upon a proposal of the government.

The competencies of the Antimonopoly Office did not change since the completion of the first study in 2004, this is further applying the general competition rules on merger control and the abuse of a dominant position.

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

The main legislation concerning mass media consists of the Act No. 167/2008 Coll., last amended by the Act No. 221/2011 Coll., on the press<sup>9</sup>, the Act on PSB and the Act on Broadcasting and Retransmission. Each Act focuses only on its separate field of interest (press, audiovisual media etc.) with lack of general legislation that would state basic principles and provide for common definitions. This "categorization" of journalists feels inappropriate to Ms. Zuzana Krutka<sup>10</sup>. Although technical "output" may be different for

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<sup>8</sup> <http://www.teleoff.gov.sk/index.php?ID=9>.

<sup>9</sup> [http://jaspi.justice.gov.sk/jaspiw1/htm\\_zak/jaspiw\\_mini\\_zak\\_zobraz\\_clanok1.asp?kotva=k1&skupina=1](http://jaspi.justice.gov.sk/jaspiw1/htm_zak/jaspiw_mini_zak_zobraz_clanok1.asp?kotva=k1&skupina=1).

<sup>10</sup> Head of the association on protection of journalistic ethic, vice-chairman of syndicate of Slovak journalists:



some journalist, the “core activity” of journalists is always the same. Another substantial fail of Slovak legislation, according to Ms. Krutka, is the lack of a definition of the notion “journalist” which leads to an absence of legally-expressed rights and duties of journalists. With this criticism agrees also Julius Lőrincz<sup>11</sup>, who feels that it is “irresponsible” to reduce the whole remit of journalism to one single issue - the “right to reply” which is, according to Mr. Lőrincz, the only aspect of the Act on the press which usually attracts interest from competent people in the executive (throughout the political spectrum).

The institute of a “right to reply” was introduced by the Act on the press in 2008 despite massive protests from basically all press publishers. Most of the journalists’ objections were against possibility to use right to reply even for truthful factual statements that (in the claimant’s view) damaged his/her honor, dignity or privacy. In 2011, the scope of this institute has changed, and the right to reply now can be used only to “correct” untruthful, incomplete or distorted factual statements, and it cannot be used by a public figure against statements about his/her “public” activities.

According to Mr. Lukas Fila<sup>12</sup>, the Act on the press in its present shape is not bad, and after modification the right to reply does not cause “*any obstacles for the day-to-day work of print media*”. “*Real and continuing troubles for journalistic work are caused by defamation claims based on provisions of civil code*”, adds Mr. Fila. However, not the legislation itself but its actual application by courts presents a real threat to journalistic profession. “*Poor condition of judiciary is clear from many decisions – an injunction to publish non-existent book, an obligation for news magazine to pay financial compensation for publishing picture wrongly marked by press agency, or high financial compensation awarded by judges to another judges*” states Mr. Fila.

The civil association “Via Iuris” expressed similar concerns towards Slovak courts’ performance in its analysis<sup>13</sup> “*Freedom of expression and actions on protection of personality*”. “*Based on our analysis of rulings of the Slovak domestic courts in reference to the protection of personality, we can state that courts provide public figures with excessive protection. In their decision-making courts often do not take into account principles stipulated by the European Court. (...) As for awarding compensation for damage to one’s reputation, for the Slovak courts if plaintiff is a public official (e.g. politician) that fact often results in a higher financial compensation in comparison to that awarded to common citizens.*”

Among other competences, the CBR also monitors impartiality and objectiveness of news and current affairs programmes and the protection of human dignity in TV and radio broadcasting. The legislation on these points is quite vague, which leaves the regulatory authority with large room for discretion. This framework and especially the authority’s actual practice gained lot of criticism. In Mr. Czwitkovics opinion, the “*number of council’s decisions about impartiality of news packages or “composition” of current affairs programmes contradicts with basic standards and principles of democratic journalism*”; and Mr. Fila points out that the council’s decisions often display signs of “*arbitrariness*”.

The other pressing issue concerning the day-to-day journalist work is the correlation of the journalist’s objective – fully and objectively inform citizens and the “ultimate” goal of the media publishers/owners – maximization of the overall profit. The total absence of legislation that would establish at least basic professional boundaries of the

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<sup>11</sup> Vice-chairman of press council.

<sup>12</sup> Deputy editor-in-chief of one of the major Slovak quality newspaper “sme”.

<sup>13</sup> Sloboda prejavu a žaloby na ochranu dobrej povesti, Peter Wilfling, Eva Kováčechová, Via Iuris 2011.



journalist/owner relations is criticized by Ms. Zuzana Krutka who stresses that there is mutual negative attitude towards such ambitions both from the legislators (politicians) and the publishers/owners. This is most unfortunate since according to Ms. Zuzana Krutka the "economic" interventions to journalistic work are nowadays more common and certainly more visible than for example open political interventions. The combination of the market pressure and absence of the legislative safeguards may in some cases pose a serious threat to the standards of professional journalism. However when analysing the struggle of raising the journalism standards in Slovakia it has to be taken into account also the relatively low capability of the most recognised professional journalism organization (The Slovak Syndicate of Journalists<sup>14</sup>) to achieve its goals.

All these factors then lead to various examples of poor journalistic work that can be observed in Slovakia. The cases in the press may vary from failures of individual journalist to maintain the professional standards to unprofessional editorial choices (from the relatively harmless such as preferring the light and attractive topics over the serious ones to more serious like preferring or dropping the topics about main business partners etc.). In the electronic media sector one may notice e.g. the widespread problem with the actual independence of the municipal TVs usually owned/or largely supported by the given municipalities or some very questionable policies of mixing editorial content with advertising such as (major news TV station) scandal with black/white lists of subjects that should/should not be displayed in programmes depending on their positive/negative business approach towards the broadcaster or case of the series of the programmes about specific subject on the grounds of a PR.

It is however worth to mention that for instance issues from the electronic media sector are very well known to competent regulatory body (CBR). Some of them were even officially submitted to CBR but they were dismissed due to the lack of legislative competences. Even though these cases were publicly known and CBR had to dropped them no change of CBR's competences followed. The situation in press is very similar while all above-mentioned „ill practices“ are well known to most of the public. Still there is quite reserved approach of the journalists themselves towards self-regulation that certainly possesses (in its present shape or in any other) the ability to eliminate them (at least in to some extent).

#### - Political advertising and/or broadcasting time

There are no legal restrictions for political advertising in print media and online media (on-demand and linear) whatsoever. Legal provisions on political advertising concern only "traditional" (not online) TV broadcasting and there is no common legislation (election code) for all kinds of election (national, local, European, presidential etc.). Each type of election has its own set of rules for political advertising on TV. This naturally creates a great deal of legal uncertainty, e.g. during all election campaigns there are certain rules under which it is possible to broadcast political advertising except regional election campaign (without any proper reasoning). For other types of elections TV campaign is governed basically by the same principles: devote the same amount of time for each political party and set time's price in fair and non-discriminatory manner, mark clearly political spots, present information in objective and impartial manner etc.

It is forbidden to broadcast political advertising other than during an election campaign (defined by each election act). The definition of political advertising is quite broad: "*political advertising is a public announcement devoted to popularize the name, trademark, slogan of a political party or its candidate*". There is a very recent case

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<sup>14</sup> <http://www.mediahit.sk/>.

where, according to the CBR (and most print media or experts), a clear violation of the above-mentioned ban on political advertising massively occurred. The CBR therefore imposed 100,000 € fine (not in effect yet, since broadcasters appealed to court). Two major commercial TV broadcasters repeatedly (circa during one month 10-20 times a day) broadcast "sponsorship announcements" where candidates of a certain political party were presented (with on-screen logo and name of party). As the official sponsor acted a civil association with the same name as the relevant political party. This case showed serious lacks in legislation (no immediate sanctions that would prevent broadcasting of such material at least until a court ruling would have been issued) and questioned the relevance of such legislation (the absolute ban on political advertising on TV and radio).

- Codes of conduct and their organisational framing

The Slovak Syndicate of Journalists<sup>15</sup> passed in 2010 (effective since 2011) the Ethical code of journalist<sup>16</sup>, which replaced the previous Code of ethics (1990). According to one of its creators, Mr. Lőrincz, the major advantage of this code is *"that much broader a community (not only people from the syndicate) participated in the preparation of this code"*. This shows also the fact that not only printed media acceded to this code but also other institutions (e.g. the former Slovak radio PSB, the international press institute, the society of local TV broadcasters, the news team of a major commercial broadcaster etc.) According to its creators, the new code is clearer and more detailed.

The Press Council supervises the adherence to the Code of ethics (now: "Ethical code of journalists"). Ms Krutka states, *"the approach towards ethical principles has changes positively recently, but only when we talk about quality press, quite a low awareness about ethical principles is to be witnessed in regional or local media although it depends on their concrete owner"*. Mr. Lőrincz adds, *"The main challenge to improve effectiveness of the Press Council's functioning is to achieve higher publicity for Council's decisions. This may, however, be accomplished only by better participation of publishers."* Ms. Krutka explains, *"even though the Council was co-found by the association of publishers and they agreed to publish the Council's decisions, sometimes media still refuse to publish them. When we ask them to do so, they say that due to the independency of their editor-in-chief they cannot order him to do anything"*. According to its members, the Council has very limited powers to change this situation. Foreign experiences show that sometimes it is necessary to obtain governmental support on this matter but such actions could, according to Ms. Krutka and Mr. Lőrincz, *"easily jeopardize whole essence of Council's (as a self-regulatory body) activities"*.

The Interactive Advertising Bureau Slovakia<sup>17</sup> (former Association of Internet Media), a partnership of the largest Slovak companies operating on the Internet and in the related advertising sector, passed an ethical code of electronic media (meaning internet media) that focusses on defining ethical principles in marketing communication and determines harmful content in electronic media. IAB Slovakia is in consultation process to cooperate with the Press Council and the CBR.

New technologies brought among the other things also a need for the new professional standards for the journalism in the Internet environment. Particularly interesting point is the very popular phenomenon of the blogging. According to the authors of the Mediadem Report on Slovakia 20% of Slovak journalists claim to have their own blogs but almost no

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<sup>15</sup> <http://www.mediahit.sk/>.

<sup>16</sup> [http://www.mediahit.sk/?id=139&view\\_more=4136](http://www.mediahit.sk/?id=139&view_more=4136).

<sup>17</sup> <http://www.aims.sk/>.

journalists use their blogs for actual journalistic work (e.g. to report about topics that for various reasons were not included in their „home“ media). As stated in the Mediadem Report on Slovakia this may be caused by the fact that some media see blogging as a part of the image of the medium, thus binding journalists to follow internal ethical rules for blogging as well as for their expression on social networks e.g. Special Code for journalists of the daily newspaper Sme who use social networks<sup>18</sup> or the IX section of Ethical Code of Sme<sup>19</sup> which deals also with blogging.

Mr Fila confirms these reflections and states that in the beginning of the blogging there was a strong discussion about what kind and to what extent can journalist reveal information (that were unfit to be published e.g. due to low level of credibility or failing other standards) on his own blog without jeopardizing the credit of his employer. There were some borderline cases after which it was decided to establish the code of conduct in this respect. Mr. Fila however considers these rules as natural since *“if a Sme journalist published a text on its Sme blog (note - Sme is also the site of one of the oldest and largest blogs) it would be virtually impossible to persuade anybody that the daily newspaper Sme had nothing to do with it”*. Mr. Fila also stressed that if the existing code (*“Sme journalist has to remember the basic values of Sme even when blogging”*) was to perceive as excessively *“freedom-limiting”* than this would have to analogically apply to any other codes of conduct dealing with journalistic work. *“In the end when the blogging became less hip and the facebook overtook the scene the blogging issue became much less important. The biggest challenge now is to draw the line between “public” and “private” in the facebook enviroment.”* adds Mr. Filla.

- Distribution Aspects
  - Access to frequencies

The Telecom office administers the frequency spectrum and issues individual authorizations to use frequencies. The Telecom office is preparing a tender competition for the allocation of frequencies from the frequency bands 800 MHz, 1800 MHz and 2.6 GHz. The authority is preparing an invitation to tender for available frequencies for new generation networks in accordance with promoting the availability of broadband access networks and high-speed access services, as approved in government resolution no. 136/2011 – Slovak republic National Broadband Strategy. According to this governmental resolution, the mid-term goal is to free-up frequency spectrum in the range of 790–862 MHz for the development of broadband services which means ensuring access to broadband connection for all with a minimum speed at 1 Mbit/s until 2013. The long-term goal is to ensure access to high-speed broadband connection (30 Mbit/s and more) until 2020. The Slovak republic is already in the final stage of digitalization and most of the analogue frequencies were already switched off (legislative deadline for analogue switch-off is 31.1.2012). Frequencies needed for national multiplexes (commercial and public service) were awarded in tender procedures for which the law set criteria, but the individual assessment of the tender bids was the responsibility of the regulatory authority. However, the tender procedure for the operator of the first and second commercial and the public service multiplex (first tender procedure) gain massive criticism in media. The court of first instance issued an injunction to stop the tender procedure based on a request by a tender contestant with reasoning that there would be a serious threat to irreparable damage, although any unsuccessful contestant could have filed appeal (with suspension effect). After parliament recalled the chairman (most probably motivated by his strong critic of the court’s order) of the Telecom office, the

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<sup>18</sup> <http://www.sme.sk/c/5711878/pravidla-pre-pouzivanie-socialnych-sieti-redaktormi-sme.html>.

<sup>19</sup> <http://www.sme.sk/c/3498627/eticky-kodex-dennika-sme.html#ixzz12YEaa4sz>.

new management cancelled the respective tender procedure and announced a new one. The company which had won the first tender procedure lateron succeeded in follow up tenders and now is the single terrestrial multiplex operator (on national level) in the Slovak republic. This final outcome is described by Mr. Czwitkovics as a "*massive failure of the Telecom office*".

On the other hand, the present operator of the terrestrial multiplex originally (through numerous commercial deals) developed from the former state-owned company for governing and operating TV and radio transmitters. It is, therefore, probable that it possessed the greatest know-how and the technical resources for such a mission, and that hardly any other company would have been able to provide services of the same quality at a lower price.

The CBR still executes tender procedures two times a year for free frequencies used for analogue radio broadcasting (which still play a major role in the Slovak republic's radio sector).

- Must-carry/must-offer rules for electronic media

According to the Act on Broadcasting and retransmission [Sec. 17 letter a) and b)], a provider of a cable retransmission offer must include in his basic (cheapest) package the PSB and the commercial free-to-air TV and radio stations which can be received with ordinary receiving equipment in the area of his coverage. This excludes encrypted channels, channels which can be received only by special (not common TV or radio) receivers and any digital TV channel besides the digital public service channels (but excluding the single-genre digital public service channel). A provider of a cable retransmission offer also must (with the consent of the respective broadcaster) include in his basic package a digital local TV channel that is obligatory (transmitted free-to-air and not containing advertising, unless consent from the multiplex operator is obtained) transmitted in a local terrestrial multiplex.

The CBR may (upon request) in a transparent and proportionate manner decide that these obligations do not apply if a given network is not the main medium to receive TV or radio channels for a considerable part of users. The CBR can decide about exceptions if a must-carry/must-offer obligation is not necessary to ensure the public's access to information by particular programmes in the public interest, major events and short extracts as well as public service broadcasting. The CBR will decide in the abovementioned manner in particular if the number of all users of the respective network is neglectable compared to the number of households using other means of reception in this area, or if executing this obligation extends retransmission in such a way that it is disproportionate to its capacity.

It is clear that conditions that enable the CBR to issue an exception are defined somewhat inadequately. There are no guidelines in this respect. Nevertheless, there are no major difficulties in the actual execution of these obligations (1-2 complaints or requests a year). There is, however, an interesting ruling of the Supreme Court<sup>20</sup> which cancelled a decision whereby the CBR refused the request by a cable operator for exception from must-carry/must-offer rules for radios even though this request was backed-up by a survey showing that only 8.75 % of users used this network for the reception of TV and radio channels. The Supreme Court argued that the CBR's reasoning that 91.25 % of the population is not a considerable part of the population is inadequate,

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<sup>20</sup> [http://www.supcourt.gov.sk/data/att/9575\\_subor.pdf](http://www.supcourt.gov.sk/data/att/9575_subor.pdf).

and returned the case back to the CBR. In its new decision the CBR granted the operator the requested exception from must-carry/must-offer rules.

- Role of platform operators

The CBR issues digital licenses for TV broadcasting (including DVB-T), and there is a legal claim for this license. The CBR, however, does not have any say on whether a license holder will be transmitted in a terrestrial multiplex. This decision is solely up to the multiplex operator. All of the major commercial broadcasters are transmitted via the national multiplex, except for one news TV station (allegedly for business reasons). The operator of the terrestrial multiplex has a legal obligation to secure for broadcasters non-discriminatory conditions on distributing the signal, in particular as regards costs/tariffs and the underlying technical conditions.

- Access to Information

- Transparency of media ownership situations

The CBR keeps electronic media owners' records (linear and non-linear) and publishes basic data on its website. All information about media owners of which the CBR disposes is available on request. The Ministry of Culture publishes a list of press owners and the Telecom office stores information about frequencies' holders. There is no official public register.

- Accountability of public service media

The Director-general of PSB bears responsibility for fulfilling its remit. The PSB Council monitors the director-general's fulfilment of his responsibilities and is entitled to deliver a declaration about PSB failing to fulfill its remit. Two such declarations issued in six months may constitute a reason for parliament to recall the director-general (if he fails to make proper adjustments).

- Freedom of information laws

The Freedom to access information, as expressed in the Constitution, is further elaborated in the Act No. 211/2000 Coll. on the Freedom of Information. The Act sets out broad rules on disclosure of information held by any organization financed by or handling public funds (in the Act later referred as "Obligee"). There are limitations on disclosing information that is classified, represents a trade secret, where the disclosure would mean a violation of privacy, or where the information was obtained "from a person not required by law to provide information, who - upon notification of the Obligee - instructed the Obligee in writing not to disclose information", or that "concerns the decision-making power of the courts and law enforcement bodies". Appeals are made to higher agencies and can be reviewed by a court.

Probably the most significant change of the Act on freedom of information is the recent amendment (effective since 2011) that lay down a new obligation for the Obligee to disclose (on the Internet) contracts dealing with public funds (with few exceptions), whereas these contracts do not come in effect prior to their disclosure. After a few months, a thousand-euro threshold was introduced in order to remove needless and excessive bureaucracy. This limit was however removed by another amendment (effective since 1 January 2012) along with some other adjustments of the system that arose from public consultations during the first year of its existence. Transparency

International Slovakia (TIS) recently published a study<sup>21</sup>, which shows high usage of the new institute (disclosure of contracts) and gives to this instrument an overall positive rating. TIS, however, reminds that the sole purpose of this institute is to serve people and encourages government to create simple and effective mechanisms for contract checks. Another important step to strengthen the freedom to access information is a new obligation (effective since 2012) to disclose on the Internet all (general and constitutional) court's rulings.

According to Mr. Fila, "The Legislation is satisfactory. The actual problem is the willingness of the authorities to "act". If an authority refuses to provide information, it is virtually impossible to get it because to obtain a court order takes too long, and when the court finally delivers a decision, the information is out of date - which usually means it's useless."

- "Have a Say on ..."

It is virtually impossible for citizens in Slovak republic to ex ante „have a say“ on media output. There is no legal or other instruments for such actions neither in case of the commercial nor the PSB broadcaster. Ex post citizen's influence on media output is limited only to complaints about illegal content in case of audiovisual media services or unethical content or practices in case of print and on-line services.

#### 2.2.23.2. Main Players in the Media Landscape

##### 2.2.23.2.1. Radio

On the one hand, the radio sector has remained quite stable for many years now. The PSB maintains high levels of audience share. Taking all its services together it is still the market leader. The commercial broadcaster D.Express, JSC (owned by American holding) stabilized its position as commercial market leader. Other private radios with highest audience share (see table) are owned by Slovak subjects.

**Table 132 SK: Main radio companies**

License holder	Owner	Station(s)	Audience share in 2011
PSB		Radio Slovensko Radio Regina Radio_FM Radio Patria Radio Devin	16.6 % 6.7 % 1.7 % 0.7 % 0.7 %
D.EXPRES, JSC	Emmis International Holding, B.V.	Radio Expres	19.4 %
Radio, JSC	Patriol, Ltd.	FUN Radio	13.2 %
Tam Art Productions, Ltd.	Harad, JSC	Jemne melodie	8.4 %

Source: MEDIAN SK, MML - TGI

<sup>21</sup> [http://blog.etrend.sk/transparencyblog/files/2012/02/FOCUS\\_Sprava-pre-TIS\\_jan2012\\_zmluvy\\_infozakon.pdf](http://blog.etrend.sk/transparencyblog/files/2012/02/FOCUS_Sprava-pre-TIS_jan2012_zmluvy_infozakon.pdf).



### 2.2.23.2.2 Television

The TV sector, on the other hand, was subject to much more changes. In 2007 two Slovak owners exchanged their TV Stations. J&T now owns "TV JOJ" (No. 2 commercial TV broadcaster in Slovakia) and Grafobal owns "TA3" (only national news TV). In 2008 the commercial broadcaster "TV JOJ" introduced its sister channel "Plus", followed by "DOMA" in 2009 – a sister channel of the commercial sector leader "TV Markiza" (from 2005 part of CME enterprises). The last few years are characterised by a "battle" for market leadership where TV JOJ - "constant" No. 2 - started to seriously threaten No. 1 "TV Markiza". The PSB in this sector has experienced for some years a continuous decline reaching in 2011 all-time lows. There is still a quite considerable influence of Czech TV stations which together in 2011 reached 9,3 % market share.

**Table 133 SK: Main television companies**

License holder	Owner	Station(s)	Market share in 2011
MARKIZA-SLOVAKIA, Ltd.	Media Invest Ltd.	TV Markiza	29.3 %
		Doma	4.5 %
MAC TV, Ltd.	Slovenska produkčna JSC	TV Joj	19.8 %
		Plus	4.5 %
PSB		Jednotka	8.1 %
		Dvojka	2.4 %
C.E.N., Ltd.	GRAFOBAL GROUP	TA3	2.0 %

Source: PMT / TNS. Market shares are in target group 12 +

### 2.2.23.2.3 Press and publishing

Two major changes occurred on the press market since 2004: in 2006, the publisher of the best selling weekly "Plus 7 dní" launched new a daily "Plus jeden deň" as a direct competitor of the best selling newspaper in the Slovak republic, the tabloid "Nový čas" (Swiss group Ringier Axel Springer). Also in 2006, the Slovak owner of the quality press title "Pravda" sold this daily to the British group The Northcliffe International Ltd. The quality daily press is now divided between the British group and the German group Rheinisch-Bergische Verlagsgesellschaft mbH (sme). On the market for weeklies, and besides "Plus 7 dní", important players are the economic affairs magazine "Trend" and the conservative magazine ".tyzden". Newspaper sales are since 1999 certified and audited.



**Table 134 SK: Main publishers, their titles and sold copies**

Publisher	Owner	Title	Avg. monthly sales in 2011
		Daily	
Ringier Slovakia JSC	Ringier axel springer Media AG	Novy cas	136 083
Spoločnosť 7 Plus, Ltd.	Karol Bustin	Plus jeden den	53 967
Perex, JSC	The Northcliffe International Ltd.	Pravda	53 332
Petit Press, JSC	Rheinisch-Bergische Verlagsgesellschaft mbH	Sme	52 600
		Weekly	
Spoločnosť 7 Plus, Ltd.	Karol Bustin	Plus 7 dní	147 291
TREND Holding, Ltd.	Brunovsky Oliver Hrusovsky Lubomir Klimesova Elena	trend	14 503
W Press JSC	Roman Kvasnica Rudolf Zajac Stefan Meszlenyi	.tyzden	13 990

Source: ABC SR

#### 2.2.23.2.4. *Online media (non-linear audiovisual (media) services; websites)*

The market for non-linear audiovisual media services is greatly underdeveloped in the Slovak republic. The only service that even got into 2011 charts with figures is on-demand portal "huste.sk" with 211,639 users a month compared to the "biggest" web portal "Azet.sk" with 1,786,189 users/month. The most popular on-line services in the Slovak republic are web portals such as "Azet.sk" or the second-ranking "Zoznam.sk". In the top ten one can, however, find 7 news websites among which the leader is "sme.sk" ("sme") with 1,534,599 users per month, and "Pravda.sk" ("Pravda") with 885,190 users on a monthly basis. Both commercial broadcasters run their websites. "Markiza" is doing fine taking into account both of its websites "markiza.sk" (732,300 users per month) and the news website "tvnoviny.sk" (549,936 users). The website of „Joj“ is doing slightly less well, "joj.sk" has 451,604 users/month<sup>22</sup>.

#### 2.2.23.2.5. *Cable/Satellite network operators, IPTV & Internet Access Providers*

There has been tremendous increase in usage of satellite operators in the Slovak republic in recent years.<sup>23</sup> This "revolution" completely rearranged the positions on the market(s) for TV network operators. The former and for a long time uncontested market leader UPC Broadband Slovakia was put aside as well as the whole cable segment in the distribution markets. It is though rather difficult to determine exactly the positions on the markets in the Slovak republic since there are no official numbers. Even unofficial data is available only irregularly and only for fragments of the market(s). However, it is probably safe to say that satellite operator "Skylink" is the operator with most users (roughly 500,000 users). The leading cable operator UPC had, in the end of 2010, 261,000 users. The satellite operator – with an aggressive marketing policy – took over the market mostly with its basic "free" packages where customers make a one-time payment for a decoding

<sup>22</sup> Source: AIMmonitor – AIM – Mediaresearch & Gemius.

<sup>23</sup> According to the findings of the Telecom Office in June 2011, 52% of the households in the Slovak Republic use satellite operators.  
[Http://www.teleoff.gov.sk/index.php?ID=5501](http://www.teleoff.gov.sk/index.php?ID=5501).

card only. Traditional and new cable operators usually try to sell cable TV as part of "triple-play" deals along with phone and Internet. High-speed Internet access via optical cables is certainly the most popular Internet deal nowadays, although the availability of such connections is still not secured on national level and it is specifically quite limited in areas with less dense population.

#### 2.2.23.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)

**Table 135 SK: Advertising market shares**

Media	Gross 2010 in €	%
TV	464 489 898	54
Print	189 327 027	23
Radio	85 049 843	10
Outdoor	80 745 173	10
Cinema	3 083 535	3
Total	822 695 476	100

Source: [http://www.abcreklama.sk/prieskumy\\_detail.php?id=133](http://www.abcreklama.sk/prieskumy_detail.php?id=133)

#### 2.2.23.3. Conclusion and Recommendations

As indicated in previous sections it certainly seems that the most serious obstacles to free journalism in the Slovak republic can be traced back to the practice of state authorities, more particular of the general courts. Especially with print media, the courts not only exceptionally show a somewhat "cold" approach to freedom of the media and freedom of expression in general. This most likely might be to some greater or lesser degree the case in many "transition" countries. A tradition of perceiving the press and electronic mass media as fourth estate and public watchdog is (naturally) still missing in these countries and even in present days we can often experience degradation of the role of Slovak mass media (usually from politics). Some of the courts' rulings certainly show substantial difference between assessment of generally acknowledged principles by European standards and by Slovak standards. Most problematic seems the proportionality in the balance between freedom of expression on the one hand and the right to protection of reputation on the other hand.

For example courts' rulings considered that an article in the weekly news magazine "Plus 7 dní" (which criticized the tendency in Slovak judiciary to grant "outrageous" sums in civil actions regarding protection of reputation brought to court by judges of other courts) violated a judge's fundamental right to maintain good reputation. This violation was, according to the court's reasoning, caused by incorrect facts in the article such as by using the term "granted by court", even though rulings were not in effect at that time, by stating that a judge was awarded 165,969 € in damages, although in reality he got 199,163 €, by stating that the judge in question was removed from his post as chairman of the court because he could not explain sources of his wealth, where in reality he had questioned the legality of this claim (independence of judiciary), and the court also marked as incorrect "fact" a form of speculation in the article (without mentioning the respective judge) which described the related actions (judges "earning" money from other judges' decisions) might be part of a "comfortable" corruption "scenario" among judges. The court came to this conclusion despite the fact that this article was part of a public discussion about a large number of cases where public officials were awarded e.g. ten times higher financial compensation than in cases of life loss, serious injuries etc. In

some cases, courts even use the fact that the claimant is a public official and therefore well-known as a basis to increase the amount of financial compensation awarded. The Constitutional Court eventually dismissed this decision by his already mentioned "ground breaking" ruling whereby it made extremely valuable statements such as – that one cannot demand (the same level of) legal „exactness“ of a law journal from a general magazine, that decisions which refuse to protect speculative and to some level incorrect statements under freedom of expression would have "chilling-effects" on the journalistic society, that – when interpreting value judgment (speculation about corruption scenario) made in the public interest which may have different meanings – one must choose the interpretation that favors freedom of expression, because any other approach could be easily abused.

But even with a precedent like this, the day-to-day work of journalists is constantly threatened by the inconsistency of courts decisional practice (in particular by lower ones) in questions of freedom of expression. Just recently two different courts of first instance delivered decisions in a case, which could be possibly referred to as most important public case since velvet revolution. "Gorilla" is the name for a set of transcripts disclosed (anonymously) on the Internet from wiretap operation of the Slovak intelligence service. These transcripts describe in extraordinary straightforward manner "connection" among executive functionaries, minister and leading partner of a major financial group. What was initially regarded as presenting a mere bluff achieved through various means a considerable level of credibility. A court of first instance issued an injunction (recently dismissed by court of second instance) to prevent the publishing of a not-yet-existing book (by a journalist who is the "father" of this case) because of the possible damage to one of the leading figures' reputation. Within just three days from the adoption of this decision by the first court, another court of first instance refused to grant an injunction on the basis of the same kind of request from another main figure in this case (both "private" figures).

A kind of "strange" approach to the protection of the freedom of expression sometimes also transpires from the actions taken by public authorities, for instance when the national security authority imposed a maximum financial sanction on a journalist and her editor-in-chief for having published classified information in an article. However, this information was revealed in the public interest, more specifically in order to draw attention to the fact that there was a leak in the competent authority. Although the Supreme Court dismissed<sup>24</sup> these decisions (they were first confirmed by regional court though), its reasoning was limited to the imposition of the maximum level of the penalty available without touching on the core issue whether the public interest in the given circumstances could have prevailed over the state interest to keep information protected.

Such cases seem to indicate that the combination of the absence of explicit constitutional safeguards for journalists as a "privileged" group together with the socio-economical heritage of a transition country may pose serious threats to the freedom of media. The question whether journalists are or are not to be regarded as a "privileged" group was openly put on the table in another case of wiretap. The military intelligence service (MIS) upon instruction of the minister of defense tapped three journalists. All wiretappings were legal (based on a court order) and implemented in an effort to investigate serious crimes. The respective journalists, nevertheless, wrote about the MIS and alleged that the very reason why they were tapped was their journalistic activities. By monitoring these journalists and discovering their sources MIS wanted to reveal criminals inside its own structure. Revealing of this case led to massive protests of all media and eventually the responsible minister was recalled. The Prime minister delivered in this respect a

controversial quote: *"The wiretap of a journalist in a democracy is unacceptable regardless of whether this is legal or not"*. – Certainly a charming, but from a legal point of view a clearly incorrect statement. Yet, it shows again the complexity of the question - "special" rights for journalists as well as inconsistency and confusion of public authorities in this field.

It is hard to imagine, though, that after twenty years of democracy one would succeed in introducing constitutional guarantees like these that usually evolved in much longer process and in a different historical era. It would seem that media are „doomed“ to continuous struggle to convince general public to place constant pressure on state authorities to improve their approach towards principles such as freedom of the media/freedom of expression.

On the other hand, based on the gathered facts, it is clear that there is plenty of room for various actions that could ease day-to-day work of journalists in the Slovak Republic. First it is necessary to define who needs and deserves the increased level of protection by introducing a definition of the notion of "journalist" into the Slovak legal system.

It is also crucial to implement basic principles founded by the ECHR and the adjacent jurisprudence of the ECtHR (e.g. public figures must tolerate a higher level of criticism, value judgments enjoy a high level of protection, provocative statements as well as exaggeration are protected, media have a right to "excusable error", a statement related to an issue of public interest which is open to ambiguous interpretation should be interpreted in favour of the freedom of expression) with regard to freedom of expression and freedom of the media into the Slovak legal system in written form (e.g. through media acts). It seems that decisions of the ECtHR or of the Constitutional Court of the Slovak Republic are not "binding" enough for lower courts which can eventually lead to absurd and unacceptable results such as ignoring the fact that a public figure must bear fiercer criticism, and even using this function as a justification for rewarding "public figures" higher financial compensation in defamation lawsuits.

The introduction of clear, transparent and obligatory rules for the courts when determining the actual amount of the financial compensation (e.g. it should be proportionate to the seriousness of the offence, the fact whether there was "actual malice" involved or only negligence, the actual sum should not be disproportionate to a defendant's income, thus it may not be "ruinous" for the media, compensation awarded to victims of violence or for bodily injuries must be taken into account) in cases of the protection of personality would be most welcomed by the publishers and journalists in the Slovak Republic.

A system of continuous education and training through courses, lectures or publications for the public authorities (including judges) should be created and maintained by the government itself.

Any of these changes will, however, hardly be achieved without constant attempts by the media themselves to perfect their practices (e.g. through a higher involvement in self-regulatory bodies) and persistent efforts to increase and maintain a high level of credibility.

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<sup>24</sup> [http://www.supcourt.gov.sk/data/att/18591\\_subor.pdf](http://www.supcourt.gov.sk/data/att/18591_subor.pdf).

## SLOVENIA

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### 2.2.24. Slovenia

#### 2.2.24.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.24.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

Article 39 of the Constitution of the Republic of Slovenia<sup>1</sup> stipulates a basic freedom of expression of thought, freedom of speech and public appearance, of the press and other forms of public communication and expression shall be guaranteed. Everyone may freely collect, receive and disseminate information and opinions.

- Freedom to receive and to access information
  - Specific rights for the citizens

In Article 40 ("Right to Correction and Reply") the Constitution provides for the right to correct published information which has damaged a right of interest of an individual, organisation or body, as shall be the right to reply to such published information.

- Safeguards on regulatory authorities

The fundamental law contains no provisions in regard of regulatory authorities.

- Safeguards on "universal service"

In the Constitution there are no regulations regarding safeguards on universal service.

