

# **STUDY**

## **Comparative Analysis of Legal Framework on Online Media with European Standards and Best Practices**

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**Tirana**

**TABLE OF CONTENTS**

- **ABBREVIATIONS**..... **Error! Bookmark not defined.**
- **Executive Summary**..... **Error! Bookmark not defined.**
- I. INTRODUCTION** ..... 7
- II. EUROPEAN STANDARDS FOR ONLINE MEDIA** ..... 10
  - 2.1 European Union and CJEU Judgments with a focus on audiovisual media** ..... 10
  - 2.2 Council of Europe and ECtHR Judgments with a focus on online media** ..... 17
- III. CONCLUSIONS AND KEY RECOMMENDATIONS** ..... 24
- **ANNEXES**..... **Error! Bookmark not defined.**
- **BIBLIOGRAPHY** ..... 28

- **ABBREVIATIONS**

Law no. 97/2013 “On audiovisual media in the Republic of Albania” – **Law no. 97/2013**<sup>1</sup>

Law no. 9918, of May 19, 2008 “On electronic communications in the Republic of Albania”, as amended - **Law no. 9918/2008**<sup>2</sup>

Law no. 10128, of May 11, 2009, "On electronic commerce" - **Law no. 10128/2009**<sup>3</sup>

Audiovisual Media Authority - **AMA**

Electronic and Postal Communications Authority – **AKEP/EPCA**

Audiovisual Media Service Providers – **OSHMA/AMSP**

Electronic publications service providers - **OSHPE**<sup>4</sup>/**EPSP**

EU Audiovisual Media Services Directive<sup>5</sup> - **Directive/AVMSD**

Court of Justice of European Union – **CJEU**

European Court for Human Rights - **ECtHR**

European Platform of Regulatory Authorities - **EPRA**<sup>6</sup>

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<sup>1</sup> Amended per Law no. 22/20163, of March 10, 2016, Decision of the Constitutional Court no. 56, of July 27, 2016 and Law no. 91/2017, of May 22, 2017.

<sup>2</sup> Law no. 9918, of May 19, 2008 “On electronic communications in the Republic of Albania”.

<sup>3</sup> Amended per Law no. 135/2013 “On some additions and amendments to Law no. 10128, of May 11, 2009 “On electronic commerce”

<sup>4</sup> According to additions proposed in draft law no. 97/2013. For more information, see: <https://konsultimipublik.gov.al/Konsultime/Detaje/120>

<sup>5</sup> (Directive on Audiovisual Media Service – codified version), Number CELEX: 32010L0013, EU Official Journal, Series L 95, of April 15, 2010.

<sup>6</sup> <https://www.epra.org/>

*Freedom of expression is guaranteed. The freedom of the press, radio and television are guaranteed. Prior censorship of a means of communication is prohibited. The law may require the granting of authorization for the operation of radio or television stations.*

(Article 22 of the Constitution)

*The right to information is guaranteed. Everyone has the right, in compliance with law, to get information about the activity of state bodies, as well as of persons who exercise state functions. Everyone is given the possibility to follow the meetings of elected collective bodies.*

(Article 23 of the Constitution)

*Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

(Article 8, ECHR)

*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. 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.*

(Article 10, ECHR)

## • Executive Summary

IPLS, upon request by AMA, undertook this Study with the purpose of conducting a comparative analysis of the European standard on online media freedom, as well as presenting findings and making respective recommendations.

The Internet has become the primary means by which individuals exercise their freedom of expression, receive impartial information, and thus provides an essential tool for participating in activities and discussions related to political or other issues of general interest. Moreover, the Internet plays an important role in enhancing public access to news and facilitating the overall distribution of information. Users of activities conducted online provide an unprecedented platform for exercising freedom of expression. Rapid, dynamic developments and advanced technologies have made online media the fastest and most informative method. This kind of dynamic is impregnated with extremely serious concerns about the boundaries between freedom of expression and the preservation of human dignity, as well as widespread global and local debate on the boundaries and balances between freedom of media, freedom of expression and rights to protection of personality, human dignity and privacy of the individual, concerns which are finding some kind of address even in the Albanian environment at the level of law-making, policy, and judicial protection, as the ultimate guarantee of balancing reports of these social and legal values<sup>7</sup>. At the end of last year (December 2018), an initiative was undertaken to further reform legislation on online and audiovisual media. These draft laws, respectively “On some additions and amendments to Law no. 97/2013 “On audiovisual media in the Republic of Albania”, as amended, and “On some additions and amendments to the law no. 9918, dated 19.5.2008 “On electronic communications in the Republic of Albania”, as amended, provides for the registration, oversight, fines and closure of online and/or audiovisual media the activity of which is contrary to the relevant legal provisions. In the context of public consultation and a high-profile debate over these legal initiatives, this Study became necessary in order to diagnose the Albanian legal framework under the optics of international standards on freedom of expression.

This Study was mainly based on *desk research*, after a detailed comparative analysis of international legislation and case law in the realm of media and freedom of expression. *Hard* and *soft* law are part of this Study and are reflected therein as binding standards, or as guidance and recommendation, in any future attempt to discuss possible legal changes.

This Study **determined** that Law no. 97/2013 is in compliance with the AVMSD Directive as well as with practice in most EU Member States, which is a result of the fact that the AVMSD Directive has been transposed into national legislation of EU Member States or those in the process of accession.

The Study **showed** that registration requirements and other procedures related to electronic publications should be prudent, (except those required for taxation or business-related purposes), as any registration obligation or requirement may have adverse effects. detrimental to media freedom.

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<sup>7</sup> <https://www.coe.int/en/web/freedom-expression/albania>

The study **concluded** that regulating online media through audiovisual media regulations is not a European practice. Likewise, the oversight authorities of the audiovisual media, under the legislation of some countries, have no authority to control online media.

Through this Study, it is **recommended** that, if the need to regulate online media is such that regulation must be made, the standards of Albanian lawmakers should be guided by the public interest of guaranteeing media freedom according to constitutional requirements, and if restrictions or interventions should be made on the freedom of the media by regulating the operation of online media, these must be made by law, must be justified and proportionate to the public interest that justifies them, thus respecting the balance in so-called "competing rights". Moreover, self-regulation of online media would be more advisable than regulation, and it is the stakeholders concerned and involved in the process, those with a public interest, who can explore how this self-regulation can be done with the least costs/risks to freedom of expression and yet be accepted as an encompassing solution.

