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MEDIA FREEDOM IN THE AGE OF ONLINE PLATFORMS

LIBERDADE DE IMPRENSA NA ERA DAS PLATAFORMAS ONLINE

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Abstract: This paper examines three distinct but closely related issues of contemporary media freedom. The first of these is the elements of the “traditional” concept of media freedom and how it differs from freedom of expression. The paper introduces the question of the additional rights granted to the media, and discusses the prevailing approach in Europe to the constitutional role and social responsibility of the media and its regulatory implications. The paper also deals with the similarities and differences between online platforms and traditional media, the ways in which these platforms restrict freedom of expression and media freedom, and the implications for European regulation. European legislation forces platforms to take action against illegal user content. It also allows them to create private speech codes, and enforce them against their users (private regulation). The prioritisation activity of platforms is also a key determinant of how users perceive the content that is potentially available to them. The activities of platforms and traditional media differ in a number of respects, but given their similar characteristics, in particular their role in the public sphere, the regulation of these media should also have similar objectives, in order to ensure access to information, equality of speakers, and equality of opinion. The paper also presents legislative responses to the direct conflict between platforms and media freedom. This occurs when platforms apply their moderation activities against a media outlet.

Keywords: media freedom; media regulation; platform regulation; Digital Services Act

Resumo: Este artigo examina três questões distintas, mas intimamente relacionadas, sobre a liberdade de imprensa contemporânea. A primeira delas diz respeito aos elementos do conceito “tradicional” de liberdade de imprensa e como este difere da liberdade de expressão. O artigo introduz a questão dos direitos adicionais concedidos aos meios de comunicação e discute a abordagem prevalente na Europa em relação ao papel constitucional e à responsabilidade social dos media e às suas implicações regulatórias. O texto também aborda as semelhanças e diferenças entre as plataformas online e os meios de comunicação tradicionais, os modos como estas plataformas restringem a liberdade de expressão e a liberdade de imprensa, e as implicações para a regulação europeia.

A legislação europeia obriga as plataformas a agirem contra conteúdos ilegais dos utilizadores. Permite-lhes também criar códigos de discurso privados e aplicá-los aos seus utilizadores (regulação privada). A atividade de priorização das plataformas é outro fator determinante de como os utilizadores percebem o conteúdo potencialmente disponível para eles. As atividades das plataformas e dos meios de comunicação tradicionais

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diferem em vários aspetos, mas, dadas as suas características semelhantes, em particular o seu papel na esfera pública, a regulação destes media deveria ter objetivos igualmente semelhantes, de forma a garantir o acesso à informação, a igualdade entre os emissores de opiniões e a equidade na circulação de ideias. O artigo também apresenta respostas legislativas ao conflito direto entre as plataformas e a liberdade de imprensa. Este conflito ocorre quando as plataformas aplicam as suas atividades de moderação contra um órgão de comunicação social.

Palavras-chave: liberdade de imprensa; regulação dos media; regulação de plataformas; Lei dos Serviços Digitais

1. Introduction

The concept and scope of press freedom is constantly changing in the context of technological developments. This paper examines three distinct but closely related issues. The first of these (in section 2) is the elements of the “traditional” concept of media freedom and how it differs from freedom of expression. This section introduces the question of the additional rights granted to the media, and discusses the prevailing approach in Europe to the constitutional role and social responsibility of the media and its regulatory implications. Section 3 deals with the similarities and differences between online platforms and traditional media, the ways in which these platforms restrict freedom of expression and media freedom, and the implications for European regulation. Platforms play a similar role in the public sphere to the media, and similarly have the capacity to enable and influence public debate, making their regulation essential from a European perspective and comparable to the fundamental principles and aspects of media freedom and regulation. This section addresses three fundamental problems: the obligations of platforms to take action against illegal content, the rules that platforms make to restrict the speech of their users, and the prioritisation and ordering of content by platforms, which has an impact on access to information. Section 4 presents legislative responses to the direct conflict between platforms and media freedom. This occurs when platforms apply their moderation activities, as discussed in the previous section, against a media outlet. The paper can, of course, only broadly outline the problems and regulatory responses described, but it nevertheless intends to give an idea of the current content of the concept of media freedom.

2. “Traditional” media freedom

2.1. The notion of the “media”

Which right of the media distinguishes it from the individual speaker? The right to freedom of the media can be broken down into several elements. Of course, journalists, editors and owners can have opinions, just like anyone else. The right to freedom of the media includes, by definition, the right to publish these opinions publicly, through the media.² In addition, the media have the right to collect information (a right that goes beyond the

2. *Lingens v Austria* no 9815/82, judgment of 8 July 1986; *Oberschlick v Austria* no 20834/92, judgment of 1 July 1997; *Thoma v Luxembourg* no 38432/97, judgment of 29 March 2001.

framework of the general right to freedom of information, which is more of a state obligation), to publish the information obtained and to refuse to disclose information. Freedom of the media can be exercised through a “medium”, so the concept of media is a key issue for the exercise of this right.³ Traditional or legacy media is easily recognised: they are press outlets, television and radio (broadcasting). Their online or digital equivalents (new portals and on-demand services) are also considered as media.⁴ We arrive to more difficult questions when considering the legal status of online platforms (that is, social media and video sharing platforms) or online search engines. Are they also media? This paper deals with this issue in section 3.