##### 2.2.24.1.2. *Media order (de lege lata and de facto)*

Entrance to media market is getting more open, but there are still many obstacles for such a small market. However, there were some suggestions for the provisions in new (future) media law regarding the implementation of a self-regulatory process in media.

- "Market Entry"
  - Licensing schemes; remit psm; notification for print publications

A licence for performing radio and TV activities shall be issued by the Agency to a broadcaster or for a TV programme on the basis of the procedure set by the Mass Media Act (2006)<sup>2</sup>. The requirements for media production (programme) are stipulated in the law and there is no possibility to decide the quantities in relation to the market situation.

The public service of producing and disseminating radio and TV programme services in the public and cultural interest of the Republic of Slovenia shall be carried out by the

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<sup>1</sup> Constitution of the Republic of Slovenia, available at: <http://www.us-rs.si/en/about-the-court/legal-basis/constitution/>.

<sup>2</sup> [http://www.rtv-slo.si/files/razno/mass\\_media\\_act.pdf](http://www.rtv-slo.si/files/razno/mass_media_act.pdf).

public institution Radiotelevizija Slovenija. Specific provisions about the quantity of own production and the media genres are put in the corporation act of RTV Slovenija.

The public service remit applies only to public service media, which can lead to more free programme scheduling for commercial broadcasters who are offering a small amount of own production programming.

According to the provision of Radio and Television Corporation of Slovenia Act (ZRTVS-1)<sup>3</sup>, the universal service is applied to the Radio Television Slovenia, the public service broadcaster which has to provide universal services to all citizens and provide the programme for majority and minorities.

There are no requirements for print media what enables a big number of media actors to establish media companies.

- Media pluralism/ownership; competition law aspects

There are anti-concentration rules which are controlled by UVK (Competition Protection Office) and the Ministry of Culture, however there are possibilities to overcome these limitations (with networks for example). Under section 9 of the Mass Media Act restrictions of ownership are formulated, in order to ensure and promote media plurality and diversity. Furthermore, provisions are foreseen for the restriction of concentration and protection of competition.

- **Legal framework for psm**; ability to fulfill their tasks

The Radio and Television Corporation Act is the basic legal framework for public service broadcasters as it imposes the public service remit and other requirements.

RTV Slovenija, with great part financed by licence fees, is second partner on the advertising market. However, it has more limitations in the field of advertising, but is not dependent only on advertising revenue which forms an advantage in comparison to commercial broadcasters.

Public service media is accountable to citizens through its funding via licence fees which is mandatory for each household in Slovenia. The subscription fee is 11 euros/month per household and it is worth being mentioned that there have been difficulties in collecting the fee.

- The role and functioning of regulatory authorities in these respects

The Competition Protection Office and the Ministry of Culture are giving the consent in the anti-monopoly procedure.

APEK (the Agency for Post and Electronic Communications) is the responsible body for broadcasting and telecommunications. The Agency has powers to manage the telecommunication and broadcasting spectrum, regulate the postal market, settle disputes among operators on prices, infrastructure etc., set the prices of some services, decide on concentration in certain cases, collect the fees from operators, make available the accreditation scheme for electronic signatures. It has to regulate the electronic communications and postal market in order to ensure competitiveness.

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<sup>3</sup> [http://www.arhiv.mk.gov.si/fileadmin/mk.gov.si/pageuploads/min\\_eng/legislation/ZRTVS\\_1..pdf](http://www.arhiv.mk.gov.si/fileadmin/mk.gov.si/pageuploads/min_eng/legislation/ZRTVS_1..pdf).

The Broadcasting Council is an independent expert body that provides support to APEK in supervising broadcasters' compliance with obligations contained in their licenses; members being appointed by the National Assembly. It shall assess the situation in the area of radio and television stations.

The Inspectorate for Culture and Media has joined, beginning of 2012, the Ministry of Education, Science, Culture and Sport. The Inspectorate is a body that oversees the implementation of legislation and other regulations and general acts relating to culture and media.

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

Journalists (and editorial personnel) are independent in their work within the framework of the programme concept and in accordance with the publisher's/ broadcaster's basic legal act.

The Mass Media Act contains in section 6 detailed provisions on the right to correction and reply. This has had a negative impact on press freedom as it could be often misused.

- Specific positive content obligations

Under the provisions of the Mass Media Act (Art. 4) there are special provisions about the quantity of educational, informative and cultural programme as well as the programme for minorities and proportion of European and Slovenian audiovisual works and proportion of works by independent producers. There are special requirements of RTV regarding the proportion of specific programmes.

- Funding schemes for specifically desired content

All media, except RTV Slovenija, are entitled to apply for the funds for content which is in the public interest. In the past, there were some non-commercial regional media that received in total up to 3 percent of the subscription fee of RTV Slovenija. There is no detailed indication on the kind of programmes to be produced from these moneys, but specifically desired content is described here as the kind of support offered for informative, cultural and educational programmes and the programmes that support plurality.

- Political advertising and/or broadcasting time

There are no strict requirements for political advertising in commercial media, however, there are very strict requirements for equal programme time for the public service broadcaster. Strict requirements meaning the proportion of the time (programme) devoted to the political parties in the parliament and the equal opportunities for all political candidates.

- Codes of conduct and their organisational framing

In particular cases, there are in the media some codes of conduct, as parts of the ethical code of journalist. However, it is only the decision of the media players whether they are willing to adopt such codes of conduct, no legally-binding obligation being in place. There exist also professional codes of conduct for different professions (journalists, advertisers), as part of activity regulation of those associations, e.g. by the Slovene



Association of Journalists, the Ethic Commissions of Journalists, the Association of Journalists and Publicists, the Association of Catholic Journalists, the Association of Sports Journalists.

- The role and functioning of regulatory authorities in these respects

There is an independent body in the Ministry of Culture composed of experts for evaluating the media content for the Media Fund which is financing the programmes that are in the public interest.

- Distribution Aspects

- Access to frequencies

APEK shall conduct the public tender procedure and make the selection on the basis of a grounded proposal by the Broadcasting Council and in accordance with the act regulating electronic communications.

- Access to distribution networks and control of actual conditions

Also in the case of the access to distribution networks, the selection is following a tender procedure.

- Must-carry/must-offer rules for electronic media

There are no legal provision or special requirements regarding must-carry/must offer obligations for electronic media.

- Role of platform operators

In Slovenia, there is at the moment one multiplex operational, however in a trial phase, distributing one programme of the public service broadcaster and one programme of a commercial broadcaster.

- The role and functioning of regulatory authorities in these respects

APEK is regulating, as aforementioned, the sector of broadcasting and telecommunications.

- Access to Information

- Transparency of media ownership situations

According to Art. 64 of the Mass Media Act, by the end of February of each year a publisher/broadcaster must publish the following information in the Official Gazette of the Republic of Slovenia: the full name and address of permanent residence of any natural person and/or the business name and head office address of any legal entity that in the publisher's/broadcaster's assets holds a stake of five percent or more of the capital or a share of five percent or more of the management or voting rights, and the full names of the members of the publisher's/broadcaster's board of directors or management body and supervisory board. The publisher/broadcaster must report any changes to the information specified in the foregoing to the Official Gazette of the Republic of Slovenia within thirty days of their occurrence.

Despite the legal provisions, media ownership situation in some cases is not transparent, as it is difficult to find all the connections behind the owners of media, different media owners of one media which is also owned or (partly) owned by other media.

- Accountability of public service media

With its activities RTV Slovenija is accountable to the Parliament, based on an annual report. According to Art. 28 of the Radio and Television Corporation of Slovenia Act, the annual report shall be published in a manner provided by the Statute of the public broadcaster and must also include an analysis of the costs of programme production by individual programme sectors or content. The annual report shall be published on the website of the RTV Slovenia public institution. Decisions and positions of the Supervisory Board and positions of the Programme Committees for the ethnic community channels relating to ethnic community channel issues shall also be made public.

- Freedom of information laws

The Mass Media Act contains provision regarding the right of the citizens to be generally informed.

- Accessibility of products/services and distribution networks

There are no special provisions regarding the access to products and services.

Some exemptions from the broadcasting licence fee are provided in respect of the persons with disabilities and special social status or on the basis of a declaration for those persons which do not use a radio or TV set.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

The ombudswoman of viewers and listeners of RTV Slovenija is an office, part of RTV, that is collecting "feed-back" of citizens, yearly is publishing the report, and it is expected that the relevant complaints will be taken into account.

- Participation in media operators/(self-)regulatory bodies

No such participation exists.

## 2.2.24.2. Main Players in the Media Landscape

### 2.2.24.2.1. *Radio*

Radio Slovenia - Val 202, A1 and Slovenija 1 which are part of public service broadcaster and commercial radio stations (Radio 1, Radio Hit, Radio Center) all operate nationwide. Other radio operators have a regional or local reach (Radio City, Radio Robin, Murski Val, Štajerski Val, ...). Also on a regional level, there are Radio Maribor and Radio Koper which are part of PSB RTV Slovenija.

**Table 136 SI: Top radio channels**

	Name	Reach
1.	Radio Val 202	107,000
2.	Radio 1	153,000
3.	Radio Slovenija 1	144,000
4.	Radio City	95,000
5.	Radio Veseljak	71,000
6.	Radio Center	69,000
7.	Radio Hit Domžale	58,000

Source: Kraft & Werk, Marketing Communication Agency

#### 2.2.24.2.2. *Television*

Main actor in the television market is RTV Slovenia, however, viewing shares are rapidly decreasing in last years particularly in favour of the viewing of POP TV (which is, just as the Pro Plus company, privately owned by Central Media Enterprise Group – CME). In 2012, SBS Group's retreat from the Slovenian market with its competing channel TV3 had to be noticed. There are many local TV stations but these are mainly struggling for survival.

**Table 137 SI: Top 5 TV channels**

	Broadcaster
1.	POP TV
2.	SLO1
3.	Kanal A
4.	SLO 2
5.	SLO 3

Source: Kraft & Werk, Marketing Communication Agency

#### 2.2.24.2.3. *Press and publishing*

National newspapers with higher circulation and reading are tabloids (Slovenske Novice), mainstream newspapers as Delo, Dnevnik, Večer are losing readers. Delo and Večer are under same ownership structure but both currently on sale.

Delo is owned by Pivovarna Laško (80%), Radenska (19%); Večer is owned by Delo. Dnevnik is owned by DZS (35%), Styria Media International (25.6%), Media DZS (15.9%), Delo (10.3%), Večer (6.5%), and rest (6%).

**Table 138 SI: Top 6 daily newspapers**

	Name	Type	Circulation	Reach
1.	Slovenske novice	Daily	78,194	311,000
2.	Žurnal24	Daily	107,738	261,000
3.	Delo	Daily	59,513	114,000
4.	Dnevnik	Daily	45,704	106,000
5.	Veèer	Daily	38,297	100,000
6.	Finance (Bussines newspaper)	Daily	14,933	53,000
7.	Primorske novice	Daily	13,000	48,000
8.	Ekipa (Sports newspaper)	Daily		23,000

Source: Kraft &amp; Werk, Marketing Communication Agency

**Table 139 SI: Printed press, Top 5 additions**

	Name	Type	Circulation	Reach
1.	Vikend	Weekly	185,212	398,000
2.	Pilot	Weekly	153,846	325,000
3.	Ona	Weekly	142,366	318,000
4.	Delo in Dom	Weekly	137,100	300,000
5.	Polet	Weekly	131,655	253,000

Source: Kraft &amp; Werk, Marketing Communication Agency

**Table 140 SI: Top 3 free newspapers**

	Name	Type	Circulation	Reach
1.	Žurnal	Weekly	284,538	413,000
2.	Žurnal24	daily	107,738	261,000
3.	Goriška			85,000

Source: Kraft &amp; Werk, Marketing Communication Agency

**Table 141 SI: Top 5 Lifestyle magazines**

	Name	Type	Circulation	Reach
1.	Lady	Weekly	50,668	215,000
2.	Jana	Weekly		123,000
3.	Anja	Fortnight	14,300	84,000
4.	Cosmopolitan	Monthly	16,917	84,000
5.	Nova	Weekly	24,893	78,000

Source: Kraft &amp; Werk, Marketing Communication Agency

#### *2.2.24.2.4. Online media (non-linear audiovisual (media) services; websites)*

Most important online platforms are 24ur.com (owned by Pro Plus company), siol.net (owned by Telekom), rtvslo.si (owned by RTV Slovenija).

#### *2.2.24.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers*

Internet Access provider as Siol (Telekom Slovenija) is increasing its share. Other important players are Telemach, T2, AMIS.

#### *2.2.24.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

Main part of advertising market share goes to POP TV and Kanal A as main commercial TV channels, who attract about two thirds of all advertisements.

#### 2.2.24.3. Conclusion and Recommendations

The Slovenian media market is limited according to the size and the possibility of extension according to the limitation of language. Therefore, there are not many foreign investors interested in investing in Slovene media. The primary role according to viewers and advertisers is assumed by POP TV, the biggest private TV channel.

In a general overview, the media freedom in Slovenia is perceived as the opportunity for the media to investigate and follow the critical watch-dog role in society. It is considered that the media are assuming their watch-dog role, however, there are limitations in its capacities to investigate in the sphere of politics and economy. For a successful investigation the appropriate staff (journalists) are needed. In the last period, media organizations have lack of potential for investigation as they are cutting the budgets, and also media are dependent on media owners which are playing an important part in deciding the editorial orientation.

The confidentiality of the source of information is enabled for the journalists and there were a few cases recently where journalists investigated a story without being requested to disclose their sources. These are the cases which came to the court.

Market concentration is observed and controlled by the Competition Protection Office, particularly for broadcasting media.

New media regulation should be adopted as it has to include new provisions for the advertising market.

The print media market is struggling in the last couple of years, the partnership, cross-ownership among newspapers disables transparent relations among them. A high number of media in Slovenia compromise a qualitative competition among them as they are "one-man-band" media which negatively impact on the decreasing of professional standards in journalism.

The information regarding the activity of the Parliament and the administrative organs are available for the media, however there are some research in the last year which showed that little interest for these kind of information from the side of the general public was present. Accordingly, for the qualitative media coverage from the Parliament and other administrative organs, senior media reporters are needed.

The co-funding of media contents (in the interest of qualitative content), by the Media Fund, which is in the public interest is an important moment for many media which, to date and predominantely, follow only viewing and advertising shares. With these funds private media can offer qualitative content. Accordingly, non-commercial regional media have obtained an important status but they need clearer regulation and provisions.

There should be more incentives for employing independent journalists; however, the status of journalists needs some changes. The requirements for important journalism positions should be adopted, also the provisions for commercial media, and their remit should be adopted as well.

## SPAIN

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### 2.2.25. Spain

#### 2.2.25.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.25.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media

The Spanish Constitution recognizes freedom of expression and freedom of information as two separate rights. Paragraph 1 of article 20, subparagraphs a), b), c), refers to freedom of expression, and subparagraph d) establishes the right to freedom of information. In order to correctly understand the scope of constitutional protection provided to such rights, several main ideas should be stressed.

Both rights are subjected to a series of “external” limits, according to the general parameters established by article 20 of the Constitution. These limits basically include other constitutionally-protected rights, principles and values including protection of minors, right to honor and privacy as well as human dignity. The jurisprudence of the Constitutional Court and the Supreme Court has provided within the last 30 years a wide range of well-consolidated criteria in order to properly define in specific cases the right balance between freedom of expression and/or information and other rights and principles.

The right to freedom of expression and the right to freedom of information are directly protected by the constitutional text and no legal development is required in order to be effectively exercised and applied. Along the same line, citizens can challenge before the Courts (including the Supreme Court) any administrative and some other kind of decisions and measures (basically Court decisions dealing with different legal issues and controversies) that may violate freedom of expression and freedom of information. Citizens have also the individual right to bring their claims before the Constitutional Court which has the final say regarding possible violations of fundamental rights.

Both freedoms cover all formats and communication media; insofar they serve to disseminate messages to the general public, so that there are no specific safeguards and rights for the media.

Article 20 subparagraph d) of the Spanish Constitution establishes the freedom of information.

In the case of freedom of information, the Spanish Constitution establishes an “internal” limit, which is mentioned in subparagraph d): it only protects the dissemination of truthful information. This idea of truthfulness can be connected in comparative terms with the notion of accuracy from the UK legal system or the idea of “*honnêteté de l’information*” that can be found in the French media legislation, as main examples. According to a very solid jurisprudence of the Constitutional Court, truthful information is provided when journalists comply with a minimal level of professional due diligence when collecting and presenting information. Moreover, truthfulness and public interest are the two main requirements imposed by the Constitutional Court in order to establish, in a specific case, that freedom of information will prevail vis-à-vis honor and privacy rights.



Professional secrecy or the right of journalists not to disclose their information sources has not been developed by law within the Spanish legal system, so that for the moment the constitutional mandate remains unfulfilled. However, the jurisprudence of the Constitutional Court has clearly upheld and protected such right, insofar the journalist is providing truthful and duly contrasted information. Most relevant journalists' codes of ethics also include and regulate such right.

Finally, it has to be stressed that in 2012 the Constitutional Court has had the opportunity, for the first time, to express its opinion about the use of "hidden cameras" in the elaboration and dissemination of information. In a decision issued on 24 February the Court held that such mechanism for the accessing of information violates protection given by the Constitution of the rights to privacy and each individual's image. However, it has to be outlined that the decision was taken in a case in which: a) individuals concerned were private professionals with no "public" profile (even if related to a public interest issue), and b) the media outlet that took and disseminated those images did not adopt any measure in order to preserve their anonymity.

- Freedom to receive and to access information

Finally it has to be stressed that, according to the interpretation made by the Constitutional Court, the right to freedom of information directly protects the collection, organization and dissemination of information, whereas it only indirectly covers the reception of such content by any citizen. In other words, unless a specific law establishes such a right in the future, citizens do not have at this present time an effective and individual right to obtain specific information at their request. Article 105 of the Spanish Constitution states: "*The law shall regulate ... b) the access of citizens to the administrative files and records except where they may affect the security and defence of the State, the investigation of crimes, and the privacy of individuals.*" However, in this case the Constitution has only established a general principle to be developed by the Parliament in the future in order to be legally effective. Moreover, the Constitutional Court has never established a neat connection between such principle and the rights recognized in article 20.

- Safeguards on regulatory authorities

The Spanish general Constitutional and legal framework does not include specific safeguards regarding the existence and the role of regulatory authorities. It should be kept in mind, in this area, the fact that nowadays Spain remains as the sole EU country that does not have such regulatory entity in the area of audiovisual media services, at the national level at least.

- Safeguards on "universal service"

Spanish general Constitutional and legal framework does not include specific safeguards regarding universal service obligations in the media sector.

#### 2.2.25.1.2. *Media order (de lege lata and de facto)*

- "Market Entry"
  - Licensing schemes; remit psm; notification for print publications

Audiovisual media service providers need to obtain a license to deploy their activities if they use spectrum resources. In other cases the provision of (either linear or non-linear)

audiovisual media services only requires to notify the audiovisual authority prior to the start of the activities (article 22 of the Law No.7/2010).

The Law No.7/2010 provides for a general regulation of public service media, including some general principles in terms of funding schemes and general remit. However, in order to properly understand the different applicable legal regimes, one should take a look at several specific laws. In this sense Law No.17/2006 regulates the nation-wide public service broadcaster *Radio Television Española* (RTVE), including a long and detailed remit and the need for a "contract" between the Government and such public organization in order to establish the specific conditions for the provision of the service to citizens.

No specific requirements apply to the press in this area.

- Media pluralism/ownership; competition law aspects

As it was explained in 2004's report, there are no specific restrictions/rules targeting either vertical media concentration, with minor exceptions in some cases (e.g. with regard to the provision of conditional access services for digital TV), or diagonal media concentration. Therefore, as long as general competition law and the limits to horizontal concentration in the media sector are respected, it is possible for a company to simultaneously own or control an unlimited number of national and regional newspapers, radio networks, satellite or regional DTT services.

Regarding horizontal rules, it has to be stressed that this kind of provisions has been significantly reduced within the last eight years. At this present time, article 36 and 37 of the Law No.7/2010 establish the basic and only general rules regarding this issue (without prejudice to additional regulations that some Autonomous Communities may introduce, e.g. in the case of Catalonia). In this sense, no natural or legal person may acquire a significant stake in more than one provider of state-wide television services, when the average audience of all the channels exceeds 27% of the total audience for twelve consecutive months prior to the acquisition. At any rate, no stakeholder can concentrate significant power over a series of media outlets when this situation will bring about either a) a power concentration over more than two nation-wide multiplex channels; b) a power concentration over more than one regional multiplex channel; or c) the existence of less than three nation-wide television competitors. In the field of radio services, a single individual cannot hold more than 50% of the licenses that cover the same territory and no more than 40% of the regional licenses in cases where there is only one license available for each territory. In addition to that, no one can hold more than one third of the radio licenses available in Spain, irrespective of the territory effectively covered.

- Legal framework for psm; ability to fulfill their tasks

The Spanish landscape regarding public service audiovisual media is a little bit complex, as it includes three different territorial levels: national, regional and local.

It has to be reminded that article 20 of the Spanish Constitution contains in paragraph 3 a reference to public service media, when reference is made to the need that the law regulates their organization and parliamentary control.

The last law enacted in this regard has been amended and according to Law No. 7/2010, the State public service broadcaster cannot be funded through commercial advertising anymore. This new funding scheme has created a serious financial crisis in RTVE.

Moreover, regional Parliaments (within the framework of the Law No. 47/1983, which allowed such possibility) have established their own regional public service broadcasters to serve the interests of citizens of these territories. The most relevant examples of such practice are the Basque country, Catalonia, Madrid, Valencia, Andalusia, Galicia, and the Balearic and the Canary Islands. Finally, according to both the State and regional legislations, local entities can also establish public service media outlets, and many of them actually do exist and operate in different areas of Spain. In the case of regional and local public service broadcasters the funding scheme established by different laws combines commercial income with public funding.

A very recent new element to be taken into account regarding the situation of national psm is the fact that in April 2012 the Spanish Government urgently modified the regulation on the composition and election mode of the board of RTVE, reducing the number of members and altering the nomination criteria. In this sense, it includes the possibility to elect such members by absolute majority, instead of 2/3 of the Parliament. This puts in hands of the current ruling majority all the power regarding the nomination of the highest body regarding the definition and provision of psm at the national level. Moreover, it has to be stressed that the reform introduced in April 2012 makes possible, for the first time, that a privatization process (under certain conditions and requirements) of such public channels can take place.

- The role and functioning of regulatory authorities in these respects

The first idea that must be stressed is that finally, Spain has approved a general, systematic and coherent law regulating audiovisual media services. Before 2010, the Spanish media legal system was formed by a constellation of fragmentary and really unsystematic laws which covered (incurring sometimes in serious contradictions) different portions of the audiovisual media landscape. Law No. 7/2010 provides a common and horizontal regulation for all audiovisual media services. It incorporates the most recent changes in this area regarding EU law (in particular the Directive 2010/13/EU, known as Audiovisual Media Services Directive, AVMS), and, in particular, it creates for the first time the Spanish Council for Audiovisual Media (CEMA, in Spanish), as the new independent audiovisual regulatory authority. However, it has to be pointed out that such authority has not been effectively created yet, and that the new Spanish Government has announced its will to change the law in order to create a new mega regulatory authority (the National Commission for Markets and Competition) which will be in charge of the regulation of all markets and economic sectors. For the moment, the authority in charge of audiovisual media regulation enforcement is the Secretariat of State of Telecommunications and Information Society (SETSI), a non-independent administrative office which is part of the structure of the Ministry of Industry. The current telecommunications regulator, the Commission of the Telecommunications Market (CMT) also holds some minor competencies in the field of audiovisual communications, in particular regarding the management of a Registry of Broadcasters which keeps some relevant information on license holders.

Finally it has to be outlined that article 149 paragraph 1 number 27 of the Spanish Constitution establishes that the central State and the Autonomous Communities do share the competence on communication media. This means that whereas the State has the competence to establish the general basic rules on this matter (as well as to establish and to enforce the media legal regime regarding nation-wide operators), regional Parliaments and regional authorities have the competence to develop such rules and to enforce them. In this sense, it has to be stressed that Catalonia and Andalusia created in

2000 and 2005, respectively, their independent audiovisual regulatory authorities (*Consell de l'Audiovisual de Catalunya* and *Consejo Audiovisual de Andalucía*).

The competition regulatory authority (National Commission for Competition, CNC in Spanish) has the power to approve or prohibit a proposed merger.

It has also to be outlined that according to Law No. 7/2010, the Government still keeps a huge amount of power regarding the provision of licenses, to the extent that it holds the competence to approve the tender rules and to adopt the final decision on its results, whereas the (future) regulatory authority only has the competence to elaborate a non-binding opinion on this. However, in some Communities such as Catalonia, the audiovisual regulatory authority holds all the competences, from the beginning until the end, regarding the tendering process.

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

As it has already been shown, article 20, paragraph 1 of the Spanish Constitution provides that a law will regulate two main values closely linked to the exercise of professional journalism: the protection of the so-called "clause on conscience" and the professional secrecy.

The clause of conscience is protected by Organic Law No.2/1997. This protection is established in two directions: a) the right of journalists to finish their professional relation with media outlets that have radically changed their editorial orientation (including the right to perceive an economic compensation in such cases); and b) the right of journalists to not participate in the elaboration and presentation of information that clearly violates ethical journalistic principles.

- Specific positive content obligations

The Spanish legal regime regarding the provision of media services has very few provisions establishing specific positive content obligations for private outlets. Apart from the negative limits that basically derive from the EU legal framework (and which have been generally incorporated but not strengthened by the Spanish legislator) most of the specific obligations assumed by private media outlets will be linked to conditions and requirements "voluntarily" assumed during the tendering process.

Interesting positive rules are to be found in the field of language quotas. According to Catalan legislation, private media outlets established in this autonomous community should use the Catalan language at least 50% of their airtime and 25% of the songs aired should be sung in Catalan language as well.

- Funding schemes for specifically desired content

No funding schemes for specifically desired content are specifically set.

- Political advertising and/or broadcasting time

Law No. 5/1985 on elections legal regime (and the interpretation been made by the Election Commission during the last 30 years) is the specific legislation establishing a series of obligations for audiovisual media service providers during elections' periods and campaigns. These obligations can be synthesized as follows: a) public service

broadcasters should provide free advertising airtime for political parties according to the results obtained in previous elections; b) public service broadcasters should distribute the time devoted by news programmes to inform about the political campaign, according as well to the results obtained in the last election (so that the majority party gets more time in news programmes than other parties). This last obligation basically derives from the interpretative case law of the Election Commission, though it raises serious complaints from journalists. Finally, c) private media outlets have also to inform fairly and in a proportionate way during election times. Political advertising on television is strictly forbidden during the rest of the year.

- Codes of conduct and their organisational framing

As it was outlined in 2004's report, journalists belonging to the Federation of Press Associations of Spain (*Federación de Asociaciones de la Prensa de España - FAPE*) commit themselves to maintain binding ethical principles when exercising their profession, which are enshrined in the Code of Ethics. In Catalonia the *Consell de la Informació de Catalunya* also plays an important role through its own self-regulatory system. This being said, it has also to be stressed that these self-regulatory schemes are neither widely known nor often used by citizens. Along the same line and realistically, these cannot be considered effective systems to the extent that there is still no significant "name and shame" effect to be caused in such environment. At the same time, some professionals have criticised the composition of the bodies in charge of the application of the ethical codes, as they would not correctly guarantee due independence from interests of media outlets.

- The role and functioning of regulatory authorities in these respects

As it has been pointed out, the existence and role of regulatory authorities remains as a pending aspect of Spanish media legislation. However, in regions in which they exist (e.g. Catalonia) they play a key role in monitoring the performance of public service broadcasters and in order to guarantee that license conditions are respected. However, in the field of codes of conduct, the main responsibilities belong only to self-regulatory bodies.

- Distribution Aspects

- Access to frequencies

Access to frequencies is limited at this present time to broadcasters which are able to obtain a license after going through a tender procedure. Community broadcasting does not exist in Spain for the moment, and despite article 32 of Law No.7/2010 includes some provisions in this area, they have not been effectively applied yet.

- Access to distribution networks and control of actual conditions

No specific legislation can be found in this area. It should only be outlined that article 11 of Law No. 7/2010 establishes that audiovisual media service providers will have access to electronic communication networks according to general legislation in this latter area and within the framework of the agreements freely agreed among the interested parties.

- Must-carry/must-offer rules for electronic media

No specific legislation can be found in this area.

- Role of platform operators

Platform operators are generally subjected to electronic communication regulations. Article 31 of Law No.7/2010 establishes that national television service providers will facilitate the access to their free, over the air contents through any electronic communication service within the terms freely agreed among the concerned parties.

- The role and functioning of regulatory authorities in these respects

According to current legislative framework, regulatory authorities (both in the telecom and audiovisual sector) basically play an arbitration role in these areas, in cases in which an agreement cannot be reached among the parties.

- Access to Information

- Transparency of media ownership situations

Article 6 of Law No.7/2010 recognizes the right of citizens to “know the identity” of any audiovisual service provider, the different companies which form a certain media conglomerate, as well as their stakeholders. The law establishes that this obligation should be fulfilled through the website of the provider in question, which should also make available to citizens specific ways to get directly in touch, such as an e-mail address. It is not possible to find within the Spanish legal system any other provision that goes beyond these general requirements.

- Accountability of public service media

Mechanisms in this field are not particularly relevant. According to article 20.3 of the Constitution, public service media are under the political supervision of the legislative power.

- Freedom of information laws

Until nowadays, Law No.30/1992, on the Legal Regime of Public Administrations and Common Administrative Proceedings has partially developed article 105, paragraph b) of the Constitution, in a very narrow way. According to what was already stressed in 2004's report, the law contains concrete provisions on access to administrative records and documents by citizens, under very strict conditions: documents must be part of a file which has been completed, documents that contain personal information can be accessed only by the persons named in the documents and more broadly, access can be denied according to a set of general and somewhat vague criteria. Of course, these decisions can be challenged before the Administrative Courts, which will have to decide within the very short margins of the law.

During the elaboration of this report, the Spanish Government has publicly announced the elaboration and future approval of a so-called Transparency Law, which will apparently try to solve the “Spanish exception” in terms of absence of any kind of “freedom of information law”. However, the legislative procedure is now in its first steps and it would be too early to try to make here any further description or evaluation.

- Accessibility of products/services and distribution networks

Article 31 of Law No.7/2010 establishes that RTVE must cede its different radio and television channels free of charge to distributors of cable, satellite and IPTV audiovisual services.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

Spain is a country in which the exercise of consumers' rights, the right to complain or even the figures of ombudsmen are not really part of the general culture. Apart from the possibility to file a complaint before the public authorities (including the still not created media authority), the presence of alternative schemes is almost testimonial, and in some cases broadcasters have created their own ombudsman just as a matter of prestige rather than an effective will of self-control and independent monitoring. At any rate, it should be stressed the work that has been done during the last two years by the figure of the *Defensor del Lector* in the national newspaper *El País* (this task has been performed by the journalist Milagros Pérez-Oliva).

- Participation in media operators/(self-)regulatory bodies

Both national and regional legislation have required the existence of some really minor and not particularly relevant participative advisory committees within the organizational structure of public service media outlets.

#### 2.2.25.2. Main Players in the Media Landscape

##### 2.2.25.2.1. Radio

As already explained in 2004's report, radio consumption in Spain ranks second after television, in particular among young people. The public broadcasting company RTVE operates through *Radio Nacional de España* (RNE) five national radio stations and more than 400 local stations. In addition, most regions have their own radio networks, such as *Catalunya Radio*. Furthermore, there are hundreds of local public radio stations (called *radios municipales*).

In 2010 radio companies achieved an increase by 2.7% in terms of commercial incomes. Radio audiences and commercial advertising are basically concentrated in three big companies: *Sociedad Española de Radiodifusión* (SER) which belongs to the big media group PRISA (owner of the newspaper *El País*, and the most important communications company in Spain, with important interests in Latin America as well) represents 49.6% of the whole market, whereas *Onda Cero* (UNIPREX, controlled by the Planeta/deAgostini Group) dominates 21.8% and *Cope* (RADIO POPULAR, controlled by the Spanish Bishops' Conference, that is the Spanish branch of the Catholic Church) controls 20.7%.

For several years, SER has been the leading network in terms of audience in all time slots.



**Table 142 ES: Main radio companies**

Companies	Ownership Structure *	General Radio Stations	Market Share (audience figures) **
Unión Radio	Prisa Group: 80% Godo Group: 20%	SER	32.2 %
Antena 3 Group	Planeta/de Agostini	Onda Cero	18.9 %
COPE	Spanish Catholic Church)	COPE	11.9 %
RNE	PSB (RTVE)	Radio 1	11.1 %

\* Ownership structure based on information provided by companies' websites.

\*\* Market share audiences based on the 2011 report made by *AIMC - Estudio General de Medios*.

#### 2.2.25.2.2. Television

Television is the most popular medium with over 90% of the population watching TV daily. The public service broadcaster RTVE operates national terrestrial channels. In addition, there are a large number of regional public service channels that are operated by the Autonomous Communities. These channels were introduced subsequently after 1983 when the adoption of the so-called Third TV Channel Act (Act No.43/1983) took place.

As above mentioned, since April 2010 Spanish television has become fully digitalised. The process of switch-over was accompanied by different public administrations and the final outcome can be described as satisfactory, at least according to technical criteria. General criticisms, however, have been raised in terms of economic viability as well as content quality and diversity. After many discussions, in 2010 the Parliament allowed the possibility to launch paid DTT channels, which clearly facilitated the apparition and deployment of *Gol TV*, based on the exploitation of sports' broadcast exclusive rights.

The second important element of change that has to be pointed out again is the transformation of the national public service broadcaster RTVE since 2006. Apart from the reform of its organizational structure in order to guarantee a higher degree of autonomy vis-à-vis the ruling political majority, nowadays RTVE cannot get funds from the advertising market. It has also to be stressed that some of the alternative funding resources established by law (e.g. a tax on telecom companies that allow access to audiovisual contents) have been challenged before the European Commission to the extent that they might contradict EU State aid regulations.

In 2010 as well, the two most important national private television stations *Gestevisión Telecinco* (controlled by Berlusconi's *Mediaset*) and *Sogecable* (PRISA) merged. This group represents two multiplexes (eight multiplexed channels). The stakeholders of this big group are PRISA (17.34%) and *Mediaset Investimenti, Spa* (41.22%) together with a *free-float* of 39.87%. Along the same lines, at the beginning of 2012 the other two national stations *La Sexta* (controlled by a group of production companies and the Mexican group *Televisa*) and *Antena 3* (*Planeta/de Agostini*) publicly announced their agreement to merge as well. This agreement has still to be approved by competition authorities.