## I. INTRODUCTION

Law no. 97/2013, approved on 4 March 2013, regulates the activity of the audiovisual media and their support services, on the basis of the principle of technological neutrality in the territory of the Republic of Albania. This law has been drafted by the Parliamentary Committee on Education and the Media in close cooperation with the experts of the Council of Europe and the European Commission and has been subjected over the years to consultations with all stakeholders and interested groups.<sup>8</sup> In compliance with the legislation approximation process, it is stated in this law that it has been *completely approximated to 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"*.<sup>9</sup>

Law no. 97/2013 applies to linear audiovisual broadcasts, non-linear audiovisual broadcasts and their support services. This law does not apply to print media. Implementation of Law no. 97/2013 is monitored by the AMA, which has no legal authority over online media for which there is no regulatory law as in the case of audiovisual media.

Online media is gaining ground continually not only globally but in Albania as well<sup>10</sup>, as shown by the trend here, due to the drastic technological developments. However, so is the debate on Media self-regulation<sup>11</sup>, or regulation by bodies established per law and created by the state.<sup>12</sup> The fact that there are no mandatory legal rules for online media compared to audiovisual media means that there are no specific boundaries set in terms of professionalism and ethics. Anonymity, an inherent feature of the Internet and consequently of online media, sets a new tone and potential for abuse in online media as compared to the traditional media, where the public usually associates content with a face and name. Moreover, the rapid spread of news in the online media as compared to traditional media, as well as the lack of self-regulatory mechanisms, amplifies the potential negative effect that this media may have on cases of inappropriate and unprofessional conduct<sup>13</sup>.

In a recent study, the Albanian Media Institute concludes that: *"The ethical conduct of online media is one of the most discussed aspects in the public debate about the media, sometimes leading to proposals for legal solutions. Despite the fact that such efforts have been unsuccessful to date, it is clear that pressure on this front is increasing and self-regulation efforts by the media would be preferred. Lack of legal requirements or self-regulating mechanisms to oversee ethical conduct,*

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<sup>8</sup> According to explanatory report attached to the draft law. For more information, see: Kuvendi.al

<sup>9</sup> Articles 1 and 2.

<sup>10</sup> Surveys with online media, SOROS- Albanian Media Institute, 2018, [http://www.osfa.al/sites/default/files/peizash\\_i\\_medias\\_online.pdf](http://www.osfa.al/sites/default/files/peizash_i_medias_online.pdf)

<sup>11</sup> Media Self-regulation Guidebook, OSCE, 2008, p.18- "Five reasons why Media should self-regulate". For more information, see: <https://www.osce.org/sq/fom/31500?download=true>

<sup>12</sup> <https://www.reporter.al/qeveria-propozon-keshill-censure-per-mediane-internet/>

<sup>13</sup> Surveys with online media, SOROS- Albanian Media Institute, 2018, [http://www.osfa.al/sites/default/files/peizash\\_i\\_medias\\_online.pdf](http://www.osfa.al/sites/default/files/peizash_i_medias_online.pdf) p.16

*as well as the copy-paste approach are among the aspects that have the most effect on the professionalism of online media<sup>14</sup>”*

The Council of Ministers and the Ministry of Justice<sup>15</sup>, through two legislative initiatives in December 2018, have proposed amending the Law on Electronic and Postal Communications, as well as the Law on Audiovisual Media, with the aim of establishing an online media recording system, as well as provisions for issuing fines and for shutdowns, based on grounds which include a judgment whether a news item published in a particular media is "impartial" or whether it infringes on "public morality". Both initiatives are currently being subjected to public consultation<sup>16</sup>.

More specifically, the draft Law on some additions and changes to Law no. 97/2013, has provided in Article 1 for a title change to the **Law on audiovisual and electronic media**. Article 2 has expanded the scope of law to **include electronic publishing services**. Article 3 has imposed a **requirement for registration**, according to which: "An Electronic Publication Service Provider "shall be a natural or legal person registered in the Electronic Publication Providers Register who provides electronic publications services." The same article provides the definition for "**electronic publications**": The "electronic publication" shall include but shall not be limited to programmes/publications the content of which is transmitted/published on a daily or periodic basis by electronic publication providers via the Internet for the purpose of informing, entertaining and educating the public. Whereas Article 33 of the draft law proposes additions to **requirements on electronic publications service providers**. An electronic publication service provider shall:

- a) Ensure that publications are made in a truthful, impartial and objective manner;
- b) ensure that the handling of events, including matters which are the subject of public debate, is fair to all the subjects concerned in these matters and is presented in a truthful and impartial manner;
- c) establish safeguards to ensure they are not used for criminal purposes;
- d) Ensure it does not violate human dignity and basic rights;
- e) ensure all users are treated the same, with no distinctions regarding sex, race, religion, ethnicity or conviction of beneficiaries;
- f) Ensure they do not breach national security and public safety;
- g) not harm public health;
- h) Comply with rules of ethics and public morality and shall not allow publications which could incite criminal acts;

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<sup>14</sup> Surveys with online media, SOROS- Albanian Media Institute, 2018, [http://www.osfa.al/sites/default/files/peizash\\_i\\_medias\\_online.pdf](http://www.osfa.al/sites/default/files/peizash_i_medias_online.pdf), p.87-88.

<sup>15</sup> OSCE has provided official support in the process of modifying and advancing anti-defamation legislation and rules for online media, while respecting freedom of expression, media and Internet access. For more information, see: <https://www.osce.org/representative-on-freedom-of-media/403625>

<sup>16</sup> <https://konsultimipublik.gov.al/Konsultime/Detaje/120>; <http://ama.gov.al/2019/01/14/organizohet-takimi-i-katert-mbi-ndryshimet-ne-ligjin-e-ama-s-dhe-akep-it/>



- i) respect the copyright, in accordance with the applicable copyright legislation and other related rights;
- j) ensure the protection of consumer rights;
- k) publish clearly and distinctly the information on:
  - i. name and address – in the case of legal persons: name and address of the authorized representative;
  - ii. notice/window where a complaint can be filed related to the published news.
- l) designate a person/persons responsible for the relevant sector/sectors of publications whose names and addresses shall be clearly disclosed. In designating these responsible persons, electronic publication service providers shall take into account their professional and ethical moral qualities.

This same draft stipulates that the Audiovisual Media Authority which currently licenses televisions and radios shall also oversee **internet media**. The draft provides for a **detailed procedure on complaints** and their consideration first by the OSHPE/EPSP, and then the AMA Complaints Council<sup>17</sup>. The Complaints Council can impose a fine and can require the EPSP to publish the apology statement in accordance with the relevant decision regarding the detected violation.

