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MEDIA REGULATORY FRAMEWORK AND THE ONLINE MEDIA – THE MACEDONIAN CASE

Comparative analysis and recommendations as to possible amendments to the legal framework

A study for the

AGENCY FOR AUDIO AND AUDIOVISUAL MEDIA SERVICES

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1. Introduction

1.1. Objective

This study was commissioned by the Council of Europe at the request of the Macedonian media regulatory authority (Agency for Audio and Audiovisual Media Services, hereinafter AAAMS),[1] with two main objectives:

- To determine if, in the EU 28 member states, audiovisual media regulation extends further than its normal scope (normality being understood as the scope resulting from their correct implementation of the current Audiovisual Media Services Directive – hereinafter AVMSD)[2] and, when indeed regulation goes beyond such a scope, what kind of regulation it implies for the media outlets which are falling under this scope. This objective naturally implies to identify which EU 28 member states define in their media laws terms commonly used such as *"online media"* or *"website"*, but also specific terms which have appeared in some Macedonian laws in recent years such as *"electronic publication"* and *"internet portal"*.[3]
- To make recommendations as to possible amendments to the existing Macedonian regulatory framework, taking into account these EU 28 practices, the Council of Europe standards and recommendations and the existing definitions of *"media"* and *"media content"* currently present in the Law on Media, according to which:
    - *"The media are means of providing public information i.e. any type of communication, such as: newspapers, magazines, radio and television programmes, teletext, and other forms of daily and periodical publication of edited programme content in a written form, as sound or picture in order to inform and satisfy cultural, educational and other needs of the general public. Media shall exclude bulletins, catalogues or other types of publications regardless of the form of publication intended solely for the publication of advertising, the education system or business correspondence, the work of companies, institutions, associations, political parties, state and judicial bodies, public enterprises, legal entities with public competencies and religious organisations. Media are not considered newspapers and bulletins of educational institutions, the Official Gazette of the Republic of Macedonia, publications of the local self-government units, posters, leaflets, brochures and placards.*
    - *Media content shall mean all types of information (news, opinions, announcements, reports and other information), as well as copyright works which are published, and transmitted through media."*

[1] In Macedonian Агенцијата за аудио и аудиовизуелни медиумски услуги. http://avmu.mk/

[2] 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, OJ L 95/1. http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010L0013

[3] The scope of this aspect of the study is strictly limited to sector-specific media laws and therefore does not include other potentially relevant information which might be present in other laws such as civil, penal, commercial, corporate, copyright, electoral or tax laws and codes.

1.2. Context

The scope of media regulation has been a contentious national issue in for several years.

During the legislative process which led to the adoption of the Law on Media and the Law on Audio and Audiovisual Media Services in December 2013,[4] several international organisations and NGO's expressed their concern about potential application of traditional statutory regulation (i.e. stipulated by primary and secondary legislation, created, adopted and implemented within the power of the State) to most if not all kinds of media, including media which, in the EU regulatory framework, clearly fall outside the scope of media regulation. For example:

- The Directorate General for Human Rights and the Rule of Law of the Council of Europe warned that *"regulating all mass media in one law entails the danger of inconsistencies, overregulation and lack of clarity for the addressees of such a comprehensive law"* and recommended to *"give more space for self-regulation, at least for the press."*[5]
- In several opinions, the Office of the Representative on Freedom of the Media of the OSCE highlighted that *"the main objections to the draft Law concern printed and electronic publications and the requirements made on them for registration"* and recommended that *"these provisions should be deleted completely as there is no need for registration of such publications in addition to what follows from other laws (for tax and business purposes) and any registration requirements may have a chilling effect on freedom of the media."*[6]
- Article 19 expressed its concerns about the proposal to introduce statutory print media regulation *"as the authorities in Macedonia have not presented any relevant and sufficient reasons for the need to introduce statutory regulation for print media in the country"* and about the proposal to designate the AAAMS as a print media regulator as *"a self-regulatory body is more appropriate to oversee and impose sanctions on print media because such a body is removed from government interference."*[7]

These concerns, which were also shared by local organisations such as the Association of Journalists of Macedonia,[8] led to the adoption in December 2013 of two different laws instead of a single one and to the adoption in January 2014 of several amendments to the Media Law, in order to exclude *"electronic publications"* from its scope and to specify that the *"subject to this Law shall not be content published in a medium and no provision of this Law shall be construed in a manner that means regulation of content."*

Yet, the debate about the scope of media regulation resurfaced in 2016 with the adoption of the Electoral Code, which imposes not only on audiovisual media service providers but also on *"internet portals"* the obligation to provide a fair, balanced and impartial coverage of election campaign and

[4] Both laws are available at http://avmu.mk/en/legislation/domestic-legislation/laws/
[5] Opinion available at http://mdc.org.mk/wp-content/uploads/2013/06/Opinion-of-the-Council-of-Europe-on-Macedonian-Draft-Law-on-Media.doc
[6] Legal analysis available at https://www.osce.org/fom/102135. Subsequent analysis of various versions of the draft laws are also available at https://www.osce.org/fom/103488 and https://www.osce.org/fom/103791
[7] Opinion available at http://mdc.org.mk/en/komentarite-na-article-19-na-predlozenite-mediumski-zakoni
[8] See for example the summary of the media situation available at http://www.znm.org.mk/drupal-7.7/sites/default/files/Summary%20of%20the%20Media%20Situation%20in%20Macedonia%20November%202014.pdf

imposes on the AAAMS to monitor this obligation. Arguing that neither the Electoral Code nor any other law defines what an *"internet portal"* is, the AAAMS concluded that it was not in a position to fulfil this task *"until proper legal conditions are set."*[9]

[9] Agency's Stance regarding the Obligation to Conduct Monitoring of Election Media Coverage by Internet Portals. Available at http://avmu.mk/wp-content/uploads/2017/06/monitoring_of_internet_portals.doc

2. European benchmark

2.1. In the EU 28 member states

In the EU member States, the material scope of the media regulatory framework is limited to audiovisual media services as defined by the AVMS Directive and therefore does not include content requirements on online media which are not mainly audiovisual ones.

Yet, it is worth mentioning that in a few countries (section 2.1.1.), either in the audiovisual law or, more often, in a specific media law, some definitions of online media (or electronic media or similar concepts) are provided. These definitions are sometimes accompanied by minimal administrative obligations such as entering a public register, but in no case this means that there is some form of content regulation similar to the one which is imposed on audiovisual media services providers. It is even, in all cases, the contrary: the objective of the law is rather to prevent the appearance of sector-specific content regulation for print or online press and to safeguard full freedom of expression.

It is also worth mentioning (section 2.1.2) the various guidelines which have been adopted by audiovisual media regulators about the scope of media regulation, with a view to avoid a too broad approach to media regulation.

2.1.1. Definitions and type of regulation[10]

Austria

The Federal Act on the Press and other Publication Media (Media Act – MedienG)[11] defines *"periodical electronic medium"* as *"a medium which is electronically a) broadcast (broadcast programme) or b) to be downloaded (website) or c) disseminated in comparable makeup at least four times each year (recurrent electronic medium)."* The purpose of the law is to safeguard the right to freedom of information and expression, to guarantee complete freedom of media outlets, to protect journalists, to ensure civil and penal responsibility of the media and legal submission of the media by the Austrian National Library.

This Act does not give any power to the media regulatory authority (Komm Austria) to regulate online media. Audiovisual media regulation is governed by another Act, i.e. the Federal Act on Audio-visual Media Services (Audio-visual Media Services Act – AMD-G).[12]

Croatia

[10] As already mentioned, the scope of this aspect of the study is strictly limited to sector-specific media laws and therefore does not include other potentially relevant information which might be present in other laws such as civil, penal, commercial, corporate, copyright, electoral or tax laws and codes. It is based on the information provided by local experts (and therefore do not pretend to be fully exhaustive) and on unofficial translations of legal texts.