As for the audiences, it has to be remarked that in general terms (and probably due to the economic crisis) the consumption of television has been increasing during the last three years, nowadays almost reaching an average of four hours per day. However, and at the same time, new thematic channels are reaching more viewers, taken from more "traditional channels". At this moment *Telecinco* and *Antena 3* continue to be the most viewed private channels, competing for the leadership with RTVE which had been increasing its audience until 2010. However, the increasing financial difficulties of this public entity have also been causing a negative impact in terms of audience. Regional public service channels keep a relatively important audience, in direct competition with main national players. Apart from the players that have already been mentioned, two other media companies have at this moment four multiplexed channels each: *Veo Television* and *Net TV*. These two outlets directly got a digital license as they were not previously present in the analogue market. A major trend is that they basically offer channels provided by third parties: e.g. *Disney Channel*, *MTV*, *AXN*.

**Table 143 ES: Main television companies**

Broadcasters	Ownership Structure *	Main TV Stations and Their Audience	Total Market Share (audience figures) **
RTVE	PSB	TVE 1 20.2 % La 2 1.8 %	22 %
Telecinco-Sogecable	Prisa 17.34 % Mediaset Investimenti, Spa 41.22 % Free-float 39.87 %	Telecinco 16.8 % Cuatro 5.8 %	22.6 %
Antena 3 Group	Planeta/de Agostini 44.58 % UFA Film 20.49 % Others 34.03 %	Antena 3	14.0 %
La Sexta Group	Grupo Audiovisual de Medios de Producción 51.65 % Televisa 40.51 % Others 7.82 %	La Sexta	6.1 %

\* Ownership structure based on information provided by companies' websites.

\*\* Market share audiences based on the 2011 report made by AIMC - *Estudio General de Medios*.

Finally there's also an emerging regional and local television market. Its figures are not still representative and economic crisis seems to have especially hit this layer of the market.

#### 2.2.25.2.3. *Press and publishing*

Newspaper readership in Spain is quite low compared to other European countries and is declining every year, in particular among young people.

**Table 144 ES: Main publishing companies, first trimester 2012**

Publishing companies	Ownership Structure *	Main titles & Market Audience (readers in thousands) **	Total Audience
Grupo Prisa	Polanco Family and other stakeholders	El País 1,924 Cinco Días 68 As 1,395 El dia de Valladolid 204	3,591,000
Recolétos	Pearson 78.93%	Marca 2,888 Expansión 182	3,070,000
Vocento	President: Enrique de Ybarra y Ybarra	ABC 756 El Correo 475 El Diario Vasco 265 El Diario Montañés 174 La Rioja 90 Ideal 171 La Verdad 235 Hoy 153 Sur 164 El Norte de Castilla 208 El Comercio 141 Las Provincias 157	2,989,000
Grupo Zeta	Founding: Antonio Asensio Pizarro	El Periódico de Catalunya 778 Sport 737 Córdoba 91 Mediterráneo 93	1,699,000
Grupo Godó	Family Godó	La Vanguardia 757 Mundo Deportivo 658	1,415,000
Unidad Editorial	RCS (Italy) 89%	El Mundo 1,282	1,282,000

\* Ownership structure based on information provided by companies' websites.

\*\* Market share audiences based on the 2011 report made by *Asociación de Editores de Diarios Españoles (AEDE)*.

The main national daily newspapers are El País (Grupo Prisa), El Mundo (Unidad Editorial) and ABC (Vocento). Regional dailies are the main players in most autonomous communities, e.g. La Vanguardia and El Periódico in Catalonia, El Correo in the Basque Country and La Voz de Galicia in Galicia.

The Grupo Prisa publishes the best selling national daily El País, the financial daily Cinco Días and the sports daily As. It is active in specialized, regional and periodical publications (*GMI - Grupo de Medios Impresos*), magazines, radio (Unión Radio), national television (Canal Plus, Digital+, Sogecable), advertising (GDM), and Internet (Prisacom, portal plus.es). Subsidiary companies of PRISA International are currently present in eight countries: Chile, Colombia, Costa Rica, Mexico, Panama, France, the U.S., and Bolivia, and operate in the radio, print media, and television sectors.

Vocento is the new name of the *Grupo Correo Prensa Española* (since May 2003) resulting from the merger between the two groups that started at the end of 2001. It publishes the national daily ABC and several regional papers, and has a significant presence in other areas of communication, including television, radio, digital media, new technologies, distribution, film and TV production companies and Internet.

*Unidad Editorial (UNEDISA)*, majority owned by RCS, is a multimedia group made up of 42 holding companies (in the press, radio, television, Internet and telecommunications

fields). It publishes the second best selling national daily newspaper, El Mundo and has interests in cultural magazines, radio, television, production and online services.

*Grupo Recoletos* is a multimedia company active in certain areas (sports, finance, etc.) across all media platforms (press, broadcasting, Internet). It publishes the sports daily paper *Marca* and the financial daily *Expansión* and specialised magazines. It is active in radio (Radio *Marca Digital*, Radio *Marca Madrid*), and television (25% in *Veo Televisión* which holds a DTT licence).

*Grupo Zeta* publishes eleven general daily newspapers (e.g. *El Periódico de Catalunya*), two sports newspapers (e.g. *Sport*), more than 80 local and specialised free papers, and 15 magazines (*Interviú* and *Tiempo*). It is also active in books, multimedia and advertising (*Zeta Gestión de Medios*).

*Grupo Godó* is an independent corporation with a family structure that is active in the fields of daily press (*La Vanguardia*, *Mundo Deportivo*), magazines, digital publications, radio, television, advertising (*Publipress*), audiovisual production, multimedia services, Internet portals, distribution and subscriber home-delivery services. It holds shares in audiovisual companies (93% in *Catalunya Comunicació*, 100% *Radiocat XXI*). Additionally, the Group holds a digital radio license and 20% stake in *Unión Radio*.

#### 2.2.25.2.4. *Online media (non-linear audiovisual (media) services; websites)*

The most visited Internet sites basically include the electronic version of already existing traditional media both in the press and the audiovisual sector:

**Table 145 ES: Main Spanish websites**

Site	Number of visitors (last trimester 2011) *
Marca (sports newspaper)	4,127,000
El Pais (daily newspaper)	3,155.000
As (sports newspaper)	2,140.000
Antena3.tv (TV channel)	1,731.000
Rtve.es (public service media)	1,700.000
Los40.com (musical radio station)	1,586.000
Paginas amarillas (yellow pages)	1,453.000
Cuatro.es (TV channel)	1,334.000
Telecinco.es (TV channel)	1,287.000
LaSexta.com (TV channel)	1,216.000

\* Source: 2011 report of AIMC – Estudio General de Medios

2.2.25.2.5. *Cable/Satellite network operators, IPTV & Internet Access Providers*

Most of the distribution market in Spain is dominated by satellite technology, followed by cable and IPTV. The consumption of audiovisual content through ISPs (Internet Service Provider) is still not particularly relevant in Spain. It has to be reminded, at any rate, that free-over-the-air DTT is still by far the most important system of television consumption (at this present time, it represents around 60% of the business market).

In terms of subscriptions, the market is lead by Digital + (satellite, 38.9%), followed by ONO (cable, 22.8%), Imagenio (IPTV, 17.2%), Telecable (cable, 3.0%) and Euskaltel (cable, 2.8%).

2.2.25.2.6. *Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

Information on audiences/readership/usage/subscription has already been provided.

Regarding advertising market, in 2010 (and according to the report elaborated in 2011 by INFOADEX) 12.883 million € were invested: 5.849 million in conventional formats and 7.034 in non-conventional formats (Phone marketing, catalogues, merchandising, personalized e-mailing, etc.).

As for conventional media, figures are as follows:

**Table 146 ES: Advertising spend**

Type of advertising support	Invested amount (in million €)
Cinema	24,4
External (public spaces)	420,8
Internet	789,5
Radio	548,5
Magazines	397,8
Television	2,471.9

2.2.25.3. Conclusion and Recommendations

Spain has approved a coherent and systematic law on audiovisual media services, including the creation of an independent regulatory authority, finally. However, very recent legislative proposals show a clear change of view from the ruling majority, regarding the future creation of a big "convergent" regulatory authority with general competences over all economic markets. This being said, it is also important to outline that the Government seems to have a serious will to approve a law to guarantee citizens' right to information and transparency.

The very serious financial and economic crisis now being faced by Spain has had very serious impacts in different media outlets. Several local private televisions, radio stations and even national newspapers (like *Público*) have been closing down within the last three years. Those media outlets which still remain in the market have seriously lost an important amount of their income sources and severe measures in terms of labour costs' reduction have been taken almost everywhere. At the same time, this delicate situation has also increased the level of concentration (both at the horizontal and vertical level) of

media companies. The case of national DTT channels is very clear in this sense: after a controversial legislative modification, the four most important national companies in that business have actually become two.

Regarding public service broadcasting, the elimination of advertising as a funding source with no real feasible alternative sources has put RTVE in a very difficult situation which has also led nowadays to an important internal institutional crisis. Thus, the immediate future and viability of this important entity is not clear at all, whereas the private sector does not seem to have obtained important and remarkable benefits from this decision. Along the same line, the recent reform in order to reduce the parliamentary majority that will be needed to appoint the members of the board of RTVE also raises serious concerns in terms of lack of autonomy vis-à-vis governmental interests.

Finally, it has to be outlined that during 2011 the Spanish Parliament adopted a modification of the legislation in the field of protection of intellectual property and on information society services, in order to guarantee a better protection of copyrighted materials in the on-line world (the so-called *Ley Sinde* or Sinde Act). In this sense, a new administrative authority has been created, with significant powers in order to close down websites which contribute to the dissemination of copyrighted materials without authorization, in particular regarding cases which until that moment escaped from the competences of ordinary courts (basically websites that do not provide direct access but offer a link to other pages that do provide copyrighted contents such as music or videos). The approval of such legislation has raised a high controversy between users and on-line and content companies. Some legal scholars have also expressed their concern about the ambiguous nature, powers and scope of activity of such administrative authority and the existence of a possible violation of the constitutional principle of separation of powers.

## SWEDEN

### 2.2.26. Sweden

#### 2.2.26.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

##### 2.2.26.1.1. *Human rights/Fundamental freedoms*

- Freedom of expression/Freedom of the media
  - Specific safeguards and rights for the media

The regulations have not changed since 2004. The two main constitutional laws regulating these questions are the Freedom of the Press Act (*Tryckfrihetsförordningen*) and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen*). Each law deals with certain types of media. The former deals with the printed press while the latter regulates other types of media, such as radio and TV. In line with the convergence of media types in the last years, distinctions become increasingly difficult. A printed newspaper that also offers web-TV on its website might fall under both laws or neither.

The Government therefore initiated a committee (*Yttrandefrihetskommittén*) in 2003 to investigate the regulations of freedom of expression and freedom of the media, aiming for more technical neutrality. The committee published one of its reports in 2010 - *Ny yttrandefrihetsgrundlag? Yttrandefrihetskommittén presenterar tre modeller*<sup>1</sup>. In the report three different models of regulation are presented: the model of responsibility (*ansvarsmodell*), the operation model (*verksamhetsmodell*) and the purpose model (*ändamålsmodell*). A follow-up report is expected at the earliest in August 2012, but it seems at the moment that it will not lead to any larger changes in the two acts. The six corner stones of the current Swedish legislation will prevail in any event: ban on censorship (*censurförbud*), freedom of establishment (*etableringsfrihet*), editorial responsibility (*ensamansvar*), protection for sources and whistleblowers (*meddelarskydd*), special catalogue of crimes (*brottskatalog*) and the special procedural law regulations (*särskilda rättegångsordning*).

- Freedom to receive and to access information
  - Specific rights for the citizens

The specific details of the freedom to access information are stipulated in Chapter 2 of The Freedom of the Press Act. While the general right is guaranteed in the Instrument of Government (*Regeringsformen*), Chapter 2 of the Freedom of the Press Act stipulates the rights and obligations in more detail, e.g. the principle of anonymity for the person exercising the right to access information, the conditions of granting access etc.

- Safeguards on regulatory authorities

Swedish public authorities are generally independent and have the authority – delegated by the government – to issue regulations within their areas of responsibility. They can decide on specific cases and issue fines and recommendations. Chapter 12 Article 2 of the Swedish Instrument of Government (*Regeringsformen*), one of the constitutional

<sup>1</sup> SOU 2010:68, available in Swedish at <http://regeringen.se/sb/d/108/a/154177>.



laws, states the independence of public authorities: "No public authority, including the Riksdag, or decision-making body of any local authority, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority *vis-à-vis* an individual or a local authority, or relating to the application of law." Further, according to Chapter 8 Article 1 the Swedish parliament may also authorise other public authorities to adopt regulations. This authorisation requires, however, an act of law or an ordinance. Rather often, this authorisation together with the specific functions of a public authority are detailed in an Ordinance adopted by the Government, e.g. the Ordinance Instructing the Post and Telecom Agency<sup>2</sup> deals with the specific tasks of the National Post and Telecom Agency (PTS).

- Safeguards on "universal service"

Universal services in the context of electronic communications are solely regulated in the Electronic Communications Act, i.e. no constitutional provisions have been implemented when transposing the Electronic Communications Directive.

#### 2.2.26.1.2. *Media order (de lege lata and de facto)*

- "Market Entry"
  - Licensing schemes; remit psm; notification for print publications

The Broadcasting Authority grants commercial TV licences, whilst the Government grants licences for public service TV channels.<sup>3</sup> A TV licence issued by the Broadcasting Authority is generally valid for six years; the Government can determine the duration of the licences it issues.<sup>4</sup>

A broadcaster must have adequate financial and technical resources to broadcast during the entire term of the licence.<sup>5</sup> A licence may have certain conditions, such as to broadcast programmes throughout the country, to broadcast a diverse range of programmes<sup>6</sup> or to prohibit advertising or sponsored programmes<sup>7</sup>.

The new Radio and Television Act (Radio- och tv-lag, SFS 2010:696) introduces requirements on the accessibility of television programmes for those with functional impairments (Chapter 5, Section 12). A license granted under the Act may carry with it certain conditions, e.g. to require that a programme be broadcast throughout the country or to a specific part of the country (see Chapter 11 Section 3, Chapter 13 Section 9).

The Broadcasting Authority grants licences to broadcast commercial radio.<sup>8</sup> Such licenses are generally valid for eight years.<sup>9</sup> Commercial radio is split into analogue and digital. A licence to broadcast analogue commercial radio is only granted to a natural or legal person that has adequate financial and technical resources to broadcast during the entire term of the licence.<sup>10</sup> The same applies for digital commercial radio, along with the

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<sup>2</sup> Förordning (2007:951) med instruktion för Post- och telestyrelsen.

<sup>3</sup> Chapter 4 Section 3 Radio and Television Act.

<sup>4</sup> Chapter 4 Section 12 Radio and Television Act.

<sup>5</sup> Chapter 4 Section 5 Radio and Television Act.

<sup>6</sup> Chapter 4 Section 9 Radio and Television Act.

<sup>7</sup> Chapter 4 Section 10 Radio and Television Act.

<sup>8</sup> Chapter 13 Section 1 Radio and Television Act.

<sup>9</sup> Chapter 4 Section 30 Radio and Television Act.

<sup>10</sup> Chapter 13 Section 4 Radio and Television Act.

condition that the person is prepared to cooperate with other licence holders on technical matters.<sup>11</sup> Both types of commercial licences may be subject to certain conditions.<sup>12</sup>

Radio and TV programmes that are sent online via live broadcast or as streaming services fall automatically under the protection of the Fundamental Law on Freedom of Expression, provided that they are aimed at the general public. In this case they do not require a license but have to be registered with the Swedish Broadcasting Authority. Making a video or audio clip available for download on a website is not considered a protected broadcast. Such a service may, however, be protected if a certificate of no legal impediment (*utgivningsbevis*) is granted (see below).

The Government grants licences to public service radio broadcast operations, along with to those who broadcast radio to places outside of Sweden.<sup>13</sup> Such a licence may have similar conditions such as those for TV broadcasts<sup>14</sup> and, as for TV, the Government can determine the duration of the licence.<sup>15</sup>

Public service broadcasters are required, freely and independently of external financial, political and other interests, to offer a range of programmes that are available to everyone, reflect the entire country and are characterised by good quality, impartiality and relevance, irrespective of their genre.<sup>16</sup>

An inquiry executed by an expert commission is to look into the remit and conditions of public service broadcasting ahead of the next licence period (starting in January 2014).<sup>17</sup>

Newspapers, i.e. periodicals, must apply for a certificate of no legal impediment to publication (*utgivningsbevis*) according to the Freedom of the Press Act. Upon granting of the certificate, the periodical falls under the Freedom of the Press Act and all its rights and obligations. Applications have to be submitted to the Swedish Patent and Registration Office (PRV)<sup>18</sup> and state a responsible editor for the periodical.

The certificate also applies to the online version of a newspaper. If the two versions are not identical, a newspaper can register a responsible editor with the Swedish Broadcasting Authority. This possibility is also available for websites and online databases in general. Even online discussion forums can fall within this category if all posts and comments are approved by the editor before they are published. By receiving a certificate from the Swedish Broadcasting Authority a website can claim the same freedom of expression protection as radio and TV (see further below). This means, inter alia, that the Swedish Personal Data Act (*Personuppgiftslag (1998:204)*) is not applicable.<sup>19</sup>

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<sup>11</sup> Chapter 13 Section 23 Radio and Television Act.

<sup>12</sup> Chapter 13 Sections 9, 27, 28 Radio and Television Act.

<sup>13</sup> Chapter 11 Section 1 Radio and Television Act.

<sup>14</sup> Chapter 11 Section 3 Radio and Television Act.

<sup>15</sup> Chapter 11 Section 4 Radio and Television Act.

<sup>16</sup> <http://www.sweden.gov.se/sb/d/14475/a/161859>.

<sup>17</sup> ToR 2011:51, <http://www.sweden.gov.se/sb/d/8375/a/173449/pressitem/173449#anc173449>.

<sup>18</sup> <http://www.prv.se>.

<sup>19</sup> More information in Swedish at <http://www.radioochtv.se/Tillstand-och-registrering/Internet/Utgivningsbevis/>. More on the relation between privacy and freedom of expression in Christine Kirchberger (ed), *Cyber Law in Sweden*, Kluwer Law International, 2011, para 407.

- Media pluralism/ownership; competition law aspects

Sweden does not have any media-specific competition rules. The general anti-concentration rules, stipulated mainly in the Swedish Competition Act (*Konkurrenslag SFS 2008:579*), apply.<sup>20</sup>

There have only been a few cases where the Swedish Competition Authority (*Konkurrensverket*) got involved with regards to media concentration. One example was the purchase of the Swedish movie chain Sandrew Metronome by SF Bio. The district court did not see any legal obstacles for the purchase and dismissed the case.<sup>21</sup>

In 2006 the European Commission initiated court proceedings against Sweden as certain digital terrestrial broadcasting services were in fact held by a partly state-owned company. After amending the Radio and Television Act, the Commission stopped the court proceedings.<sup>22</sup>

In practice, competition on the TV market can be seen both between the different channels as well as between the different TV operators.<sup>23</sup>

- Media pluralism/ownership; competition law aspects

Public service media consists of Sveriges Radio AB (SR), Sveriges Television AB (SVT) and the Swedish Educational Broadcasting Company (UR). These companies are financed through radio and television fees, in accordance with the Television Licence Fees Act (1989:41). The fee is levied on all who own a TV or radio receiver. TV sellers are obliged to report the purchase of televisions to the government, although individual reporting of ownership is voluntary.

Parliament decides on the level of the fees and on the annual funding for the public service broadcasters.

- The role and functioning of regulatory authorities in these respects

The Ministry of Culture is responsible for media policy. As shown above, there are different authorities involved depending on the type of media in question. Their responsibilities are clearly regulated in legislation.

On 1 August 2010, the Swedish Broadcasting Authority replaced the previous agencies, the Broadcasting Commission and the Swedish Radio and TV Authority. The Broadcasting Authority is required to monitor developments within the field of media, to decide on permits, charges and registration, to exercise supervision on issues relating to TV broadcasts, on-demand, teletext and radio broadcasts, and to decide on issues related to certificates of publication. A special decision-making body in the new agency examines whether the content of radio and TV programmes comply with the rules for broadcasting.<sup>24</sup>

- "Pursuit of Core Activity"

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<sup>20</sup> [http://www.kkv.se/upload/Filer/ENG/Publications/The\\_Swedish\\_Competition\\_Act.pdf](http://www.kkv.se/upload/Filer/ENG/Publications/The_Swedish_Competition_Act.pdf).

<sup>21</sup> Decision by the Stockholm District Court from 9 June 2005, no T 6633-05.

<sup>22</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/878&format=HTML&aged=1&language=EN&guiLanguage=en>.

<sup>23</sup> See also the report by the Swedish Competition Authority, TV-Distribution in Sweden - Is It Competitive? at <http://konkurrensverket.se/t/asp/rapport.asp?rid=126>.

<sup>24</sup> <http://www.sweden.gov.se/sb/d/9197/a/161339>.

- Ordinary law safeguards for journalistic activity

Both the Freedom of the Press Act (TF - *Tryckfrihetsförordningen*) and the Fundamental Law on Freedom of Expression (YGL - *Yttrandefrihetsgrundlagen*) contain safeguards for journalistic activity. For example, Chapter 1 Article 2 TF stipulates: "No written matter shall be scrutinised prior to printing, nor shall it be permitted to prohibit the printing thereof."

The principle of editorial responsibility (*ensamansvar*) means that only one person can be held responsible – from a criminal and civil law perspective. Chapter 8 TF and Chapter 6 YGL identify the person to be held responsible, e.g. the editor of a TV programme.

One of the main cornerstones of the Swedish freedom of information laws is the principle of protection for whistleblowers and sources (*meddelarskydd*). The principle encompasses several rights:

- a) freedom of communication - *meddelarfrihet* (anybody is allowed to communicate information regarding any subject for publication in print or any other media protected by TF or YGL)
- b) freedom of procurement of information - *anskaffarfrihet* (anybody is allowed to procure information on any subject for publication in any of the media protected by TF or YGL)
- c) right to anonymity – *rätten till anonymitet* (right to not have one's name published)
- d) prohibition of inquiry into the identity – *efterforskningsförbud* (public authorities are not permitted to inquire into the identity of an author).

There are certain exceptions to these principles, though they are limited and specified clearly in the two Acts.

Any publications that fall within the two Acts cannot be prosecuted on the basis of the Swedish Criminal Code, but have to be judged according to the special Articles in TF (Chapter 7) and YGL (Chapter 5).

In general, criminal liability for any offence rests with the responsible editor (Chapter 8 TF and Chapter 6 YGL). In other words, the author of a publication cannot be held responsible.<sup>25</sup>

- Specific positive content obligations

There are no specific rules on content obligations, but some might apply on an individual basis. For example, the broadcasting license for SVT (Sveriges Television, the public service broadcaster) includes general rules on the importance of content and cultural diversity and a specific responsibility for upholding the status of the Swedish language.

- Funding schemes for specifically desired content

Sweden financially supports its daily press according to the Press Aid Regulation (*Presstödsförordning (SFS 1990:524)*). There are two forms of subsidies to the daily

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<sup>25</sup> Additional information in English can be found in the information material from the Ministry of Justice, Public Access to Information and Secrecy Act, 11 September 2009: <http://www.sweden.gov.se/sb/d/574/a/131397>.

press, one for operation and one for distribution. The operational subsidy is granted to daily newspapers that meet the requirements of the Regulation. Press aid is available to newspapers, i.e. publications of daily press character that are published at least once a week, have content primarily written in Swedish and are mainly distributed within Sweden. There are different requirements dependent on if the newspapers has a high (6-7 times a week) or medium (3-5 times a week) periodicity or if it has low periodicity (1-2 times a week). In general the subscribed circulation has to be at least 1,500 copies, and primarily be based on subscriptions. In addition, the average distribution among households may not exceed 30 %. For low periodicity newspapers a maximum requirement regarding paid advertising share is also stipulated.<sup>26</sup>

At the moment around 90 daily newspapers receive this operational subsidy, which amounted to 500 million SEK in 2011. Distribution subsidy is paid to daily newspapers that are distributed through organized and shared distribution. Currently 137 daily newspapers receive this distribution subsidy, which amounted to 67 million SEK in 2011.<sup>27</sup>

The EU Commission (DG Competition) approached the Swedish Government in 2009 with regards to the fact that the state aid is not in compliance with the single market.<sup>28</sup> Sweden subsequently amended the Press Aid Regulation in 2010.

- Political advertising and/or broadcasting time

Although advertising is specifically dealt with in the Radio and TV Act,<sup>29</sup> political advertising is only regulated where a broadcast is subject to conditions of impartiality,<sup>30</sup> where such advertising is prohibited. In other cases, political advertising has been prohibited by terms of the broadcasting licences. As will be discussed below, many channels broadcast from the UK, and are therefore subject to UK law, where in any case political advertising is prohibited. In practice, the Swedish prohibition applies only to the public service channels, SVT (television), SR (radio) and UR (the Swedish Educational Broadcasting Company). This is because the broadcasting licences issued to digital and commercial channels from 2006 onwards no longer contained the prohibition on political advertising;<sup>31</sup> this therefore means that commercial channels, including the TV4 Group, can show political advertising.<sup>32</sup> Such advertising is, however, not common, and only tends to occur during election periods.

- Codes of conduct and their organisational framing

The code of ethics has not changed since 2004. The self-regulatory code was issued by the Press Cooperation Committee (*Pressens Samarbetsnämnd*), a Joint Committee founded by media organisations in Sweden (The Newspapers Publishers Association, The Magazine Publishers Association, The Union of Journalists and The National Press Club). It applies for press, radio and television and was last amended in 2001. The four media organisations are responsible for the Charter of the Press Council and the Standing

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<sup>26</sup> For more details please see <http://www.prestodsnamnden.se/hem/in-english/>.

<sup>27</sup> See the website of the Press Subsidies Council (*Presstödsnämnden*): <http://www.prestodsnamnden.se/hem/in-english/>.

<sup>28</sup> See press release at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/940>.

<sup>29</sup> Chapters 8 and 15.

<sup>30</sup> Chapter 5 Section 6 in relation to TV and Chapter 14 Section 3 in relation to radio.

<sup>31</sup> <http://sverigesradio.se/sida/artikel.aspx?programid=1291&artikel=828307>; [http://www.bt.se/ledare/kronikoror/fritt-fram-for-politisk-tv-reklam-hur-blev-det-sa\(2135641\).gm](http://www.bt.se/ledare/kronikoror/fritt-fram-for-politisk-tv-reklam-hur-blev-det-sa(2135641).gm).

<sup>32</sup> <http://www.tv4.se/1.300043>; <http://www.tv4.se/1.1242852>.

Instructions for the Press Ombudsman and contribute to the financing of both the Press Council and the Office of the Press Ombudsman.<sup>33</sup>

The code consists of six main rules of publicity:

- to provide accurate news: news reports should be accurate and objective, facts should be checked, the text should be in line with headlines, pictures should be checked for authenticity.
- to treat rebuttals generously: factual errors should be corrected, critical rulings by the Swedish Press Council should be published without delay.
- to respect individual privacy: refrain from publication that could violate individual privacy, exercise caution in publishing information about suicide, show consideration for victims of crime, do not emphasise particulars e.g. ethnic origin, sex, nationality etc. unless important.
- to exercise care in the use of pictures: readers should not be misled or deceived, it should be stated when a picture has been altered.
- to listen to each side: represent the view of all parties, remember that a person suspected of an offence is innocent until proven guilty.
- be cautious in publishing names: refrain from publishing names if it might cause harm unless it is obviously in the public interest, refrain from publishing a picture or particulars that would enable identification, remember that responsibility for publishing names and pictures rests with the publisher.

The Press Council and the Press Ombudsman are responsible for matters regarding the press.

- The role and functioning of regulatory authorities in these respects

The Swedish Broadcasting Authority is responsible for monitoring radio and television programmes, forming part of the Ministry of Culture and set up in August 2010 following the new Radio and Television Act.

- Distribution Aspects
  - Access to frequencies

In accordance with Chapter 4 Section 1 of the Radio and Television Act, the Government decides what broadcasting frequencies are allocated for TV broadcasts that require a licence.

The Broadcasting Authority determines the boundaries of the transmission areas for analogue whereas the Government decides the broadcast frequencies for digital commercial radio.<sup>34</sup>

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<sup>33</sup> The Press Ombudsman, <http://www.po.se/english/code-of-ethics>.

<sup>34</sup> Chapter 13 Sections 2, 22.

- Access to distribution networks and control of actual conditions

Distribution of newspapers is being handled by several private or partly state-owned companies.<sup>35</sup> There is no direct obligation to coordinate the distribution of newspapers, but the above mentioned press subsidy for distribution is only granted if the newspapers cooperate and apply the principle of equal pricing. The subsidy, therefore, leads to an indirect motivation to coordinate the distribution of periodicals in Sweden and most of the Swedish daily newspapers participate in the cooperation.

Concerning radio and TV, there is no common distribution network. Teracom, a state-owned company, has provided the technical infrastructure for TV and radio since the 1920s. Nowadays it also controls the infrastructure for terrestrial digital broadcasts and offers data communication. In the pay-TV segment, services are offered through its subsidiary Boxer. As a company with significant market power, Teracom has – according to a decision by PTS – to allow providers access to its distribution network.

Some of the larger electronic communication providers also offer TV packages, and vice versa. Comhem, for example, both offers cable TV and Internet access via the same network. Telia and some other communications providers have started offering TV subscription, often in co-operation with large media companies, e.g. Telia offers TV in co-operation with Viasat.

- Must-carry/must-offer rules for electronic media

Section 1 Chapter 9 of the Radio and Television Act deals with the obligation of cable and IP-TV operators to retransmit programmes and stipulates that any natural or legal person owning an electronic communication network shall ensure that residents can receive television broadcasts. In practice this concerns transmissions from the Swedish public service channels, SVT.

If an operator does not allow the transmission, one can file a complaint with the Swedish Broadcasting Authority.

- Role of platform operators

The Swedish digital terrestrial network currently consists of five transmitter networks or multiplexes. Multiplex 1 (consisting of the public service TV stations SVT1, SVT2, SVT24, etc.) reaches 99.8% of permanent Swedish households, multiplexes 2-4 (e.g. TV4, Kanal 5 and TV3) approximately 98% and multiplex 5 approximately 70%. Multiplex coverage has gradually expanded since 2004. Each multiplex can accommodate up to seven different programme services depending on programme content and compression.<sup>36</sup>

To an increasing extent, organisations and especially local authorities have started offering open broadband networks, typically called city networks (*stadsnät*). One example is Sundbyberg situated in the greater area of Stockholm.<sup>37</sup> The idea is that the operator provides the platform (currently mainly fibre network) on top of which service operators can offer their specific services such as Internet access, TV, radio, telephony, etc. The platform operators are often local municipalities who aim at providing a fast network to their citizens and cooperate closely with house-owners' and tenants'

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<sup>35</sup> A list of companies can be found here in Swedish <http://www.tu.se/marknadsinsikt/73-distribution/1620-distributorer>.

<sup>36</sup> The Digital TV Commission's final report, KU 2004:04, [www.regeringen.se/content/1/c6/11/30/58/5153a9e7.pdf](http://www.regeringen.se/content/1/c6/11/30/58/5153a9e7.pdf).

<sup>37</sup> Sundbybergs Stadsnät <http://www.sundbybergsstadsnat.se/>.



organisations. The advantage is increased competition between the service providers as housing organisations previously would conclude a contract with one network and service provider only. Now the municipality offers the network and different service providers offer Internet, TV, radio and/or telephony to the apartment owners or tenants.

In order to increase standardisation, the different providers of open networks founded an umbrella organisation, the city network factory.<sup>38</sup>

- the role and functioning of regulatory authorities in these respects

For most issues regarding distribution, the Swedish Broadcasting Authority is the responsible regulatory authority. However, for newspapers there is no regulatory authority as no legal obligation exists in relation to distribution.

- Access to Information

- Transparency of media ownership situations

Several Swedish organisations publish reports on a regular basis on the media market and the different companies owning media services. One example is the Press Subsidies Council (*Presstödsnämnden*), which publishes annual numbers on the economy of the daily press.<sup>39</sup> There is also an online database that lists all Swedish magazines and newspapers, also sorted by media company.<sup>40</sup>

Another example is NORDICOM, a knowledge centre within media and communication research, and a cooperation between the five countries of the Nordic region - Denmark, Finland, Iceland, Norway and Sweden. NORDICOM publishes an annual report on the Swedish media landscape, comprising newspapers, journals, books, radio, television and film.<sup>41</sup> These reports not only publish statistics about the media market, but also the involvement of the different media companies in the market. In addition, the reports discuss the ownership structure of the major media companies and their histories.

- Accountability of public service media

Public service media must follow the rules set out in the Radio and Television Act, for example on impartiality, objectivity, respect for privacy and advertising.

The Swedish Broadcasting Authority is responsible for monitoring radio and television programmes. As stated above, the authority is part of the Ministry of Culture. Public service media hand in an annual report to the Ministry of Culture, detailing the fulfilment of their public service duties. The reports are available online through the company's website.<sup>42</sup>

- Freedom of information laws

The main act with regards to access to information is the Freedom of the Press Act (*Tryckfrihetsförordningen*), in particular Chapter 2. In Sweden, the principle is openness,

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<sup>38</sup> <http://www.stadsnatsfabriken.se/>.

<sup>39</sup> <http://www.presstodsnamnden.se/publikationer-2/dagspressens-ekonomi/>.

<sup>40</sup> <http://www.medieregistret.se/>.

<sup>41</sup> Links to other media-relevant websites can be found at <http://www.nordicom.gu.se/eng.php?portal=mt&main=showLinksMt.php&media=Sverige&type=land&translation=Sweden&me=14>.

<sup>42</sup> E.g. [http://svt.se/2.60232/1.698442/public\\_service-redovisningar](http://svt.se/2.60232/1.698442/public_service-redovisningar) and <http://sverigesradio.se/sida/artikel.aspx?programid=3088&artikel=4858908>.

which means that an official document can be accessed by the public unless the law states otherwise. The main act containing such exceptions is the Public Access to Information and Secrecy Act (*Offentlighets- och sekretesslag* (2009:400)).<sup>43</sup>

- Accessibility of products/services and distribution networks

Sweden's switch from analogue to digital TV did not lead to any aid schemes, as it was assumed that the market would regulate itself in order to keep competition within the sector. In addition, the Swedish government decided to rely upon the regular social security system to meet the needs of vulnerable groups.<sup>44</sup> As such, no groups receive discounts on for example the broadcasting licence fee e.g. students or pensioners.<sup>45</sup> Newspapers often offer commercially reduced rates for subscriptions, for example to students. However, this is through self-regulation, and is mainly done to attract new customers.