Also, what about citizen journalists? If, in the online sphere, virtually anybody can publish their opinion freely, can anyone be a journalist (from a legal perspective), and so claim privileges provided by law? With the advances in technology, we can be no longer certain that only professional journalists working in the legacy media (or its online equivalent) – that is, journalists who follow the rules of a profession – should be considered to be entitled to media freedom. On the Internet, anyone is free to publish their content, even on public issues, virtually free of charge. According to Peter Coe (2021), traditional (professional) journalists and media can no longer be considered the exclusive right-holders of media freedom, since citizens who regularly or even only occasionally carry out journalistic or similar activities should also be included. These citizens have become active participants in the public sphere by producing and publishing various content, contributing to the debate on current affairs, exposing abuses of power, and increasing the diversity of opinions, and there is therefore no justification for denying them the right to exercise their freedom of the media and the opportunities that this right affords. Persuasive arguments can be raised for acknowledging the individual speakers (publishing outside of the institutional media) as members of the “media”, as “citizen journalism” is capable to contribute to public debates, sometimes more efficiently than professional media outlets (Coe, 2021). Nevertheless, under the currently applicable legal doctrines, they are rarely identified as the beneficiaries of media freedom, and citizen journalists are usually not recognised as “journalists” from a statutory perspective when the statutory regulation is applied by the courts.

2.2. Freedom of expression and media freedom

The media naturally enjoy the right to free expression. But how can we differentiate between the right to free speech and media freedom? Several metaphors are in use when discussing the role of the media in society. The media is a symbolic *agora* of today’s society (Tucker, 1906); it is the space where individual opinions may appear and clash, and which also helps those interested in making informed opinions and making decisions. Individuals need the help of the media, without which they would not have access to the necessary information. The idea of the media keeping watch over the government can be linked to Thomas Carlyle’s “Fourth Estate” metaphor (Carlyle, 1841: 147). According to this conception, the media exercises control over the reigning powers, revealing the functioning of state bodies and government, exposing its anomalies, and providing the members of society with sufficient information in order to be able to make informed decisions in

3. On the partial rights of media freedom, see Oster (2015: 69-83).

4. Though their identification can raise difficult questions, see generally Katsirea (2024).

democratic procedures. So, government control is identified as an important function of the media (Rowbottom, 2018: 19–20), and the European Court of Human Rights (ECtHR) often refers to the media as the “public watchdog” of society if the Court wants to justify protecting its freedom.⁵

On the other hand, speech through the media (especially broadcasting) is considered to be more effective and, as a consequence, more dangerous to individual rights or societal interests. The ECtHR has confirmed in a number of decisions that radio and television play a particularly important role in the transmission of political information and ideas of public interest, and that it is therefore important to take account of the public’s interest in this regard. “It is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media.”⁶ Audiovisual media have at their disposal, through the representation of moving images, tools that are not available to the press. Furthermore, television and radio are familiar sources of entertainment for listeners and viewers in the intimate environment of their homes or workplaces, which further reinforces their impact.⁷ The specific prohibition of offensive or harmful content in media regulation serves as a compensation for the privilege of access to homes (Phillipson and Fenwick, 2006: 564).

What’s the regulatory answer to this dual nature of the media? Enhancing its opportunities to actively play the role of the “public watchdog”, several privileges granted to the media, that differentiates journalists (media speech) from other speakers. These additional rights of the media are recognised by all European legal systems. The reason for this is the hope that the safeguarding of those privileges is important, even if certain players in the media market do not exercise them, or exercise them while failing to serve the public interest through them. Behind this approach is the consideration that additional protection should be opened up to the media, regardless of how many people use it and for what purpose, and that there should be confidence that there will be media outlets which guarantee that these rights will be used to inform society and act as a check on the authorities.

But the definitional problem remains. To whom should legal systems grant additional rights? Certain rules in some jurisdictions – such as the United Kingdom’s (UK) law on the protection of journalistic sources⁸ – are worded in general terms, protecting not only the media but also anyone who reaches out to the public and makes their views or some information known. This is not an unjustified approach, as not only the media but also an individual speaker can provide information to the public. However, most rules granting

5. *Lingens* (n 1) [44]; *Jersild v Denmark* no 15890/89, judgment of 23 September 1994 [GC], [31] and [35]; *Bladet Tromsø and Stensaas v Norway* no 21980/93, judgment of 20 May 1999, [59] and [68]; *The Observer and The Guardian v the United Kingdom* no 13585/88, judgment of 26 November 1991, [59(b)]; *The Sunday Times v the United Kingdom* no 13166/87, judgment of 26 November 1991, [50(b)]; *Dalban v Romania* no 28114/95, judgment of 28 September 1999, [49]; *Bergens Tidende and Others v Norway* no 26132/95, judgment of 8 August 2000, [49] and [57]; *Thoma* (n 1) [45]; *Goodwin v the United Kingdom* no. 17488/90, judgment of 27 March 1996, [39].