[11] Available at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1981_314/ERV_1981_314.html

[12] Available at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2001_1_84/ERV_2001_1_84.html

The Electronic Media Act[13] defines:

- *"electronic media"* as *"audiovisual programmes, radio programmes and electronic publications"* and
- *"electronic publications"* as *"edited programme contents which the electronic publications providers broadcast daily or periodically via the Internet with a view to provide public information and education"* (article 2).

The Act states that *"(1) Freedom of expression and full programme freedom of electronic media shall be guaranteed. (2) No provision of this Act may be construed in such a manner that it provides the right to censorship or limitation of the freedom of speech and expression of thought"* (article 3).

Pursuant to article 80 of the Act, *"A natural or legal person shall be obliged to submit a request for entry into the Register of electronic publications providers, which is kept with the Electronic Media Council, prior to the first broadcast of the electronic publication."*

The content obligations imposed on electronic publications are those of articles 12 (prohibition of hate speech and discriminatory content), 15 (free of charge publication of official statement in case of war situations or immediate danger to the independence and the integrity of the country), 26 (prohibition of content which offends human dignity, which especially contains immoral and pornographic content, or which in any manner encourages, promotes and glorifies violence and crime and encourages citizens, especially children and youth, to use tobacco products, alcohol or drugs), and 27 (legal submission of the media).

The Media Act[14] defines:

- *"media"* as *"newspapers and other print media, radio and television programmes, programmes of newspaper agencies, electronic publications, teletext and other forms of daily or periodical publishing of editorial programme contents through the transmission of recording, voice, tone or picture. Media shall not comprise books; school books; bulletins; catalogues or other holders of information publishing intended exclusively for educational, scientific and cultural process, advertising, business communication, internal operations of trade companies, institutes and institutions, associations, political parties, religious and other organizations; school papers; the "Official Gazette" of the Republic of Croatia; official papers of local and regional self-government units and other official releases, posters, leaflets, brochures, banners and video sites without a live picture and other free information, unless otherwise stipulated by this Act"* and
- *"programme contents"* as *"information of all kinds (news, opinions, notifications, messages and other information) and other authors' works published through the media with the intention of informing and satisfying cultural, scientific, educational and other needs of the public."*

In the same spirit as the Electronic Media Act, the Media Act states that *"(1) The freedom of expression and freedom of the media shall be guaranteed. (2) Freedom of the media shall comprise in particular: freedom of the expression of opinion, independence of the media; freedom to collect, research, publish and disseminate information for the purpose of public informing; pluralism and diversity of media, free flow of information andopenness of the media to different opinions, beliefs and various contents, accessibility to public information; respect for the protection of human personality,*

[13] Available at http://www.e-mediji.hr/repository_files/file/502/
[14] Available at http://www.e-mediji.hr/repository_files/file/726/

privacy and dignity; freedom to establish legal persons for the performance of activities in public informing, printing and distribution of press and other media from the country and abroad, production and publishing of radio and television programme, as well as other electronic media; autonomy of editors in chief, journalists and other authors of programme contents in compliance with the professional codex. (3) Limitations to the freedom of the media shall be permitted only when and to the extent necessary in a democratic society in the interest of national security, territorial integrity or public peace and order, prevention of disorder or criminal acts, protection of health and morality, protection of the reputation or rights of others, prevention of disclosing confidential information or for the purpose of preserving the authority and impartiality of the judiciary solely in a manner stipulated by law" (article 3). Article 4 adds that *"(1) Nobody shall have the right to influence the programme content of the media by use of pressure or misuse of their position, or in any other manner illegally limit the freedom of the media. (2) The court shall decide on violations of the freedom of expression and freedom of the media."*

The only content obligation, deriving from common law, is mentioned in article 4 (4) which states *"It shall be prohibited to transmit programme contents in the media which incite or glorify ethnic, racial, religious, gender or other inequality or inequality on the basis of sexual orientation, as well as ideological and state creations on the basis of such foundations, and to provoke ethnic, racial, religious, gender or other animosity or intolerance, animosity or intolerance on the basis of sexual orientation, to incite violence and war."* There are also basic requirements in terms of publication of information intended to ensure the transparency of ownership and management of the media outlet (article 15) and the right to correction or reply (articles 40-55) with a special requirement on electronic publications that *"the correction and information it pertains to shall be marked and linked"* (article 41).

Finland

The Act on the Exercise of Freedom of Expression in Mass Media[15] defines *"network publication"* as *"a set of network messages, arranged into a coherent whole comparable to a periodical from material produced or processed by the publisher, and intended to be issued regularly"* (section 2).

The purpose of the law is to safeguard freedom of expression to ensure civil and penal responsibility of the media and to make sure that *"interference with the activities of the media shall be legitimate only in so far as it is unavoidable, taking due note of the importance of the freedom of expression in a democracy subject to the rule of law"* (section 1).

This Act does not give any power to the media regulatory authority to regulate online media. Audiovisual media regulation is governed by two other Acts, i.e. the Information Society Code[16] and the Act on Audiovisual Programmes.[17]

Hungary

The Act CLXXXV of 2010 on Media Services and Mass Communication[18] defines:

[15] Available at http://www.finlex.fi/fi/laki/kaannokset/2003/en20030460.pdf
[16] Available at http://www.finlex.fi/fi/laki/kaannokset/2014/en20140917.pdf
[17] Available at http://www.finlex.fi/fi/laki/kaannokset/2011/en20110710.pdf
[18] Available at http://nmhh.hu/dokumentum/106487/act_clxxx_on_media_services_and_mass_media.pdf

- *"press products"* as *"individual issues of daily newspapers or other periodical papers, online newspapers or news portals, which are offered as a business service, for the content of which a natural or legal person has editorial responsibility, and the primary purpose of which is to deliver textual or image content to the general public for information, entertainment or educational purposes, in a printed format or through any electronic communications network. Editorial responsibility shall mean the responsibility for the actual control over the selection and composition of the media content and shall not necessarily result in legal responsibility in connection with the press product. Business service shall mean any independent service of a commercial nature provided on a regular basis, for profit, by taking economic risks"* (article 203(60)) and
- *"publication"* as *"a) any book in a printed or an electronic format, on a disk, cassette or any other physical medium; online and downloadable book; b) any press product in a printed or an electronic format; online and downloadable periodical publication; c) any other printed material (address registers, name registers, publications containing graphics, drawings or photos, maps; flyers; printed postcards, greeting or similar cards; printed pictures, samples, photos; printed calendars; printed business advertisements, catalogues, brochures, poster ads and similar items; other textual publications) excluding printed stickers, postal-, excise duty-, duty-, etc. stamps; stamped papers, cheques, bank notes, share certificates, security papers, bonds, deeds and the like; d) any products of film-, video-, and television programme production (films intended for public showing on celluloid, video cassette, video disc, other physical medium; downloadable films, videos); e) any sound recordings (intended for public showing, recorded tapes, discs, downloadable sound content); f) any musical works (printed musical works, musical works in electronic format, downloadable musical works)"* (article 203 (22)).

The Act states that **"***Media services may be provided and press products may be published freely, information and opinions may be transmitted freely through the mass media, and Hungarian and foreign media services intended for public reception may be accessed freely in Hungary. The content of the media service and the press product may be determined freely, nevertheless the media service provider and the publisher of press product shall be liable for compliance with the provisions of this Act"* (article 3).