As stated previously, the Swedish Electronic Communications Act (2003:389) requires that universal services shall always be available for everybody on equivalent terms throughout Sweden at affordable prices (Chapter 1 Section 1 Paragraph 2). This includes for example telephony and functional Internet access.<sup>46</sup>

The Swedish Broadband Strategy from 2009 states that 40 % of households and businesses should have access to broadband at a minimum speed of 100 Mbps by 2015, and 90 % by 2020. Infrastructure investment will be done by the market players. The Government aims at providing good business conditions for the market players. In addition, they introduced a home improvement tax allowance for certain types of groundwork, e.g. work on cables for electricity or electronic communication.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

The Press Council and the Press Ombudsman are responsible for matters regarding the press. They are independent self-disciplinary bodies that deal with complaints about the editorial content of newspapers, magazines and their websites. The complainant must be personally affected (i.e. identified in some way) by the publicity and the complaint should be made within three months from publication.<sup>47</sup> Companies, government authorities and organisations can also file complaints.

When a complaint is filed, the Press Ombudsman must decide whether it can be dealt with by a factual correction or a reply from the affected person published in the newspaper concerned. If this is not the case, the Press Ombudsman may undertake an inquiry if she/he suspects that the rules of good journalistic practice have been violated. The outcome of this enquiry will be either that the matter does not warrant formal criticism of the newspaper, or that the evidence is weighty enough to warrant a decision by the Press Council.<sup>48</sup> A newspaper that has been found to violate good journalistic practice is expected to publish the written decision of the Press Council, and shall pay an administrative fine.

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<sup>43</sup> More information in English can be found in the information material from the Ministry of Justice, Public Access to Information and Secrecy Act, 11 September 2009, <http://www.sweden.gov.se/sb/d/574/a/131397>.

<sup>44</sup> The Digital TV Commission's final report, KU 2004:04, SOU 2008:35.

<sup>45</sup> <http://radiotjanst.se/sv/avgiften/>.

<sup>46</sup> Broadband Strategy for Sweden, Government Offices of Sweden, 2009, p.34.

<sup>47</sup> <http://www.po.se/english>.

<sup>48</sup> <http://www.po.se/english/how-self-regulation-works>.

The Swedish Broadcasting Authority is responsible for monitoring radio and television programmes. The Broadcasting Commission deals with complaints regarding the content of media broadcast by Swedish companies at the local, regional and national levels.<sup>49</sup> The Commission's decision can be guilty, exculpatory (i.e. free from blame), or exculpatory with criticism. The result of a guilty decision depends on what rule the company has broken; it may have to publicise the decision, it may be required to pay a special fee to the state, or it may be fined if it does not comply with certain measures.

However, as many television channels are owned by foreign companies, they do not fall under the Swedish Radio and Television Act and instead follow the rules of the country where the company is established. Several of the main channels broadcast to Sweden fall within these rules. TV3, TV6, TV8 and TV10 are broadcast by Viasat Broadcasting UK Ltd; Kanal 5 and Kanal 9 are broadcast by SBS Broadcasting Networks Ltd. As these two companies are established in the UK, complaints are handled by the British authority Ofcom (Office of Communication). A complaint must have reached Ofcom within 20 days from the date of broadcast. Matters relating to TV advertisements are sent on to the ASA (Advertising Standards Authority). An agreement has been reached whereby the Swedish Broadcasting Commission sends complaints regarding the British companies to Ofcom; Ofcom reports the outcome of any review to the Swedish Broadcasting Commission.<sup>50</sup>

As the Broadcasting Commission deals with complaints regarding the content of Swedish media broadcasts there is no need for a special ombudsman at the public service broadcaster.

In addition to these media-specific procedures, the Swedish Consumer Agency (*Konsumentverket*) has the task of safeguarding consumer interests. The Agency's Director General, also the Consumer Ombudsman, represents consumer interests in relations with businesses and can pursue legal action.<sup>51</sup>

- Participation in media operators/(self-)regulatory bodies

Many media operators have set up viewers' or readers' panels, but it depends very much on the individual company what influence these panels have.

## 2.2.26.2. Main Players in the Media Landscape

### 2.2.26.2.1. Radio

The conditions for sending commercial radio have recently been relaxed, following the new Radio and Television Act. Commercial radio's total revenue amounted to 688 million SEK in 2010.<sup>52</sup> Two main groups, MTG (Modern Times Group) and SBS Radio, control virtually all of the commercial radio market.

71.4% of the Swedish population listen to radio at least 5 minutes on a regular day. On average they listen for 3 hours and 10 minutes every day.<sup>53</sup>

<sup>49</sup> <http://www.radioochtv.se/Tillsyn/Granskning-av-program/Granskningsnamndens-beslut/>.

<sup>50</sup> <http://www.radioochtv.se/Tillsyn/Granskning-av-program/Detta-kan-man-anmala/>.

<sup>51</sup> <http://www.konsumentverket.se/otherlanguages/English/About-the-Swedish-Consumer-Agency/>.

<sup>52</sup> *Den svenska mediemarknaden 2011*, Sundin, *MedieNotiser* Nr. 3/2011, Nordicom (Nordic Information Centre for Media and Communication Research), p. 23, [http://www.nordicom.gu.se/?portal=mr&main=info\\_publ2.php&ex=346](http://www.nordicom.gu.se/?portal=mr&main=info_publ2.php&ex=346).

<sup>53</sup> TNS SIFO Radioundersökningar Rapport II 2012, <http://www.tns-sifo.se/rapporter-undersokningar/radioresultat>.

MTG Radio has 45 stations, with an audience share of 18%. SBS Radio has greatly strengthened its position on the market recently through several major acquisitions, including Bonnier radio. It has 42 stations, and in December 2010 received 13 of the 14 new broadcasting licenses announced by the Broadcasting Authority. SBS Radio currently has an audience share of 15%. The balance of market power will change in 2013 when SBS Radio takes over the running of NRJ's 20 stations, which have been part of MTG since 2004.

Public service radio, Sveriges Radio, has four national channels, 26 local channels and some digital channels. Public service radio accounts in total for 51% of the audience share; the largest national channel is P4 with 30%. Local radio gains 2.7% and web radio 4.4% (divided approximately equally between public service and commercial radio) of the audience share.<sup>54</sup>

#### 2.2.26.2.2. Television

Television has undergone a transition in the 2000s from expensive analogue technology to low-cost digital technologies, which has fundamentally changed production and distribution conditions. As a result, a number of new channels have been launched by all the major players in the market. These new channels are generally niche channels, focusing for example on sport or nature. A number of large foreign media groups have recently established themselves on the TV production market through the acquisition or launch of companies, for example the British company ITV with ITV Studios Nordic and the German company Bertelsmann with Freemantle. Within the distribution market there is intense competition between satellite, cable and terrestrial networks and between companies in each sector. The major telecom companies have in recent years started to offer IPTV and mobile TV.

70.7% of the Swedish population watched TV at least 5 minutes every day in 2011. On an average day people watched TV for 162 minutes which is 4 minutes less than in 2010.

Public service television, Sveriges Television, consisting of 5 channels, has a combined audience share of 35%. The TV4 Group, consisting of 20 channels, follows with a 29% audience share. Other players are Viasat/MTG (17%) and SBS Broadcasting/ProSiebenSat1 (9%).<sup>55</sup>

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<sup>54</sup> Figures taken from *Den svenska mediemarknaden 2011*, Sundin, *MedieNotiser* Nr. 3/2011, Nordicom, p. 23-24.

<sup>55</sup> Figures taken from *Den svenska mediemarknaden 2011*, Sundin, *MedieNotiser* Nr. 3/2011, Nordicom, p. 25-26, 43-44.

**Table 147 SE: Main television operators, their channels and audience share**

TV Company	Number of Channels	Audience share 2010 %
Sveriges Television	6 e.g. SVT1, SVT2	35.3
TV4/Bonnier	18 e.g. TV 4, Canal +	28.8
Viasat/MTG	19 e.g. Channel 3, 6, 8	17.3
SBS Broadcasting/ProSiebenSat1	2 e.g. Channel 5 and 9	9
Discovery	6	2.2
Viacom	4	1.9
Disney	3	1.8
Time Warner	4	0.8
BBC	4	0.4
MMG	4	0.2
Other		2.7

### 2.2.26.2.3. *Press and publishing*

In 2010 the overall revenues from the newspaper business amounted to about 18 billion SEK. An additional 492 million SEK are added through the Swedish press subsidies, representing an added income of 2.6%. The overall result from the newspaper business was 1.4 billion SEK.

The two largest newspaper owners are the Stampen Group and the Bonnier Group, accounting for 23–24% of the total revenues of the daily newspaper industry. The third largest newspaper unit is the Schibsted Group with a share of 16%. This means that that the two biggest units accounted for 47% of the industry's revenues.<sup>56</sup>

Sweden has about 170 newspapers with a circulation of about 4 million. Around 87% of the Swedish population reads a newspaper daily.<sup>57</sup>

<sup>56</sup> Source: Report by Press Subsidies Council (Presstödsnämnden) on the Economy of the Daily Press for 2010 (*Dagspressens Ekonomi*). <http://www.presstodsnamnden.se/publikationer-2/dagspressens-ekonomi/>.

<sup>57</sup> <http://www.tu.se/in-english/1697-swedish-newspapers>.

#### 2.2.26.2.4. Online media (non-linear audiovisual (media) services; websites)

Moving images, TV and video clips have become an increasingly common activity on the Internet. Larger and faster broadband has contributed to this trend. In 2011, 21% of the Swedish population watched TV via the Internet, as compared to 9% in 2009. YouTube is one of the most visited websites.

In 2011, the following types of media were – at least occasionally – accessed via the Internet:<sup>58</sup>

**Table 148 SE: Access to media websites/types of content**

Types of media accessed (at least occasionally)	Percentage (%)
Newspapers	80
Music (listening/downloading)	66
TV	54
Video (watching/downloading)	53
Radio	45

With regards to the daily usage patterns, 35% read newspapers online every day, 6% listen to radio and 4% watch TV online. The most commonly visited online TV channel is SVT, the Swedish public service television, followed by TV4, which is only half as common.

Another trend is online music, with services such as *Spotify* streaming music at a wide selection and low cost. In 2011, 57% of the Swedish population listened to music online, which correlates to almost everybody interested in music in general.<sup>59</sup>

Monthly statistics over the most visited Swedish websites, calculated according to the number of daily visitors and page views, are available on <http://www.alex.com>.

<sup>58</sup> Taken from Swedes and the Internet 2011, Report by .SE, <http://www.internetstatistik.se/rapporter/swedes-and-the-internet-2011/>, p. 14.

<sup>59</sup> Swedes and the Internet 2011, Report by .SE, <http://www.internetstatistik.se/rapporter/swedes-and-the-internet-2011/>

**Table 149 SE: Most important websites used/monthly basis**

Rank	Website	Description	Website Address
1	Google	Search engine	<a href="http://www.google.se">http://www.google.se</a>
2	Facebook	Social network	<a href="http://www.facebook.com">http://www.facebook.com</a>
3	Google	Search engine	<a href="http://www.google.com">http://www.google.com</a>
4	YouTube	Video search engine	<a href="http://www.youtube.com">http://www.youtube.com</a>
5	Aftonbladet	Online news	<a href="http://www.aftonbladet.se">http://www.aftonbladet.se</a>
6	Wikipedia	Encyclopaedia	<a href="http://www.wikipedia.org">http://www.wikipedia.org</a>
7	Windows Live	Search engine	<a href="http://www.live.com">http://www.live.com</a>
8	Blocket	Individual advertisements	<a href="http://www.blocket.se">http://www.blocket.se</a>
9	Blogspot	Blogging platform	<a href="http://www.blogspot.se">http://www.blogspot.se</a>
10	Yahoo!	Search engine	<a href="http://www.yahoo.com">http://www.yahoo.com</a>
11	Swedbank AB	Bank	<a href="http://www.foreningssparbanken.se">http://www.foreningssparbanken.se</a>
12	LindedIn	Social network	<a href="http://www.linkedin.com">http://www.linkedin.com</a>
13	The Pirate Bay	Bittorrent directory	<a href="http://www.thepiratebay.se">http://www.thepiratebay.se</a>
14	Expressen	Online news	<a href="http://www.expressen.se">http://www.expressen.se</a>
15	Twitter	Social network	<a href="http://www.twitter.com">http://www.twitter.com</a>
16	WordPress.com	Blogging platform	<a href="http://www.wordpress.com">http://www.wordpress.com</a>
17	Hitta	Yellow Pages	<a href="http://www.hitta.se">http://www.hitta.se</a>
18	Dagens Nyheter	Online news	<a href="http://www.dn.se">http://www.dn.se</a>
19	The Internet Movie Database	Media database	<a href="http://www.imdb.com">http://www.imdb.com</a>
20	Svenska Dagbladet	Online news	<a href="http://www.svd.se">http://www.svd.se</a>

The following figures are taken from <http://www.alex.com/topsites/countries/SE> on 8 May 2012:

Statistics updated on a weekly basis are also available and can be found at <http://www.tns-sifo.se/rapporter-undersokningar/webbplatsstatistik>.



### 2.2.26.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers

TV in Sweden is being delivered by terrestrial, cable, satellites and IPTV. The main pay-TV operators in Sweden are (the infrastructure owner within parenthesis):<sup>60</sup>

- Terrestrial: Boxer (Teracom)
- Cable: Com Hem, Canal Digital, Tele2Vision, numerous local distributors
- Satellites: Viasat (SES), Canal Digital (Telenor)
- IPTV: Telia Digital-TV, FastTV, Bredbandsbolaget, Canal Digital

**Table 150 SE: Providers of digital TV services (June 2011)<sup>61</sup>**

Provider of digital TV	Market share based on subscriptions
Boxer	23.3%
Comhem	22.8%
Canal Digital	12.9%
Telia Sonera	15.9%
Viasat	12.3%
Others	12.7%

**Table 151 SE: Providers of broadband access (June 2011)<sup>62</sup>**

Provider of (fixed & mobile) broadband	Market share based on subscriptions
Telia Sonera	37.4%
Tele 2	15.6%
Telenor	21%
Hi3g	9.3%
ComHem	7.5%
Others	9.1%

<sup>60</sup> <http://konkurrensverket.se/t/asp/rapport.asp?rid=126>.

<sup>61</sup> The Swedish Telecommunications Market first half-year 2011, PTS, <http://www.statistik.pts.se/pts1h2011e/index.html>.

<sup>62</sup> The Swedish Telecommunications Market first half-year 2011, PTS, <http://www.statistik.pts.se/pts1h2011e/index.html>.

#### 2.2.26.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)

The audience share per day for SVT1 is 39%, SVT2 23% and TV4 36%.<sup>63</sup>

In 2010, the share of total advertising investment was the following: newspaper 26%, Internet/mobile 19%, television 17%, radio 2%.<sup>64</sup>

According to another report, a total of 13,5 billion SEK was invested into advertising in 2011. TV advertising amounted to 5,1 billion, newspapers to around 4 billion SEK, Internet to 1,7 billion and radio to 412 million.<sup>65</sup>

#### 2.2.26.3. Conclusion and Recommendations

Freedom of information and freedom of expression have had a long and strong tradition in Sweden. Not only from a historical perspective – Sweden enacted the first freedom of information act in 1766, but also from a legislative perspective, as both freedoms are stipulated in the Swedish constitution. Starting from this strong base, the importance of human rights in context with other interests such as privacy, Sweden has seen a lot of discussion on the balance of different interests. Recent discussions focused particularly on the possibility for websites to receive a certificate of no legal impediment (*utgivningsbevis*), the consequence being that several Swedish online services no longer fall under the Swedish Personal Data Act.

The self-regulatory regime within the press has been effective and has guaranteed both protection of individual interests and freedom of expression for journalists and media organisations. Effective complaint procedures are in place and diversity in content and culture has been seen not only in the press but in TV and radio alike. The high amount of soft law and self-regulation within press, radio and TV does not hinder access to information by citizens, rather it allows for more flexibility and therefore does not require any further legislative measures.

Though media concentration is rising in certain sectors, especially within print and newspapers, competition is still strong enough to provide a working market with advantages for consumers and the general public. In the event of dominant positions and mergers that would change the market balance, the Swedish Competition Authority can prevent and limit possible damage. Though not only a Swedish phenomena, media companies are increasingly growing and merging into several markets (press, tv, radio, internet). Media providers are in many instances owned by non-Swedish companies, and may provide services in several European countries at the same time. This leads to an increased need of harmonised legislation in order to ensure a certain minimum standard throughout the EU, not only with regard to access rights but also complaint procedures which at the moment involve cross-border cooperation in some cases.

Public service media guarantees diversity in content and impartiality while press subsidies ensure that also smaller newspapers can survive and share their opinion with the public. Sweden completed its digital switchover for television in late 2007. The new Radio and Television Act was a consequence of the move to digital and the need to fully implement the Audio-Visual Media Services Directive (2007/65/EC). The new Act covers on-demand television, unlike the previous. In addition, rules on advertising are simplified

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<sup>63</sup> MMS Annual Report 2011, in Swedish at <http://www.mms.se/rapporter/tv-tittandet/ar.asp>.

<sup>64</sup> *Den svenska mediemarknaden 2011*, Sundin, *MedieNotiser* Nr. 3/2011, Nordicom, p. 6.

<sup>65</sup> *Mediebyråbarometern för december och helåret 2011*, <http://www.sverigesmediebyraer.se/mediebarometerDec2011.shtml>.

and specific provisions regarding product placement have been introduced.<sup>66</sup> As Sweden has implemented the relevant EU Directives, no concrete measures are necessary in this regard.

The Swedish broadband strategy has greatly increased the number of high-speed Internet connections and the infrastructure is continuously developing. In addition, e-government initiatives, facilitated by The eGovernment Delegation (<http://en.edelegationen.se/>), aim at providing citizens with a vast variety of electronic services which allows people living in remote areas to access services otherwise not easily available to them. These initiatives together actively encourage access by citizens and no further measures are currently necessary in order to ensure universal access to services.

The Swedish principle of openness combined with a strong protection for sources and whistleblowers has guaranteed citizens' access to information and contributed to an open public debate. Opinions have been voiced on the risks of such a strong protection, as the privacy of individuals might be at stake at times. It remains to be seen if the current Government inquiry will lead to any changes in the legislation and if the balance of interests will be adapted in order to consider personal integrity to a larger extent.

As the report touches upon opposing human rights i.e. access to information and protection of privacy, as well as bringing in national and European legislative competence, possible recommendations must be dealt with at different levels. To the extent EU harmonisation is applicable, ensuring a minimum level of freedom of information has to be a priority. Privacy will always be one of the main opponents to freedom of information but is generally something that needs to be weighed on a case-by-case basis. As freedom of information is very much connected to government and public authorities some aspects should stay within the competence of the national legislator, and national traditions should be taken into consideration. From a Swedish point of view, the principle of openness is considered particularly important. Although this is shown in the area of public service, the growing private sector involvement in the media market may not reflect this principle to the same extent. As private sector involvement is unlikely to diminish in the near future, a higher level of transparency would be recommended in order to ensure citizens' access rights.

Due to convergence of different media types (newspapers being published online, TV available via mobile phones etc.), the fact that different legislation is applicable dependent upon the media in question (radio, TV, internet etc.), and that different rules and procedures apply depending on the media company in question (public service broadcaster, private company established nationally or outside of Sweden), the current media landscape in Sweden is somewhat complex for the average citizen to fully comprehend. The complexity of the current framework may lead to certain problems, such as a citizen being unsure of where to file a complaint. In order to make the framework easier to understand, technology-neutral legislation focusing on the content and not the medium would therefore be recommended. In addition, information on which authority has responsibility for particular issues should be made more readily available to citizens, so that in the case they are unsure of where to turn to they are guided to the relevant authority. The number of responsible authorities could also be minimised, and a more streamlined approach adopted.

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<sup>66</sup> Chapter 8 and Chapter 6 respectively.

## UNITED KINGDOM

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### 2.2.27. United Kingdom

#### 2.2.27.1. Human Rights/Fundamental Guarantees, Legislation/Regulation, Codes of Conduct/Practice

The United Kingdom does not have a formal, written constitution. Protection of fundamental freedoms, usually found in written bills of rights, can be found instead in ordinary statutes, though the courts have begun to recognise that some statutes are more significant in constitutional terms than others.<sup>1</sup> While parliamentary sovereignty means that this category of statutes could be repealed, any such repeal would require the express wording of Parliament.

##### 2.2.27.1.1. Human rights/Fundamental freedoms

- Freedom of expression/Freedom of the media

As noted in the previous report, fundamental rights are, in principle, protected in the United Kingdom by the Human Rights Act 1998, which incorporates the provisions of the European Convention on Human Rights, including freedom of expression (article 10 ECHR). Two points in this regard should be noted. First, section 12 of the Human Rights Act provides specific protection for freedom of expression in that, when determining a case which impacts upon freedom of expression, the court should have regard to any code of practice. Initially, it had been thought that this meant that the courts would automatically defer to the relevant regulatory (or self-regulatory) bodies. This has not proved to be the case. Apart from section 12, the media are not guaranteed any special rights to freedom of expression, or rights of access to information, over and above that awarded to individuals (see immediately below), with the possible exception of protection of journalists' sources. Secondly, while it is assumed that the human rights act is a constitutional statute, as noted this does not mean it is immune from repeal. The current government in its election manifesto said it would repeal the human rights act, replacing it with a "British" Bill of Rights. This controversial proposal has not yet been acted upon. The Human Rights Act therefore, for the time being, remains in force.

- Freedom to receive and to access information

UK legislation provides for access to public information. The Freedom of Information Act, as described in the initial country report, came into force in 2005. Note there is an equivalent act to cover Scotland (Freedom of Information (Scotland) Act 2002). The Data Protection Commissioner was given responsibility for overseeing the act, and was re-named the Information Commissioner (s. 18(1) Freedom of Information Act). It is far from clear whether the Freedom of information Act is a constitutional statute as described above.

Although the UK subscribes to the principle of open justice; a trial has been described as a 'public event'<sup>2</sup> and the courts have emphasised that not only must justice be done, but it must be seen to have been done.<sup>3</sup> Thus, the rules on access to the family courts (for the purpose of reporting on the process of justice) have been relaxed. Current proposals

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<sup>1</sup> *Thoburn v Sunderland City Council* [2003] QB 151, DC.

<sup>2</sup> *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 607.

<sup>3</sup> *R v Sussex Justices; Ex parte Macarthy* [1924] 1 KB 256, 259.

aim to allow for a greater number of hearings in camera, which would exclude not only members of the public but also media representatives. This apparently is in the interests of the fight against terrorism.

The protection to journalists' sources, protected partly by virtue of the Strasbourg jurisprudence on freedom of expression, is recognised within the UK via a range of statutory provisions, but not given an express constitutional status, notably s. 10 Contempt of Court Act (see 2.2.27.1.2 below). Certainly, some concerns have been expressed in Parliament as to whether stronger guidance should be given to police forces as to the need to respect confidentiality of sources.

- Safeguards on regulatory authorities

The Information Commissioner's Office (ICO) is an independent public body set up to uphold information rights in the public interest; it also retains responsibility for data protection.

- Safeguards on "universal service"

Universal service is protected via the regulation of broadcasters and the imposition of must carry/must-offer obligations in the statutory regime (see chapter below).

#### *2.2.27.1.2. Media order (de lege lata and de facto)*

Media regulation in the UK is a patchwork of self-regulatory, co-regulatory and regulatory initiatives involving a range of public bodies and industry initiatives. As noted in the previous report, the key piece of legislation is the Communications Act 2003, which covers electronic communications including radio and television broadcasting and confers powers to regulate the sector, on Ofcom. It has a broad range of powers concerning licensing, content regulation, radio frequency allocation and competition matters. The BBC is subject to a separate regime, contained in its Charter and agreement.<sup>4</sup> As the Charter forms the basis of the BBC's incorporation, as well as defines its nature and tasks, the Charter must be renewed to ensure the BBC's continued existence and functioning. The current Charter runs until 31 December 2016. Recent information from DCMS informs us that a White Paper is planned for early 2013, with a Bill to be introduced by the last session of this Parliament. The press is currently not subject to regulation, but instead claim to operate a self-regulatory system. This is currently subject to review under the Leveson Enquiry.

- "Market Entry"
  - Licensing schemes; remit psm; notification for print publications

Broadcasters remain regulated via a licence granted by The Office of Communications (Ofcom), though for many categories of licence (e.g. digital programme services, digital additional services and their radio equivalents) Ofcom must grant the licence if certain conditions are fulfilled. Such licences do not confer a right of access to a communications network or spectrum: the content provider must make its own arrangements. Following the provisions of the Communications Act, public service broadcasters have a greater range of obligations imposed on them (via licence conditions) than the non-terrestrial/commercial broadcasters (holding a television licensable content service

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<sup>4</sup> See further, Woods, L., 'Regulation and Extra-Legal Regulation of the Media Sector' in Goldberg, Sutter and Walden (eds) *Media Law and Practice* (OUP, 2009), pp. 347 *et seq.*

licence). The government is proposing to introduce specific provisions to allow the introduction of local television services on Freeview. Comprising three statutory instruments,<sup>5</sup> these will form the framework to allow Ofcom to regulate local television: currently, two of these orders are still in draft. On-demand services must notify The Authority for Television On Demand (ATVOD) of the on-demand services that they provide. ATVOD is under a duty to ensure that service providers comply with standards set down in the amended Communications Act and may ensure compliance through enforcement notification and financial penalties.<sup>6</sup>

The policy direction of the Communications Act was to a large extent deregulatory.<sup>7</sup> In line with this, Ofcom, which is an independent body, has delegated regulatory responsibility in respect of broadcast advertising to the Advertising Standards Authority (ASA) and, in respect of video on demand, to ATVOD.<sup>8</sup> Although Ofcom has some regulatory responsibility for the BBC, the BBC is subject to a separate regime under its Charter, involving the BBC Trust.

The print media lies outside Ofcom's remit, being governed by a self-regulatory scheme, based on the Editors' Code, and implemented by the Press Complaints Commission (PCC). The proposal to give Ofcom the power to oversee all media and not just TV and radio was dropped from the (then) Digital Economy Bill in an attempt to get the bill through parliament before the end of that parliament. Following the phone hacking scandal, the Leveson Enquiry was set up. The Leveson Inquiry as an investigation into the culture, practices and ethics of the press is running in four "modules" dealing with:

- the relationship between the press and the public and looks at phone-hacking and other potentially illegal behaviour;
- the relationships between the press and police and the extent to which that has operated in the public interest;
- the relationship between press and politicians; and
- Recommendations for a more effective policy and regulation that supports the integrity and freedom of the press while encouraging the highest ethical standards.

Some reporting has suggested the Leveson Inquiry is looking at the bid by NewsCorp to acquire shares in BSkyB. This is not the case; the matter has been discussed as part of "module 3", as the final say in media mergers can rest with the Secretary of State for Culture Media and Sport and is a politicised, if not political, decision. As a result of the phone-hacking revelations, the PCC has agreed to transfer its responsibilities and assets to a new regulatory body.<sup>9</sup> The form of this body has not yet been agreed, and the PCC continues as a transitional regulator.

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<sup>5</sup> The Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2012 (still in draft); The Local Digital Television Programme Services Order 2012 (still in draft); and The Code of Practice for Electronic Programme Guides (Addition of Programme Services) Order 2011 (SI 3003/2011).

<sup>6</sup> S. 368I Communications Act 2003, as amended by The Audiovisual Services Regulations 2009 (SI 2009/2979).

<sup>7</sup> See also Deregulation and Contracting Out Act 1994 ("DCOA").

<sup>8</sup> S, 368B Communications Act 2003.

<sup>9</sup> PCC, Minutes of the meeting of The Press Complaints Commission Limited, held on Wednesday 21 February 2012, available at [http://pcc.org.uk/assets/559/Minutes\\_February\\_2012.pdf](http://pcc.org.uk/assets/559/Minutes_February_2012.pdf) [accessed 13th April 2012].

- Media pluralism/ownership; competition law aspects

The basic framework for media ownership remains as it was described in the previous report; that is, a media-specific regime found in the Communications Act, which imposes a specific public interest test on media mergers, against the general competition framework found in the Competition Act 1998 in which the main actors are the Competition Commission and the Office of Fair Trading (OFT). As suggested above, there was public concern about the independence of the relevant Secretary of State in making his decision on the BSkyB bid (referred under this regime), and the revelations of the Leveson Inquiry have re-inforced this concern. Critics of the regime have suggested that it is inappropriate for final decisions to be made as an administrative matter by a politician and that it might be preferable to have some form of check on this power – either by an obligation to follow the regulators' views or by having the decision approved by Parliament (see further below).

Note that the Competition Commission and OFT are not limited to media ownership concerns, but may review anti-competitive practices of media undertakings generally. For example, the OFT referred 'project kangaroo' to the Competition Commission. Project Kangaroo was a joint venture between the BBC, Chanel 4 and ITV to produce a paid-for on-line video-on-demand service. The service was felt to constitute too much of a threat to competition in a developing market and the project was blocked by the Competition Commission.<sup>10</sup>

Under the provisions introduced by the Enterprise Act, Ofcom has a duty to flag up concerns about media plurality, whilst the Broadcasting Act also makes the regulator responsible for ensuring licence owners of broadcast media are "fit and proper". The meaning of 'fit and proper' has been the subject of some debate in the light of the phone hacking scandal: the Liberal Democrats raised the question of the extent to which group companies would be tainted by the activities of other companies in the same group.<sup>11</sup> While this seems in principle possible,<sup>12</sup> Ofcom did not seem enthusiastic about investigating the matter over the summer of 2011.<sup>13</sup> Nonetheless, the matter was raised again in the House of Lords but any action seems to be awaiting the outcome of the Leveson Enquiry and any decision to bring criminal charges against the persons involved.<sup>14</sup>

Ofcom is under a duty<sup>15</sup> to report on media ownership every three years: the most recent report was that of 17 November 2009. As a result of this report, a statutory instrument was introduced<sup>16</sup> to remove the restrictions on ownership in local radio and press. It amends Schedule 14 to the Communications Act and the Media Ownership (Local Radio and Appointed News Provider) Order 2003.<sup>17</sup> The following restrictions were removed from the Schedule: the prohibition on a person holding a licence to provide a regional Channel 3 service where that person also runs a local newspaper (or local newspapers) with a local market share of 20 per cent or more in the coverage area of the service; the prohibition on holding more than one national radio multiplex licence; and

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<sup>10</sup> [http://www.competition-commission.org.uk/press\\_rel/2009/feb/pdf/05-09.pdf](http://www.competition-commission.org.uk/press_rel/2009/feb/pdf/05-09.pdf).

<sup>11</sup> See press Release 8 July 2011, [http://www.libdems.org.uk/press\\_releases\\_detail.aspx?title=Simon\\_Hughes%3A\\_Ofcom\\_must\\_investigate\\_whether\\_BSkyB\\_is\\_%E2%80%99fit\\_and\\_proper%E2%80%99&pPK=292bc47b-a281-4faa-a990-7e0c0505885f](http://www.libdems.org.uk/press_releases_detail.aspx?title=Simon_Hughes%3A_Ofcom_must_investigate_whether_BSkyB_is_%E2%80%99fit_and_proper%E2%80%99&pPK=292bc47b-a281-4faa-a990-7e0c0505885f).

<sup>12</sup> Ofcom's paper "Frequently asked Questions 'Fit and Proper' in relation to broadcast licensees" of 18 July 2011.

<sup>13</sup> Ofcom's letter to Rt Hon Simon Hughes MP, Rt Hon Don Foster MP and Tim Farron MP of 22 July 2011.

<sup>14</sup> Hansard, House of Lords Debates 7 March 2012, columns 1771-2.

<sup>15</sup> S. 402, and Schedule 14 to the, Communications Act 2003.

<sup>16</sup> Media Ownership (Radio and Cross-media) Order 2011 (SI 1503/2011).

<sup>17</sup> The Media Ownership (Local Radio and Appointed News Provider) Order 2003 (SI 2003/3299).



the prohibition on holding more than one local radio multiplex licence in specified circumstances.

The efficacy of the media ownership rules and the public interest test has, however, been the subject of some debate in the light of News Corporation's abortive bid for BSkyB, and Ofcom suggested that the public interest test may need revision.<sup>18</sup> Particular concern has been expressed about concentration of control in news production for television.<sup>19</sup> Following the phone-hacking scandal, there has been some suggestion that media ownership rules need further amendment to prevent the rise of the over-mighty press baron.<sup>20</sup> Consequently, Ofcom has been requested to work on "a new framework for media plurality in a cross-media world".<sup>21</sup> A consultation on the issues closed on 18 November 2011, but the outcome is not yet known. The House of Commons Select Committee contemporaneously launched an inquiry into media plurality.<sup>22</sup>

As the Leveson Inquiry reveals malpractice among the UK media, broadcast regulator Ofcom is recommending that the state of media ownership should be assessed around once every four years but rejects the prospect of market share prohibition. In its report submitted in early June 2012, Ofcom has proposed an effective framework for measuring media plurality be based, to a significant extent, on data and analysis. It said that on balance, a periodic review of plurality every 4 or 5 years is the best approach with further consideration needed as to whether the existing media merger regime should sit within a new proposed plurality regime or continue in parallel. Ofcom added that online media should be included in a plurality review as online news sources are used by a significant and growing proportion of the UK population. Ofcom rejects on the other hand the notion of share prohibition as being "inflexible". It notes that in terms of prohibitions on transactions, there is currently a prohibition which prevents an organisation with more than a fifth of national newspaper circulation from holding a similar share or more in a Channel 3 licence or licensee. Ofcom considers that the case for retaining or removing this rule in the context of a new proposed plurality regime is a matter for the UK Parliament. Ofcom recommends that the BBC Trust assesses the BBC's contribution to plurality, both internal and external, and considers a framework for measuring and evaluating this periodically.

Ofcom also has more general competition obligations. It was under its competition powers under the Enterprise Act that Ofcom carried out an investigation into Premium Pay TV Movies (see further below),<sup>23</sup> and with regard to Sky Sports provision,<sup>24</sup> in both instances finding a distortion of competition.