On the other hand, Article 2 of the draft Law on Additions to Electronic Communications provides that EPCA shall have the responsibility to "take measures" to ensure "that entrepreneurs of electronic communications networks and electronic communications services shall comply with requirements related to safeguarding the interests of the country and public safety even in a state of war or emergency, and shall guarantee the individual's fundamental rights and freedoms as well as any requirement provided for in the applicable legal framework of the Republic of Albania". Whereas Article 3 provides that EPCA shall cooperate with AMA to enforce provisions of this law and other regulatory provisions as well as ensure enforcement of decisions issued by the Complaints Council and other AMA bodies, obligating internet service providers implement relevant orders/decisions issued by these authorities in accordance with deadlines and procedures set forth by applicable legislation.<sup>18</sup>

The two aforementioned legal initiatives, for which meetings and stakeholder consultations were held, also reflect this concern, namely the increasing trend of online media as well as the tendencies to insult, slander and denigrate human personality and dignity, and the need for self-

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<sup>17</sup> Media Self-regulation Guidebook, OSCE, 2008, p.48 -49. "Press council" is the most common form for a self-regulatory body. Mainly composed of media professionals, these councils are independent of political power. Their main task is to deal with complaints about the work of the media, through collective decision-making. By doing this, they offer guarantees to the public about the quality of information it receives, demonstrate that media professionals are responsible, and show that extended state regulation of the media is not needed. Each established press council is unique, the result of its country's particular history and media environment. Some countries have long established press councils: Germany, the Netherlands and the Scandinavian countries, for example. Others, like Belgium, have established them quite recently. Recent democratic changes in countries such as Bosnia and Herzegovina, Bulgaria, Georgia and Armenia have led to an explosion of independent media which created the need for media self-regulation. For more information, see: <https://www.osce.org/sq/fom/31500?download=true>

<sup>18</sup> <https://konsultimipublik.gov.al/Konsultime/Detaje/119>

regulation<sup>19</sup> of these media while respecting freedom of expression, in balance and in a proper ratio with standards for human dignity and communication ethics.

This is the context in which this Study was conducted, with the following main objective and purpose:

- a) analyse the Albanian legal framework for audiovisual and online media and compare it with European standards and best practices;
- b) present relevant findings and recommendations regarding possible amendments to the Albanian legal regulatory framework.

## **II. EUROPEAN STANDARDS FOR ONLINE MEDIA**

### **2.1 European Union and CJEU Judgments, with a focus on audiovisual and online media**

The Audio-Visual Media Services Directive specifies that the rules provided therein apply only to audiovisual media, including classical television and on-demand audiovisual services<sup>20</sup>. The main purpose of the Directive is to uphold the main principles of the European Free Market, such as free competition, equal treatment and ensuring transparency and legal predictability in the field of audiovisual media<sup>21</sup>. According to Article 1(1)(a), 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 communication.

Given the above, it is inferred that for the Directive to apply to a certain situation, seven cumulative criteria should be present<sup>22</sup>:

- Existence of a service. This implies the existence of a commercial context where service is provided in exchange for payment. As stated above, "service" under the Directive takes on the meaning given by Articles 56 and 57 of the TFEU. Article 57 of the TFEU defines “service” as “normally provided for remuneration”. As also specified in item 21 of the Directive Preamble, this definition covers any form of economic activity, but should not

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<sup>19</sup> Self-regulation in any profession or sector entails the development and enforcement of rules by those whose conduct is to be governed, with the ultimate aim of improving the service offered to consumers, claimants or – in the case of the media – the public at large. It requires standards to be set and agreed on by the individuals and institutions to which they will apply and the development of procedures and mechanisms for enforcing them. For more information, see: <https://www.article19.org/data/files/pdfs/publications/self-regulation-south-east-europe.pdf>

<sup>20</sup> European Audiovisual Observatory (2013) IRIS plus 2013-4, What is an On-demand Service? p. 8

<sup>21</sup> Ibid.

<sup>22</sup> Ibid. p. 9

cover activities which are primarily non-economic and which are not in competition with television broadcasting. More specifically, these services do not include offers based on individual demand which are not of a commercial nature, such as private websites and content generated by private users of a dedicated platform as in the case of Youtube<sup>23</sup>;

- Acceptance of editorial responsibility. This is defined in Article 1(1)(c) as the exercise of effective control both over the selection of the Programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. The latter are also called non-linear audiovisual media service and are defined in Article 1(1)(g) of the Directive. Regarding the audiovisual media services provider, the Directive specifies in Article 1(1)(d) that they may be natural or legal persons who have editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determine the manner in which it is organized. It is worth mentioning that this definition excludes natural or legal persons who only serve as transmitters of Programmes, the editorial responsibility of which lies on third parties.
- A primary purpose of providing audiovisual media services. Item 22 of the Directive Preamble stipulates that “principal purpose” implies the exclusion of all services where any audiovisual content is merely incidental to the service and not its principal purpose. An example of this could be a website which contains graphic animated elements with information on a non-audiovisual product;
- Provision of programmes. The concept of “programme” is specified in Article 1(1)(b) of the Directive as a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by an audiovisual media service provider and the form and content of which are comparable to the form and content of a television programme. According to item 23 of the Directive Preamble, the term ‘audiovisual’ includes silent films but does not cover radio services or other audio transmissions. The description also covers text-based content which accompanies Programmes, such as subtitling services, but excludes text-only services, such as teletext. Regarding restrictions of on-demand Programmes, Item 24 of the Directive explains that they should be interpreted as Programmes similar to those of television, because in accordance with this definition, they compete for the same audience as television broadcasts. The nature and the means of access to these services would reasonably lead the user to expect that the Directive would provide them regulatory protection for these types of Programmes as well. Item 24 also stipulates that the concept of ‘programme’ should be analysed and interpreted in a dynamic way taking into account developments in television broadcasting, in order to prevent disparities as regards competition and access to the free European market. In addition, items 23 and 28 of the Directive Preamble, when read in conjunction, further

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<sup>23</sup> Ibid.

clarify the scope of the Directive. As stated earlier, the Directive shall not apply on text-only services, to include electronic versions of newspapers or magazines.

- Programmes shall be of an informative, entertaining or educative nature. The lack of a precise definition in the Directive of the nature of audiovisual programmes creates uncertainty about the categorization of programmes, enabling the above concepts to be applicable to any type of audiovisual programme.
- The need to address the general public, thus implying the exclusion of the exchange of audiovisual content within small groups of interest.
- Use of electronic communication systems, excluding the sale of any physical goods. These electronic communication systems, as stated above, are defined in Article 2 (a) of Directive 2002/21/EC. These systems are “transmission systems and, where applicable, switching or routing equipment and other resources, to include non-active network elements, which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed and terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed”. This definition excludes some traditional ways of transmitting audiovisual products, such as cinema broadcasts or the sale of DVD/BluRay.

As can be seen from the above-mentioned, the Directive is not always clear and exhaustive in its definitions. However, it is worth noting that the Directive imposes minimum obligations on the handling of rules on audiovisual media. The Directive imposes harmonization of the basic concepts and relevant results, but not the method and means of implementation chosen by the Member States. Consequently, partly because of the characteristic nature of the Directive as an EU legislative instrument, and partly because of the ambiguity of some of the concepts contained in the Directive, Member States have been forced to find individual solutions to many questions which have not been answered by the Directive<sup>24</sup>.