There is no licensing or related system for audiovisual media services in Hungary, and press products are subject to the same notification system to the media regulatory authority (NMHH) as audiovisual media services. Each service *"shall be notified to the Office for registration, within sixty days from commencement of the service or activity. The registration shall not be a precondition for starting such a service or activity"* (article 41(2)). The NMHH shall keep a register of linear audiovisual media services, linear radio media services, radio media services, on-demand audiovisual media services, on-demand radio media services, ancillary media services, printed press product, online press products and news portals. The latter are not defined in more details than those provided in the definition of *"press products"*. Each register shall mention the names, contact information of media service providers, press product founders and publishers, as well as the names and titles of the media services and press products and shall be publicly available and accessible on the website of the NMHH (article 41(3)).

More specifically, the Act adds that *"the publisher and founder of the press product shall notify the Office about any changes concerning the registered data within fifteen days. The title of the press product registered in the official register cannot be changed"* (article 46 (7)).

The Act does not determine any specific content obligation imposed on press products.

Latvia

The Law on the Press and Other Mass Media[19] defines:

- *"press and other mass media"* as *"newspapers, magazines, journals and other periodicals (published at least once every three months, one-time print run of more than 100 copies) as well as electronic media, newsreel, information agencies announcements, audiovisual recordings intended for public distribution. Website can be registered as mass media"* (article 2). The same article adds that *"this Law shall not apply to state authority and administration instructions, laws, regulations, judicial and arbitration practice newsletters, educational and scientific institutions issued materials and local newsletters."*

The law does not provide a specific definition of the term *"website"*.

The Law states that it is *"intended to protect the Latvian Constitution, in which is enshrined the right to freedom of expression"*, that *"the press and other mass media censorship is not allowed"* (article 1) and that *"there shall be no interference in media activities"* (article 4).

The same set of obligations applies to all media, regardless of the technical mean in which they are disseminated, and is limited to basic requirements in terms of delivery of information upon registration, copyright compliance, legal submission and the prohibitions listed in article 7:

- the prohibition *"to publish information that is a state secret or other specifically protected by law secret, which calls for violence and the overthrow of the prevailing order, advocates war, cruelty, racial, national or religious superiority and intolerance, and incites to the commission of some other crimes"*;
- the prohibition to publish material from pre-trial investigation materials without the written permission of the prosecutor or the investigator and material that violates the presumption of innocence;
- the prohibition *"to publish the content of correspondence, telephone calls and telegraph*
- *messages of citizens without the consent of the person addressed and the author or their heirs"*;
- the interference with individuals' personal lives;
- the prohibition to publish information that violates the natural and legal persons dignity and respect, or that violates business secrets;
- the prohibition *"to publish child pornography and materials which demonstrate against child violence"* as well as *"erotic and pornographic materials in a manner that violates the procedure laid down in laws and regulations governing the erotic and pornographic material movement."*

The media shall be registered in the Latvian Company Register.

Audiovisual media regulation is governed by another Act, i.e. the Electronic Mass Media Law,[20] which does not include any provision related to electronic media.

[19] Available (only in Latvian) at https://m.likumi.lv/doc.php?id=64879

Slovenia

The Mass Media Act[21] defines:

- *"mass media"* as *"newspapers and magazines, radio and television programme services, electronic publications, teletext and other forms of editorially formulated programme published daily or periodically through the transmission of written material, vocal material, sound or pictures in a manner accessible to the public"* and *"programme"* as *"information of all types (news, opinion, notices, reports and other information) and works under copyright disseminated via mass media for the purpose of informing the public, satisfying the public's cultural, educational and other needs, and communicating on a mass basis"* (article 2). The same article adds that *"the term mass media does not cover bulletins, catalogues, other forms of publication of information intended exclusively for advertising, business communication, educational processes or the Internal work of companies, institutions and foundations, societies, political parties, and church and other organisations, school gazettes, the Official Gazette of the Republic of Slovenia and the official gazettes of local communities, other official publications, posters, pamphlets, brochures and banners, and video pages without moving pictures (unpaid reports), unless stipulated otherwise by law."*
- *"electronic publication"* as *"mass media by which legal and natural persons disseminate programme via computer links such that it is accessible to the public at large, irrespective of size"* (article 115). The Mass Media Act dating as far back 2001, it is clear that such a definition is outdated.

The Act states that *"Mass media activities shall be based on freedom of expression, the inviolability and protection of human personality and dignity, the free flow of information, media openness to different opinions and beliefs and to diverse content, the autonomy of editorial personnel, journalists and other authors/creators in creating programme in accordance with programme concepts and professional codes of behaviour, and the personal responsibility of journalists, other authors/creators of pieces and editorial personnel for the consequences of their work"* (article 6).

The same set of obligations applies to all media, regardless of the technical mean in which they are disseminated, and is limited to:

- the commitment of the State to support the exercise of the public interest in the media, including the electronic communications, with the focus on pluralism and democracy (Articles 4-10);
- the specific prohibition of *"the dissemination of programme that encourages national, racial, religious, sexual or any other inequality, or violence and war, or incites national, racial, religious, sexual or any other hatred and intolerance"* (article 8);
- the obligation (with exception of physical persons) related to transparency of ownership and management of the media outlets (articles 23-24);
- the obligation to *"without delay and free-of-charge publish an emergency report in connection with a serious threat to the lives, health or property of the public, to the natural and cultural heritage or to the security of the state"* (article 25);

[20] Available at http://neplpadome.lv/en/assets/documents/anglu/Electronic%20Mass%20Media%20Law%2012.2014.pdf
[21] Available at http://www.akos-rs.si/files/APEK_eng/Legislation/mass-media-act.pdf

- the obligation to ensure implementation of the right of reply (articles 26-44);
- basic rights regarding the access to information (article 45);
- basic principles on advertising such as respect of human dignity and prevention of racial, gender or ethnic discrimination and religious or political intolerance (article 47);
- provision requiring protection of minors in relation to pornography in electronic publications (article 84).

This Act does not give any power to the media regulatory authority (AKOS) to regulate electronic publications. In case of breaches, the competence for adopting decisions on misdemeanours and fines lies with the Culture and Media Inspectorate of the Republic of Slovenia, which is a body under the responsibility of the Ministry of Culture that oversees the implementation of legislation and other regulations and general acts relating to culture and media.

Audiovisual media regulation is governed by another Act, i.e. the Audiovisual Media Services Act),[22] which does not include any provision related to electronic publications.

2.1.2. Scope of media regulation: caselaw and guidelines

Via caselaw or guidelines of their media regulatory authority, some countries have provided for more detailed elements about the scope of audiovisual media regulation than those provided by the simple transposition of the AVMS Directive. Here again, it should be stressed that none of these decisions or guidelines imply the extension of media regulation to media content which is not mainly composed of audiovisual content.