- Legal framework for psm; ability to fulfill their tasks

The framework for public service broadcasting in the UK remains as before: the BBC provision under the Charter and Agreement and the services provided by terrestrial broadcasters under the Communications Act. It is heavily reliant on self-assessment, although Ofcom provides a review of the provision of PSB periodically, most recently in

<sup>18</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/public-interest-test-nov2010/statement/public-interest-test-report.pdf>.

<sup>19</sup> House of Lords Select Committee on Communications, *The Ownership of the News*, 1st Report of Session 2007–08, (HL Paper 122–I).

<sup>20</sup> See e.g. House of Lords Debates, *supra* n. 12.

<sup>21</sup> [http://www.culture.gov.uk/images/publications/CMS\\_188245\\_Ensuring\\_Media\\_Plurality.pdf](http://www.culture.gov.uk/images/publications/CMS_188245_Ensuring_Media_Plurality.pdf).

<sup>22</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/inquiries/parliament-2010/media-plurality/>.

<sup>23</sup> Ofcom, Premium pay TV movies – Decision, 4 August 2010, [http://stakeholders.ofcom.org.uk/consultations/movies\\_reference/statement/](http://stakeholders.ofcom.org.uk/consultations/movies_reference/statement/).

<sup>24</sup> Ofcom, Pay TV Statement, 31 March 2010, [http://stakeholders.ofcom.org.uk/consultations/third\\_paytv/statement/](http://stakeholders.ofcom.org.uk/consultations/third_paytv/statement/).

2008. Note, however, the 2010 BBC funding settlement saw the licence fee frozen for 6 years at £145.50 pa, with the BBC at the same time absorbing costs for the World Service and the Monitoring Service (previously the responsibility of the Foreign Office) as well as some of the costs of S4C (the Welsh language channel broadcast in Wales). While some concerns have been expressed about the impact on quality of increasing spending obligations while reducing funds, the government's view is that this is a matter to which the BBC and BBC Trust must attend.<sup>25</sup>

At the same time, the Digital Economy Act 2010 (better known for the controversial obligations imposed on ISPs to stop on-line piracy) introduced new provisions regarding Channel 4: s. 22 Digital Economy Act 2010 inserted into the Communications Act 2003 a new section, s 198A, which requires Channel 4 to 'participate in (a) the making of a broad range of relevant media content of high quality that, taken as a whole, appeals to the tastes and interests of a culturally diverse society,<sup>26</sup> which includes news and current affairs; content that appeals to the tastes and interests of older children and young adults; and "feature films that reflect cultural activity in the United Kingdom".<sup>27</sup> Its original requirement to make innovative content for minority groups now applies to its online activities as well as television. In general, this represents a strengthening on the public service/public sphere obligations of Channel 4<sup>28</sup> which otherwise had perhaps become best known for its extensive Big Brother transmissions. New content reporting requirements were also imposed on Channel 4.

- The role and functioning of regulatory authorities in these respects

Save to the extent that Ofcom has designated ATVOD and the ASA as competent authorities with regard to video on demand, the legal position has not changed since the last report,<sup>29</sup> although the public climate has perhaps altered. In particular, the effectiveness of the PCC has been the subject of much criticism in the evidence given to the Leveson Inquiry. Of less high profile has been the response to ATVOD. Many web-based providers (including the on-line version of newspapers and magazines) have been concerned as to ATVOD's expansive approach to its jurisdiction, which has led to a number of challenges to ATVOD's determination of whether a service falls within the definition of ODPS.<sup>30</sup> The majority of the appeals to Ofcom have been unsuccessful, although some determinations have been withdrawn, in particular with regard to on-line newspapers. Ofcom plans to review the regulation of VOD during 2012 and has invited stakeholders' views.<sup>31</sup> Note also the proposals with regard to the introduction of local television services: the draft order will extend provisions of the Broadcasting Act 1996 and Part 3 of the Communications Act 2003 (with modifications) to local digital television programme services and are thus to be regulated by Ofcom.

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<sup>25</sup> Hansard, House of Lords Debates, 17 November 2010, column WA205, question HL3874.

<sup>26</sup> S. 198A(1)(a) Communications Act 2003.

<sup>27</sup> S. 198(A)(1)(b) Communications Act 2003.

<sup>28</sup> See section 265 Communications Act 2003.

<sup>29</sup> For a review of regulatory bodies in this sector in the UK, see Woods, L., 'Regulation and Extra-Legal Regulation of the Media Sector' in Goldberg, Sutter and Walden (eds) *Media Law and Practice* (OUP, 2009).

<sup>30</sup> A list of appeals to Ofcom can be found on the Ofcom website: <http://www.atvod.co.uk/regulated-services/scope-determinations>.

<sup>31</sup> Ofcom, Invitation to Stakeholders to make contributions to ATVOD Review, 22<sup>nd</sup> march 2012, Available at <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/atvod-invite.pdf> [accessed 13 April 2012].

- "Pursuit of Core Activity"
  - Ordinary law safeguards for journalistic activity

The key provision is s. 10 Contempt of Court Act, which permits journalists to maintain the confidentiality of their sources. It is subject to four listed exceptions, although the party seeking disclosure must show that disclosure is necessary for one of those purposes. The House of Lords in *Ashworth Hospital Authority v MGN*<sup>32</sup> noted that the same approach to the issue of necessity should be adopted in the UK as in the case of *Goodwin v UK*<sup>33</sup> under the ECHR. The Police and Criminal Evidence Act (PACE) 1984 provides a special regime for the police when they wish to obtain "journalistic material". On the other side of the coin, production orders may also be made under the Terrorism Act 2000<sup>34</sup>, and during the phone-hacking scandal, (unsuccessful) attempts were made by the police to use the Official Secrets Act to circumvent the PACE regime. Actions between private parties may also result in journalists being forced to reveal sources, through *Norwich Pharmacal*<sup>35</sup> orders. The ECHR decision in *Financial Times v UK*<sup>36</sup> reiterated that protection of journalists' sources is one of the basic conditions of press freedom in a democratic society, even when the source is operating malevolently. In finding a violation of Article 10 ECHR, it seems the approach of the British courts (admittedly a Court of Appeal decision<sup>37</sup> criticised by the Lords in *Ashworth*) was insufficient. As a contrast, it should be noted that there is no right of anonymity for those who seek to publish on-line. In *the Author of a Blog*,<sup>38</sup> which concerned a whistleblower whose identity the Sunday Times sought to expose, Eady J held that anonymity was not protected by privacy. This is an unfortunate judgment as the court did not consider the freedom of expression aspects of this issue (and the Leveson Inquiry reveals that the factual basis of the decision for the Sunday Times may have been inaccurate).

Before the phone-hacking scandal broke, there was much in the press about the draconian defamation laws and the illegitimate development of a law of privacy by judges. To some extent, the issue of whether the UK law on defamation is acceptable depends on your view of the value of speech. By comparison with the USA, the UK position was more restrictive, but hardly the most restrictive in Europe. Case law had developed some protection<sup>39</sup> and there were defences, though there were concerns about the way this operated in practice<sup>40</sup> as was recognised in *Jameel v Dow Jones*.<sup>41</sup> Nonetheless, a new bill<sup>42</sup> is under consideration, having recently passed second reading without debate.<sup>43</sup> The bill proposes to legislate so as to avoid trivial claims, arguably already the position under cases such as *Thornton v Telegraph Media Group Ltd*<sup>44</sup> and even *Jameel v Dow Jones*,<sup>45</sup> where the court reiterated the point that there needs to be a substantial wrong. The view was taken that legislation would clarify any doubt on the matter and discourage dubious claims and a substantial-harm-test was included in the bill. The bill also proposes a new defence providing for responsible publication in the public

<sup>32</sup> [2002] UKHL 29.

<sup>33</sup> (1996) 22 EHRR 123, para 39.

<sup>34</sup> *Malik v Manchester Crown Court & anor* [2008] EWHC 1362 (Admin).

<sup>35</sup> [1973] 2 All ER 943.

<sup>36</sup> *Financial Times v UK* Application no. 821/03, judgment 15 December 2009.

<sup>37</sup> *Interbrew SA v Financial Times* [2002] EWCA Civ 274.

<sup>38</sup> *The Author of a Blog v. Sunday Times* [2009] EWHC 1358 (QB).

<sup>39</sup> *Reynolds v Times Newspapers* [1999] 4 All ER 609; *Jameel v Dow Jones* [2005] EWCA Civ 75; *Flood v Times Newspapers Limited* [2012] UKSC 11.

<sup>40</sup> For a general discussion of the issues and solutions see Reframing Libel: <http://reframinglibel.com/>

<sup>41</sup> [2005] EWCA Civ 75.

<sup>42</sup> <http://www.justice.gov.uk/consultations/365.htm>

<sup>43</sup> The Joint Committee on Human Rights has issued a call for evidence on this bill.

<sup>44</sup> [2010] EWHC 1414 (QB), citing the House of Lords in *Sim v Stretch* 1936] 2 All ER 1237.

<sup>45</sup> [2005] EWCA Civ 75.

interest. Note, this defence – following the line of the preceding case law – does not apply just to journalists. Interestingly, the proposal that compliance with press codes of conduct should be taken into account has not been included. The bill also proposed new defences of ‘truth’, abolishing the existing common-law defence of justification though seemingly reflecting it<sup>46</sup>, and ‘honest opinion’, which parallels fair comment as most recently elaborated in *Spiller v. Joseph*.<sup>47</sup> The bill proposes changes to the rules on privilege and also to introduce a single publication rule. Jurisdiction has been changed to address the perceived fear of libel tourism (though the incidence of actual cases of libel tourism is low). Other key questions relate to defamation on the internet, as well as the cost of, and time taken in, bringing an action, as well as the question of the extent to which corporations should be able to bring actions for defamation. The bill is not yet law; the Joint Committee on the Draft Defamation Bill has recently published its report.<sup>48</sup> It made the important point that, ‘It is essential that the Government makes clear, in a way that the courts can take into account, during the passage of the Bill if not before, when it is seeking to make changes of substance to the law and when it is simply codifying the existing common law.’ It also made proposals for a new take-down procedure regarding Internet publications. It seems clear, however, that there will be no special treatment for journalists though they may be more likely to benefit from some of the changes than others. Much of the case law on privacy has been based on Article 8 ECHR and associated jurisprudence, leading some commentators to suggest that it is this that motivates some elements of the press in an anti-Convention stance. The courts take a balancing approach between the competing interests of Articles 8 and 10 ECHR; neither takes automatic priority and much will turn on the facts.<sup>49</sup> It has been suggested that certainty would be best served by the development of a new bill on privacy; this has not been taken forward however, and it is debatable how much a bill would solve given problems which lie in the application of legal principles to the facts. One issue that has given rise to particular concern is the privacy injunction, particularly the so-called ‘super injunction’. A super injunction is different from anonymity, as a super injunction requires that no information about the case can be published. It should be remembered that anonymity does not arise purely in celebrity cases but can relate to family matters or asylum. It seems hard to ascertain the numbers of injunctions/super-injunctions, though the Inforrm blog is publishing information on this matter now.<sup>50</sup> One of the key concerns is the extent to which blackmail arises in the context of celebrity partners, threatening to ‘kiss and tell’ for money. Note the PCC code does not cover payments for a ‘kiss and tell’ story (cf payments to criminals prohibited by cl 16).<sup>51</sup> Eady J commented, ‘*the majority of cases over the last few years, in which the courts have had to apply those [privacy] principles, would appear to be of the so called “kiss and tell” variety and they not infrequently involve blackmailing threats*’.<sup>52</sup> While there seems to be a risk of blackmail

<sup>46</sup> In *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772 at para 34, the Court of Appeal indicated that “the defendant does not have to prove that every word he or she published was true but rather the “essential” or “substantial” truth of the sting of the libel”.

<sup>47</sup> [2010] UKSC 53.

<sup>48</sup> <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20304.htm>.

<sup>49</sup> For a review, see Eady, D., “Protecting free speech in the context of the European Convention of Human Rights” <http://www.city.ac.uk/centre-for-law-justice-and-journalism/seminars-events/past-events/cljj-inaugural-lecture>.

<sup>50</sup> <http://inforrm.wordpress.com/privacy-injunctions-2010-2011/> See also <http://lawjusticejournalism.org/2011/04/14/privacy-injunction-hearings-not-super-but-anonymous/#more-126> and Justice Wide Open, Centre for Law, Justice and Journalism, City University London: <http://lawjusticejournalism.org/2012/01/16/registration-open-for-justice-wide-open-event-on-legal-knowledge-in-a-digital-era/>.

<sup>51</sup> See comments of Robertson and Nicol *Media Law* (5<sup>th</sup> ed) p. 790.

<sup>52</sup> *CTB v Newsgroup Newspapers* [2011] EWHC 1232 (QB).

here<sup>53</sup>, there is presumably a danger a claim of blackmail has turned into a catch-all justification for a super injunction.

- Specific positive content obligations

The Communications Act requires public service broadcasters to cover specified types of content. These obligations are repeated in the licences (save for the BBC, where relevant provisions are found in the Charter and Agreement) and then given force through Statements of Programme Policy (SOPs) and reviewed through a self-assessment regimes (SARS).<sup>54</sup> A similar self-assessment system operates with regard to the BBC and its obligations under the Charter and Agreement.

Public service broadcasters are under obligations to produce certain types of desired content, though to different degrees. They are also required to commission work from third party producers. The Communications Act also requires terrestrial licensees to provide news, but these provisions have been criticised for being too flexible and allowing Channel 5 to scale back its news provision and ITV to lower its regional news production. Ofcom had previously allowed ITV to scale back its production of children's programming.<sup>55</sup>

Perhaps one of the key differences between the regulation of the print media and the broadcast media as far as access to information for the audience is concerned, is the fact that there is no taste and decency clause in the Editors' Code and nor is there any impartiality requirement, both of which are imposed on broadcasters. In this there is nothing new, though there is pressure from some quarters to remove the impartiality obligation.

- Funding schemes for specifically desired content

There is no specific provision regarding funding schemes.

- Political advertising and/or broadcasting time

Non-broadcast political ads, such as those appearing on posters, newspapers, cinemas and leaflets, do not have to comply with the same strict rules to which all other ads have to adhere but political advertising has always been banned from television and radio. The ban is now based on s. 319(2)(g) Communications Act 2003 and reflected in the BCAP codes and the Ofcom Content Code. Section 7 of the BCAP Code provides: "*No advertisement: (a) may be inserted by or on behalf of any body whose objects are wholly or mainly of a political nature; (b) may be directed towards any political end*" and in this tracks the wording of the Communications Act. The question of whether an advert is political is to be determined by Ofcom, not the ASA. The ban is enforced via the inclusion by virtue of sections 321 and 325 of the Act, of a condition in broadcasters' licences requiring them to secure compliance with the prohibition.

'Political' has a wider meaning than 'party political' and covers such things as issue campaigning or seeking to influence opinion on matters of public controversy but should

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<sup>53</sup> See also e.g, *OPQ v BJM* [2011] EWHC 1059 (QB) – it is interesting that the contra mundum injunction was granted even though there was no threat to life or limb, which was the previously excepted position: *Tugendhat and Christie: The Law of Privacy and the Media* (OUP, 2011), para 13.35. Eady held it was available where Convention rights were threatened.

<sup>54</sup> For more detail see Woods, L., 'Regulation and Extra-Legal Regulation of the Media Sector' in Goldberg, Sutter and Walden (eds) *Media Law and Practice* (OUP, 2009), pp 358-360.

<sup>55</sup> Ofcom, Statement on Reduction in ITV's Children's Programmes, 18 March 2008, available at: <http://stakeholders.ofcom.org.uk/broadcasting/tv/children-itv/> [accessed 13 April 2012].



be distinguished from a public service announcement under section 321(7)(a). An example of this difficult boundary can be seen in the *Bedtime Story* advert, dealing with climate change and broadcast at the behest of a number of government departments. The broadcasting of this advert led to many complaints to the ASA. While that body could deal with issues such as whether the advertisements were misleading, it fell to Ofcom to deal with the complaint that, as the advert dealt with a matter of controversy, it violated the ban on political advertising.<sup>56</sup> The relevant government departments made the point that a matter of public interest can still be controversial, but that there was no reason why the government should not seek to educate people as to the current prevailing scientific understanding on such an issue. Ofcom broadly agreed, holding that "the primary determinant of an advertisement of a public service nature is that the advertisement's purpose is to inform and educate the public by means of imparting information which is in the public interest" and that this was a matter of fact to be determined in each case. Factors to take into account are: the nature of the advertisement's subject matter; the nature of any information or advice given; the manner in which information or advice is given; the timing and context of the advertisement's broadcast; and the degree of any controversy that might be associated with the subject matter and/or contents of the advertisement. Ofcom noted that there was debate about whether anthropogenic climate change existed but recognised that current scientific orthodoxy accepted this theory. Ofcom concluded that the advertisement fell within s 321(7)(a), but was close to the edge of acceptable. By contrast to earlier adverts, this broadcast focussed much more on broader issues, rather than specific actions that individuals could take. More recently, Clearcast determined that an ad by ONE International called "The F Word – Famine is the Real Obscenity" was in breach of the prohibition as ONE International appears to be a political organisation with political objectives: to pressure political leaders to take particular action.<sup>57</sup> In this, it was applying Ofcom's decision in *Make Poverty History*,<sup>58</sup> a decision which has been criticised for meaning that any charity which has even only a partial political purpose will fail this test. By contrast, an anti-bullying advert by a charity was deemed acceptable by Clearcast (though this is not determinative: Ofcom has the final say).

The Communications Act requires Channels 3, 4 and 5, and national radio stations, to give airtime to political parties in the form of Party Political Broadcasts (PPBs) and Party Election Broadcasts (PEBs). PEBs are limited to 5 minutes' duration, though in practice political parties prefer shorter slots. Parties must contest at least one sixth of seats to be entitled to a broadcast. The major parties' broadcasts are carried in "peak time" - between 6pm and 10.30pm. For smaller parties, their allocation depends on size. Note that the limitation on the broadcasters does not apply to the Internet and during the last general election, the Tories, LibDems and Labour launched their election broadcasts on YouTube and similar sites. All parties also used social networking sites; again outside the general field of media regulation. As smaller parties get less television coverage, the Internet is a valuable tool for publicity. Matters were reviewed by Ofcom and Electoral Commission, though no steps to regulate have been taken as yet.

The Queen's Speech is also broadcast at Christmas.

- Codes of conduct and their organisational framing

There has been some disquiet about the PCC's level of effectiveness since its inception. While the system has been subject to on-going monitoring by the Department for

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<sup>56</sup> Ofcom Broadcast Bulletin, 167, 11 October 2010.

<sup>57</sup> Clearcast Press Release 7 October 2011, <http://www.clearcast.co.uk/clearance-of-one-campaign>.

<sup>58</sup> Ofcom Broadcast Bulletin, 43, 12 September 2005.

Culture, Media and Sport (DCMS), it is only now in the light of the phone hacking scandal that change is envisaged. The nature of the change has not yet been finalised so the Editors Code continues to be relevant. As noted in the previous report, there is a code of ethics adopted by the National Union of Journalists (NUJ). There is no separate enforcement mechanism for the code, although some employers will require compliance as part of the terms of a journalist's employment.

Since the last report, there have been a number of changes to the codes underpinning the regulatory system, all have been, to varying degrees, updated (Ofcom Content Code; BBC Editorial Guidelines; Editors' Code; NUJ code; ATVOD Rules and Guidance (March 2011); BCAP Code (on broadcast advertising)). There are likely to be more changes forthcoming. Last year, the phone-hacking scandal broke, resulting in the House of Commons Select Committee investigating the matter,<sup>59</sup> and then the establishment of the Leveson Inquiry.<sup>60</sup> Additionally, there has been a House of Lords enquiry into the Future of Investigative Journalism.<sup>61</sup> Against a background in which the ethics of journalists being scrutinised, the NUJ change to its code gains significance. Essentially, this 2011 amendment inserts what has been termed a "conscience clause" into the NUJ code. It states that journalists are entitled to refuse to produce work in breach of the code and will be given the support of the union if they do so. The NUJ has also established an "Ethics Hotline" to provide further support by allowing journalists to seek a second opinion on a required course of action.

Since the last report, the PCC has engaged in some reform of its institutions and practices, however questions remain. Membership is optional and, while the PCC claims to take preventative action, an increasing number of cases before the ordinary courts as well as the evidence given to the Leveson Inquiry, suggests that the PCC is not an effective body; as noted above, it will hand over to another regulator, its form yet to be determined.<sup>62</sup> It remains to be seen what the outcome of the Leveson Inquiry is; there have been many previous suggestions that the press need stronger regulation and none have come to fruition.

- Distribution aspects
  - Access to frequencies

As noted above, the grant of a content licence does not imply any access to frequency or electronic communication network. The exception to this proposition relates to the terrestrial broadcasters, where the grant of a licence was competitive (under the 1990 Act), and the BBC. Three of the six digital multiplexes carry the BBC and Channels 3, 4 and 5 programming (with a reach of approximately 98.5%).

Note digital switchover will be complete this year and most of the UK except the home counties have already switched off analogue. Some of the digital dividend will be used (geographic interleaved spectrum) to allow the development of local TV, though it may be that such services will be delivered via IPTV in the long term.<sup>63</sup> To implement this

<sup>59</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/inquiries/parliament-2010/phone-hacking/>.

<sup>60</sup> <http://www.levesoninquiry.org.uk/>.

<sup>61</sup> <http://www.parliament.uk/business/committees/committees-a-z/lords-select/communications-committee/inquiries/parliament-2010/the-future-of-investigative-journalism/>.

<sup>62</sup> Ofcom has given evidence to the Leveson Enquiry: available at [http://media.ofcom.org.uk/2012/04/18/ofcom-evidence-to-the-leveson-inquiry/?utm\\_source=updates&utm\\_medium=email&utm\\_campaign=leveson](http://media.ofcom.org.uk/2012/04/18/ofcom-evidence-to-the-leveson-inquiry/?utm_source=updates&utm_medium=email&utm_campaign=leveson).

<sup>63</sup> DCMS, Local Media Action Plan January 2011, [http://www.culture.gov.uk/images/consultations/ConDoc-Local\\_Media\\_Action\\_Plan\\_190111.pdf](http://www.culture.gov.uk/images/consultations/ConDoc-Local_Media_Action_Plan_190111.pdf).



plan, a (draft) SI directs Ofcom to ensure that, at every place in the United Kingdom, one broadcasting channel is kept available, or is made available, for the purposes of multiplex broadcasting of a local digital television programme service.<sup>64</sup>

- Access to distribution networks and control of actual conditions

The Communications Act implements the Telecoms Package and Ofcom has powers under the act for resolving disputes (see s. 185 Communications Act). It has had on a number of occasions considered disputes with regard to EPG charges<sup>65</sup> as well as about the positioning of programmes on the EPG.<sup>66</sup> There is an EPG Code.<sup>67</sup> Under section 310(2) Communications Act the public service broadcasters have a right to an appropriate degree of prominence on EPGs, which is implemented by the code.<sup>68</sup> The code also contains conditions relating to FRAND in respect of other broadcasters. The new local TV stations would also benefit from prominence rules.<sup>69</sup>

- Must-carry/must-offer rules for electronic media

Section 64(1) Communications Act gives Ofcom the responsibility for implementing 'must carry' obligations, which it does by imposing these requirements in electronic communications licence conditions. Section 64(3) lists those services which must be carried as BBC, Channel 3, Channel 4, Channel 5, S4C and the public teletext service. This list may be amended. The broadcasters are subject to matching 'must offer' conditions.<sup>70</sup>

- Role of platform operators

The multiplexes are operated under a non-transferrable licence according to the Broadcasting Act 1996 and then the Wireless Telegraphy Act 2006, s 8(1). Following the collapse of ONDigital (ITV Digital), a 'free to air'-only obligation was imposed on the multiplex operators, essentially to protect Freeview, the consortium set up by the BBC, Crown Castle (as it then was) and BSkyB, which was offering a free-to-air service. In 2006, Ofcom decided to remove the restriction in relation to Multiplexes B, C and D (effectively owned by Freeview consortium). An operator may make an individual request to offer pay-TV, though this was likely to be an issue for Multiplexes C and D, as Multiplex B is operated by the BBC. In 2007 Sky (with Arqiva) proposed to remove Sky Three, Sky News and Sky Sports News, replacing them with 4 subscription channels (Picnic): as Sky also proposed to change the standard used for broadcasting, specific decoder boxes would be required. Ofcom ruled that this would give rise to competition concerns, but in 2010 consented to the Picnic proposal though subject to conditions. Ofcom specifically stated that Sky would be permitted to launch Picnic only once it has concluded a wholesale agreement with at least one third-party retailer. The wholesale agreement would be for the premium sports and movies channels that Sky wishes to retail on DTT - Sky Sports 1 and Sky Movies Screen 1.<sup>71</sup>

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<sup>64</sup> Article 3(2) (Draft) Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2012.

<sup>65</sup> See e.g. Dispute between Rapture TV and Sky about EPG charges (Case CW 00920/09/06), 9 March 2007.

<sup>66</sup> See e.g. Complaint from Education Digital Management Ltd (Case CW/00882/12/05), 10 May 2006.

<sup>67</sup> <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/epg-code/>.

<sup>68</sup> On the impact of location, see report commissioned by Ofcom: Attentional Limited, An Analysis of the Audience Impact of Page One EPG Prominence, July 2010, [http://stakeholders.ofcom.org.uk/binaries/consultations/review\\_c3\\_c5\\_licences/statement/attentionalreport.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/review_c3_c5_licences/statement/attentionalreport.pdf).

<sup>69</sup> The Code of Practice for Electronic Programme Guides (Addition of Programme Services) Order 2011.

<sup>70</sup> Ss 272-275 Communications Act.

<sup>71</sup> <http://stakeholders.ofcom.org.uk/consultations/picnic/statement/>.

- The role and functioning of regulatory authorities in these respects

As noted, these services are licensed by Ofcom, though the licences are now issued under the Wireless Telegraphy Act 2006.

- Access to Information
  - Transparency of media ownership situations

Normal company legislation continues to apply so companies must follow filing obligations for private or public listed companies as relevant. This includes information as to directors and shareholders and is available at companies house.

When companies or individuals apply for a Communications Act licence, they must provide certain information to Ofcom so that Ofcom may satisfy itself that the conditions in the Communications Act are met (e.g. that the licensee is a fit and proper person, or that the licensee is not a disqualified person under the Broadcasting Act 1990 (as amended)). The licence also requires a licensee to provide information to Ofcom *inter alia* about proposals affecting the control of the licensee, and changes in control; changes in shareholders and directors; changes in management, key staff and contact details. Licensees must also inform Ofcom of an intention to transfer a licence, using the appropriate form, which requires similar information, as a licence is transferrable only with the prior written consent of Ofcom.

It is an offence to attempt to mislead Ofcom, which may itself lead to disqualification. Ofcom regards this information as public information and publishes lists of the holders of various licences.<sup>72</sup>

There is no equivalent obligation with regard to the press.

- Accountability of public service media

The situation remains broadly the same as it was at the time of the previous report.

- Freedom of information laws

The general freedom of information laws apply and will affect public bodies. Note that the BBC is permitted to keep commercial information confidential or other sensitive issues<sup>73</sup> (subject to the public interest<sup>74</sup>) or when the requests are vexatious and harrasing.<sup>75</sup> There is also a derogation for the purposes of journalism.<sup>76</sup>

- Accessibility of products/services and distribution networks

A Help Scheme was established to provide everyone aged 75 and over or eligible disabled with everything needed to switch one TV to digital. This covered cost of set top box and any upgrade to aerials. The elderly also continue to enjoy a reduced BBC licence fee.

<sup>72</sup> Available at <http://licensing.ofcom.org.uk/tv-broadcast-licences/updates/>.

<sup>73</sup> See e.g. Freedom of Information Act 2000 (Section 50), Decision Notice Date 15 February 2006 (FS50066295) – re the BBC, where the BBC was allowed not to disclose the minutes of the Trust in response to the Hutton Report.

<sup>74</sup> See e.g. ICO News Release, 13 December 2010 “ICO orders disclosure of contract incentives offered by the BBC”.

<sup>75</sup> See e.g. Freedom of Information Act 2000 (Section 50), Decision Notice Date 19 March 2007 (FS50086298) – re the BBC.

<sup>76</sup> E.g. Freedom of Information Act 2000 (Section 50), Decision Notice Date 14 February 2011 (FS50353677) – re the BBC.

As part of the reorganisation following digital switch over, Ofcom proposes to clear channel 69 (800MHz) to match the rest of Europe. Funding was made available to support the change, which affected the Programme Making and Special Events (PMSE) sector.

- "Have a Say on ..."
  - Complaint procedures, "Ombudsmen"

The position remains broadly the same as previously, with the various regulatory and self-regulatory bodies providing complaints procedures, usually with the possibility of review by an external independent body, or possibly by judicial review before the courts. These bodies vary in the remedies they provide: the PCC has come under criticism in this regard.

- Participation in media operators/(self-)regulatory bodies

The position remains the same as previously. In general terms, the regulatory bodies do include non-industry actors, but these are appointed for their standing not as a representative of the viewer/listener/reader.

#### 2.2.27.2. Main Players in the Media Landscape

##### 2.2.27.2.1. *Radio*

There are 18 national radio stations as at the end of 2009 together with 371 local stations. Ofcom lists the radio licences as being 294 local sound broadcasting licences together with 3 national sound broadcasting licences and 88 Radio Licensable Content Service (RLCS). As regards digital services, there are 46 local radio multiplex services and 1 national radio multiplex. Of the digital sound programme service there are 65 local and 15 national.

Additionally, there are those stations provided by the BBC. The BBC national, network radio stations are the imaginatively named BBC Radio one, 1 Extra, BBC Radio two, BBC Radio three, BBC Radio four, Radio 4 extra, BBC Radio five live, Five Live Sports Extra, BBC Radio six music and BBC Asian Network. There is also the World Service. The listening share of the BBC network services is according to RAJAR 46.60% for the quarter ending December 2011. There are 41 BBC local radio stations and four channels relating to the nations making up the UK: BBC Radio Scotland; BBC Radio Ulster; BBC Radio Wales; and BBC Radio Cymru. BBC Local/Regional had an 8.9% share.

There are several radio 'brands', with a number of radio licences each, such as the Capital Radio Group, Absolute Radio Network and Heart. Heart and Capital both belong to Global Radio. The merger between Capital Radio Group and GWR noted in the last report took place to form Gcap Media plc, but the shares in that company were subsequently acquired by Global Radio in 2008. Global also holds Gold, Classic FM, LBC and XFM which gives it, according to RAJAR figures, an audience of more than 20 million. It also claims to have the top 3 commercial services: the Heart and Capital networks and Classic FM. Absolute Radio is run by TIML Radio Ltd.

### 2.2.27.2.2. *Television*

Overall, BARB figures for 2010 show a gradual increase in the individual average weekly reach<sup>77</sup> (93.90%) as well as an average increase in daily viewing hours<sup>78</sup> (4.03) and in platform universes<sup>79</sup> (25,950,000). The third quarter of 2010 shows that 93% of homes in the UK had access to digital TV and that 73% of homes had access to Freeview. An increasing number of homes have HDTV; at the end of the first quarter of 2010, Ofcom records 24 million HDTV sets. Its annual reports notes that it has issued 989 television licences, made up of 887 TLCS licences (which authorises cable, satellite, and internet); 84 DTAS/DTPS (for content on Freeview); 18 public service (regional channel 3 licences, 4, 5 and Breakfast). The BBC is not licensed by Ofcom, so BBC services are on top of these numbers.

On terrestrial television, the market players are the same as previously, and the division of the market into publicly owned (the BBC and Channel 4) and private limited company likewise remains the same (the ITV companies and Channel 5, as well as the news provider ITN). In general terms there has been a consolidation of ownership in these companies, as the Granada-Carlton merger illustrated. One point of note is that on 17 November 2006, the BSkyB Group acquired 696 million shares in ITV plc ("ITV") representing 17.9% of the issued share capital of ITV.

There is one major satellite broadcaster in the UK: BSkyB. BSkyB commissions and acquires programming to broadcast on its own channels. It also supplies a number of its channels on a wholesale basis to third party operators for retransmission to their subscribers (see Virgin Media below). Sky also contracts with individuals to provide television programming, comprising both Sky channels and channels of other providers (there are 147 such partner channels), which are provided by the Astra satellite. Certain Sky channels are available free-to-air in the UK DTT platform, Freeview. Additionally, Sky sports channels are available (via Top\_IP TV) on DTT and on the BT Service (see competition section above). Sky also operates broadband as well as pay-TV services.

### 2.2.27.2.3. *Press and publishing*

Newspapers in the UK tend to be divided into two main categories: the broadsheets (serious press) and the 'red tops' or tabloid newspapers. The Scottish market has its own titles. The most popular print newspapers in the UK by circulation are The Sun, the Daily Mail, The Guardian, The Times, the Financial Times and The Daily Telegraph. In general, it seems that newspaper circulation figures are dropping.

Many of the titles are consolidated into common ownership. For example, News International/News Corporation (which owns BSkyB) owns The Sun (and now the Sun on Sunday) and the Times/Sunday Times. The Sun's circulation is in excess of 3 million. Richard Desmond's (a Channel 5 licensee) Northern & Shell owns the Daily Star/ Daily Start Sunday, the Express/Sunday Express (circulation approx. 700, 000). It also runs a couple of 'adult tv' channels. Trinity Mirror publishes the Express/Sunday Express (the second best selling tabloid after The Sun) and The People. The Scott Trust publishes the Guardian and the Observer; while its print circulation is not significant by comparison with the tabloids or even the Times or the Telegraph, it was the first to surpass the 25 million unique users mark in a month for a UK newspaper website. Its circulation is greater than that of the Independent, which is now owned by Independent Print Limited

<sup>77</sup> Average weekly reach is the average number of people who have viewed TV within a week for at least 3 consecutive minutes.

<sup>78</sup> The average daily hours of viewing provided is in decimal form.

<sup>79</sup> The Universe is the total population of TV homes on a specific broadcast platform.

(Lebedev). It also publishes the London Standard, now a free newspaper. The Daily Mail/Sunday is owned by the Daily Mail and General Trust plc,<sup>80</sup> via Associated Newspapers. The Daily Mail had a per issue circulation in excess of 2 million. Through Northcliffe Media, the group also has a number of regional papers and extensive holdings outside the UK. Associated Newspapers is behind 'Metro', a free newspaper but which is available nationally. The group also has a 20% shareholding in ITN. Press Holdings owns the Telegraph/Sunday Telegraph; the same company also publishes the Spectator magazine. The Financial Times is published by Pearson PLC. It is a significant business newspaper: it only has a small circulation of 75,665 in the UK alone, but it has an international circulation of 432,944.