Consequently, the intervention of the CJEU in clarifying the boundaries of the applicability of the Directive, as well as some of its key concepts, is inevitable. The following are two cases which illustrate exactly what has been said above.

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<sup>24</sup> Ibid. p. 11

## ***New Media Online v Bundeskommunikationssenat, C-347/14, Judgment of 21 October 2015***

### **Circumstances of the case:**

In 2012, the Austrian Media Authority attempted to examine whether the special section of an electronic newspaper, containing a catalogue of about 300 videos, could be considered a non-linear audiovisual media service<sup>25</sup>. The Austrian Media Authority did not focus on the volume or length of videos, but on the fact that the various audiovisual reportages in this newspaper were comparable to television broadcasts and addressed simultaneously the same audience as a television broadcast. Consequently, identifying the existence of competition between services, the Austrian Media Authority decided that this electronic newspaper service could be categorized as an on-demand audiovisual media service. The publisher disagreed with this assessment and therefore addressed the Austrian courts, which referred two questions in the preliminary application to the CJEU.

### **Questions referred for ruling:**

Do short video clips classify as Programmes? Does the video section of the electronic newspaper portal constitute an on-demand audiovisual media?

The CJEU ruled that the concept of ‘programme’, within the meaning of Article 1(1)(b) of the Directive 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. According to the Court, a proper interpretation of Article 1(1)(a) of the Directive requires an assessment of the principal purpose of making videos available in the electronic version of a newspaper. The focus must be on the nature of the video service. The Court argued that the distinction is made between videos that are independent in form and content from the journalistic activity of the electronic newspaper operator, or whether these videos are merely an integral and complementary part of this journalistic activity. In the present case, it was decided that the videos in question were specific in form and content, and independent of the journalistic aspect of the newspaper. Consequently, in application of the Luxembourg Court's reasoning, the Federal Administrative Court rejected the appeal made by New Media Online, upholding the decision taken by the Austrian Media Authority.<sup>26</sup>

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<sup>25</sup>Media Regulatory Framework and the Online Media – The Macedonian Case p. 13

<sup>26</sup> 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>

***Peugeot Deutschland v Deutsche Umwelthilfe, Case C-132/17, Judgment of 21 February 2018***

**Circumstances of the case:**

The Peugeot branch in Germany posted on Youtube a promotional video of one of its cars. An environmental association in Germany sued the company on the grounds that the video in question contained no indication of fuel consumption and carbon dioxide emissions in the air. Classifying this video as an audiovisual media service is important, because if this video is, then under applicable German law, Peugeot was not required to include the above information in its video.

This case is about clarifying the problems related to audiovisual commercial communications. The latter are defined in Article 1 (1) (h) of the Directive as images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes.

**Questions referred for ruling:**

The CJEU was asked through a preliminary request, to rule whether promotional videos published by Peugeot on YouTube could qualify as an audiovisual media service within the meaning of AVMSD.

**CJEU Judgment:**

The court ruled that a promotional video on Youtube cannot have as its primary purpose the provision of programmes in order to inform, entertain or educate the general public. The Court also added that although the video in question may to some extent inform, entertain or educate some viewers, as Peugeot alleged, this effect only occurs as a result and through the attainment of the video's own promotional purpose. Consequently, according to the Court, even if a promotional channel on Youtube would meet all the criteria and characteristics of an audiovisual media service as set out in Article 1 (1) (a) (i) of the Directive, its promotional substance and purpose are sufficient to exclude this channel from the applicability of the above-mentioned article. In conclusion, the Court ruling is that Article 1(1)(a) of the Directive 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. As a result, the video at issue did not fall under jurisdiction of the above-mentioned article and Peugeot could not benefit from the exclusion of the obligation to provide the information required by German legislation

regarding consumer protection and information.<sup>27</sup> This judgment clarified the issue of audiovisual commercial communication.

(....)

The two judgments described above are good examples to illustrate the often-complicated applicability of the Directive as well as the dilemmas of media authorities or courts in adjudicating matters related to this Directive. Furthermore, these judgments are indicative of the scope of the Directive, which is narrower in practice than can be seen from a quick glance at its articles.

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The following are some pieces of legislation, for comparative purposes, concerning the concepts and definitions of audiovisual services, electronic publications, programmes or even web portals, as well as the audiovisual media monitoring authorities under the relevant legislation.

The Law on Electronic Media, in **Montenegro**<sup>28</sup> provides the definitions of "audiovisual media services", "electronic media" and "programme"<sup>29</sup>. The same law provides for a regulatory authority, titled the Agency for Electronic Media, with no control over online media<sup>30</sup>.

According to the Law on Media in **Northern Macedonia**, the Agency for Audiovisual and Audio Services is the regulatory authority in the field of Media<sup>31</sup>.

The Law on Electronic Media of **Croatia**<sup>32</sup>, defines "electronic media " as "audiovisual programmes, radio programmes and electronic publications", and the "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<sup>33</sup>). This law states that: (1) Freedom of expression and freedom of the complete electronic media

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<sup>27</sup>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>

<sup>28</sup> <https://www.epra.org/articles/media-legislation#MONTENEGRO>

<sup>29</sup> Article 8: 1) AVM service means a service under editorial responsibility of an AVM service provider 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, and may take the form of electronic media (radio or television broadcast), an on demand AVM service or audiovisual commercial communication; 3) **electronic media (a linear AVM service)** means a radio or television broadcast which presents a set of information in the form of images and/or sound or combination thereof (audiovisual content) constituting an individual item, under the same name, intended to inform and meet the cultural, educational, social and other needs of the public, which enables simultaneous listening to and/or viewing of programmes on the basis of a programme schedule; 5) programme means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by an AVM service provider and whose form and content is comparable to the form and content of television or radio broadcasting; audiovisual commercial communication means including in a programme a set of images with or without sound designed: (a) to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity, in return for payment or for similar consideration or (b) for self-promotional purposes;

<sup>30</sup> Article 10-14 of the Law.

<sup>31</sup> [https://cdn.epra.org/organisations/documents/54/original/Profile\\_MK\\_0219.pdf?1550763691](https://cdn.epra.org/organisations/documents/54/original/Profile_MK_0219.pdf?1550763691)

<sup>32</sup> <https://www.epra.org/articles/media-legislation#CROATIA>

<sup>33</sup> Article 2 (1) For the purposes of this Act particular terms have the following meaning:

1 **Electronic media**: audiovisual programmes, radio programmes and electronic publications.

program shall be guaranteed. (2) No provision of this Act shall be construed so as to provide for the right to censor or restrict freedom of speech and expression of opinion (Article 3).