- In Austria, by a decision of 2012, Kommunikationsbehörde Austria has examined whether the distinct video section of a newspaper website (Tiroler Tageszeitung Online, operated by New Media online GmbH) with a catalogue of around 300 videos could be considered as non-linear audiovisual media service.[23] Komm Austria focused not on the length or the volume of the videos but on their content, and on the fact that they were available in a distinct video section of the newspaper website, and concluded that the audiovisual reports on local events and activities, sport reports, film trailers or instructions or actual news events compared to the content of a broadcast and addressed the same audience as television broadcast and therefore could be qualified as an on-demand audiovisual media service. This decision led to the caselaw of the Court of Justice of the European Union which is examined further.
- Other similar cases about autonomous video sections of newspaper websites have been dealt with in Slovakia[24] and in Sweden.[25]
- In Belgium, the Conseil Supérieur de l'Audiovisuel (CSA) has adopted in 2012 guidelines to stakeholders on which non-linear audiovisual media services fall within the scope of media regulation following the transposition of the AVMSD into the Belgian regulatory

[22] Available at http://www.akos-rs.si/files/APEK_eng/Legislation/Act/AKOS-Audiovisual-Media-Services-Act.Unoffical-Translation.pdf
[23] Kommunikationsbehörde Austria (2012) *Bescheid KOA 1.95 0/12-048 Auf Antrag der New Media Online GmbH.* Available (only in German) at https://www.rtr.at/en/m/KOA195012048/29200_KOA_1.950-12-048.pdf
[24] Summary available at http://merlin.obs.coe.int/iris/2012/9/article38.en.html
[25] Summary available at http://merlin.obs.coe.int/iris/2013/1/article35.en.html

framework.[26] The purpose of the recommendations are to safeguard legal security and predictability regarding who is subject to regulation and who is not as well as to ensure fair competition between players providing the same type of audiovisual content. The CSA considers that the following services might fulfil the definition of an non-linear audiovisual media service : applications for smartphones, tablets and connected TV's if their content differs from another version of the service that is already delivered by other means, newspaper websites with video section - as long as the section is the principal purpose of the service or can be isolated from the rest of the website as a service in its own right and download-to-own (DTO) and download-to-rent (DTR) services.

- In the Netherlands, the CvdM has adopted in 2011 similar guidelines *"on the Classification of Commercial On-Demand Media Services."*[27]
- In Italy, Agcom also has adopted in 2010 similar regulation *"on the authorisation of non-linear audiovisual media services"*,[28] which considers only services with yearly revenues exceeding EUR 100,000 to be on-demand AVMS. This threshold is introduced in order to determine presumptively which economic activity is in real competition with broadcasting. Only revenues deriving from typical television activities are taken into consideration.
- In the United Kingdom, by a decision of 2015, Ofcom has adopted *"Guidance notes on who needs to notify an on-demand programme service to Ofcom."*[29] This document provides guidance on the factors and criteria that are applied by Ofcom when determining whether a service falls within the definition of an on-demand programme service (ODPS, i.e. the equivalent of a non-linear audiovisual media service under the AVMSD) under section 368A of the Communications Act 2003 and is therefore subject to the regulatory framework for ODPS. In its case law,[30] Ofcom has also identified features it considers to be characteristics of a service where providing audiovisual material is more likely to be the principal purpose and, by contrast, characteristics of a service in which the provision of audiovisual material is more likely to be merely ancillary. These features relate to "*the homepage through which the audiovisual material is accessed; the cataloguing and accessing of the material; the duration, completeness and independence of the material; the access links between the relevant audiovisual material and other content; the content links between the relevant audiovisual material and other content; the balance and nature of the audiovisual and other material; and*

[26] Conseil supérieur de l'audiovisuel (2012) Recommandation relative au périmètre de la régulation des services de médias audiovisuels. Available (only in French) at http://csa.be/documents/1713. See also the presentation made by the CSA at the 35th EPRA meeting: https://www.epra.org/attachments/portoroz-plenary-1-new-services-and-scope-presentation-by-marc-janssen

[27] Commissariaat voor de Media (2011) Regeling van het Commissariaat voor de Media van 22 september 2011 houdende beleidsregels omtrent de classificatie van commerciele mediadiensten op aanvraag zoals bedoeld in artikel 1.1, eerste lid, van de Mediawet 2008 (Beleidsregels classificatie commerciele mediadiensten op aanvraag 2011). Available (only in Dutch) at https://www.cvdm.nl/wp-content/uploads/2013/08/Beleidsregels-classificatie-commerci%C3%ABle-mediadiensten-op-aanvraag-2011.pdf See also the presentation made by the CvdM at the 35th EPRA meeting: https://www.epra.org/attachments/portoroz-plenary-1-new-services-and-scope-presentation-by-marcel-betzel

[28] Agcom (2010) Delibera n. 607/10/CONS Regolamento in materia di fornitura di servizi di media audiovisivi a richiesta ai sensi dell'articolo 22-bis del Testo unico dei servizi di media audiovisivi e radiofonici. Available (only in Italian) at https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_2fsZcpGr12AO&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_2fsZcpGr12AO_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_2fsZcpGr12AO_assetEntryId=854396&_101_INSTANCE_2fsZcpGr12AO_type=document

[29] Available at https://www.ofcom.org.uk/__data/assets/pdf_file/0028/71839/guidance_on_who_needs_to_notify.pdf

[30] Available at https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/on-demand/atvod-archives/scope-appeals

whether, on an overall assessment, the audiovisual material could be said to be integrated into, and ancillary to, another service."[31]

Table 1. Summary of the European benchmark

	Definition of online media or similar concept	Role of media regulatory authority beyond audiovisual media services	Relevant caselaw or guidelines about the scope of media regulation
AT	"periodical electronic medium"	No	Decision about the video section of a newspaper website
BE	No	No	Guidelines on the scope of audiovisual media regulation
BG	No	No	No
CY	No	No	No
CZ	No	No	No
DE	No	No	No
DK	No	No	No
EE	No	No	No
ES	No	No	No
FI	"network publication"	No	No
FR	No	No	No
GB	No	No	Guidance notes on who needs to notify an on-demand programme service to Ofcom
GR	No	No	No
HR	"electronic media" "electronic publication" "media" "programme content"	Notification + basic content requirement derived from common law	No
HU	"press product" "publication"	Notification + update of the register of notified services	No
IE	No	No	No
IT	No	No	Regulation on the authorisation of non-linear audiovisual media services
LT	No	No	No

[31] ERGA (2015) *Report on material jurisdiction in a converged environment.* Available at https://ec.europa.eu/digital-single-market/en/news/erga-report-material-jurisdiction-converged-environment

LU	No	No	No
LV	"press and mass media"	No	No
MT	No	No	No
NL	No	No	Guidance on classification of commercial on-demand audiovisual media services
PL	No	No	No
PT	No	No	No
RO	No	No	No
SE	No	No	Decision about the video section of a newspaper website
SI	"mass media" "programme"	No	No
SK	No	No	Decision about the video section of a newspaper website

2.2. International standards

2.2.1. European Union

Under the current EU regulatory framework, the material scope of media regulation is limited to audiovisual media services. Pursuant to article 1(1)(a) of the AVMSD, an audiovisual media service is *"(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC; (ii) audiovisual commercial communications."* This means that seven cumulative criteria have to be met in order to fall under the scope of media regulation:

- the existence of a service (which mean that the activities need to have a commercial character and are normally provided for remuneration);
- the presence of an editorial responsibility (which is further defined and excludes user-generated content);
- a principal (and therefore not incidental) purpose to provide audiovisual programmes;
- the provision of programmes (which is also further defined);
- the goal to inform, entertain or educate ;
- the need to address the general public (which includes the notion of mass media therefore excludes exchanges within communities of interest);

- the use of electronic communication networks (which therefore excludes the sale of all physical goods and exhibitions in cinemas).[32]

Recitals 21 to 28 provide further guidance about how to interpret these criteria. For the purpose of this study whose goal is to assess whether or not statutory media regulation could apply to online media, several of these appear important:

- Recital 21, which stresses that *"the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public."* This clearly means that it would not be proportionate to extend the scope of media regulation to media which do not have a significant impact on the public and which do not compete with audiovisual media.
- Recital 22, which stresses that *"the definition should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service."* This criterion of the principal purpose has been one of the most difficult to implement and it does not come as a surprise if it is on this aspect that the caselaw of the CJEU mainly focuses.
- Recitals 23 and 28, which make clear that *"stand-alone text-based services should not fall within the scope of this Directive"* and that *"the scope of this Directive should not cover electronic versions of newspapers and magazines."*

The material scope of the AVMSD has been clarified by two judgments of the CJEU.