#### *2.2.27.2.4. Online media (non-linear audiovisual (media) services; websites)*

ATVOD provides a directory of services that have registered as VOD service providers; many reflect the main media players already identified. For example, the terrestrial PSBs provide catch up TV services. It also includes services such as those offered by BT, providing a range of entertainment content. There are also companies which operate 'virtual video shop' sites, such as Netflix, Amazon's LoveFilm and Tesco's Blinkbox. Other services cover specific genres such as sport and porn. The issue of whether the newspaper sites were VOD sites has caused some dispute with ATVOD.

The on-line film market is comparatively established in the UK though early market leaders (Apple via iTunes, estimated by Screen Digest to have 60 per cent of the transactional digital movie market in the UK in 2007) now face more competition with other film providers as well as the broadcasters' catch up services. It has been suggested that the success of Apple (and Microsoft) in this field is due to the fact that the content is used as a way of driving sales of devices and services, and sold at low profit or breakeven point.

While audience figures are compiled for press, television and radio, there seems to be no equivalent set of figures across VOD providers as a whole, although some information can be derived from company annual reports, and the hit rate for newspaper sites are published by the Guardian. It is therefore difficult to assess the composition of the market, especially when the focus is on opinion forming sites, rather than sites overall (which can be aggregated in company reports). There is also some overlap, as can be seen below, with the position for catch up TV – a process which is likely to continue.

#### *2.2.27.2.5. Cable/Satellite network operators, IPTV & Internet Access Providers*

The multiplex licences are owned by: BBC; Digital 3&4 Ltd; SDN Ltd; BBC Free to View Ltd; and Arqiva (2 licences).

The cable market has likewise consolidated with NTL, Telewest and Cable and Wireless forming Virgin Media. The main cable operator is Virgin Media. It owns and operates cable networks that pass approximately 13 million homes in the U.K. and is a 'quad-play' provider: broadband internet, television, mobile telephony and fixed-line telephony services. It produces no unique content, rather providing access to others' channels/programmes and operates a video-on-demand service (Virgin TV On Demand). Virgin sold its television channel business (Virgin Media Television) to BSkyB in 2010 but at the same time entered into long term carriage agreements with BSkyB. The agreements mean that some of BSkyB's basic channels, the Virgin Media TV channels and BSkyB's sports and movie channels in standard definition are available via the Virgin

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<sup>80</sup> <http://www.dmgt.co.uk/uploads/files/6423-DMGT-AR-2010-5JAN2011-FINAL-Linked.pdf>.

network. The carriage agreements also provide for the distribution of BSkyB's basic channels in high definition together with a selection of premium sport and movie channels in high definition on our cable television service. Virgin Media has also entered into an agreement with Tivo for set top boxes.

*2.2.27.2.6. Audience/Readership/Usage/Subscription; Advertising market shares (all media)*

In general, despite the huge changes in the communications market generally, driven by new technology and new services (such as smart phones), the average amount of time spent viewing TV and listening to radio in the UK has remained fairly stable over the last decade. There has been an increase in take up of new – and also older – technologies. Satellite (including free to view satellite) and cable saw increases in subscribers, as well as take up of new communication devices, such as HDTV and smart phones. With the completion of digital switch over being imminent, the increase in digital homes was significant.

BARB figures show that the average amount of time spent watching television is 4 hours a day, though this average increases with the viewer's age (and there is a higher average viewing figure in Scotland and Wales). While the BBC's share of television audience is declining, over its channels it had 32.9% of the market; whereas the cumulative total for ITV was 22.86% and for the main satellite provider, BSkyB, 6.61%. While there is a trend that shows a move away from the terrestrial broadcasters, they still attract a significant share of the audience: together they attracted 71% of viewing hours during 2010 in multichannel homes. Although there is some variation among the nations, Ofcom figures suggest that on average more than half the viewing hours are spent watching PSB channels; there is greater variation with regard to radio listening. There has been a significant increase in the use of the Internet to watch catch-up TV. RAJAH's figures show an increase in number of people listening to radio: the first quarter of 2011 showed that 91.6% of the UK adult population listened (weekly figures) and listener hours rose to 1.04 billion a week. There has been a trend towards listening to the national stations as opposed to local stations, and the BBC's share of listeners has increased on its network stations. Radio is more popular than other on-line distribution channels (such as spotify or spotify premium). There is low growth also for on-demand only audiovisual content.

According to Ofcom, during 2010 the UK TV industry generated revenue of £11.8 billion, which constituted a 6.6 per cent increase on 2009. The increase was driven by a recovery in advertising revenue and continued increases in subscription revenues. The biggest increase came in respect of the commercial terrestrial PSB channels (although it is still overall down over the longer term). Radio revenue likewise showed an increase, though the figures are on a much smaller scale. Over the same period, internet advertising spend grew by 16 per cent to more than £4 billion.<sup>81</sup> Despite this, Ofcom suggests that in real terms, advertising spend has decreased over the last decade in respect of both TV and radio.<sup>82</sup> Nonetheless, advertising remains the main income stream for most operators. Subscriber income has increased in real terms, benefitting the pay TV operators rather than the terrestrial PSBs, though revenue growth has slowed. PPV and subscription revenues constitute approximately 17% of the overall market. Sponsorship deals generated £178m (24% of the total income – down by 6%). 'Download-to-own' is increasing in popularity although in absolute terms is still small. Ofcom in its 2011 International Communications Report suggested that advertising revenue in respect of UK internet almost equalled that of television having 29% and 30% respectively of UK

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<sup>81</sup> Ofcom, The Communications Market 2011 (August): 8<sup>th</sup> Annual Communications Market Report.

<sup>82</sup> Ofcom, The Communications Market 2011 (August): 8<sup>th</sup> Annual Communications Market Report, p. 29.



advertising revenue, which is double the global average according to Ofcom's figures. Newspapers (excluding magazines) had 23%.

### 2.2.27.3. Conclusion and Recommendations

The media landscape seems to have been dominated by 'scandals' and concerns about press freedom and press regulation. The Defamation Bill is under way; the Leveson Inquiry in full flood, though it remains to be seen what changes will result. It is to be hoped that this time a firmer line is taken; the history of press (self) regulation has been with threats to regulate as whatever form self-regulation has taken, has been seen as insufficient. Surely now has come the time to investigate the options for a truly independent and obligatory regulatory system.

The government is focussing on the electronic communications sector (again): potentially much more profitable than the press. We have noted the changes being introduced to facilitate Local TV. The government has also launched a review of the communications sector generally, its aim being "to strip away unnecessary red tape and remove barriers to growth"<sup>83</sup> and legislation is planned by the end of this Parliament. One big question relates to the future of the BBC. Although the current arrangements are fixed until 2016, when the BBC's current charter expires, the current government has already sought to 'rein in' the BBC, arguing that the expenditure cannot be justified given the BBC's falling viewing numbers in a multichannel environment.<sup>84</sup> This of course is a very metropolitan view, one that overlooks limitations on individuals' access to other sources of broadcast content, whether for geographical, town-planning or financial reasons, quite apart from issues of range of content and market failure and the fact that overall the BBC seems to be the most trusted news supplier and maintains significant market share. Surely, a more appropriate response would be to put the BBC on a more long-term footing than periodic charter review permits and to remove some of the duplications from the regulatory system. The BBC seems too important to leave to political whim- both in terms of its existence and its financing. Finally, Ofcom itself has not been immune from the Government's reforming zeal, though it seems that it is no longer under threat of abolition. Ofcom is a creature of the Communications Act. Within the constraints imposed thereby, it seems to have fulfilled its functions. Given that some form of regulatory body seems necessary, in terms of infrastructure and content regulation, does change do much other than involve cost and confusion? While it is hard to predict how the media landscape will change in the next decade, one thing seems likely - that regulatory structures will be different.

From the above, the following recommendations arise (though they may be unlikely to sit well with the political stance of the current government):

- the current regime for press regulation is ineffective; a different system (possibly co-regulatory) is required in which the regulatory body must be independent, not only from government but also the industry itself
- it is anachronistic that so much power regarding the structure of the media markets (existence of BBC and its funding; determination of public interest test) lies in the hands of the executive and this should be remedied
- the scope of the public interest test itself needs to be broadened.

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<sup>83</sup> [http://www.culture.gov.uk/images/publications/commsreview-open-letter\\_160511.pdf](http://www.culture.gov.uk/images/publications/commsreview-open-letter_160511.pdf)

<sup>84</sup> <http://www.parliament.uk/business/publications/research/key-issues-for-the-new-parliament/value-for-money-in-public-services/future-of-the-bbc/>



### 3. COMPARATIVE ANALYSIS

#### 3.1. Constitutional law/fundamental rights safeguards for the freedom of the media and of the citizens' right to information

The freedom of expression is protected by both Art. 11 of the CFREU and Art. 10 ECHR. Unlike the former fundamental rights document, the ECHR does not contain an explicit guarantee of the freedom of the media (or its constituent parts such as the press, broadcasting, cinema etc.), but, following the constant jurisprudence of the ECtHR, it is clear that this freedom is also safeguarded by Art. 10 ECHR. The freedom of information, understood as the right to impart and to receive information from sources which are generally accessible ("active" and "passive" freedom of information), is also guaranteed by the two instruments. While Art. 42 CFREU provides for an express safeguard of the right to access information held by public authorities, more precisely: the EU organs, institutions and further bodies, the jurisprudence of the ECtHR in relation to Art. 10 ECHR does not seem to have embraced in a comprehensive manner such concept yet.

Similar to the situation at the European level, there exists some divergence in the way EU Member States have enshrined the freedom of the media and the freedom of (access to) information in their constitutional texts/bills of human or fundamental rights. While in the majority of countries there is an explicit mentioning of the freedom of the media, as one will observe in Sweden, in others this concept has been interpreted as being included in, or found to represent a corollary of, the freedom of expression by the relevant jurisprudence, mainly the constitutional courts in Spain and in the Slovak Republic, for instance. Only a limited number of national constitutions stipulates expressly a freedom of the citizens to access information held by public authorities, for example Greece, Estonia, Portugal or Romania; in some other Member States, such right has been derived from the general freedom of expression and information or from further concepts, as is the case in Spain, Lithuania, Austria or Belgium.

With regard to the situation in several Member States (Belgium, Finland, Germany, Italy, Spain, Czech Republic, Poland), it can be noticed that the jurisprudence of the constitutional courts has had, and continues to have, a major impact on defining the notion and elaborating on the extent of the freedom of the media, foremost in cases concerning the balancing of this freedom with other protected interests, such as the right to protection of one's personality (including privacy and protection of personal data), confidentiality of state secrets, freedom to conduct a business and protection of property, etc. The same can be said in respect of the jurisprudence by the ECtHR, and, mainly in relation to the fundamental freedoms provided for by the TFEU, of the case-law of the ECJ.

For the ECtHR the freedom of the media, in particular of broadcasting, is clearly to be understood as an individual right, whereas to stress the function of the press and of audiovisual services as "public watchdog" essentially serves to provide arguments, also in the balancing processes with other freedoms concerned, in favour of the exercise of the freedom. In contrast, some constitutional courts in the Member States, for example in the Slovak Republic, in Germany and Belgium, use the "public watchdog" figure more in a way to characterise the freedom of the media as an "institutional" one, i.e. the recognition and exercise of the freedom is governed by the interest of democracies to have open and widely-accessible information and communication fora. Furthermore, while the ECtHR has emphasised on different occasions that it follows from Art. 10 ECHR that the Member States act as the "ultimate guarantor" of diversity of the media, putting

on them a positive obligation to ensure that a variety of viewpoints can be expressed by different actors, and particularly by public service media, the approach taken to date by the ECJ and by some national courts has been a different one: media pluralism has been recognised as an overriding reason of general public interest which may justify restriction on fundamental freedoms, or of the freedom of the media itself. This latter approach is also followed by the ECtHR when interpreting Art. 10 para. 1 sentence 3 read in conjunction with para. 2 ECHR.

It is important to note that the constitutions of a couple of Member States (i. a. Spain and Austria) contain specific safeguards not only for psm (implicitly), but also for media regulatory authorities (explicitly), underlining especially their independence and their function *vis-à-vis* public communication processes and, partly, psm.

## **3.2. The legal and regulatory order for the media**

### **3.2.1. General remarks**

The sections within country reports dealing with the regulatory framework aim at exploring the conditions which exist for media operators and journalists; it follows the idea that a framework which is favourable to a diverse and pluralistic, independent and comprehensive provision of information will, in the end, enhance chances to increase the citizens' ability to inform themselves by consulting reliable/credible and current sources.

It should be noted at this stage that, for present purposes, the analysis of the national media orders in general has not focussed on such aspects which have been harmonised by the AVMSD. There are, of course, more obvious cases which lend themselves to being considered relevant for the citizens' right to information, such as the right to short news reports, the prohibition on coverage of major events exclusively on pay-TV, the promotion of accessibility of programmes for certain parts of the population, or even the prohibition on programmes containing incitement to hatred, and so forth. However, since these aspects have been harmonised at EU level already, the detail of national transposition and implementation was not deemed of considerable concern for the assessment to be undertaken by this study.

In almost all EU Member States legislation is in place which governs the activities of the press, broadcasting (radio and TV) and the provision of non-linear (audiovisual) media services. The regulation of these media activities may be governed by a single act, through specific acts for the press and electronic media, through acts dedicated to commercial media activities and public service media, respectively, or via legislation applicable only to broadcasting and/or so-called Information Society services. In addition, co- and/or self-regulation are in place, either as a substitute for public regulation or as a complementary tool.

In the following, for evident and inevitable reasons, the general lines of the situation in the EU Member States are portrayed; information on specificities of one or several countries or more detailed analysis of the legal and factual framework is primarily rendered accessible via the individual country reports.

### 3.2.2. "Market entry" aspects

- Licensing/authorisation for audiovisual media service providers; the remit of public service media; registration/notification schemes for print publishing

All Member States require broadcasters to subject themselves to different forms of licensing procedures before starting radio or TV operations. Usually the countries are following graduated approaches in respect of the need of licensing/ authorisation when services are at hand whose distribution does not entail making use of scarce frequency spectrum resources. More specifically, this holds true for (traditional) ways of programme conveyance via satellite or cable networks, but also distribution "over the Internet", which includes, as the case may be, webcasting and IPTV.

Conditions for obtaining broadcasting licences vary greatly, partly following from the requirements stipulated for the category of service which is to be provided, but also reflecting on slightly different legal traditions attached to the concept of freedom of the media (see *supra*). Besides, the observed graduated approach is motivated by consideration of the possible impact of some services on individual and public opinion-forming and/or related to more recent forms of programme distribution which have not (yet) a huge market impact.

The broadcasting-market entry regulates therefore different procedures. In accordance with the way of programmes distribution, different licensing regimes exist, e. g. depending on whether the broadcaster will broadcast its programmes through a terrestrial analogue network or a digital one. In the first case, the regulatory authorities issue a communication permit to the broadcaster, which need to respect all the conditions (after attending a tender procedure – as in Romania or Hungary, for instance) laid down in the authorisation or in the "book of obligations" (as in Luxembourg) and to apply eventually for a renewal, because the license is valid for a certain period of time (8 years for radio in the Slovak Republic and Sweden, 9 years in Romania, 10 years in Austria or Finland or 12 years for TV in the Slovak Republic). In the second case, the licensing is not related to a specific frequency, the number of the licenses is not limited and the operator should only abide by the legal requirements, while a license even for an unlimited period of time might be issued. In specific cases, the activity license for provision of free access television and radio services (in Estonia) or of DTT services for mobile television (in France), the services are selected after a invitation to tender and the license is issued to the applicant who has made the best bid in the selection procedure.

In practice, let aside market-entry hindrances which are to be reasoned with a lack of available distribution channels (frequencies for terrestrial transmission), neither the necessity nor the suitability of authorisation schemes do appear to provoke, generally speaking, considerable debate in Member States – although some voices remain sceptical towards the need to uphold such entry barriers at all, given the reduced organisational, technical and financial threshold for providing programme services nowadays. It must be noted, however, that authorisation of broadcasting activities should not be looked at in an isolated manner; account rather should be had additionally to administrative procedures related to authorising the use of radio spectrum resources and access to platform services for digital transmission (multiplexing) (*infra*, distribution aspects). Where market entry for broadcasters or other service providers is made conditional on the prior control of possible future media pluralism concerns, this issue does not - in itself - seem to have given rise to prominent debate (see further *infra* on media ownership).

In a very limited amount of Member States, as in the case of Hungary, the role of media and telecommunications regulatory authorities (or converged bodies) has been seen in a critical light, questioning whether full independence from political or economic interests is always present, which should theoretically ensure that authorisation regimes are governed by objective considerations only, and not be based on e.g. perceived disadvantages for ruling political forces which might be brought about by allegedly "negative" media coverage.

The formulation of the psm remit, in a certain sense, may be considered to form a market-entry aspect, too, since Member States' authorities thereby will direct, at least in a general manner, the activity of these operators. It can be said that the broad definitions which are to be encountered in Member States legislation on psm cover several elements of great importance to the citizens' right to be informed, including news reporting and political debate, information services as well as education and culture; this includes in the majority of cases also coverage of European and international developments (for more on this see *infra*, legal framework for psm). In order to offer a range of programmes that are available/accessible and of interest to ideally everyone and to cover the entire national territory, all Member States are having one (in the case of "Radio 100,7" in Luxembourg) or several public service broadcasters (seven in Romania), with the objective of offering programmes of good quality, impartiality and relevance, irrespective of their genre.

In essence, Member States do not require the activity of press publishing made subject to authorisations. While a smaller number of countries, such as Cyprus, Italy, Lithuania, Hungary, Malta and the Slovak Republic, maintains in place notification or registration requirements, only some have introduced specific rules on "electronic versions" of newspapers/magazines or stand-alone, press-like Internet services (Denmark, Finland, France, Latvia, Hungary, Malta, Poland). Incentives for registration or notification of a "press product" may, however, be provided, since these may be linked to the recognition of specific privileges or rights affording protection of journalists or print outlets.

- Media-specific anti-concentration rules and/or competition law aspects of media ownership

Member States of the EU have adopted highly divergent approaches with regard to "market power" regulation in the media sector. While a significant part among them have introduced complex and sometimes rather sophisticated schemes aimed at restricting (cross-)media ownership, others "only" rely on general competition policy to address market power of media organisations, rarely foreseeing any kind of specific media-pluralism considerations coming into play in the case of merger control or the assessment of an alleged abuse of a dominant market position, for instance.

Basically, the ownership issues are thoroughly examined during the licensing procedure. Details about shareholders, shares and funding sources must be provided in the application, including a declaration by every shareholder as to shares owned and kinship relations. However, the legislation in most of the countries provides clear limits to horizontal concentration in the media sector. In Spain, a significant stake in more than one provider of state-wide television services is reached when the average audience of all the channels exceeds 27% of the total audience for twelve consecutive months prior an eventual acquisition), in France a natural or legal person cannot own directly or indirectly more than 49% of the share capital or voting rights of a company holding an authorisation for a national television service which is broadcast by DTT (33% in the case of a local channel), while in Greece the media concentration regulation derives from the Constitution itself, which outlines the obligation for media outlets to register ownership

status and information regarding the financing of the outlet. Cyprus is limiting both horizontal and vertical ownership and the law foresees expressly that a foreign (non-EU) ownership is possible only to a ceiling of 5% per person, conditional upon the approval of the council of ministers and limiting the maximum foreign ownership to 25%. The limit of 25% is maintained also in Greece while, in contrast, in Estonia there are no restrictions on foreign ownership of the media services providers or print media.

With the purpose of preventing (and consequently prohibiting) the abuse of dominant positions, many Member States have provided in the legislation certain limitations: in Estonia the dominant position is presumed if an undertaking accounts for at least 40% of the turnover in the market, in Hungary the "significant market power" has to be considered as an average annual audience share of at least 15%, while in Italy even shares of advertising in daily newspapers are subject to specific restrictions. Furthermore, in Lithuania the issue of the dominant position has been considered by the Constitutional Court as a constitutional duty of the legislator, in order to establish legal regulation and restrictions and to limit therefore the possibilities of a monopoly or of a too obvious domination in the media market.

Concerning cross-media ownership, it is worth mentioning the "two-out-of-three" rule stipulated in the Greek legislation, meaning that a single natural or legal person cannot participate in more than two traditional media categories (radio, TV, newspapers).

Finally, one of the main problems remains to ascertain the final beneficial owner of shares and despite the legal provision that many of the Member States are securing, this strict regulatory framework has not prevented high levels of concentration of media and cross-media ownership.

It has been frequently pointed out by national experts that, in the opinion of the legislative or the competent authorities, particularly smaller markets or markets in countries with a less well-off economy do not appear sufficiently prepared to address high levels of concentration in the media, since for an efficient functioning the media business would have to be able to reach a certain size. But even in Member States which, at least before the current financial and economic crisis, had been regarded to perform above average or at least comparatively well, the levels of media concentration have rather seldom given rise to intervention - either by the legislator, or by media regulatory (where such have competencies in this field) and competition authorities. A more general perception therefore holds that especially significant cross-media ownership positions achieved by a few operators (as for example the cases of *O'Brian's* Communicorp, which has interest in the radio and publishing sector in Ireland, of *Murdoch's* NewsCorp in the UK and elsewhere, and *Berlusconi's* Mediaset and further activities in Italy) give reason for concern in respect of the diversity and variety of media content output, thus challenging the goal to provide the citizens with an adequate choice of information.

- Legal framework for public service media and their ability to fulfil their mission

In the EU Member States, the fundamental law (as in Spain), primary and secondary legislation and regulation as well as co- or self-regulation or combinations of those govern the activity of psm, in the vast majority of cases not only covering radio and TV operations, but also activities in the "new media". Given the impact of EU State aid law on the definition of the remit of psm and particularly their funding and control, the countries have implemented a variety of measures in order to lay out the psm mission, ranging from enumerating the number and describing the general orientation of TV and radio channels in legislative acts, over "public service (management) contracts" (in the "French" model: *cahier de charges et de mission*) concluded between the psm and the

government or the media regulator, to the establishment of "public value" tests which have to be fulfilled before a new activity is being commenced with, or a combination of those. From a standpoint of freedom of the media, translated into the concept of freedom of programming, the difficulty in such exercises lies in finding the right balance between, on the one hand, a sufficient level of detailed description of the psm tasks, and, on the other, ensuring the necessary freedom for broadcasters to choose the topics and the manner in which these are covered.

Often, it has been reported, the legal framework for the psm does not achieve to fully ensure independence from politics or the economy. This observation is linked to influence exercised by the political strata on e.g. the governing bodies of psm, and finds its expression particularly in insufficient safeguards against changes being "forced upon" the psm after a transfer of ruling power in governments has taken place. Another matter of concern is the dependence of the psm on political decision-making in relation to funding; in this respect financial means available for the fulfilment of the remit are frequently considered insufficient. This latter aspect can be traced back to a general lack of allocation of necessary financial resources and/or to deficiencies in the way such moneys are being collected or assigned. The financial and economic crisis already referred to has certainly not eased the situation in many countries, either because funding from license fee income has decreased or because the provision of (direct) government subsidies has shown instability in times of budget restraints.

The general tasks of the public sector are mainly focused on the concept of diversity (including both cultural/linguistic pluralism and variety of information and genres), programme quality and innovation. The most important aspect at this point concerns political independence from controlling bodies, as long as members of executive or supervisory boards are designated following political decisions (or even reflecting the distribution of power in Parliament, as is the case in the Czech Republic, Hungary or, traditionally, in Italy). In this context, many discussions and concerns have been expressed – also at European level, as shown in this study – regarding an inappropriate development of the public service broadcasters (for example, besides the cases already referred to, in Greece and Romania) which jeopardises the freedom of expression and the objective forming of opinion.

Regarding the financing, in all the Member States (except for Spain, where no commercial communication is allowed), the public service broadcasters are financed on a "dual funding" basis: this entails that the major part of the financial resources originates from state funding (annual state grant/ broadcasting licence fees) and that the other part is derived from commercial revenues or other commercial activities.

With respect to new media services and the extent to which the remit of public service media also requires them being active in this field, the German Constitutional Court has clearly stressed that there is an important role to be played by PSM when it comes to the provision of their offers in new formats and/or via new platforms. In respect of the ability of the public service broadcasters, doubts have been expressed as to the effectiveness of the public service media funding system to fully ensure the independence of the public service broadcasters from political and governmental influence (in Italy), but also regarding the lack of stability in the board of management of the public service broadcaster (in Poland) and referring to the quality of the informational, educational and entertainment programmes in relation to weak financing through state funding (in Greece). Due to this latter deficiency the public service broadcasters are often detained from launching digital and online services, and therefore conveying content via various platforms to reach all citizens in the information society.



### 3.2.3. Pursuit of “core activity”

#### - Ordinary law safeguards for journalistic activity

In this section, the research interest was mostly directed towards enquiring what kind of legal safeguards exist for the conduct of journalistic and editorial activities, more precisely, whether the ordinary law provisions could be misused to make journalistic work disproportionately difficult (“chilling effect”), e.g. through “silencing” libel or slander claims, and whether sufficient safeguards exist for enabling the media to fulfil their “public watchdog” function, e.g. through the provision of workable and effective schemes for the access to information held by public authorities. One (upfront) issue touched upon by several contributions concerns the (non-)existence of a legal definition and/or recognition scheme of the profession of “journalist”: in many instances, whether or not such regime is in place does not have a significant bearing on the exercise of the activity; in some cases, however, certain legal (i.e. not merely practical) privileges will be available to those recognised journalists/publishers or other editorial staff members of media companies, as for example the Press Laws in Malta, Latvia or Cyprus provide for. The EU Member States have enacted a variety of provisions, stemming from criminal, civil or administrative law, which aim at balancing the freedom of the media with the rights of others, in this case the personality rights. In this regard, Finland was, for instance, several times convicted by the ECtHR for favouring protection of privacy and dignity at the expense of the freedom of expression. Liability for defamation, libel or slander is foreseen by the law (defamation and insult are criminalized in Poland, Belgium, Denmark) and the Constitution of Belgium provides a cascade liability system for the press. In Estonia, the protection of one’s reputation against defamation is set forth even in the Constitution and a law introduced at the end of 2010 stipulates the so-called “preventive damages” concept, based on the financial situation of the person who caused a breach of the personality rights of a person. In the context of claiming important penalties in case of moral damages, having regard to the libel tourism, it is worth mentioning that the European Parliament has recently adopted a resolution with recommendations to the European Commission on the amendment of the EC Regulation on the law applicable to non-contractual obligations (Rome II).

In general terms, protection for the journalistic activity is safeguarded through taking into account the specific role of the media and its importance for public debate, i.a. in the context of defamation claims, where the justification of statements is open to recourse to having observed journalistic standards (as expressed, for example, in codes of conduct/ethics), thus reducing the burden of proof for media professionals in case the correctness of an assertion of facts is difficult or would lack a clear-cut result. Furthermore, the legal provisions in all countries stipulate the right of rectification (correction in Finland) or reply.

The details of how responsibility or liability is attributed to different steps within the “production chain” of a journalistic product – journalist, editor, publisher – also shows great variances.

When it comes to the right of journalists not to disclose their sources and the related protection against searches and confiscation/seizure of material, some variation in detail can be observed (in Bulgaria also the regulatory authority CEM can request to media service providers to reveal their source of information; the Hungarian Constitutional Court having recently ruled out such possibility), although the main material lines of this right and especially the procedural safeguards attached to it – such as the requirement of a court order or the “necessity or unavoidability test” – appear to be common standard.



The right to access information held by public authorities, or private bodies acting in a quasi-administrative capacity, in an administration's interest or on its behalf, is foreseen in the legislation of most of the Member States, which also forbids obstructions to information gathering and press criticism.

Nevertheless, in practice, a couple of perceived shortcomings particularly of the juridical approach to the abovementioned safeguards has to be noticed – ranging from illegal searches (in Cyprus or Germany), over too broad an acceptance of invoked exceptions to professional secrecy (how the "secret of state" has been clarified by law in Italy), damages being awarded for alleged invasion on personality rights, to difficulties of obtaining information held by public bodies. In some instances, national courts will be in a position to provide for effective remedies, however, it is not only on singular occasions that as a last resort the ECtHR had to remind Member States of their obligations under Art. 10 ECHR.

It is yet unclear, in the jurisdiction of many countries, whether and, in the affirmative, to what extent such guarantees also encompass new forms of information provision, particularly by blogs and Internet fora. However, the Supreme Court of the Netherlands has concluded in 2008 that almost every publication on the internet can be considered to be comparable with a press publication and should deserve the same level of protection.

Furthermore, some Member States, such as Belgium, also have introduced legislation on the relationship between journalists and their editors/publishers/ media owners, in order to enhance independence in coverage.

#### - Specific positive content obligations

Foremost psm are the objects of the imposition of specific positive content obligations. Still, while legislation in EU Member States in the vast majority of cases remains silent on the issue, in the context of licensing commercial broadcasters specific obligations as to the inclusion and extent of news coverage, current affairs information programmes, educational and cultural programme elements is more frequently to be encountered, worth mentioning here are the Netherlands, the United Kingdom and Belgium. However, the level of specification of positive stipulations on required content is to be regarded rather low. Abstention from using such instruments to steer media output is obviously justified in the first place by the freedom of the media.

As far as the pursuit of cultural objectives is concerned, in particular promotion of (minority) languages, the existence of some quota regimes and other, less strictly formulated obligations can be noted, for instance in the Czech Republic, Slovenia and Romania. In a broader sense, enhancing accessibility of media content to people with disabilities may also be seen as a facet of the topic, e.g. in Portugal the free-to-air channels must provide 8 hours per week of programmes, fictional or documentary, with subtitles, sign language or audio description.

#### - Funding schemes for specifically desired content

Notwithstanding funding public service media, only some Member States have opted to introduce schemes that aim at supporting (other) broadcast media or, more importantly, press activities or engagement for general journalistic purposes (Austria, Czech Republic, Denmark, France, Italy, Luxembourg, Sweden, the Netherlands). It appears, however, that all countries concerned remain reluctant to make the availability of such financial aid conditional upon the provision of a certain kind of content. Here, two main concerns may play a role, firstly, the freedom of the media concretised as a freedom to decide by

themselves, based on editorial or other considerations, what to publish, and, secondly, the perceived risk of arbitrary decision-making which might be motivated by specific political or economic interests. Therefore, in most instances, for example for radio in France, existing aid schemes concentrate on contributing to bearing the costs of distribution, technical equipment used for production, or education. Seldom, the national authorities, as in Austria and the Netherlands, have taken initiatives to subsidise content which should provide an (added) "public value", through making available an "additional" voice, thus enhancing the external plurality of media output, for instance.

- Political advertising and/or (party-) political broadcasting time

In almost all EU Member States there is a ban on political commercial communications, generally except for the period of election campaigns (but also the contrary approach can be encountered). With regard to pre-election periods, many, sometimes rather sophisticated regimes, as in Belgium, exist as to providing air-time for the coverage of candidates and their programmes. In Denmark political advertising is not allowed on television, in the United Kingdom neither on the radio, but in the press, while in other countries – Czech Republic, Cyprus, Poland, Spain, Romania, Luxembourg, Latvia – such advertisements are permitted (under specific regulation, free or paid) during election campaigns. By so doing, the legislators and regulators aim at ensuring information of the citizens on the topics of current debate and the related (diverging) stances on these; fairness/equality in treatment – such as an allocation of time made available in proportionality to importance with specific consideration to newcomers – as well as impartiality and objectivity are guiding principles for the performance of moderators/presenters in political debate programmes.

Balance of political and public/current affairs coverage is an obligation imposed widely on psm, save for the specific Dutch model of internal pluralism within the range of psm operators. Some countries (France and Romania, for example) have established dedicated monitoring schemes in order to ensure political pluralism in all broadcast media (at all times).

- Codes of conduct and their organisational framing

Self- or co-regulation for the press sector or, more broadly, the media sector exists in many EU Member States. These may take the form of codes of conduct adopted by individual media outlets, agreed among journalists, or among editors/ publishers or between both of these groups – for a specific, parts of or the entire media sector -, issued by an umbrella organisation such as a Press Council, etc. It is interesting to note that in some instances, as in the case of Greece, formulation or implementation of said codes involves regulatory authorities.

The scope and detail of regulation and the extent to which such codes go beyond norms in legislation, where such exist on the subject matters, varies greatly. In part, such codes might also be *sedes materiae* for delineating the different rights and obligations of journalists and the owners/responsible persons of the media, respectively, thus defining the internal media relationships.

There is also some variation in perceptions as regards the effectiveness of bodies established with the task to monitor adherence to codes - by their own initiative, upon complaint by persons concerned by media coverage, or the public at large. Criticism furthermore relates to the limited incentive which is given to entrusting press councils with the examination of complaints; in view of their almost non-existent sanctioning powers, lack of inclusion of market participants or disrespect of (the duty to publish)

reprimands by media affiliated with them, preference is usually given to seeking redress by way of filing law suits.

### *Distribution aspects*

- Access to frequencies; to distribution networks and control of actual conditions; must-carry/must-offer rules and the role of platform operators

As has been alluded to in respect of licensing regimes applicable to broadcasting or other electronic media (*supra*), a full picture of the conditions relevant for market entry can only be obtained when account is being had of the legal and practical factors of having media content distributed. In this respect, again, there exists a great diversity in the approaches followed by EU Member States, which begins with the questions of whether the licensing of the broadcasting activity entails, mostly in connection with terrestrial frequencies, also a right to use a transmission capacity and whether this right is conferred upon an applicant by the media authority or by the telecommunications regulator. Therefore, in the majority of the cases, the spectrum capacities are allocated to the commercial broadcasters through an administrative decision or authorisation of the regulatory authority, in the wake of an invitation to tender procedure. The situation shows variations also with regard to the issue of access to distribution networks (e.g. digital broadcasting in terrestrial mode, on cable and satellite), where broadcasters and providers of non-linear audiovisual media services are mainly dependent on concluding agreements with network operators following negotiations on the applicable conditions. Whether or not the relevant legislation or regulation provides safeguards to ensure fair, reasonable, non-discriminatory treatment of content providers, in principle, is not a matter in the discretion of Member States, given the obligations that stem from the Package of Directives on electronic communications and general competition law. However, the avenues of regulation opted for in individual countries show some divergences: it may be stipulated in legislation that network operators and/or service providers have a duty to contract, subject to some conditions being fulfilled, there may be a system of prior control by regulatory authorities of the requirements being made for carriage, or recourse may be had to different instruments of ex-post control. These considerations also hold true for the manner in which the role of platform operators (mainly multiplexers) is defined – where those functions/ entities are separate from network or service provision. In particular, the role assumed either by content providers directly or by regulatory authorities in the process of establishing which channels are made available on a platform, is not defined uniformly in Europe. Furthermore, the strategy plan for digitisation of (radio and) TV broadcasting in many Member States foresees that at least one multiplex is reserved to the public service channels. Diverging concepts have been devised in relation to providing incentives for the commercial actors to also engage into the digital switch-over.