According to Article 80 of the Law, "The natural or legal person shall submit a request for registration in the Register of Electronic Publications Providers, held by the Council of Electronic Media, before the first broadcast of the electronic publication".

The Law on Media in **Slovenia**<sup>34</sup> defines "mass media" as: newspapers and magazines, radio and television programme services, electronic publications, teletext and other forms of editorially formulated programmes published daily or periodically through the transmission of written material, vocal material, sounds 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 public information means, satisfying the public's cultural, educational and other needs, and communicating on a mass basis, (Article 2<sup>35</sup>). The same Article stipulates 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 transparencies, and video pages without moving pictures (unpaid reports), unless stipulated otherwise by law.

This Act does not confer any power on the Media Regulatory Authority to regulate electronic publications. In the event of violations, the power to make decisions related to misdemeanours and fines rests with the Culture and Media Inspectorate of the Republic of Slovenia, which is a body under the responsibility of the Ministry of Culture, overseeing the implementation of legislation related to culture and media. The regulation of audiovisual media is

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**2 Electronic publications:** edited programme contents which the electronic publications providers broadcast daily or periodically via the Internet with a view to provide public information and education.

**3 Audiovisual media service:** a service as defined by Articles 56 and 57 of the Stabilisation and Association Agreement between the Republic of Croatia and European Communities and their Member States, 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 the provisions of Electronic Communications Act. Such an audiovisual media service is either a television broadcast or an on-demand audiovisual media service and/or audiovisual commercial communication as defined in this Act.

<sup>34</sup> [https://www.rtvsllo.si/files/razno/mass\\_media\\_act](https://www.rtvsllo.si/files/razno/mass_media_act).

<sup>35</sup> [https://www.akos-rs.si/files/APEK\\_eng/Legislation/Digital-Broadcasting-Act-EN.pdf](https://www.akos-rs.si/files/APEK_eng/Legislation/Digital-Broadcasting-Act-EN.pdf)

<sup>35</sup> Article 2, (1): Under the present Act mass media are 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. (2) Under the present Act programme comprises 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. (3) 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 transparencies, and video pages without moving pictures (unpaid reports), unless stipulated otherwise by law.



governed by another act, the Audiovisual Media Services Act, which does not include any provisions regarding electronic publications<sup>36</sup>.

The Federal Law "On Press and Other Publishing Media" of Austria<sup>37</sup> provides that: "a periodic electronic media" is a "medium" transmitted electronically (broadcasting program) or, b) downloaded (website) or, (c) is distributed in a comparable content at least four times a year (repeated electronic medium). The purpose of the law is to uphold the right to freedom of information and expression, to guarantee full media freedom, to protect journalists, and to hold media accountable.

This Act does not confer any power on the media regulatory authority (Komm Austria) to regulate online media. The regulation of audiovisual media is done by another act, the Federal Audiovisual Media Services Act<sup>38</sup>.

## **2.2 Council of Europe and ECtHR Judgments with a focus on online media**

In terms of the legislation and rules applicable by the Council of Europe, the legal instrument most similar to the Directive is the European Convention on Transfrontier Television. However, this Convention is almost negligible, having been unchanged since its adoption in 1989.<sup>39</sup>

The Committee of Ministers of the Council of Europe, in its Recommendation CM/Rec, (2011)7 "On a new notion of the media", has provided a list of criteria, designed to help Member States assess what can be "a new, broad media notion"<sup>40</sup>. According to this Recommendation, lawmakers are encouraged to consider some basic criteria and rules to precisely determine and define in their respective legislation which particular activities, services or actors ought to be regarded as "media". These recommendations are:

- Intent to act as media, indicators of which are: self-labelling as media, working methods which are typical for media, commitment to professional media standards, membership in media groups and practical arrangements for mass communication;
- Purpose and underlying objectives of media, which could include: production, aggregation or dissemination of media content as well as operation of applications or platforms designed to facilitate interactive mass communication;

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<sup>36</sup> Macedonia case- Comparative analysis and recommendations as to possible amendments to the legal framework. For more information, see: <https://www.coe.int/en/web/freedom-expression/-/a-new-study-is-out-media-regulatory-framework-and-the-online-media-the-macedonian-case>

<sup>37</sup> [https://www.ris.bka.gv.at/Dokumente/ErV/ERV\\_2001\\_1\\_84/ERV\\_2001\\_1\\_84.pdf](https://www.ris.bka.gv.at/Dokumente/ErV/ERV_2001_1_84/ERV_2001_1_84.pdf)

<sup>38</sup> [https://www.ris.bka.gv.at/Dokumente/ErV/ERV\\_2001\\_1\\_32/ERV\\_2001\\_1\\_32.pdf](https://www.ris.bka.gv.at/Dokumente/ErV/ERV_2001_1_32/ERV_2001_1_32.pdf) §1. Article 1: (1) In order to administer and carry out regulatory tasks relating to electronic audio media and electronic audio-visual media, including supervision of the Austrian Broadcasting Corporation and its subsidiaries, the Austrian Communications Authority ("KommAustria") shall be established.

<sup>39</sup> Media Regulatory Framework and the Online Media – The Macedonian Case p. 18.

<sup>40</sup> Available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cc2c0](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0)

- Presence of editorial control, such as the existence of an editorial policy, editorial processes and staff;
- Presence of professional standards, such as compliance with professional ethics, deontology, existence of compliance and complaint procedures, as well as benefitting from protection or professional privileges, such as protection of sources or their confidentiality;
- The level and quality of dissemination of information to the general public;
- Public expectations, indicators of which could be: public expectation of a media being easily accessible and persistent, expectation of pluralism and media diversity as well as adherence to professional standards of accountability and transparency.

This recommendation has taken into account on one hand the broader approach to the notion of media (which includes to some extent social networks and online games), but on the other it is silent on the regulatory regime(s) to be applied to these media (if applicable).<sup>41</sup>

The recommendation only takes this issue into account when suggesting that Member States "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".

This Recommendation also states 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. (...) Any action sought against media in respect of content should respect 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 Recommendation CM/Rec (2015), 6 "On the free, transboundary flow of information on the Internet", the CoE Committee of Ministers has provided valuable standards for the purpose of this Study, 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"*.

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<sup>41</sup> A conclusion also reached by the study "MEDIA REGULATORY FRAMEWORK AND THE ONLINE MEDIA - Macedonian case".

(Comparative analysis and recommendations as to possible amendments to the legal framework). For more information, see: <https://www.coe.int/en/web/freedom-expression/-/a-new-study-is-out-media-regulatory-framework-and-the-online-media-the-macedonian-case>)

The Council of Europe emphasizes 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".<sup>42</sup>

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 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.