The aforementioned case law of Kommunikationsbehörde Austria (section 2.1.5) having been appealed by New Media Online to the Bundeskommunikationssenat and then to the Federal Administrative Court, the Court decided to suspend the procedure and request a preliminary ruling from the CJEU.

Reversing the opinion of the Advocate General who considered that the Directive *"should be interpreted as meaning that neither the website of a daily newspaper containing audiovisual material nor any section of that website constitutes an audiovisual media service within the meaning of that directive"*, the CJUE ruled in its judgment "New Media Online" [33] that *"the concept of 'programme' within the meaning of Article 1(1)(b) of Directive 2010/13 must be interpreted as including, under the subdomain of a website of a newspaper, the provision of videos of short duration consisting of local news bulletins, sports and entertainment clips"* and that *"on a proper interpretation of Article 1(1)(a)(i) of Directive 2010/13, assessment of the principal purpose of a service making videos available offered in the electronic version of a newspaper must focus on whether that service as such has content and form which is independent of that of the journalistic activity of the operator of the website at issue, and is not*

[32] For further details on how to interpret these seven criteria, see the two following publications of the European Audiovisual Observatory :

- European Audiovisual Observatory (2013) IRIS plus 2013-4, What Is an On-demand Service? Available at https://rm.coe.int/1680783488
- European Audiovisual Observatory (2016) IRIS plus 2016-1, On-demand services and the material scope of the AVMSD. Available at https://rm.coe.int/16807834888

[33] Court of Justice of the European Union (2015) *New Media Online v Bundeskommunikationssenat*, Case C-347/14, Judgment of 21 October 2015. Available at http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-347/14&td=ALL

merely an indissociable complement to that activity, in particular as a result of the links between the audiovisual offer and the offer in text form."

Following the reasoning of the CJEU, the Federal Administrative Court decided to reject the appeal of New Media Online, in this way confirming the original assessment of KommAustria that the video section of this newspaper portal is in fact to be considered an on-demand AVMS considering that the video clips are mostly unrelated to the press articles of the newspaper and constitutes therefore an autonomous activity.

A more recent – but less relevant for the present study – judgment of the CJUE clarified the issue of audiovisual commercial communication.[34] In its judgment "Peugeot Deutschland", the CJEU was requested for a preliminary ruling on the question whether promotional videos published by Peugeot on YouTube could be qualified as an audiovisual media services. Peugeot Deutschland had posted a promotional video on its YouTube channel about one of its vehicles. An environmental protection association brought an action against the company on the grounds that the video did not contain any indication of official fuel consumption and specific Co2 emissions. The German judges considered that it was necessary to determine whether the promotional videos published on YouTube could qualify as audiovisual media services, since such a qualification would exempt Peugeot Deutschland from the obligation to include in its online videos this information which is required by the German consumer information and protection legislation. The CJEU ruled that *"a promotional video channel on the YouTube internet service, such as that at issue in the main proceedings, cannot be regarded as having as its principal purpose the provision of programmes in order to inform, entertain or educate the general public"* and that *"to the extent that a promotional video can inform, entertain or educate viewers, as Peugeot Deutschland claims, it does so with the sole aim of, and as a means of, achieving the promotional purpose of the video in question. Therefore, even in the event that a promotional video channel on YouTube were to satisfy the other criteria and display the features of an audiovisual media service referred to in Article 1(1)(a)(i) of Directive 2010/13, its promotional purpose suffices to exclude it from the scope of that provision."* Consequently, the Court considered that *"the answer to the question referred is that Article 1(1)(a) of Directive 2010/13 must be interpreted as meaning that the definition of 'audiovisual media service' covers neither a video channel, such as that at issue in the main proceedings, on which internet users can view short promotional videos for new passenger car models, nor a single video of that kind considered in isolation."*

This video was therefore excluded from the scope of Article 1(1)(a) of Directive 2010/13. Consequently, Peugeot Deutschland could not benefit from the exemption from the obligation to include in its online videos the information required under German consumer information and protection legislation.

2.2.2. Council of Europe

The piece of legislation equivalent to the AVMSD for the Council of Europe is the European Convention on Transfrontier Television. Yet, it is useless to refer to it in the framework of the present study since the Convention has not been updated since its adoption in 1989 and is therefore completely outdated.

[34] Court of Justice of the European Union (2018) Peugeot Deutschland v Deutsche Umwelthilfe, Case C-132/17, Judgment of 21 February 2018. Available at http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-132/17&td=ALL

Notwithstanding this situation, the Council of Europe, in its Recommendation CM/Rec(2011)7 of the Committee of Minister to member states on a new notion of media,[35] has provided a list of criteria meant to help the member states to assess what could be *"a new, broad notion of media which encompasses all actors involved in the production and dissemination, to potentially large numbers of people, of content (for example information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audiovisual or other form) and applications which are designed to facilitate interactive mass communication (for example social networks) or other content-based large-scale interactive experiences (for example online games), while retaining (in all these cases) editorial control or oversight of the contents."* Media policy makers are invited to take account of the following criteria (and indicators) when considering if particular activities, services or actors ought to be regarded as media:

- The intent to act as media, indicators being: self-labelling as media, working methods which are typical for media, commitment to professional media standards, membership of professional media associations and practical arrangements to produce or disseminate to a wide audience through means of mass communication).
- The purpose and underlying objectives of the media, indicators being : the fact to produce, aggregate or disseminate media content, the fact to operate applications or platforms designed to facilitate interactive mass communication or mass communication in aggregate (for example social networks and/or to provide content-based large-scale interactive experiences (for example online games), the underlying media objective(s) (animate and provide a space for public debate and political dialogue, shape and influence public opinion, promote values, facilitate scrutiny and increase transparency and accountability, provide education, entertainment, cultural and artistic expression, create jobs, generate income – or most frequently, a combination of the above) and the periodic renewal and update of content.
- The presence of editorial control, indicators being: the existence of an editorial policy, of editorial processes, of editorial staff and of moderation of third party content.
- The presence of professional standards, indicators being: the adhesion to the profession's own ethics, deontology and standards, the existence of compliance and complaints procedures, the fact to seek to benefit from protection or privileges offered to the media (protection of sources, privileged communications and protection against seizure of journalistic material, freedom of movement and access to information, right to accreditation and protection against misuse of libel and defamation laws.
- The outreach and dissemination, indicators being: the actual dissemination to a large number of people, the aggregate audience (all those sharing the platform or common features of the service and who can be reached by the content produced, arranged, selected, aggregated or distributed by the operator, including when the delivery of or access to content is not simultaneous) and the resources affected to project content to a mass-communication dimension.
- The public expectations, indicators being: the expectation that the media is presumed ongoing and broadly accessible, expectations in terms of pluralism and diversity (availability of a range of sources of information whose content is diverse, responding to the interests of

[35] Available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0

different segments in society) and of reliability, of respect of professional and ethical standards and of accountability and transparency.

This recommendation appears to have little relevance for the purpose of the present study, considering on one side the broadest approach it has to the notion of media (encompassing to a certain extent social network and online games) and on the other side the fact that it stays mute about the regulatory regime(s) which should apply to these media (if any).