Some cases have been reported, in Bulgaria, Italy and Hungary, in which the actual provision by (licensed) broadcasters (radio and TV) of their services could not have been effectively pursued due to obstacles encountered in the access to distribution facilities. In the first two cases, intervention by organs of the EU (European Commission, ECJ) and, in the case of Italy, also by the CoE (ECTHR) has taken place in order to ensure respect of the *acquis unionaire* and the freedom of the media.

Must-carry rules that aim at ensuring that the most important, not exclusively public service, media are being made available to citizens on the relevant distribution platforms (traditionally cable, more recently – depending on the importance of this way of conveying radio or audiovisual services – also terrestrial networks operating in digital mode), are in place in the majority of Member States.

A limited number of Member States' bodies of regulation (Lithuania and Cyprus) hold provision on distribution systems for print publications, but if so, the emphasis is on equal treatment and universal coverage. In an even smaller number of cases (France, for example), there exists a system of regulatory oversight; generally, the entire issue will be left to the application of competition law on an *ex-post-facto* basis.

#### 3.2.4. Access to information

Turning to instruments of which (mainly) citizens' may avail themselves for the purpose of accessing information, this section of the country reports comprises different aspects: (i) is media ownership transparent; (ii) what requirements are imposed on psm in terms of accountability – towards supervisory authorities, the government/parliament, but moreover the general public; (iii) what does the state of enactment and implementation of legislation on access to public information look like; and (iv) is accessibility of media products given.

As a complement to, or as a component or even instead of, regulation on media ownership/pluralism, several EU Member States (except for Denmark) have been embracing the concept of transparency of media ownership situations and have incorporated under the legal obligations also provisions regarding a proper publicity of each broadcaster (programmes, editorial responsibility, contact details), although this data does not implicitly contain the ownership structure (as, for example in Poland). Furthermore, the information is publicly available either through registration in commercial registers (as in the Czech Republic and Estonia), on the web page of the regulator (e. g. in the Netherlands, Lithuania, Bulgaria, Portugal and Sweden) or on the website of each broadcaster (as in Romania and Spain). However, approaches taken vary greatly in detail and seem to encounter, at least in a significant number of countries, persistent difficulties of full implementation (application and enforcement). In numerous cases, such schemes are not comprehensive, i.e. they exist for only one or several, but not all sectors of the media (including the advertising sector) or other relevant upstream or downstream markets such as electronic communications networks and services (as in Slovakia and Greece), thus the levels of cross-ownership and vertical concentrations can hardly be assessed, and remain therefore somewhat obscure. Furtheron, there may be limited scope of transparency insofar as the information may not require to go beyond including the first level of ownership and cannot serve to identify, hence, the actual beneficiaries.

Different accountability instruments to be used by psm exist in all EU Member States; however, the accessibility and the degree to which the information is published show great divergences. The means used to increase accountability by providing tools for reporting, either by the psm themselves and/or supervisory authorities, on (financial and programming) plans (*ex ante*) as well as on the fulfilment of their remit and the results of the business management (*ex post*), are differing from country to country, and reflect on differing traditions in respect of the psm and also with regard to cultures of administration (in the Netherlands there exists, for example, both types of regulation). It appears that a smaller number of Member States - particularly those which seem to have adopted a view that the provision of the public service is essentially an obligation toward the State, who provides for its funding – does not lay significant emphasis on making such reports or external research available to the general public: Spain, Finland, Latvia, Portugal. This means at the same time, there exists an indication that the psm is not, at least not predominantly, seen as a service which is accountable to the citizens. Irrespective of the foregoing, it was mentioned that a considerable level of insecurity exists in view of the use citizens' make from the information available; as will be

discussed *infra*, this may find reason in a lack of involvement in concrete discussions on the psm, specifically its remit and orientation, in general.

Legislation (even the Constitution in Greece) and regulation on the right of the citizens (and of representatives of the media, where for these no specific guarantees are in place) to access information held by public authorities appears to have gained additional momentum in recent years. It is of interest to note that the scope of the provisions in some Member States also includes psm operators in the *ratione personae* of institutions subject to relevant requests; however, there are safeguards against access to material that is of (fundamental or exclusive) relevance to editorial/ programming or otherwise concerns sensitive issues. The exercise of the right to access information represents one of the rare circumstances in which the citizens enjoy the freedom of directly accessing original information, that is to say, they are not depending on intermediary functions such as those of the media. However, the legal provisions guarantee the freedom to receive information, as long as no conflict with a legal requirement to maintain confidentiality or secrecy arises. Such provisions in respect of documents considered as secrecy or "non-official" are stipulated, for instance, in countries as the Czech Republic, Denmark Finland or France. This being said, it is particularly important that the actual application of the right should not be frustrated through complex or complicated, and sometimes unnecessary costly (as in Ireland and the Netherlands), time-consuming procedures or by way of allegedly undue invocation of exceptions that would justify non-disclosure. In order to support the freedom to receive information, some Member States provide even a legal time limit for the administrative authorities to answer to an information request: in the Netherlands, for example, two weeks are foreseen, in Portugal ten days, while in Romania thirty days represent the maximum delay. In spite of the permissive procedures, several technical (contact through emails addresses) and practical restrictions (incomplete information) have been found, partly from the inconsistent legal interpretation of public and non-public matters, partly from too short deadlines for making available the information requested.

In essence, there do not appear to exist major obstacles of accessing media products or service, from the perspective of the citizens. Nevertheless, this does not intend to argue that all Member States have put in place regulation which would, on the opposite, ease such access. In few cases, such as in Luxembourg, Estonia and Malta (for analogue transmission) no broadcasting licence fee exists, while in a limited number of cases (Germany Poland, Romania and Slovenia, for instance), for social reasons, reduction or exemption from the licence fees is provided for to some groups of society. Only seldom, schemes are operational which include as a social welfare the provision of TV and radio reception devices (in Germany and Latvia), and some programmes exist which promote reading newspapers particularly in schools or for pupils and students. For new information services, however, access to the Internet – e.g. through provision of computers and connection to the www – has mostly not been integrated in respective schemes, although the importance of information made available online increases, as does the switch to eAdministration services which require citizens to "go online". Moreover, in the above contexts of access to public information and to accountability tools of psm as well as of media ownership transparency, exclusive online publication of information becomes more usual, rendering sufficient universal service guarantees of broadband Internet access ever more important. "Hadopi-type" or "three-strike" legislation/ or ("self-")regulation on the other hand may render it more difficult to maintain, in the future, sustainable access to Internet, particularly should weaknesses of such system become more concrete, - let aside technical problems of correct identification of an IP address allocated on a temporary basis to a subscriber - an entire

household may be cut off, although “only” one member of it has misused the Internet to illegally obtain copyright-protected works, for instance.

### 3.2.5. “Have a say on ...”

The citizens’ right to information not only theoretically could be enriched, without necessarily unduly restricting the freedom of the media, if there existed measures to exert influence on media content output. In a “negative way”, this influence might be channelled through complaint mechanisms established at individual media operators (as opposed to schemes like press councils competent for the assessment of obedience to codes of conduct relevant for a multitude of players), or with regard to the possibility to bring matters to the attention of official or institutionalised ombudspersons. Indeed, such instruments exist, though to a highly diverging degree. The efficiency of those apparently depends not least on the “complaints culture” in a given country and on the position and repute of an ombudsman body, particularly if established internally. A major problem seems to be connected to a low level of public awareness of the existence of such possibilities, especially where media do not feel specifically inclined to communicate actively and widely on this. Safeguards implemented may be seen in the option to appeal to other bodies and in the requirements imposed on ombudspersons in few Member States to inform citizens on the outcome of their interventions: Ombudsmen institutions for the media exist in Finland, Belgium, Slovenia and Spain, while in Malta it has no jurisdiction over the private media.

Perhaps more importantly, active participation opportunities for citizens in advisory or even decision-making functions of the media themselves, supervisory authorities or self-regulatory institutions appears not to rank high on the priorities of media policy agenda of and within Member States. It might even be considered particularly astonishing – for a service funded by and provided for the citizens – that public service institutions are not as a general rule designed in a way which does include basic elements of at least indirect representation of general societal or viewers/listeners/users interests. This does, of course, not mean negligence of the fact that, especially where control is exercised through parliaments or media regulatory authorities – which either directly or indirectly represent interests of the society at large in the pursuit of public service tasks – , other forms of incorporating views on the actual and future performance might exist.

However, in some Member States – Austria , Denmark, Estonia and Greece – the participation of the viewers or listeners in bodies of media operators or in (self-) regulatory authorities/bodies is foreseen, but on the other hand this does not imply always or expressly private persons from the public (as in Austria), but also representatives of the civil society groups, including churches (case of Hungary) or persons with achievements and experience in culture and media (Poland).

But the limited recourse that is had to this kind of user involvement and the fact that the role of user’s participation remains consultative and marginal, seems hardly to be in line with the requirements of modern, open, participatory societies and with a real service-orientation.



### 3.3. Media markets situation in the EU Member States

In the same way as (cross-)media ownership situations vary among Member States, the level of multinational engagement of a couple of major players of a European, if not global, scale shows differences when national market situations are compared. From the analysis it transpires that concentration tendencies within individual media sectors as well as several or all markets appear to have been accelerating, which may in part be attributed to the economic crisis, in part to market streamlining irrespective of this aspect, and not least by a lack of instruments for intervention, or resistance in gaining conviction that one would be able to lawfully base decisions on unclear, vague terms in legislation.

While assessment of the mere number of media outlets operating, within one or covering more markets, hardly can provide any useful insight into the level of diversity of opinion or quality of information being made accessible, it seems that in some Member States there exists an "unhealthy" high level of operators to the detriment of sufficient access to refinancing resources, in particular in smaller markets and/or economies which face difficulties. But also the opposite appears to be true in several cases, i.e. the existing market oligopolies not allowing for new entrants to find a sustainable business-case scenario due to little or even decreasing prospects of funding opportunities.

In this context, the partly aggravating situation of psm should be taken into account. It might be argued that some national media policies are based on the assumption that a strong, independent public service sector may balance out possible deficiencies of a comprehensive information provision to citizens through diverse media offerings; then, a reduced level of attention devoted to content/ quality requirements for commercial operators as well as less vigour in the area of media ownership may be seen justified. But if such basic assumptions or policy preconditions are not met, not only the framework for the psm becomes unstable, but rather the entire information-capacity power of the different media markets may be heavily compromised. In the following, some impressions are given – in respect of all media markets covered by the present study – which may serve to demonstrate the diversity of national supply situations.

As regards radio, the number of programmes edited by public service broadcasters ranges from two (Luxembourg) to eighteen in Poland (nationwide as well as regional) and over fifty in Germany (regional, not including web-radio offers) plus three nationwide programmes. In the commercial sector, the number is varying between two main radio stations in Hungary or Denmark (at the national level) to 1,052 in Greece (928 not being officially licensed).

Television is in many countries the most popular medium, as for example in Spain, with over 90% of the population watching TV daily. In the majority of Member States, the programme offer of the public service broadcaster ranges between two to four channels (as in Cyprus, Malta, Portugal, Poland, Hungary) and 23 in Germany. In the case of commercial television, the digitalisation process has multiplied the number of free channels, for instance in Finland the free-to-air channels reach up to around twenty and pay-TV channels up to around thirty. While in Malta, there are only 2 commercial broadcasters, in Germany a total of 202 nationwide private television programmes are licenced.

In the press sector, at a national level the range of newspaper offers is from around three to four dailies in Spain and the Netherlands, to sixteen in France (the national daily newspaper market being actually dominated by three main groups). The levels of



newspaper consumption are still quite high – 73.7% of the population in Austria and 87% in Sweden reads a newspaper daily. However, the largest newspaper market in Europe is the German one, this kind of information supply encompassing 351 different titles with a total circulation of over 23.8 Mio. copies sold per date of publication. This notwithstanding, as in almost all other European countries too, the circulation figures of daily and Sunday newspapers decrease continuously. However, when analysing the situation with a reference to the total number of dailies and their circulation in one country, Finland holds the third place in the world, with nearly 500 copies per thousand inhabitants. The category of free newspapers (which cover their costs only by means of advertising revenues) have gained a significant share in the market in recent years, especially in Flanders, but also in Hungary; here, the daily of the largest circulation is Metropol, with an average of 274,296 copies disseminated per issue.

Magazines (in many cases published by, or affiliated to, newspapers) are having a significantly lower circulation, targeting a more limited segment of people, having a specialised, thematic character; in Denmark, however, there are more than hundred different magazine titles, for instance.

Although the press sector is in some cases strongly dominated by bigger media players – three strong “domestic” suppliers which together control 70.3 percent of the market in the Netherlands and cover also the media in other countries as contrasted to foreign groups in Hungary and Slovakia -, in only a few Member States large numbers of publications remain, such as in Portugal where one counts approximately 650 local and regional newspapers, mainly with a weekly periodicity.

The migration of print media to the Internet in the past years still continues, thus the print media is in search for new ways to retain its readership. Nevertheless, it should be noted that substantial investments were made by traditional publishers into the electronic press segment and in particular in the provision of editorial contents to portable devices, such as tablets and smartphones. Besides, very important brands of news agencies or radio and television channels attract big amounts of website visitors. Most of these sites belong to commercial stations and offer specific content, while the public service broadcasters, with some exceptions in the field of catch-up TV and video libraries, are developing their sites more as a representation of their own brand(s). News, sport and entertainment are the most accessed information: in Belgium , for example, in 2010 around 150 million video downloads were initiated, an increase of 75% compared to the year before. However, in many Member States, there is no compilation of figures regarding the real use of the Internet, website users or across the VOD providers; thus it is difficult to assess the composition of the market, especially when the focus is on opinion-forming sites.

With regard to network and platform operators as well as Internet service providers, the evolution of the entire EU market has to consider the digitalization process and the condition of the network infrastructure in different countries. The cable network remains in some Member States the most important distribution network; in Austria, the number of households with cable TV grew substantially from 1,279 Mio. in 2003 to 1,549 Mio in 2011, in the Czech Republic there are about 100 cable broadcasting operators. In other countries (in Spain or France, for instance) most of the distribution market for pay-TV is dominated by satellite technology or terrestrial platforms, respectively, while in Germany the market leader covers about 2.8 mio. subscribers, in both satellite and cable platforms. More often, providers of electronic communications services implemented the “triple (or quadruple) play” offer, which combines high-speed Internet access, telephony and television/radio (and mobile communications services); in the United Kingdom, the

main operator owns and operates cable networks that pass approximately 13 million homes and is a "quad-play" provider.

Depending on the specificity of each country and on the economical and technological development, the behaviour of the information consumers is quite different. For instance, the audience shares of radio use in Germany shows, for example, consistently high levels: 58.43 Mio. people per day tune in a radio and stay tuned for more than four hours. In Greece, television is still considered the most important medium for news (78% of Greeks turn to TV for news), followed by the press, the Internet and radio. Also a decline of the public service television has been observed, such as in Cyprus or the Czech Republic.

The economic crisis has also hit, in the past years, the advertising industry and, consequently, the media which meant a decline of expenditure and income, respectively. However, for a certain complex of reasons, including digitalisation and several lifestyle changes, in apparently more exceptional cases a high demand for advertising slots has led to an increase in the prices for advertising. In Austria, for instance, the advertising revenue in 2011 amounted to a total of € 3,844,207,000.00, which is particularly due to the growing importance of online advertising. This latter observation certainly has a general importance for almost all of the Member States' media markets and is underlined by a constant, yearly increase in advertising spend on the Internet.

#### Conclusions and recommendations in respect of the national situations

As an overall observation it can be stated national experts to have concluded that, while there is certainly room for improvement of the situation at national level, the status quo does not present itself as entirely unsatisfactory. Nevertheless, on a more individual account, it is fair to say that quite a number of difficulties have been identified, the provision of remedies to which is seen as being also a duty for the legislature/regulatory bodies, but certainly for the media themselves, too.

Recommendations, where these have been made, include suggestions in respect of the respective national situation having some specific characteristics, but also cover issues which are deemed to be of a cross-cutting nature since these affect a plurality of Member States. Account should be had to the fact that only a handful of recommendations referred to action to be taken at EU level, though it cannot be excluded that this was induced by a perhaps restricted, or at least unclear, phrasing of the related point of the questionnaire. Simply in order to briefly give some examples of suggestions in the form of catch-phrases, the following overview can be provided:

- enhance compatibility of national media legal orders with European standards, particularly case-law of the ECtHR on Arts 10 and 8 ECHR;
- disintegrate politics and media (regulators);
- improve editorial independence and funding for psm;
- introduce media-specific anti-concentration regulation and/or render it readily enforceable;
- increase media ownership transparency to sufficient and sustainable levels;
- implement a truly convergent regulation;

- enhance vigorous effect of media supervisory authorities;
- provide better incentives, including funds, for diverse and high-quality content;
- provide answers in relation to applicability of safeguards to new forms of "journalism" or expression on the Internet;
- unlock the potentials of digitisation of media;
- devise means of assistance, not necessarily merely financial, to help especially the print sector to adapt to the new digital environment;
- provide remedies against ever-increasing difficulties for journalistic work (mainly economic and legal situation, but also other factors like "internal independence" and protection from various kinds of threats).

## 4. CONCLUSION AND RECOMMENDATIONS

Given the (partly) differing legal nature of European Union law *vis-à-vis* Council of Europe instruments in the media field, the fact will not be encountered with great surprise that EU law - in particular the fundamental freedoms, competition, specifically State aid law, and to some extent also "secondary legislation" - proves to have a more "binding, enforceable character" when contrasted to e.g. recommendations of the CoE's Council of Ministers or Parliamentary Assembly.

However, the impact of EU law on a number of highly important facets of Member States' media legal orders yet remains of limited scope. As has been outlined in particular in the chapter on the "European benchmark" (*supra*, at 1.3.), EU legislation deals with a number of structural and organisational aspects of media operations, such as in view of public funding being provided for psm, the press or other (infrastructure) sectors, and also in respect of several aspects relevant for electronic communications. Still, in this scenario the impact of the fundamental freedoms, though highly important and directly applicable, remains a somehow "weak" factor in the sense that their implementation, in the absence of harmonising measures, is based on a case-by-case approach requiring the balancing of different interests stemming i.a. from public order considerations and overriding reasons of the general interest.

The "softer" issues - such as the protection of journalistic sources, protection against "silencing" defamation claims, the right to access information held by public authorities or the entitlement of socially-weaker groups to reduced licence fees for psm - which are of course of utmost importance for the freedom of the media and the right of the citizens' to information, will generally be vested, at a European level, in the competence of the CoE, moreover Art. 10 of the ECHR, and thereby the crucial role played by the ECtHR is highlighted when interpreting the relevant guarantees and assessing both the legitimacy of restrictions and the extent to which positive obligations are imposed on, and thus to be respected by, the Member States.

Naturally, the above sketched-out, quite "binary" picture comes with a number of graduations and, more importantly, the mutual promotional influences on the freedoms concerned should neither be "downplayed" nor the complementary of actions, also at a practical-political level, be neglected: it is of great importance and does not remain without effects on Member States' policies if and when the institutions of both fora raise concerns with regard to certain developments, for instance.

As spotlighted in the foregoing comparative analysis relating to the individual country reports, the legal frameworks for the freedom of the media and the citizens' right to information in the EU Member States certainly show some room for improvement, in some instance even definite need for action, but the overall situation may reasonably be considered as having a rather reassuring character. A number of caveats to this global assessment immediately needs to be made with a view to some or even a larger number of countries, for instance in relation to the situation of psm (independence and financing), the commercial broadcasting and on-demand media sectors (hindrance to effective market entry, levels of concentration, role of regulatory authorities, difficulties in establishing sound funding bases), the working conditions for media and journalists (confidentiality of sources, threat of defamation claims, insufficient access to documents held by public institutions, efficiency of self-regulatory bodies), and so forth.

In view of the overall findings, considerations for the future shaping of EU policies, both general and specifically related to the media, are presented:

- Recommendations in view of EU general and media policies

At present stage, a limited amount of suggestions shall be provided as to the main directions which should be followed when the shaping of EU media policy is at hand:

- European Union media policy should strive to achieve even greater inclusiveness and coherence, also with regard to other EU policies;
- it should continue to stretch out to other International fora; however, with a view to the added value which the Council of Europe can contribute particularly in respect of subject-matter that will clearly rest outside of EU competencies and of (European) countries which are not (yet) becoming more closely integrated into the EU's accession and neighbourhood policies, a mutually-benefitting, complementary *modus vivendi* should be aimed at;
- the European Parliament should continue to underline the dual character of the media as expressions of culture and of societal needs, on the one hand, as well as their nature as market products and service, on the other, while attempts should be rejected to "artificially" portray these two facets as only being in confrontation with each other;
- the balanced approach which has shown to be instrumental when EU policies are at hand implying a direct impact on national media policies, such as competition law and State aid law, should be preserved;
- the European Parliament should continue to be, together with the Committee of the Regions, the European Economic and Social Committee and also the Council, an advocate for stressing the need to duly observe and respect the existing diversity between and within Member States, their media and economic potentials and the needs of the citizens;
- further initiatives should be envisaged in order to secure and enhance the availability of information on the situation of the media in Europe, in order to maintain a sound basis for devising future policy options;
- more cooperation appears advisable in respect of different organs, institutions and bodies as well as ad hoc or continuously-working expert groups and research institutions, within and outside the framework of the EU, in order to enhance dialogue and increase information and knowledge through pooling existing expertise and competences – and the European Parliament should seek to be an active part in such schemes;
- in particular as far as the area of protection of human rights is concerned, the activities of different expert bodies, e.g. by the FRA, the Ombudsman, the European Data Protection Supervisor, etc., should be followed with great attention and, wherever possible, the possibility and appropriateness of joining resources and knowledge to the advantage of more comprehensive approaches and for countering undue "proliferation" of fora, where this would risk to lead to unsustainable resources being made available to each of them, should be taken into account;
- additional funding should be made available to increase, on a constant basis, the access of the MEPs, the EP's committees and services to inhouse knowledge in the fields of technologies and economics of media sectors;

- the dialogue with citizens and experts representing "grass-roots" initiatives in the media and information sectors should be upheld to the greatest extent possible, notwithstanding the need to monitor closely the developments in formal procedures like petitions as a form of an "early-alert" system; in view of the expected concrete definition of a framework for citizens' motions, the EP should maintain a vigilant position as to whether the design of details matches the requirements of fully ensuring participation;
  - in the case of further accessions to the EU, emphasis should be laid on the fact that pre-accession undertakings are formulated in a clear manner and accessible to objective assessment as to their fulfilment, particularly where fundamental rights and the rule of law according to the Copenhagen criteria are at hand;
  - trade policy developments continue to deserve specific attention, as has been demonstrated not least in the context of ACTA negotiations;
  - in the event of future revision of the EU treaties, an additional, careful consideration should be given to the opportunities to at least clarifying the extension of the CFREU to action at Member State level, and to the expediency of assessing the efficacy of Art. 7 TEU material and procedural conditions;
  - in the same perspective, while preservation of the diversity of Member States cultures remains an important objective, it should be asked whether the complete and uncompromised exclusion of harmonisation competencies of the EU in the cultural domains still presents itself as the optimal solution for addressing future problems, not least when bearing in mind that - while devising EU policies in other fields - the impact on the cultural sectors appears to become increasingly significant (anyway).
- Specific recommendations in view of current and future EU media policies

In relation to more specific and/or current media policy initiatives, the following suggestions are formulated:

- the European Parliament, besides continuing to provide political support, might wish to reflect upon the desirability of formally requesting the European Commission to initiate infringement procedures on matters of national media legal orders, either being of importance *prima facie* for the safeguard of the TFEU's fundamental freedoms or, in combination therewith, for the safeguard of fundamental rights, particularly Art. 11 CFREU;
- the European Parliament could focus more closely - based i.a. upon the soon-to-be-expected outcome of the assessment of the EU competencies in respect of media ownership and transparency legislation, but also on further consideration - investigate into the appropriateness of formally calling on the European Commission to present a proposal for a EU Directive on this subject-matter;
- in light of existing provisions in the AVMSD on the right of reply, transparency requirements for audiovisual media service providers, the right to short news reporting, the prohibition on incitement to hatred, the European Parliament might see prospects in discussing with Member States and the European Commission the opportunities to enhance the formulation of rights and obligations of the media;

- in the same vein, a future revision of the AVMSD might entail, firstly, an additional extension of scope (*ratione materiae*), given that the European Commission has announced to consult on, and possibly put forward a Communication in relation to, Connected-TV, and, secondly, should make the provision on independent regulatory authorities as “biting” as are the parallel, “sister”-provisions in the eCommunications package and in EU data protection law;
- the European Parliament should also explore the avenues of pressing, on the one hand, for a revision of the eCommerce Directive, which lacks - given the current and increasing importance of on-demand services, which are media-like, but not audiovisual – both significant guarantees and requirements and in particular shows need for re-assessing the “safe-harbour” principles for intermediaries, while, on the other hand, in the above context of Connected TV and also beyond, “consumer equipment” regulation requires adaptation to products’ and services’ design actual realities of new and emerging media markets;
- with regard to universal service obligations, the stand-still in discussions over the appropriateness of including (fast or even ultra-fast, but at least “real”) broadband Internet access into the definition, should be overcome, while in parallel different kind of support mechanisms at European and national level should be explored in order to prevent a digital divide; additionally and also in respect of electronic communications regulation, the issue of net neutrality deserves continuous attention by policy makers at all levels, since developments here can impact simultaneously on the distribution of and the access to information which is of public interest;
- a review of existing aid schemes for different kinds of media content production and distribution as well as in view of the underlying conditions (training, equipment) at national level should be commissioned with the purpose of, firstly, establishing best practices models and, secondly, to help delineate discussions on alleged disability to adapt to new environments and embrace opportunities of the new media “ecosystem” from the more substantial issue of what kind of value is attached to the making available of high-quality and diverse media output;
- the existing or perceived hindrances for the establishment of new business models in the online environment - which might stem from a lack of legal certainty or actually be the result of unsuitability of the existing, applicable legal framework mainly in the field of copyright and related rights – should be addressed in the shortest possible delay, not least in order to maintain awareness particularly of younger generations of the “value of culture”; in parallel, the preconditions should be secured to foresee the introduction of a “cultural flat rate” with the aim to, firstly, compensate rightsholder for the continuing loss of any remuneration presently incurred and, secondly, to provide for a legitimate exception to exclusivity rights where copying happens solely for private, non-commercial purposes – thus transposing the idea of private copy levies into today’s “digital realities”.



## 5. ANNEX

### 5.1. Questionnaire

Information of the citizen in the EU: obligations for the media and the institutions concerning the citizens' right to be fully and objectively informed – Update 2012

#### - Questionnaire -

##### Preface

As stated in the terms of reference underlying the tender procedure, the study shall cover the following 'themes of research':

'freedom of the media, freedom of expression and freedom of information, codes of practice for journalism and self regulation, legal framework on media ownership and regulation, the media system in Europe'.

With a view to the country reports, forming an integral part of the overall study, the following structure had been foreseen by the European Parliament: (i) relevant legislation and regulation related to the media [acts, legislation, regulation, codes]; (ii) the media landscape and main players in the industry; (iii) conclusions and future perspectives. In order to duly take into account the character of the present study as update to the study published in 2004, we would like to ask you, when drafting the country report, to refer to the initial study whenever possible without prejudicing the report's readability. **In the following, the description of the required country report is formulated in such a way as to outline what kind of information should be covered/ what is "needed" content-wise, irrespective of whether, in the individual case at hand, an update or some addenda would suffice or an entirely new text has to be written.**

Overall, the study and its country reports shall allow to gain a reliable picture of the *status quo* as regards the citizens' access to information – via the media and otherwise – that is deemed important for public debate and, hence, for the individual and collective formation of opinion.

##### Content of Country Reports

ad (i):     a) Relevant Legislation etc.

**aa)** Initially, a short overview over the **constitutional law/fundamental freedoms** background of the media legal order should be given:

- What are the safeguards in terms of freedom of expression, freedom to impart information (freedom of the media), freedom to receive information, freedom to access information (held by public authorities)?
- Are there specific safeguards to protect the media/journalists enshrined in the constitution, such as the right not to disclose one's sources or the right to refuse to testify or similar guarantees; and are there specific rights, *e.g.* a right to request information which goes beyond the "normal" citizen's right to access information?

- Has specific mentioning been afforded to the press, public service media, or media regulatory authorities, such as institutional guarantees or alike?
- What kind of universal service entitlements (not to be understood only under a telecommunications-law angle) are foreseen?

Please elaborate on these issues including the relevant jurisprudence of the courts – whose interpretation might in some cases go beyond the explicit text of the norms!

**bb)** The core part of the first section shall be devoted to describing the main elements of the **media order**, be it legislative/regulatory or self-regulatory, which have a bearing on the pursuit of the relevant freedoms, **as well as the actual situation**. The points addressed in this respect in the 2004 study should in any event be covered (*cf.* country report on Austria, points 1.4 and 1.3). Overall, the information provided shall allow to assess “the two sides of the medal”, *i.e.* what (legal and factual) conditions exist ...

- ... firstly for those who are willing to impart information ...

**(1)** “market entry”: licensing/registration schemes for commercial broadcasters or providers of online services; remit of public service media; notification requirements for print publications; etc. In particular

- media-specific anti-concentration rules (horizontal, vertical, cross-ownership) and/or competition law aspects of media ownership and their application as well as other safeguards for the preservation and promotion of diversity,
- legal framework for public service media operations (broadcasting and online) as well as their ability to fulfil their tasks and their actual performance,
- the role and functioning of regulatory authorities in these respects;

**(2)** “pursuit of core activity”: in particular

- ordinary law safeguards for journalistic activity (*e.g.* freedom of information laws, protection against searches, protection against “silencing” libel and defamation claims)
- specific positive content obligations,
- funding schemes for specifically desired content (for present purposes: mainly in relation to news/current affairs and information/ service),
- political advertising and/or broadcasting time to be offered to parties/candidates or editorial programmes/articles devoted to upcoming elections,
- codes of conduct and their organisational framing,
- the role and functioning of regulatory authorities in these respects.

**(3)** “distribution aspects”: in particular

- access to frequencies (*i.a.* for terrestrial transmission of broadcasting services),
  - access to distribution networks and control of actual conditions (FRAND; circulation instruments for the press),
  - must-carry/must-offer rules for electronic media,
  - role of platform operators (*e.g.* multiplexes),
  - the role and functioning of regulatory authorities in these respects.
- ... and secondly for those who are willing to receive information

**(4)** access to information: in particular

- transparency of media ownership situations,
- accountability of public service media,
- freedom of information laws,
- access to products/services and distribution networks (right to install or aid schemes to purchase reception devices; universal (technical) coverage and/or service obligations; exemption from broadcasting license fee, where applicable; public subsidisation or commercially-offered reduced rates for subscription to print publications etc.)

**(5)** "have a say" on what information is provided and how: in particular

- complaint procedures, "Ombudsmen",
- participation in bodies of media operators (viewers' and listeners' councils or alike) or in (self-)regulatory authorities/bodies.

ad (ii): **b)** Main market players etc.

Here in the second section, some general figures on the main players (and their shares in audience reach, subscription etc) in the following markets are requested:

**aa)** Radio

**bb)** Television

**cc)** Press and Publishing (titles mainly devoted to political/economic/cultural information, not: "car maintenance journals", books on cooking recipes or furnishing, and so on)

**dd)** Online media (particularly: non-linear audiovisual media services; websites. For exemptions see above under cc).)

**ee)** Cable and Satellite operators/IPTV/Internet access providers (please note: information on service providers, such as satellite- or cable-"only" TV programmes, should be included (and appropriately indicated) under aa) or bb) above; here the focus is on telecommunication network and service providers including platform operators, pay-TV operations, however, where attributable to programming activities, should also feature under bb) above)

**ff)** Audience (broadcasting)/Readership (print)/Usage (online)/Subscription (telecoms)/Advertising market shares (all markets)

ad (iii): **c) Conclusion and perspectives.**

Your own assessment of the overall situation – as mainly characterised by the findings under a) and b) above in view of the study's interest in learning about the state of play in the (pluralistic and diverse) provision of information to the citizens – should be made here. If compared with the approach of the 2004 study, it might be advisable to also tackle relevant case-law (court judgements, regulatory authorities' decisions, practice of the media themselves as well as self-regulatory codes and institutions) at this stage of the description, unless such information on the practice is of such relevance that the information provided under the previous sections would be incomplete or even misleading if not presented at an earlier stage. Please bear in mind, when allocating elements of your description to either section that, on the one hand, your conclusion has sufficient grounding and textual framing and that, on the other hand, the assessment of perspectives is duly and understandably prepared for.

## 5.2. List of Sources

References used for the drafting of this study, including case law of European and national courts, legislation and regulation, codes of conduct, doctrine, statistical data, articles in written and electronic press, have been comprehensively indicated in the relevant parts of this study, particularly in nos. 1 and 2, to which the reader is kindly referred.

## 5.3. About the Authors

- The Institute of European Media Law (EMR), Saarbrücken/Brussels

### Organisation

The EMR was founded in 1990 as an association under private law being recognised to pursue not-for-profit goals in the public interest; today it is a partner to numerous national and European institutions. The Institute acts as a service provider and neutral platform in a number of fields of media law. Thanks to its network which comprises over 175 national experts from approx. 40 European countries, it is particularly able to carry out comparative legal studies. The EMR organises conferences and publishes research results in different publications, including its own series of books.

The EMR is composed of supporting and regular members. Together they form the General Assembly, which convenes at least on an annual basis. Supporting members of the association comprise public service as well as commercial TV and radio broadcasters from Germany and other European countries, the German media regulatory authorities and further donors. Regular members are media experts from Germany and neighbouring countries. The executive bodies of the EMR are the assembly of members and the board of directors. The board of directors brings together practitioners from the media; its composition reflects the neutral, cross-sectoral approach of the Institute's work. Beside the General Assembly, by which it is elected, the Board is the second organ of the association; for the latter's day-to-day operations, it nominates the Executive Board which consists of the Director, the Director for Scientific Affairs, and the General Manager.