Recommendation of Committee of Ministers CM/Rec (2007) 2, "On media pluralism and diversity of media content" emphasized that: "... *in order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, Member States should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed to the public.*

This Recommendation states that: "*Member states should seek to ensure that a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public. Where the application of general competition rules in the media sector and access regulation are not sufficient to guarantee the observance of the demands concerning cultural diversity and the pluralistic expressions of ideas and opinions, member states should adopt specific measures. Member states should consider the adoption of rules aimed at limiting the influence which a single person, company or group may have in one or more media sectors as well as*

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<sup>42</sup> Available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805c3f20](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c3f20)

*ensuring a sufficient number of diverse media outlets. These rules should be adapted to the size and the specific characteristics of the national, regional or local audiovisual media and/or text-based media market to which they are applicable".*

As regards media-related issues, in particular online or audiovisual media, the ECtHR has set standards mainly for problems related to only two articles of the Convention; Article 8 and Article 10. It is noteworthy that the ECtHR did not address issues pertaining to the field of audiovisual media, unlike the ECtHR as described above. The issues closest to those based on the Directive above are the issues related to the liability of portals or online media operators for third-party comments and activity on their websites.

Although these issues are not directly related to audiovisual media or to the definition or extent of this concept by the Directive, they are relevant in the context of the recently proposed draft laws, which provide for controlling criteria and penalties or penalizing mechanisms for online media as per legal provisions.

In the case **Delfi v. Estonia**, the ECtHR analysed the interference of portals on comments and freedom of expression of readers and commenters, affirming liability of portals for deleting negative comments.<sup>43</sup>

Delfi, one of Estonia's leading online media portals, published in 2006 a news story about a shipping company (SLK). The news concerned a violation by the company of the navigation rules applicable at the time. A large number of readers commented on the news published by Delfi. Some of these comments incited violence and expressed hatred for SLK's main shareholder. Six weeks after the comments were published, the shareholder in question asked Delfi to delete the comments from their site. The latter, after the request was made, deleted the comments considering them as a violation of the shareholder's individual rights. Although the comments were deleted, courts in Estonia convicted Delfi on the grounds that it should have prevented these comments which were clearly illegal.

The ECtHR applied the principle of proportionality, according to which, with the imposition of civil penalties, freedom of expression was interfered with, but this interference had been made by law, and had the legitimate aim of protecting the reputation of others. According to the ECtHR, interference with the freedom of expression of the portal was proportionate and necessary to achieve the goal in a democratic society. The court therefore held that Estonia had acted proportionately and had not violated Article 10 of the ECHR.

The ECtHR maintained that: "*... in the case of publication of information in the media, the publisher can be a media company as well as the person who transmitted the information to the*

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<sup>43</sup> <https://strasbourgobservers.com/?s=delfi>

*media publication. Publishing of news and comments on an Internet portal is also a journalistic activity. At the same time, because of the nature of Internet media, it cannot reasonably be required of a portal operator to edit comments before publishing them in the same manner as applies for a printed media publication. While the publisher is, through editing, the initiator of the publication of a comment, on the Internet portal the initiator of publication is the author of the comment, who makes it accessible to the general public through the portal. Therefore, the portal operator is not the person to whom information is disclosed. Because of their economic interest in the publication of comments, both a publisher of printed media and an Internet portal operator are entrepreneurs. Interference by an Internet portal operator with the freedom of expression of persons posting comments is, however, justified by the obligation of the portal operator-entrepreneur to respect the honour and good name of third parties.*<sup>44</sup>

According to the ECtHR, where competing Convention rights such as those guaranteed by Article 8 and Article 10 are concerned, States have a wide margin of appreciation, determining the point of balance between them, depending on national contexts. In order to carry out a proportionality assessment, the ECtHR has identified some specific aspects such as: how much freedom of expression is needed in the case at hand, such as the context of the comments, the measures implemented by the portals, in order to prevent or delete offensive comments, responsibility of commenters as an alternative and consequences according to national internal procedures for the portal.

In conclusion, based on the *Delfi* case, online news portals, which allow their users to comment, are responsible for the content of third-party comments published online, even when: a) the online site operator is not aware of these comments; and, b) even if the operator deletes comments after being notified of their existence.

In the case **MTE – Index v Hungary**<sup>45</sup>, the ECtHR analysed issues related to liability for third-party commenters online, just as in *Delphi* in terms of facts. Thus, MTE and Index, on their online site, published an opinion on how two Hungarian real estate companies used unethical contractual practices in their work, and urged readers to be aware of the event. Some commenters on this portal expressed their opinions in an offensive and vulgar way, but without resorting to hate speech in their words. Real estate companies did not contact MTE, a self-regulatory body, and Index, the online portal, but sued them in court. Although the comments were deleted after the lawsuit, the Hungarian courts ruled that the portals were solely responsible for online third-party comments.

The ECtHR reiterated that, while non-publishers in the traditional sense of the word, online portals have in principle some "duties and responsibilities" for the news and information they publish. However, according to the ECtHR, the Hungarian courts had not properly respected the

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<sup>44</sup> Case 64569/09, *Company Delfi AS v. Republic of Estonia*, 15 June 2016.

<sup>45</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13

notion of the applicant's responsibility, assessing in a disproportionate way his freedom of expression with the right of the two real estate companies for a good commercial reputation.

Applying the proportionality test, same as for *Delfi*, and considering the elements and differences in the *MTE - Index v Hungary* case<sup>46</sup>, the ECtHR found that Hungary had failed to balance the right to privacy with the freedom of expression, and consequently the decision of the Hungarian courts was considered in breach of Article 10 of the ECHR.<sup>47</sup>

In the case **Magyar Jelt Zrt v. Hungary**<sup>48</sup>, the applicant was a company that owned a very popular online portal in Hungary. The portal published an article by a media reporter on several attacks on children of a Roma school. In the article, the portal was referring to a link which led to a Youtube video of the interview of a Roma community leader about some attacks on a school in which most students were from this community. The leader accused a political party called Jobbik, and its members, of the attack.

This party brought defamation proceedings against all media outlets which had published or disseminated the interview of the Roma community leader and had misinformed about the attack, which had in fact been carried out by sport fans and not members of this party. It also sued the applicant, which had uploaded the video on its portal. It argued that by using the term “Jobbik” to describe the school assailants and by publishing a hyperlink to the YouTube video, the defendants had damaged its reputation through defamation. Hungarian courts ruled in favour.

The question brought before the ECHR was whether, under the specific circumstances of the case, the interference with freedom of expression was based on sufficient and proper reasons, and therefore necessary in a democratic society under the ECHR.