The latter comes as no surprise since it is hard to imagine how the same regulatory regime could apply to such a large amount of different players. The Recommendation indeed takes this issue into consideration by inviting member states to *"review regulatory needs in respect of all actors delivering services or products in the media ecosystem so as to guarantee people's right to seek, receive and impart information in accordance with Article 10 of the European Convention on Human Rights, and to extend to those actors relevant safeguards against interference that might otherwise have an adverse effect on Article 10 rights, including as regards situations which risk leading to undue self-restraint or self-censorship."* The Council of Europe also recalls that *"as a form of interference, media regulation should comply with the requirements of strict necessity and minimum intervention, specific regulatory frameworks should respond to the need to protect media from interference (recognising prerogatives, rights and privileges beyond general law, or providing a framework for their exercise), to manage scarce resources (to ensure media pluralism and diversity of content – cf. Article 10, paragraph 1 in fine, of the European Convention on Human Rights) or to address media responsibilities (within the strict boundaries set out in Article 10, paragraph 2, of the Convention and the related case law of the European Court of Human Rights)."* It adds that *"Any action sought against media in respect of content should respect strictly applicable laws; above all international human rights law, in particular the provisions of the European Convention on Human Rights, and comply with procedural safeguards. There should be a presumption in favour of freedom of expression and information and in favour of media freedom."*

In its Recommendation CM/Rec(2015)6 on the free, transboundary flow of information on the Internet,[36] the Council of Europe has also provided relevant standards for the purpose of the present study by reaffirming that *"States should protect and promote the global free flow of information on the Internet. They should ensure that interferences with Internet traffic within their territory pursue the legitimate aims set out in Article 10 of the ECHR and other relevant international agreements and do not have an unnecessary or disproportionate impact on the transboundary flow of information on the Internet."* More specifically, the Council of Europe stresses that *"States should exercise due diligence when assessing, developing and implementing their national policies with a view to identifying and avoiding interferences with Internet traffic which have an adverse impact on the free transboundary flow of information on the Internet. This implies taking the following points into consideration:*

- *Assessment: regulatory or other measures that are capable of having such an impact should be assessed with regard to State responsibility to respect, protect and promote the human rights and fundamental freedoms enshrined in the ECHR.*
- *Transparency, foreseeability, accountability: when developing policy and regulatory frameworks that may impact the free flow of information on the Internet, States should ensure transparency, including the results of evaluations mentioned above, foreseeability as to their*

[36] Available at : https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680 5c3f20

implementation and accountability. In particular, proposed regulatory frameworks should be published following proper procedures and with sufficient time to allow public comment.

- *Proportionality and review of measures: States are obliged to ensure that the blocking of content or services deemed illegal is in compliance with Articles 8, 10 and 11 of the ECHR. In particular, measures adopted by State authorities in order to combat illegal content or activities on the Internet should not result in an unnecessary and disproportionate impact beyond that State's borders. States should strive to develop measures which are the least intrusive and least disruptive and implement them following a transparent and accountable process. Measures adopted or promoted by States should be regularly reviewed to determine their practical effectiveness and whether they are still necessary or proportionate."*

3. Recommendations

3.1. The current material scope of media regulation

Currently, the material scope of audiovisual media regulation at the national level is aligned with the practice of most EU Member States, which is itself a result of the transposition of the AVMS Directive. In practice, this means that:

- traditional broadcasting services (linear audiovisual media services) are within the scope;
- video-on-demand services (non-linear services) are also within the scope, as long as the provision of audiovisual content is their principal purpose.

As mentioned earlier (section 1.2.), online media which are not mainly audiovisual do not fall under the scope of media regulation. This has been made clear in the Audio and Audiovisual Media Law which states in its article 3 §1 that *"Audio or audiovisual media services shall exclude the following services:*

- *services which are, above all, non-commercial and are not competing with radio or television broadcasting, such as private web-sites and services comprised of provision or distribution of audiovisual content created by private users for the purpose of sharing and exchanging within the communities of interest;*
- *transmission services, that is, distribution of programmes for which the editorial responsibility is borne by third parties;*
- *any form of private communication, such as electronic mail send to limited number of recipients;*
- *services the primary objective of which is not provision of programmes, i.e., where any audiovisual content is random to the service and is not its primary objective, including:*
    - *web-sites containing auxiliary audiovisual elements, such as animated graphic elements, short commercials or information related to a certain product or non-audiovisual service, which is not audiovisual;*
    - *games of chance which entail a monetary bet, including lotteries, betting services and other forms of gambling;*
    - *online games;*
    - *search engines;*
    - *electronic versions of newspapers and magazines;*
    - *individual text-based services."*

3.2. Potential changes to the material scope of media regulation

3.2.1. About the Audio and Audiovisual Media Law

It appears both from the European benchmark and from the international standards and practices that the material scope of the Law on Audio and Audiovisual Media Services is aligned with international practices and does not require any modification.

It is also clear that submitting online media which are not mainly audiovisual to audiovisual media regulation is not a European practice and should be avoided.

3.2.2. About the Law on Media

It appears both from the European benchmark and from the international standards and practices that the existence of Media Law itself is not a common practice throughout Europe, the only (relatively) similar situations being present only in Austria, Croatia, Finland, Hungary, Latvia and Slovenia.

It is also clear that the purpose of such laws is not to add an administrative layer of regulation which would apply to all media and which would be enforced by an independent administrative media regulatory authority, but rather to find the most appropriate way to guarantee freedom to receive and impart information while safeguarding basic public policy objectives such as the prohibition of hate speech, the uncontrolled dissemination of pornography or the management of specific threats to national security.

A. On the existence of a specific law on media and the appropriateness to extend the material scope of the Law on Media

Most EU member states do not have a specific law on media: they rather rely on common law such as civil, penal, commercial, corporate, copyright, electoral or tax laws and codes. Therefore the need for such a piece of legislation is questionable: if the debate about reforming the Law resurfaces, this debate should therefore not avoid the question of the opportunity to get rid of some layers of obligations in terms of administrative law and to have public policy objectives being managed by diligently enforced common law, such as for example in Austria. But this question goes beyond the objective of the present study.

On the other hand, it should be highlighted that, to our knowledge, the enforcement of the Law by the AAAMS has not raised concerns in terms of malpractice and especially in terms of media freedom.

As detailed under section 1.2., what has raised public concern is the material scope and the remit of the Law. These two issues cannot be addressed separately. Furthermore, they cannot be addressed without questioning also the objectives of the lawmaker. The opportunity of the extension of the Law to online media would depend on the public policy objective(s) which is(are) pursued (are they legitimate?) and the adequacy of the obligations which would come with such an extension with the

objective(s) pursued (are they proportionate?). Neither these objectives nor the possibility to apply all or part of the Law on Media (or the Audio and Audiovisual Media Law) to online media have been detailed by the commissioner of the present study or by the Macedonian authorities, making it extremely difficult to provide specific recommendations on the issue.

Yet, we can provide the following comments which might be helpful if and when amending the Law.