The staff consists of the General Manager, 4 additional lawyers, one assistant and 10 scientific researchers (all with a legal education background). Their tasks cover the Institute's publication activities, studies and research, management and development of databases as well as assisting in the organisation of conferences. Focussing on different areas of media law, they are the contact persons for their respective fields of specialisation.

### Fields of activity

One of the EMR's major activities is to carry out legal studies covering current aspects of media law on behalf of public and private institutions. The EMR has carried out studies for organisms such as the German Federal Government, the European Commission, European Parliament, and the Committee of the Regions, the Council of Europe, the German Länder media authorities as well as regulatory bodies of neighbouring countries, national and foreign public and private media enterprises as well as several associations.

### **Conferences**

Serving as a platform for information and communication, the EMR via its conferences, dialogues, workshops and expert meetings contributes to the development of media law and policy. Almost 150 events in different formats have been organised regularly in collaboration with partners who aim at benefiting from the experience gathered over more than 20 years.

### **Scientific research**

The Institute has conducted a variety of research projects which have been funded by different national and foreign institutions.. In order to support the EMR's research activities, an advisory council was established in 1997. Its current members are renowned experts in media law research and practice.

### **Publications**

The EMR edits its own series of publications, published by Nomos, covering conference proceedings, studies and research findings as well as Ph.D. theses and *liber amicorum*.

Two electronic newsletters provide information on recent developments: abstracts on recent media law and policy from all over Europe and the U.S. on the one hand, and short notes on the most significant events in relation to the Institute.

The EMR is member of the Advisory Board of the European Audiovisual Observatory in Strasbourg and of the Editorial Board of IRIS. The Institute contributes to the various publications in this series, i.e. monthly abstracts on recent media law and policy developments in Central and Eastern Europe to the electronic newsletter 'Legal Observations', two lead-articles as well as additional information provided for the bi-monthly IRIS *plus* as well as conference reports and comparative legal analysis for the IRIS Special.

In the same way, the EMR's short reports focussing on Western Europe, the EU and the CoE and concentrating on broadcasting, telecommunications and new media law are published in the *Newsdienst MMR-Aktuell* of the German specialised legal journal *MultiMedia und Recht*.

### **Databases**

The EMR offers a comprehensive service for the provision of legal information, namely established in the form of two online databases, DEMIS, which compiles all relevant jurisdiction that has been issued either on the European or on the German level, and EMIS which contains legal texts which have an impact on the media and which originate from the European Union, the Council of Europe and the European states; at present around 1,750 documents in English, French and/or German can be accessed via a cross-lingual retrieval system.

### **Partners**

Based on the partnership agreement initially concluded in 1994 and renewed since, the European Audiovisual Observatory in Strasbourg is the most import partner of the EMR. The EMR is also in close contact with the Europa-Institut, Law Section, University of Saarland, the Hans-Bredow-Institute for media research at Hamburg University, and the Institute of Information Law at the University of Amsterdam.

### ***EMR Media Network***

The mutual co-operation established with media law experts all over Europe acting as correspondents under the umbrella of the EMR Media Network has enabled the EMR to include expert analysis into different projects for a considerable number of years.

- Dr Carlos de Almeida Sampaio (Portugal)

He obtained his Law Degree from the University of Lisbon Law School in 1974-1975. There he also received a Master in Legal and Economic Sciences in 1983. JD studies at the College of Law, University of Illinois, Champaign-Urbana, in 1993-1995: PhD at the University of Lisbon Law School. He was admitted to the Portuguese Bar in 1979. Then he was Assistant Professor of European Law, Fiscal Law and International Economic Law at the University of Lisbon Law School in 1979-2002. Invited Professor of the Law Degree and Post-graduation in European Studies, at the Portuguese Catholic University. From 1987-1992 he was Prime Minister's Senior Advisor for European Affairs. He was a Member of the Portuguese Court of Accounts Reform Commission. Member of Banco Pinto & Sotto Mayor Board of Directors (1992-1993). Non executive member of Siemens, S.A. Board of Directors (1993-2006).

The main projects on which he has advised in recent years include large industrial investments, establishing industrial projects of state-of-the-art technology in Portugal, and investment contracts and international distribution agreements. He has also advised large international groups on matters relating to the fields of electronics, communications and audiovisual.

He was Partner of Cuatrecasas, Gonçalves Pereira & Associados since April 2008 to May 2012. Actually he is Partner of CSA-Correia, Seara, Caldas e Associados.

- Ms Ieva Andersone (Latvia)

She is an attorney-at-law qualified in Latvia, and practicing as a senior associate in SORAINEN Latvia office since 2005. Before joining SORAINEN, she worked as a legal counsel with the Latvian National Broadcasting Council.

Ieva has gained her legal qualification from the University of Latvia and a LL.M first class degree in European and Commercial law from the University of Cambridge (Trinity Hall).

Ieva's key areas of expertise include litigation & arbitration, competition, intellectual property and commercial contracts. Since 2011, Ieva is co-heading the competition & regulatory and commercial contract teams in SORAINEN Latvia office. Since 2005, she has been the Latvian correspondent for the IRIS newsletter on audiovisual media law published by the European Audiovisual Observatory, as well as has authored numerous publications on Latvian intellectual property and competition law. Ieva has also lectured on public international law and EU law at the Law Faculty of the University of Latvia and is a professional trade-mark attorney.

- Prof Dr Kevin Aquilina (Malta)

He is Associate Professor and Dean of the Faculty of Laws at the University of Malta. He is also Head of the Department of Media, Communications and Technology Law at the Faculty of Laws. He holds a doctorate of philosophy in law (Ph.D.) from the London School of Economics and Political Science of the University of London, a doctorate in law from the University of Malta (LL.D.) and a Masters in International Maritime Law (LL.M.) from the



International Maritime Organization's International Maritime Law Institute. He currently lectures on Media Law and Administrative Law. He has held the office of Chief Executive of the Maltese audiovisual broadcasting regulator – the Broadcasting Authority – and was Chairman of Press Ethics Commission. He has written extensively on Media Law and is a regular contributor to *IRIS – Legal Observations of the European Audiovisual Observatory*, of the Council of Europe.

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He is Assistant Professor (Ricercatore) of European Union Law at the School of Law at the University of Naples "Federico II". He graduated in Law *summa cum laude* from the University of Rome and holds an LL.M. in European Law from King's College London and an LL.M. in International Legal Studies from New York University, where he was also a Fulbright Fellow. He completed a JSD in International Law and a Postdoctoral Research Fellowship at the Department of International and EU Law at the University of Naples "Federico II". He was a Visiting Scholar at the Institut voor Informatierecht at the University of Amsterdam and at the Centre of European Law at King's College London. Dr. Arena was awarded the "SIDI 2011" Prize by the Italian Society of International Law for an article on the Doctrine of Preemption in the EU. Dr Arena has authored and co-authored several publications on peer-reviewed Italian and international legal journals, as well as the first Italian collection of WTO legal texts (Naples, Editoriale Scientifica, 2009), a monograph on public services in the law of economic integration (Naples, Editoriale Scientifica, 2011) and a handbook on media law in Italy (Alphen aan den Rijn, Wolters Kluwer, 2012).

- Ms Cristina Bachmeier (Project Manager for the study)

Cristina Bachmeier graduated in law from Bucharest University, Romania, in 1999. From 1999 until 2001 she worked as a Director of Cabinet of the State Secretary in the Ministry of Justice in Bucharest. She was head of the department for law, human resources and administration of the Romanian subsidiary of Fuchs Gewuerze GmbH (2001-2006). Since June 2009, Cristina Bachmeier is a permanent member in the Romanian Advertising Council (RAC), active judge in the Ethical Committee of RAC and consultant for Copy Advice. She worked as an in-house lawyer for Intact Media Group (Antena 1, Antena 2, Antena 3, Euforia TV, GSP TV; Radio ZU, Radio Romantic) from 2006 until 2010 and was a legal representative at the Romanian Audiovisual Council and at the European Association of Commercial Televisions (ACT). In July 2011, she was admitted to the bar of Frankfurt/Main as a European lawyer. Since the end of 2010, she is following a postgraduate Master programme in order for her to obtain a LL.M. in Media Law at the Johannes Gutenberg University in Mainz, Germany. Since March 2012 she is working as a scientific researcher at the Institute of European Media Law (EMR).

- Dr Joan Barata Mir (Spain)

He is the Vice Dean for International Relations and Professor of Communication Law at the Blanquerna Communications School (Universitat Ramon Llull, Barcelona). He has also been Head of President's Cabinet and Secretary General of the Catalonia Audiovisual Council, and member of the Permanent Secretariat of the Mediterranean Network of Regulatory Authorities. He gained his PhD from the University of Barcelona, writing a thesis on Television and Public Service Theory, and is the author of several books and articles on audiovisual law and regulation. He is an international specialist in media law, and has assisted the elaboration of communications and audiovisual laws and regulations in several countries.

- Mr Marcel Betzel (Netherlands)

He is a policy advisor for the Dutch media authority, Commissariaat voor de Media (CvdM). He is involved in policy advisory work, research and legal affairs. He is dealing with topics like the implementation of the AVMS Directive, regulation of new media, jurisdiction issues and monitoring of media concentration developments in Dutch media. International affairs and relations are his main task and he represents his authority in the AVMS Directive Contact Committee of the European Commission, the Working group of the AVMS Regulatory Authorities and the European Platform of Regulatory Authorities (EPRA). Besides he is a board member of MEDIA Desk in the Netherlands which is involved in the MEDIA programme of the European Commission in order to promote European works in film sector and mainly provides assistance to Dutch applicants of these European funds. Furthermore he sometimes represents the Council of Europe (CoE) during expert missions to countries in transition (recently Azerbaijan, Armenia and Ukraine). Marcel Betzel studied law at the Maastricht University and University of Antwerp and Journalism at the Academy of Journalism in Tilburg. Before, he also worked as a legal consultant, music journalist at the Dutch public service broadcaster VPRO and guest lecturer for the post graduate programme radio and television journalism of the University of Groningen.

- Dr Christoph Bezemek, BA, LL.M. (Austria)

Assistant Professor of Law, teaches at Vienna University of Economics and Business (WU). Dr Bezemek has studied law and philosophy at the University of Vienna and at Yale Law School. He has held several appointments as Visiting Lecturer at domestic and foreign institutions of higher education; various publications and lectures in the field of Public Law.

- Dr Christophoros Christophorou (Cyprus)

He studied Education in Cyprus and Paris and Political Science in Athens and Lille (France), where he obtained his Ph.D. He has worked as school teacher, as a senior press officer in the Public Service (PIO - Cyprus) and as the first Director of the Cyprus Radio and Television Authority. As Cyprus representative to media experts groups at the Council of Europe and other European organizations he contributed to the drafting of modern media policies (1990-2001). As an external expert of the Council of Europe in media, regulation and elections, he participated in training and other seminars in most Central and Eastern Europe countries. Christophorou has also thirty years research work on political parties and elections and is the author of books and publications on elections, media and other subjects. He is assistant professor in Communications at the University of Nicosia.

- Mr Eugen Cojocariu (Romania)

He is a professional journalist from Romania. Head of Radio Romania International/RRI, part of Radio Romania/SRR, public service, Eugen has worked for RRI since 1992. He speaks English and French and was a correspondent in Chişinău (Republic of Moldova) and Paris. Eugen Cojocariu is member of more professional bodies (Professional Journalists Union of Romania/UZP, Southeast Europe Media Organisation/SEEMO, International Union of Francophone Press/UPF, World Federation of Journalists and Travel Writers FIJET Romania). In 2001 he won the Romanian's Press Club Prize for a radio talk-show and was nominated in 2003 for the same prize. Since 2009 Eugen is a nonpermanent Vice President of EURANET (European radio project financed by the European Commission), in charge with development and distribution, and member of the International Radio Group of the European Broadcasting Union/EBU. He graduated from Chemistry and Physics, then from

Political Sciences. Eugen holds a European Mastery on the Management of Cultural Enterprises, as well as a MBA degree in General Management.

- Prof Dr Mark D. Cole (Luxembourg)

He is Associate Professor of Law at the University of Luxembourg since March 2007 (Law of New Information Technologies, Media and Communications Law). Of British origin, he grew up in Switzerland and Germany where he studied law and political sciences. He holds a doctorate from the Johannes Gutenberg University of Mainz (Ph.D., 2003) where he was research assistant from 1999 to 2002 and again from 2005 to 2007 at the Chair in Public Law, International and European Law, Media Law. Additionally, he holds both German State Examinations in Law and gained practical experience in media law at the DG Competition of the European Commission, a law firm specialising in Intellectual Property Law and the legal department of a television broadcasting company. For three years he was Researcher at the Mainz Media Institute where he still teaches a class on European Media Law in the LL.M.-programme on Media Law. In addition he also teaches yearly a course on European Media Competition Law at the Europa-Institut Saarbrücken and is a member of the Research Advisory Council of the Institut für Europäisches Medienrecht (EMR), Saarbrücken/ Brussels. More information under [www.medialaw.lu](http://www.medialaw.lu) with details on a comparative research project concerning the EU Audiovisual Media Services Directive.

- Mr Jan Fučík (Czech Republic)

After having graduated from the Faculty of Law of the Charles University in Prague, he started to work in the public Czech TV, later as head of the legal department. He dealt with different aspects of the media law and cooperated in the preparation of Czech media laws during the past twenty years. He also took part in the work of the Legal Committee of the European Broadcasting Union in Geneva. He then started to work in the Council for Radio and Television Broadcasting. His task was to cooperate with European Union authorities and with the regulatory bodies of EU Member States with a similar field of competence, focusing in particular on obtaining and providing data and information required by law, by decisions issued on the basis of law or decisions made on the basis of law, or by the legal acts of the European Union and to cooperate in the field of television broadcasting regulation with the relevant bodies of the member states.

Today he is employed in the Ministry of Culture of the Czech Republic, Legal Department. His tasks focus on preparation of media regulation. He is a member of the Contact Committee according to the AVMS Directive and a member of the Standing Committee of the Transfrontier Television Convention of the Council of Europe. He acts as an IRIS correspondent for the Czech Republic for many years.

- Ms Katharina Grenz (Germany)

She obtained her law diploma (First State Exam), after finalising her legal studies at the University of Saarland, in December 2010. Currently, she is a trainee lawyer at the Regional Supreme Court of the Saarland, Saarbrücken. Since January 2010, she works as a research assistant at the Institute of European Media Law (EMR).

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joining the law firm in 1998 and currently leads the firm's data protection & privacy team. She is experienced in all aspects of data protection legislation, including employee and consumer data privacy, employee monitoring, international data transfers, personal data processing consent forms and policies. Her other fields of expertise include IT & communications, media, employment law, environmental law and general business and corporate law.

- Prof Dr Michael Holoubek (Austria)

Professor of Law, he teaches at Vienna University of Economics and Business (WU) and has held various positions in regulatory authorities, i.a. as member of the Austrian Private Broadcasting Authority and as member of the Federal Communications Board. Professor Holoubek has served as an expert in parliamentary hearings on many occasions. He has lectured on a variety of issues in the field of Constitutional and Administrative Law, Fundamental Rights, and European Law, both at domestic and at international conferences, and published extensively on a broad scope of subjects in these fields. In 2011 he has been appointed as member of the Austrian Constitutional Court.

- Ms Jurgita Iešmantaitė (Lithuania)

From 1991 to 1996 she studied law at the Vilnius University, Faculty of Law. Currently, she is the Deputy Executive Director at the Radio and Television Commission of Lithuania (RTCL). Her regular duties consist of discharge of management functions and the provision of consultations. Beside her regular duties she participates in the activities of WGs on drafting legislation. Before working at the RTCL, she worked as Senior Lawyer at the Lithuanian National Radio and Television (LRT). Her working area consisted in the safeguarding of the legitimacy of the activities of the public service broadcaster, the provision of consultations. She made contracts and participated in negotiations.

- Dr Petros Iosifidis (Greece)

He obtained his first degree in Sociology from Panteion University of Social and Political Sciences of Athens and completed his MA in Communication Policy Studies and PhD in Media Policy at City University and University of Westminster, respectively. He is currently Reader (Associate Professor) in Sociology and Media Policy at City University London. He is author of five books, has published extensively in referred journals, contributed chapters to books and presented papers in national and international conferences. He is associate editor of the 'International Journal of Digital Television' (Intellect UK) and co-editor of the book series 'Global Media Policy and Business' (Palgrave Macmillan). He has acted as an ESRC (Economic and Social Research Council) Peer Review College reviewer and as a national expert for European projects.

- Ms Christine Kirchberger (Sweden)

She obtained her Law Degree from the University of Vienna. After working as a trainee with the European Parliament and at two district courts in Austria, she obtained a Master's Degree in Law and Information Technology from the University of Stockholm. In 2001, Christine Kirchberger joined the Swedish Law and Informatics Research Institute (IRI) at Stockholm University as a junior lecturer. She has been teaching legal informatics to law students as well as computer scientists, both in Stockholm and other Swedish universities as well as at King's College in London. Christine Kirchberger has participated in several EU projects on IT-related legal issues, such as eHealth, electronic procurement and data

protection, and published several articles and blog posts on legal information retrieval and legal informatics in general. In 2010, she authored "Swedish Cyber Law", as part of Kluwer's International Encyclopaedia for Cyber Law.

- Dr Ewa Komorek (Ireland)

LL.B (Warsaw 2002), LL.M (Amsterdam, 2003), PhD (Trinity College Dublin, 2008); she is a lecturer in Media Law in the Griffith College Dublin and an adjunct lecturer in Trinity College Dublin. She formerly worked for the European Commission's DG Competition (Media Unit) and in the EU & Competition Departments of Linklaters and Hammonds law firms in Brussels. She also worked as a consultant in the EU & Competition team of A&L Goodbody Solicitors in Dublin, and as research assistant for the Sales Law Review Group in the Irish Department of Enterprise, Trade and Employment. She is the author of the book "Media Pluralism and European Law" (forthcoming, Kluwer Law International, 2012).

- Dr Philie Marcangelo-Leos (France)

She has a postgraduate degree in media law (1997) and a Ph.D. on pluralism in the audiovisual sector in public law (2003) (published by LGDY) from the University of Aix-Marseille III. Since 2005, she writes articles for several law journals of the Victoires-Editions group concentrating on media law (Légipresse, Légicom) and is editor of Légilocal, a journal which specializes in the law of local authorities (Groupe Victoires-Editions). She is also author of several articles on topics concerning transports and environment for the website localtis.info of the Caisse des dépôts et consignation and keeps the site legally up to date. In 2008, she contributed to the EMR study "The contribution of public service media to social and to the promotion of a culture of tolerance" on behalf of the Council of Europe.

- Prof Dr Roberto Mastroianni (Italy)

He is full Professor of European Union Law at the University 'Federico II' in Naples, Italy, where he also teaches Media Law. He graduated in Law at the University of Florence, Italy (1987), and holds a PhD in European Law from the University of Bologna (1991) as well as a LLM from the Penn State/Dickinson School of Law in Carlisle (PA), USA (1992). He specialized in International Copyright Law and in European Media Law at the Universities of Geneva, Amsterdam and New York (NYLS). Former Researcher of International Law at the University of Florence (1992-1997), he served as Referendaire at the European Court of Justice in Luxembourg, in the Cabinets of Advocate General Giuseppe Tesouro and Antonio Saggio (1997-2000). He practises law in Rome and Naples in the area of European Law and Media Law, and collaborates with several private and public companies and authorities. Among his publications are a treatise on International copyright Law (Milan, Giuffré, 1997), a book on the reform of Italian Broadcasting Law (Turin, Giappichelli, 2004), a monograph on the Audiovisual Media Services Directive (II ed., 2011) and several articles and notes on EU Law, International Law and Mass Media Law. He is the co-author of a European Law handbook (Diritto dell'Unione europea, with G. Strozzi, Turin, Giappichelli, 2011) and of a treatise on Procedural Law of the European Union (Il contenzioso dell'Unione europea, with M. Condinanzi, Turin, Giappichelli, 2010).

- Prof Dr Kaarle Nordenstreng (Finland)

Professor of Journalism and Mass Communication at the University of Tampere 1971-2009, earlier editor of radio youth programmes and head of research at the Finnish Broadcasting Company. He is author and editor of 50 books, including *Normative Theories of the Media:*

*Journalism in Democratic Societies* (with Christians et al. 2009) and *Finland's Media Landscape* (in Finnish, edited with Wiio 2012). His international tasks include consultation at UNESCO (1969-1975) and membership in European Science Foundation's Research Programme "Changing Media – Changing Europe" (2000-2004).

- Mr Juraj Polak (Slovakia)

He graduated in Comenius University at Faculty of Law in 2005. He worked for the Ministry of Interior Affairs in the administrative law and legislative department and was also secretary of the Minister's appealing committee (advisory body which gives recommendation to the Minister on how to handle appeals against decisions adopted by the bodies of the Ministry).

He is working for the Office of the Council of Broadcasting and Retransmission of the Slovak Republic (hereinafter only "Council") since 5 years where he works for the law and license department, and for a year and a half, he was deputy of the head of this department. His regular duties mostly include writing legal opinions on the matters handled by Council (mostly regarding complaints from citizens), writing answers to appeals against Council's decisions and representing the Council at courts.

Besides his regular duties he is the person responsible for international affairs that concern the Council. He represents it at EPRA meetings, meetings of the working group of the AVMS regulatory authorities. He frequently attends the Contact Committee meetings with delegate from the official government body. He is involved and he attends the recently founded CERF's (Central Europe regulatory forum) meetings as also other international events in which the Council is involved.

In 2009, he was member of a group which closely cooperated with the Ministry of Culture of the Slovak Republic on the transposition of the Directive 2007/65/EC into the Slovak legal system and he represented the Council at the meeting of the Government's legislative council when the relevant main legislative proposals were passed. He was also involved (with the Ministry as the officially responsible body) in writing the answers to the European Commission in the review process of the notifications of the Member States regarding the Directive's transposition.

He is also national correspondent for the Slovak Republic for the IRIS newsletter of the European Audiovisual Observatory.

- Dr Gábor Polyák (Hungary)

Associate professor at the University of Pécs and at the Corvinus University of Budapest. He graduated in law and media sciences at the University of Pécs. He obtained an LL.M. degree at the University of Vienna in ICT law. His PhD was made at the University of Pécs with the title 'Forming the Media System'. He is the chief editor of the Hungarian professional journal 'Infokommunikáció és Jog' ('Infocommunications and Law'). He is author of numerous publications and expert papers in media, informatics and telecommunications law. He worked as advisor at the National Radio and Television Authority (ORTT) during the presidency of László Majtényi. He is Fellow of the Bolyai Scholarship of Hungarian Academy of Sciences.

He was assisted in his contribution to the present study by Attila Mong, Krisztina Nagy, Ágnes Urbán and Zsófia Lehóczki, all of which are member of Standards Media Monitor (Mérték Médiaelemző Műhely), a civil and professional organisation committed to opinion



and press freedom, with the aim of evaluating the impacts of media laws and other media policy decisions.

- Dr Maciej Ramus (Poland; market analysis part)

He is currently lecturer (dozent) at the Faculty of Management of the University of Warsaw and strategy analyst at the Polish Radio S.A. In the nineties, Dr Ramus acted as Director General at the Ministry of Culture of the Republic of Poland, Advisor to the Polish Ministry of Finance, CFO and Vicepresident of the Polish Radio and Television.

- Leyla Rock (France, coordination of country report)

She graduated from the Faculty of Law of the University of Saarland, Saarbrücken, in June 2012, when she finalised her legal studies and passed the First State Exam. She is working at the Institute of European Media Law (EMR) since September 2010 and was involved as scientific assistant in the study "INVODAS – Interessenausgleich bei der Vorratsdatenspeicherung", conducted on behalf of the German federal Ministry of Education and Research (BMBF), where she significantly contributed to the editing and comparative analysis of country reports on Member States transposition of the Data Retention Directive.

- Prof Dr Søren Sandfeld Jakobsen (Denmark)

He is Professor at the Law Department of Aalborg University. His primary research areas cover Media, IT and Communications Law, on which subjects he has published a number of books, articles, reports, etc. His PhD dissertation (2004) concerned the legal aspects of the growing media convergence. He has previously worked as attorney-at-law and Head of the Legal Office of the Danish Ministry of Business and Industry. He is a member of several research groups and holds a number of honorary offices within his legal field.

- Dr Evgeniya Scherer (born Nikolova) (Bulgaria)

She has been a qualified lawyer for more than 10 years. She has received her diploma for Master in Law at the Sofia University "St. Kliment Ohridski" and at the University of Hamburg. She obtained her doctor's degree in 2009 from the University of Hamburg. Her dissertation concerns the digitalisation of television in Europe and especially in Germany and Bulgaria. In 2004, Dr Scherer was a lecturer in telecommunication and media law at the Institute for European and German Law with the Faculty of Law at Sofia University. As a senior consultant at Kambourov & Partners law office (2004-2006) she was involved in number of high-profile project-finance cases such as the privatisation of the national film-making monopolist Boyana Films EAD. Today she is acting as an attorney-at-law and a consultant in the media field in Bulgaria and in Germany. She has participated/participates in European and Bulgarian projects concerning media legislation and environment such as the EU-Twinning-Project „Strengthening the capacity of the Bulgarian Ministry of Culture to secure the development and implementation of a National Audiovisual Policy, including copyright protection" (2009-2010) and "The electronic media environment in Bulgaria in times of change and digitalisation" (2010-2012). She was involved as a national expert on behalf of EMR in two media studies, namely in the "Study on the monitoring of the compliance by television broadcasters with the provisions of Chapter IV of the "Television without Frontiers" Directive (2010-2011) and in "The Media in South-East Europe. A comparative Media Law and Policy Study" (2010-2011). Since 2010, Dr Scherer is a lecturer in European, German and Bulgarian media law at the University for Applied Sciences in Kehl, Germany. She has many related publications.



Dr Scherer is a founding member of the German School established at the German Embassy in Sofia and was a Board Member voluntary until March 2010. She speaks Bulgarian (native), German, English and Russian.

- Mr Alexander Scheuer (Responsible for the study)

Attorney at law, General Manager, Member of the Executive Board of the Institute of European Media Law (EMR), Saarbrücken/Brussels (2000 to date). Scheuer is a member of the Advisory Committee and of the IRIS Editorial Board, both at the European Audiovisual Observatory. Since 2003 he has been member of the Scientific Advisory Board (*Kuratorium*) of the Voluntary Self-Regulation of Private Televisions in Germany (*Freiwillige Selbstkontrolle Fernsehen, FSF*), Berlin. Editor and author of the Commentary "European Media Law", Castendyk/Dommering/Scheuer, Alphen a/d Rijn 2008; co-author of the Commentary on the EU- and EC-Treaties, Lenz/Borchardt (eds.), Köln, Basel, Genf, München, Wien (1999, 2003, 2006, 2010; chapters on free movement of workers, freedom of establishment). Scheuer has been responsible for several major studies in the area of media and telecommunications law, commissioned, at European level, *i.a.* by the European Commission (co-regulation; media market definitions), the Committee of the Regions, the Council of Europe and the European Broadcasting Union, as well as, at the national level, by different media authorities in Germany, Austria and Switzerland. He has published widely on European media, telecommunications, protection of minors and copyright law. Scheuer has held numerous speeches at international and national conferences and acted as a speaker and panel chairperson/moderator among others in several media expert seminars organized by the respective EU Council presidencies.

- Ms Birgit Schmeyer (France, translation into English)

Birgit Schmeyer's graduation in law from Saarland University, Germany (2010), was followed by LL.M. studies in South Africa at the University of Johannesburg (2011). She got a diploma after two years of French Law studies (D.E.U.G. in 2007). Since the end of 2007, she is working as a student and scientific assistant at the Institute of European Media Law. She is currently a Ph.D. student at Saarland University where she is also working as a research assistant.

- Dr David Stevens (Belgium)

He is research manager (since 2005) and researcher (since 1998) at the Interdisciplinary Centre for Law & ICT of the Faculty of Law of the Katholieke Universiteit Leuven (part of the Flemish Institute for BroadBand Technology).

His academic expertise relates to the evolving role of governments and national regulatory authorities in the telecommunications and media sectors. The most important projects on this subject were funded by the Fonds voor Wetenschappelijk Onderzoek Vlaanderen (Fund for Scientific Research Flanders), the federal and regional governments and private and public market players. In 2009, David defended his PhD on this matter. He regularly publishes on communications and media law in Belgian, European and international journals and is a frequent speaker at national and international conferences. Since 2010, he is a member of the editorial board of *Computerrecht*, a Dutch-Belgian journal on law & informatics published by Kluwer.

David is also actively involved in a number of government advisory bodies in the Belgian media and communications sectors, such as the 'Raadgevend Comité voor de Telecommunicatie' (as chairman since 2007) and the 'sectorraad media' of the 'Raad

Cultuur, Jeugd, Sport en Media (as chairman since 2008). These committees are permanent advisory bodies to respectively the federal Minister for Telecommunications and the Flemish Minister for the Media.

- Ms Pam Storr (Sweden)

She obtained her Law Degree from the University of Durham, England. She has since obtained two LL.M. degrees, in Law and Information Technology and in European Intellectual Property Law from the University of Stockholm. Pam Storr joined the Swedish Law and Informatics Research Institute (IRI) at Stockholm University in 2009 and is currently a lecturer within the field of IT law. She teaches primarily on the Master Programme in Law and Information Technology, and is currently course director for the programme. She is also the research coordinator at IRI and the editor for IRI's blog.

- Ms Miriam van der Burg (Netherlands)

She works as a researcher at the Strategy, Policy and Research department of the Dutch Media Authority (Commissariaat voor de Media, CvdM). This national regulatory authority is concerned with controlling compliance with the Media Act in the Netherlands. Moreover, the CvdM monitors developments in the media landscape since 2001. The annual report, called *Mediamonitor*, provides insight into the public information supply and particularly into the effects of media concentration on the diversity and independence of that information supply. Miriam is co-author of the *Mediamonitor* and is concerned with policy matters such as the performance contract of the national Public Broadcasting Service (Nederlandse Publieke Omroep). Before she started working at the CvdM, she finished a research master in Communication Science at the University of Amsterdam.

- Dr Krzysztof Wojciechowski (Poland; legal information parts)

In 1992 he graduated from the University of Warsaw, Faculty of Law and Administration. He obtained a training for the profession of legal adviser, in the Warsaw District Bar of Legal Advisers between 1997-2001 and is a legal adviser (*radca prawny*) in the Warsaw Bar. In 2003 he obtained a grade of doctor of law, on the basis of the thesis devoted to the protection of sports events and audiovisual sports transmissions. He works as a lecturer at the University of Warsaw, Faculty of Law and Administration, in the Institute of Civil Law, currently in the Department of Intellectual Property Law. He teaches civil law and intellectual property law, including European copyright law. As a legal adviser Dr Wojciechowski works for Polish public service television, Telewizja Polska (TVP), where he holds the position of the adviser to the Board of Management. He is involved in the works of European Broadcasting Union (EBU) and is a Chairman of the Statutes Group of EBU, member of the EBU Legal and Policy Committee and the Copyright Group. He has also cooperated with the Council of Europe and UNESCO. Currently he is a member of the Intergovernmental Council of UNESCO International Programme for the Development of Communications (IPDC). Dr Wojciechowski participated in legislative works in Poland on copyright and media. He is a member of the Copyright Committee in Poland – the arbitration board responsible for approval of tariffs and certain other matters relating to collecting societies. Dr Wojciechowski has also been an *ad hoc* expert of the National Broadcasting Council and the Ministry of Culture and National Heritage in Poland.

- Prof Dr Lorna Woods (United Kingdom)

Lorna Woods has research interests in the areas of broadcasting law and policy, regulation of the media (including the Internet), and related issues of freedom of expression and privacy. She is also known for her work in EC Law (particularly free movement rights and the law relating to public services) as well as the European Union and human rights. She practised as a solicitor for five years, working at Simmons and Simmons before returning to academia. She has taught at Sheffield University and Essex University before joining City University in 2008. She is currently Associate Dean for Research.

She is the co-author of 'EU Law' (9th ed.) (OUP, 2006), one of the leading textbooks in this field; (with Sabine Michalowski) 'German Constitutional Rights' (Ashgate, 1999); 'Free Movement of Goods and Services' (Ashgate, 2004); and (with Prof. J. Harrison) 'European Broadcasting Law and Policy' (Cambridge University Press, 2007) and has published widely in the field of European broadcasting law and policy. Professor Woods has been country expert in respect of a number of studies relating to regulation, self-regulation and co-regulation in the media and new media sectors, commissioned variously by the European Commission, DFID and a number of NGOs. She has also contributed to the UNESCO/Council of Europe round table on Ethics and the Internet.

- Ms Anne Yliniva-Hoffmann (Germany)

She is a lawyer and had been researcher at the Institute of European Media Law (EMR) until mid-June 2012. She studied Law in Marburg and Würzburg and graduated with a particular focus on Tax and Company Law. After her two-year legal clerkship she worked as a researcher and lecturer at the University of the German armed forces in Munich. The thematic priority of her research work at the EMR comprised general audiovisual media law as well as copyright and film law. Furthermore she had been responsible project manager for the EMR contributions to the *IRIS newsletter* and the *MMR*, specialists journals on the international/national audiovisual law sector.

- Prof Dr Suzana Žilič Fišer (Slovenia)

She is a graduated journalist and holder of an MSc in Political Science. She completed her postgraduate studies at the Central European University, Budapest. She continued her education at the Faculty of Social Science, University of Ljubljana, where she obtained her doctorate.

After her studies, she started to work as a journalist for a number of media institutions and newspapers (Večer) as well as for the national Radio-Television Slovenia (RTV Slovenia). In 1995, she continued her career at Pro Plus Company, where she became editor and executive producer and deputy director of production at POP TV. She held this post up until the end of 2001. At Pro Plus, she was head of the company's largest production department, the Maribor department. At the end of 2001, she was awarded a Chevening Research Scholarship from the British Council and the British Foreign and Commonwealth Office, so she left for London. Between 2001 and 2004 she was a researcher and lecturer at the University of Westminster and the European School of Economics, London.

From 2004 on, she is Lecturer and Head of Media Communications at the Faculty of Electrical Engineering and Computer Science, University of Maribor. She published several academic and research papers, books and co-authored other works in the fields of the media, media management and the realisation of public interest.

Between June 2006 and 2008 she was president of the Ministry of Culture's expert commission for the evaluation of projects for co-funding for media contents, and later on took part in the Ministry of Culture's expert commission for the preparation of a new media law. She has been involved in the ECOC 2012 project right from the start, first as a member of the temporary ECOC secretariat and later as a member of the Maribor 2012 Institute Council.



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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