According to the Court, posting of a hyperlink does not automatically entail dissemination of defamatory information. Therefore, situations to be taken into account in order to conclude whether an online portal should be responsible for publishing a hyperlink should be assessed on a case-by-case basis, referring to these aspects:

1. Did the journalist endorse the impugned content?
2. Did the journalist repeat the impugned content?
3. Did the journalist merely include a hyperlink to the impugned content (without endorsing or repeating it)?

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<sup>46</sup> Unlike *Delfi*, where the posted comments contained hatred and threats to one's life, the comments on MTE and INDEX were merely vulgar and offensive, but not clearly illegal. Another factor worth comparing is the nature and purpose of the publisher. *Delfi* was one of the largest online portals, where readers' ability to comment was an integral part of their commercial activity. On the other hand, MTE was merely a not-for-profit society, representing interests for certain groups but not recognized economic interests, and had no primary purpose of publishing the news. Also, the identity of the person affected by the comments is also an important element. In the case of *Delfi*, the person was an individual, while in the case of MTE it was a legal entity.

<sup>47</sup> <https://blogs.lse.ac.uk/mediapolicyproject/2016/02/19/the-european-court-of-human-rights-rules-again-on-liability-for-third-party-comments/>

<sup>48</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* ECtHR nr. 22947/13

4. Did the journalist know or could he or she reasonably have known that the impugned content was defamatory or otherwise unlawful?
5. Did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism?<sup>49</sup>

In light of the specific circumstances of the case, the ECtHR found that there had been a violation of Article 10 of the ECHR by the Hungarian authorities. However, the ECtHR emphasized that “where a journalist does not act in good faith in accordance with the ethics of journalism and with the diligence expected in responsible journalism dealing with a matter of public interest” even if he/she merely repeats a statement, this may potentially engage the question of liability<sup>50</sup>.

These decisions are evidence of the complexity of the regulation by law and the balancing of rights in the virtual world. However, the ECtHR has stated that where effective editorial procedures make it possible for news portals to respond quickly, the existing notice-and-take-down approach will in many cases work as an appropriate means of balancing the rights and interests of all concerned parties.<sup>51</sup>

The ECtHR, after the Delfi case, in a later ruling, **PIHL v. Sweden**, clarified the limited liability of operators of websites or online platforms containing defamatory user-generated content<sup>52</sup>. According to the ECtHR, *non-profit blogs are not liable for defamation of commenters if they remove the comment after a request from the injured party*. In this case, the applicant was not the owner or operator of an online platform, with comments from users complaining of an interference with their right to freedom of expression under Article 10 of the Convention. The applicant was a private person who complained of a violation of his right to privacy and reputation under Article 8 of the ECHR because the Swedish authorities had refused to hold the website operator responsible for a blog with a defamatory posting and an anonymous online comment.<sup>53</sup>

Whereas in the case **Tamiz v. United Kingdom**, the ECtHR stated that Google blogs as provider of publication services shall not be held liable for offensive comments. This decision stipulates that: “*As long as the notion of respect is not a "clear-cut" concept, and can normally be secured by a number of possible methods, the choice of measures designed to secure compliance with this obligation falls within the Member States' margin of appreciation*”. In light of these considerations, the ECtHR states that: “*the reality is that millions of Internet users post offensive*

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<sup>49</sup>Ibid, prg. 77

<sup>50</sup> ibid, prg. 80

<sup>51</sup> <https://blogs.lse.ac.uk/mediapolicyproject/2016/02/19/the-european-court-of-human-rights-rules-again-on-liability-for-third-party-comments/>

<sup>52</sup> Case Rolf Anders Daniel Pihl v. Sweden, 9 March 2017

<sup>53</sup> <https://strasbourgobservers.com>

[/2017/03/20/pihl-v-sweden-non-profit-blog-operator-is-not-liable-for-defamatory-users-comments-in-case-of-prompt-removal-upon-notice/](https://strasbourgobservers.com/2017/03/20/pihl-v-sweden-non-profit-blog-operator-is-not-liable-for-defamatory-users-comments-in-case-of-prompt-removal-upon-notice/)

*comments every day but most of them are likely to be too trivial in character to cause any damage to another person's reputation*". In this context, the ECtHR maintained that: *"the applicant was a career politician, and should have a high tolerance threshold, although Mr Tamiz's comments were posted in July 2010 - before he joined the Conservative Party"*. Holding that the applicant had other options for action against the author of the blog and comments, the Court ruled that the applicant's allegations did not meet the "real and substantial harm" limit, as a requirement for defamation proceedings and balance test between Articles 8 and 10 of the Convention.<sup>54</sup>

"Harm" is a criterion that depends on the various fundamental legal differences under national law, including the "elements of harm", according to the jurisprudence of the European Court of Human Rights. National differences undoubtedly complicate the harmonization of laws and a standardized approach at the international level. The ECtHR has argued that: "The Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press."<sup>55</sup>

Undoubtedly differences exist between approaches adopted through laws, from European states legislations to regulate content on the Internet. Content regarded as harmful or offensive does not always fall within the boundaries of illegality. Usually, the difference between illegal and harmful content is that the former is criminalized by national laws, while the latter is considered offensive, objectionable, or undesirable but is generally not considered criminal. Legal developments regarding the Internet have shown that states differ in terms of categorizing or labelling certain types of content as illegal or "harmful"<sup>56</sup>.

### III. CONCLUSIONS AND KEY RECOMMENDATIONS

#### **Related to Law on Audiovisual Media**

Law no. 97/2013 is fully aligned with the standard of 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" and its content as a result of the process of approximation of Albania's laws with the EU *acquis communautaire*. The terminology of the law is also fully

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<sup>54</sup> Case Tamiz v. United Kingdom, 12 October 2017, prg. 81-82- 87-89.

<sup>55</sup> Editorial Board of Pravoye Delo and Shtekel v. Ukraine, Application no. 33014/05, Judgment of 05.05.2011, para 63.

<sup>56</sup> Freedom of expression on the internet, OSCE, 2012. Study of OSCE member countries.



approximated with the Directive. Most of the terminology is taken from the Directive and implemented in an identical manner to the law.