B. The need to respect of the caselaw of the European Court of Human Rights

In any event, should online media which are not mainly audiovisual be subject to some kind of statutory regulation, this should be done with due respect for article 10 of the European Convention on Human Rights according to which "*§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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*" Therefore, according to the caselaw of the European Court of Human Rights, the State Party to the Convention (which is the case of "the former Yugoslav Republic of Macedonia") should:

- Make sure that any change regarding regulation of any media outlet is prescribed by a law. This includes "*not only written regulations but also, the legal culture of common law in the countries. Therefore, the Court accepted two sub-tests: accessibility and predictability of the law. Accessibility is deemed to be fulfilled if the applicant's proceedings indicate that he 'had indications that it was appropriate to the circumstances of the legal rules applicable to the particular case'. Predictability in turn, implies a rule that is 'created with sufficient precision to enable the citizen-if there is a need, with the appropriate advice-to predict to the extent that is reasonable in the circumstances, the consequences that particular activity may include.'*"
- Make sure that these changes are necessary: "*The exercise of the right to freedom of expression includes obligations and responsibilities. It can be limited only under conditions, with restrictions and sanctions strictly provided by law and which in a democratic society constitute measures necessary and exclusively for the purpose of: protecting national security, protecting territorial integrity, protecting public security, protecting against unrest and crimes, health protection, morale protection, reputation or rights of others, preventing the dissemination of confidential information or preserving the authority and impartiality of the judiciary. Each of these grounds has been elaborated and substantiated by the Court's case law and no other ground could be accepted as a legitimate aim.*"
- Prove that these changes are proportionate to achieve the aim pursued: "*State Party are given a certain margin of appreciation in assessing the existence of an "urgent social need" from the application of restrictive measures and in the choice of the measures, they apply. State*

Party do not have unlimited power in such assessment and should always offer "relevant and satisfactory explanations."[37]

C. The need to keep freedom of media as the main public policy objective and therefore to avoid content regulation

The amendments made to the Law in 2014 made it very clear that *"subject to this Law shall not be content published in a medium and no provision of this Law shall be construed in a manner that means regulation of content."*

This is a fundamental amendment, and as shown by the benchmark (section 2.1.1.), such a provision is always present in the media law in other EU member states.

No amendment to the Law should water down such a provision or have the objective to create additional content obligations. In this regard, the amendment of the Electoral Code about the regulation of impartial coverage of election campaign by internet portal is an obvious example of a measure which could have harmed media freedom if it had been enforced by the AAAMS or by any other public body.

It might even be appropriate to make it clearer that the main purpose of the Law is to guarantee media freedom. A best practice in this regard is the presence, in the aforementioned Austrian Media Act, of a preamble stating that *"This federal act shall, in order to safeguard the right to freedom of expression and information, guarantee complete freedom of media. Restrictions of this freedom, whose exercise carries with it duties and responsibilities, are subject to the conditions specified in Art. 10 para 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms."*

D. The need to keep the administrative obligations imposed on the media to the minimum requirements

If the Law did not harm freedom of media so far, it is due to the fact that the burden is indeed rather limited on the media, consisting mainly in entering the registry of publishers and to publish an impressum.

No amendment to the Media Law should have the objective to add any kind of administrative obligation on the media.

In this regard, it should be stressed that not being subject to statutory media regulation does not mean that online media operate in a legal vacuum. On the contrary, media outlets are already subject to an important set of laws such as the Law on Companies (when they have commercial activities) or to the Law on Associations and Foundations (when they are non-profit). Besides, several public policy objectives in terms of content published by online media (such as for example fight against hate speech and discrimination and respect of copyright) can be safeguarded by an important set of other laws than the Media Law, such as the Criminal Code, the Law on Civil Liability for Insult and Defamation, the Law on Prevention and Protection against Discrimination, the Law on Copyright and Related Rights, the Law on Protection of Personal Data, the Law on Free Access to

[37] Lazarova Trajkovska, Mirjana (2017) *Freedom of expression through the practice of the European Court of Human Rights.* Association of Journalists of Macedonia. Available at http://znm.org.mk/?attachment_id=4075&lang=en

Public Information, the Law on Archival Material... A study conducted by the Macedonian Institute for Media in 2015 has shown how in practice these laws are applied or could be applied to online media.[38] The vast majority of the problems caused by online media can therefore be solved by common law.

E. The need not to make artificial differences between media

In an era of well-established convergence, the boundaries between "old" and "new" media (or between "offline" and "online" media, or between "print" and "electronic" media) is not blurring anymore: it is disappearing. Linear and non-linear services are available at the same time on the same screen. Most print media have an online activity, and sometimes media which have appeared online end up developing print activities.

Against such a background, it is difficult to continue to motivate the exclusion of online media of the scope of the Law on Media (if, of course, the three aforementioned conditions are respected). As highlighted under section 2.2.2., the recommendation of the Council of Europe on a new notion of media appears to have little relevance for the purpose of the present study, considering on one side the broadest approach it has to the notion of media (encompassing to a certain extent social network and online games) and on the other side the fact that it stays mute about the regulatory regime(s) which should apply to these media. Yet, it confirms that indeed the notion of media cannot be defined by a 20th century approach driven by technological considerations and distribution means. Otherwise, there is a risk of creating an uneven level playing field between players competing for the same advertisers and the same eyeballs.

The risk is even more important if we take into consideration the notion of *"paramedia"*. As explained by Zoran Richliev, *"Anonymity which is characteristic for all web entities and the ease to start new websites resulted with formation of paramedia - entities which act as media and in its essence are not: they do not have journalists, do not create original content, do not have editorial structure and their aim is not protecting the public interest. Another phenomenon which leads in same direction is colonization of existing informative web pages with weak integrity into clusters lead by one center with increased one-sided political agenda. Political and economic centers took over or created numerous web pages whose only aim is not to inform but to distort the public opinion with fake news, propaganda and half-truth."*[39] A regulatory framework which would apply to professional media outlets which voluntarily follow high professional and ethical standards and which would not apply to "paramedia" which have no regard whatsoever for the public interest but only have the view to manipulate the public opinion would reinforce the regulatory imbalance instead of remedying to it.

F. The need to support self-regulation

Macedonian media have made significant efforts in recent year in order to have a reliable self-regulatory system for journalism ethics, at least for journalism as described by the aforementioned

[38] Available at http://mim.org.mk/attachments/article/853/Macedonia%20in%20the%20digital%20age%20%E2%80%93%20between%20the%20rights%20and%20responsibilities%20while%20communicating%20on%20Internet.pdf

[39] Richliev Zoran (2017) *Recommendations towards increased integrity and professional level on online media.* Association of Journalists of Macedonia.

criteria and indicators of the Council of Europe. There are indeed reports about the lack of quality of online media, including reports coming from the Association of Journalists of Macedonia itself.[40] But as it has been stressed by the former OSCE Representative on Freedom of the Media Miklos Haraszti, *"quality should never be a pre-requisite for freedom. Only a fully free press can be fully responsible.* [...] *True ethics standards can be created only by independent media professionals, and can be obeyed by them only voluntarily. Whether passed in good will or not, any attempt to impose standards on journalists by law will result in arbitrary limitation of their legitimate freedoms, and restriction of the free flow of information in society. Of course, taxpayer-paid public-service broadcasters are obliged by law to report and comment in an objective, fair, and ethical manner. But public service requirements, too, must be formulated and enforced by independent professional bodies, and will only function if politicians refrain from interfering with editorial work."*[41] Therefore, in order to enhance the quality of the online press, we would rather suggest that the State supports and promotes effective and efficient self-regulation rather than engages on the path of any kind of statutory regulation of media which exceeds the scope of audiovisual media regulation. Such a suggestion would of course make less sense in countries which are lacking of a media self-regulatory framework or where self-regulatory systems have proven to be a failure. Considering the current situation of the Macedonian media landscape, the support to self-regulation appears appropriate and timely, since it would come as a support to already numerous other initiatives such as the following:

- The Association of Journalists of Macedonia (AJM), which has been created in 1946, has elaborated the Code of Ethics of Journalists of Macedonia[42] which is enforced on its individual members, even if only via moral sanctions, by its Council of Honour.[43] Any citizen can submit a complaint to the Council of Honour if he/she considers that a journalist has violated professional and ethical standards, and the Council has a duty to consider the complaint and determine whether the journalist was reporting in accordance with the Code of journalists.
- Since 2014, the Council of Media Ethics of Macedonia (CMEM) is also active in the field of media self-regulation and has also the duty, via its Press Complaints Commission (PCC)[44] to apply moral sanctions on those who do not observe the Code of Ethics of Journalists of Macedonia. The main difference with the Council of Honour is that the PCC is composed of representatives of publishers (2), journalists (2) as well as representatives from the public (3) and that it does not deal with individual journalists but with the media themselves. A complaint related to the contents published in the print, audiovisual or online media may be filed by every citizen, legal entity and civic and international organization against a media outlet. The PCC does not deal with complaints against individual journalists.
- Both the AJM and the CMEM avoid working in domestic isolation and are involved in European network of similar bodies, giving them direct access to the experience and the

[40] See for example Richliev Zoran (2017) *Recommendations towards increased integrity and professional level on online media.* Association of Journalists of Macedonia (available at http://znm.org.mk/?attachment_id=3873&lang=en) and Richliev Zoran (2017) *Recommendations towards responsible online media.* Association of Journalists of Macedonia (available at http://znm.org.mk/?attachment_id=3874&lang=en).
[41] OSCE Representative on Freedom of the Media (2008) *The media self-regulation guidebook.* Available at https://www.osce.org/fom/31497?download=true
[42] http://znm.org.mk/?page_id=1412&lang=en
[43] http://znm.org.mk/?page_id=799&lang=en
[44] http://semm.mk/en/komisija-za-zalbi-3/delovnik

expertise of their European counterparts and direct opportunities to assess and enhance their own practices. The AJM is a member of the European Federation of Journalists (EFJ)[45] and the CMEM is a member of the Alliance of Independent Press Councils of Europe (AIPCE).[46]

The proper functioning of a body for journalism ethics cannot be achieved overnight. Issues related to the conception of the scheme,[47] to its implementation,[48] to its enforcement[49] and to its articulation with statutory regulation[50] are numerous, complex and require solutions based on years of practice and on appropriate assessments meant to make sure that the system can indeed function for the benefit of society at large.

The CMEM appears to be fully aware of the need for improvement if we consider the amount of projects it has launched in the recent years:

- a project on "Institutional strengthening of the Council of Media Ethics of Macedonia" supported by the Embassy of the Kingdom of Netherlands (2014-2016 and 2017-2019);
- a grant funded by the UNESCO on "Building networks of support for enhanced self-regulation in the media and promotion of human rights" (2017-2018);
- a grant funded by CIVICA MOBILITAS to support the functioning of the CMEM's office and the work of the Press Complaints Commission as well as increasing of the visibility of the CMEM (2016-2018);
- a project on "Through the path of self-regulation to credibility of the media and public trust" within the project "#ReForMedia – Enhancing the cooperation between the civil society, institutions and citizens for implementing reforms in the media sphere" supported by the European Union (2016-2017);
- a grant funded by the UNESCO on "Bringing the actors together for enhanced self-regulation in the media" (2016).[51]

Against such a background, it appears appropriate for the State to positively involve itself in improving the conditions for functioning of and participation to the self-regulatory systems, for example via incentives for all media outlets to participate and via support of an efficient articulation between self-regulatory bodies and the statutory regulators such as the AAAMS. Here again, we can refer to the former OSCE Representative on Freedom of the Media Miklos Haraszti: *"time and again, the road to unnecessary legal interference is paved with good will, and prompted by the public's real need for standards in journalism. Many undue limitations are intended to "help" enhance ethics and*

[45] https://europeanjournalists.org/
[46] http://www.aipce.net/
[47] Is the conception process multi-stakeholder? Is the initiative widely publicised and easily accessible? Are participants committed and are they providing real effort? Are their actions outside the self-/co-regulation scheme coherent with the aim of the scheme? Are the objectives of the system clearly set out? Etc.
[48] Is there an evaluation of the system assessing performance, impact and room for improvement? Is there a procedure for resolving disagreements of participants in the scheme? Is there an adequate and transparent financing of the system? Etc.
[49] How is the complaint resolution mechanism functioning? Is the public aware of its existence? Is it providing timely responses to complaints? What is the outcome of the decision? Does it contribute to the overall compliance with the system and better understanding of its functioning? Can there be sanctions and if yes are they enforced and effective? Etc.
[50] Is there any formal recognition of the self- or co-regulation bodies by the state/public authorities required? Are there any incentives for participation in the self- or co-regulation scheme? Is there any supervision of the self- or co-regulation implementation carried out by the state/public authorities? Are state or public funds involved in financing of self- or co-regulation? Etc.
[51] For further details, see http://semm.mk/en/pravna-ramka-3/1proekti

quality, or "balance" freedom of the press against other important values, like state security, social peace, or personal rights. In the hope of eliminating hatefilled public debate, governments often overstep the legitimate limits of criminalisation of speech and allow prosecution of all kinds of intolerant, discriminatory speech, or simply views that offend others. Such laws tend to merely impose the tastes of the ruling parliamentary majority."[52]

There certainly are numerous valid arguments against media self-regulation. In the United Kingdom, where self-regulation has proven to be very efficient in some sector such as advertising standards, it has at the same time proven to be highly ineffective in other sectors such as journalism ethics, as it has been shown by the *"News of the World"* phone-hacking scandal in the United Kingdom has revealed the weaknesses and even the failure of self-regulation.[53] In the UK, the system has been criticized for being inefficient, as shown by the Leveson Inquiry. To avoid such situations, public support for transparency, efficiency and effectiveness of self-regulation needs to be reinforced, as well as support to the adaptation of self-regulatory system to the challenges that the digital era imposes on them, both in terms of content of the issues at the stake and in terms of material and territorial scope of their jurisdiction (adaptation of code of ethics to new practices such as the challenge of moderation of users and to new challenges such as the speed at which cases have to be handled, inclusion of new public concerns such as respect of privacy and of new hybrid media such as pure internet players or internet portals or social media…).

G. The need to take into consideration the rationality of media regulation

The two main reasons for statutory media regulation are of a technical and of a democratic nature.

When it comes to online media, the technical justifications are clearly irrelevant since there is no use of a quite scarce resource such as terrestrial frequencies (DTT) or a less scarce resource such as the available space on a managed network (cable or IPTV).

The democratic reasons can sometimes be present (such as for example the impact on society or the level-playing field between players competing for the same large audience and/or for the same advertising market share), but the imposition of specific regulatory framework has to remain proportionate. As it is stressed by the European Regulators Group for Audiovisual media (ERGA), *"any extension of the scope of the Directive needs to be in line with the (current and future) goals of audiovisual media regulation. In particular, it is assumed that the imposition of specific rules may only be justified when the social benefit of regulation outweighs the economic cost to the provider. In particular, it may only be justified for those audiovisual services that are important for society, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism - education and culture and if a more level playing field is achieved."*[54]

Therefore, should there be any political will to put some types of online media within the scope of statutory media regulation, the importance of such media on society should be taken into

[52] OSCE Representative on Freedom of the Media (2008) *The media self-regulation guidebook.* Available at https://www.osce.org/fom/31497?download=true

[53] Leveson, L. J. (2012) *An inquiry into the culture, practice and ethics of the press: a report*. London: The Stationary Office. Available at https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press

[54] ERGA (2015) *Report on material jurisdiction in a converged environment.* Available at https://ec.europa.eu/digital-single-market/en/news/erga-report-material-jurisdiction-converged-environment

consideration and a special care should be given to the harm that the burden of statutory regulation can cause to small media**,** for example by including a *de minimis* clause (i.e. a threshold – for example in terms of turnover – under which statutory regulation would not apply).

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