Some of the key concepts unified by the Directive and transposed by law are: the definitions of 'audiovisual media services' as: *'a service under the editorial responsibility of a media service operator, 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. Such an audiovisual media service is either a television broadcast or an on-demand audiovisual media service which are: 'non-linear audiovisual media services provided by the media service provider at the moment chosen by the user, upon request, based on a programme catalogue provided for this purpose by the media service provider'; 'linear transmission' and 'non-linear transmission', which are defined respectively as: "providing audio and/or audiovisual program service for simultaneous reception by listeners and/or viewers", and "providing audio and/or audiovisual program service for reception, upon individual request and at the time of choice by users" ; or even the concept of 'Advertising' described as: 'any form of publicity transmitted for payment or other benefits by a public or private enterprise or by a person for self-advertising purposes, in connection with their own commercial or for-profit, professional or expert activity and to support the provision of goods or services, including immovable property, other rights and obligations, against payment.'*

With regard to the scope and applicability of Article 2, this Law is again fully aligned with the Directive. This means that traditional broadcasting services, or linear audiovisual media services, are covered by the jurisdiction of the law. The same can be said for non-linear audiovisual media services. The same article clearly precludes the applicability of the law on print media. In this way, the law is in line with most EU countries' legislation. On the other hand, regulating online media through legal regulation of audiovisual media is not a European practice, a conclusion which is also drawn from other studies carried out for this purpose<sup>57</sup>.



### **On Potential Changes to the Law on Audiovisual Media and the Law on Electronic Communications**

Council of Europe standards regarding the media recognize the 'margin of appreciation' of the respective State, both in the instruments with which they operate and in how they can achieve the goals and objectives of general interest at national level in ensuring freedom of expression, but also the preservation of human dignity, while respecting the balance between these two fundamental constitutional values of human rights.

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<sup>57</sup>MEDIA REGULATORY FRAMEWORK AND THE ONLINE MEDIA - Macedonian case- (Comparative analysis and recommendations as to possible amendments to the legal framework). For more information, see: <https://www.coe.int/en/web/freedom-expression/-/a-new-study-is-out-media-regulatory-framework-and-the-online-media-the-macedonian-case>, p.23

The need or not for a specific law on media, which would consequently regulate the aspect of online media, is a long, thorough debate and beyond the scope of this analysis. If the need to regulate online media is such that regulation should be made, the standards of the legislator should be guided by the public interest in guaranteeing media freedom under these international and constitutional standards:

- *any change shall be prescribed by law.* A provision in the law involves the accessibility and predictability of the law, therefore the norm shall be established with sufficient precision for the subjects affected by the law, it shall predict the extent that is reasonable in the circumstances, as well as the consequences that may result from engaging in a particular activity.

- *these changes shall be necessary.* Exercising freedom of expression entails duties and responsibilities. It can only be limited to the conditions and sanctions strictly provided for by law, and that in a democratic society constitute the necessary and exclusive measures, with the aim of: protecting national security, protecting territorial integrity, protecting public security, protecting from riots and crimes, the protection of health, the protection of morals, the reputation or rights of others, preventing the dissemination of confidential information or maintaining the authority and impartiality of the judiciary. Each of these reasons has been analysed by the ECtHR case law and should therefore be considered.

- *these changes shall be proportional to the goal pursued.* Member States are given a certain margin in assessing the existence of a "pressing social need", in applying restrictive measures and in the choice of means<sup>58</sup>. The state has limitations in this assessment and should always provide "necessary and convincing explanations" on the proportionality test. At the heart of the principle of proportionality is the "right balance of interests", their important and objective evaluation, and the avoidance of conflict through the selection of appropriate means for their realization. A restriction would be considered in compliance with the principle of proportionality if: (i) the legislator's objective is sufficiently significant to justify a restriction of the right; (ii) the measures taken are reasonably related to the objective - they shall not be arbitrary, unfair or based on illogical assessments; (iii) the means employed are no stricter than required to achieve the desired objective - the greater the harmful effects of the means selected, the more significant the objective to be attained must be so that the means is justified as necessary.

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<sup>58</sup> In this perspective, the ECtHR maintained: "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." (*case Manole and others v. Moldova, Judgment of 17 December 2009, § 100*).

Some considerations, or orientations for the Legislator, in terms of adjustments or efforts to develop a new law, would be:

- The legislator should ensure that changes to existing laws or the creation of a new law do not weaken media and press freedom by creating further administrative responsibilities. As already noted in the existing examples, the law should clearly aim at guaranteeing and protecting media freedom.
- The need to keep administrative responsibilities to a minimum. New amendments or laws should not have as their primary objective the addition of administrative procedures and requirements to legally structure the functioning of the media. The absence of a specific law on media is not sufficient justification for imposing administrative measures and obligations, as such a lack does not imply a legal vacuum. To date, non-audiovisual media have regularly been subjected to various commercial, criminal, civil and tax laws. Consequently, the amendment or introduction of a new law should have the primary objective of simplifying and summarizing the legal framework into a single instrument. This way, enforcement and compliance with the law would be simpler and more efficient.
- It is important that the law does not create artificial differentiation between media concepts. Given that clarity and predictability would be the main drivers for the existence of such a law, artificial differentiation between print, online, and non-audiovisual linear or non-linear services would not serve the purpose of the law. When linear and non-linear services are present simultaneously on the same portal or when the print media is almost always online, the new law should ensure that its provisions are comprehensive and equitable. Otherwise, it risks creating different standards and rules for specific entities operating in the same area, thereby harming market competition.
- Although it is an ongoing challenge in Albania, media self-regulation is an essential factor in the functioning of the media system. The Code of Ethics, which is the only means of media self-regulation in Albania, does not constitute a legal obligation and does not cover online media<sup>59</sup>. The new law could consequently serve as an incentive for updating the Code of Ethics, and as a watchdog of its implementation.

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<sup>59</sup> Albanian Media Code of Ethics (2006). For more information, see: <http://www.osce.org/sq/albania/21235?download=true>  
<https://www.reporter.al/manualidrejtjesise/download/LIRIA%20E%20SHPREHJES%20DHE%20E%20MEDIAS.pdf> p.3

## ❖ **Summary of Proposals**

1. Law no. 97/2013 is in full compliance with Directive 2010/13/EU of the European Parliament and of the European Council. In this respect, Albanian legislation does not need to be amended. With regard to the correct interpretation and application of the concepts of law, the Albanian courts may refer to the ECtHR cases mentioned above.
2. Except for audiovisual media, other types of media are not regulated by a specific law in Albania. The need for such a law is debatable. In the context of the recently discussed amendments, or if the Legislator decides to develop such a law, some essential objectives should be considered, most notably the one related to media freedom.
3. In order to achieve clarity and simplicity in implementation, it is necessary that the administrative responsibilities and procedures provided for in the new law be sufficient to achieve their purpose and not exceed it.
4. The law should be comprehensive in nature and should not create artificial differentiation between the "old" and "new" concepts of the media. Otherwise there is a risk of harming market competition.
5. The new law could serve as an impetus for media self-regulation and the enforcement of these rules.

## • **ANNEXES**

- Law no. 97/2013
- Draft Law "Some additions and amendments to Law no. 97/2013 "On audiovisual media in the Republic of Albania", as amended.
- Draft Law "Some additions and amendments to Law no. 9918, of May 19, 2008 "On electronic communications in the Republic of Albania", as amended.

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