6. *Jersild* (n 9) [31]; *Pedersen and Baadsgaard v Denmark* [GC] no 49017/99, [79]; *Centro Europa 7 S.r.l. and Di Stefano v Italy* no 38433/09, judgment of 7 June 2012 [GC], [131]–[133].

7. *Murphy v Ireland* no 44179/98, decision of 10 July 2003, [74].

8. Contempt of Court Act 1981, section 10.

such privileges refer to the media or to journalists specifically. In this case, it is up to the courts to decide who is considered to be covered by the rule; only professional media actors or journalists, or instead even amateurs, lone bloggers, citizen journalists or social media users, if they otherwise carry out regular information activities by the means available to them. An overview of the European legal systems reveals a wide range of such privileges.

The media and journalists include have the right to protect their sources of information from unnecessary disclosure. The legal systems of Member States of the European Union (EU), as well as that of the UK, guarantee the anonymity of journalistic sources,⁹ and the case law of the ECtHR is rich on this subject.¹⁰ The European Media Freedom Act (EMFA)¹¹ also provides protection for the sources of the media (sections 3–6 of article 4).

Another right related to the protection of sources, which can also be interpreted separately from it, is that of protection against house searches and the seizure of tools and data carriers used by journalists. Such rules are also widespread, without which the right to protection of sources would be meaningless. The case law of the ECtHR on this right is also rich.¹² The EMFA, at EU level, also provides protection from searches and seizures (subsection b) of section 3 of article 4).

Some jurisdictions provide, within certain limits, an exemption for journalists from the obligation to testify in court proceedings if the reason for the summons is related to their journalistic activities.¹³

The gathering of news and information is supported by certain access rights, which grant journalists access to places that are otherwise closed to the public or to which they have limited access. These may include prisons, courtrooms, government buildings, the Parliament building, press conferences, or any place or institution which, for some reason, even on a

9. See, for example, UK's Contempt of Court Act 1981, section 10; German Code of Criminal Procedure (Strafprozeßordnung), subparagraph 5 of paragraph 1 of article 53; German Code of Civil Procedure (Zivilprozessordnung), subparagraph 1 of paragraph 5 of article 383; French Act on the Freedom of the Press (Loi sur la liberté de la presse du 29 juillet 1881), article 2.

10. See, among other decisions, *Goodwin* (n 9); *Financial Times Ltd and Others v the United Kingdom* no 821/03, judgment of 15 December 2009; *Sanoma Uitgevers BV v the Netherlands* no 38224/03, judgment of 14 September 2010 [GC]; *Voskuil v the Netherlands* no 64752/01, judgment of 22 February 2008; *Telegraaf Media Nederland Landelijke Media BV and Others v the Netherlands* no 39315/06, judgment of 22 November 2012; *Becker v Norway* no 21272/12, judgment of 5 October 2017.

11. Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act).

12. *Nordisk Film & TV A/S v Denmark* no 40485/02, judgment of 8 December 2005; *Roemen and Schmitt v Luxembourg* no 51772/99, judgment of 25 February 2003; *Ernst and Others v Belgium* no 33400/96, judgment of 15 July 2003; *Tillack v Belgium* no 20477/05, judgment of 27 November 2007; *Martin and Others v France* no 30002/08, judgment of 12 April 2012; *Ressiot and Others v France* no 15054/07, judgment of 28 June 2012; *Saint-Paul Luxembourg SA v Luxembourg* no 26419/10, judgment of 18 April 2013; *Nagla v Latvia* no 73469/10, judgment of 16 July 2013; *Stichting Ostade Blade v the Netherlands* no 8406/06, judgment of 27 May 2014; *Ivaschenko v Russia* no 61064/10, judgment of 13 February 2018.

13. See, for instance, the German Code of Criminal Procedure, subparagraph 5 of paragraph 1 of article, German Code of Civil Procedure, subparagraph 5 of paragraph 1 of article 383.

case-by-case basis, the press may need access to.¹⁴ A specific case of the right of access is the right to distribute a press product in places closed to the public: In one case, the ECtHR found that a ban on distribution at a military base that affected a magazine for no good reason violated the European Convention on Human Rights (ECHR).¹⁵

An investigative journalist may choose the method of obtaining information which they uses, and in the meantime, they has the right to keep the fact of their being a journalist secret.¹⁶ A related issue is the possibility of publishing illegally obtained information and recordings. The law does not give a general permission to do such things to the press, but the courts may consider conflicting interests, and may even decide that although a journalist has obtained information illegally, its disclosure was not infringing.¹⁷

In certain cases, journalists and editors may be entitled – at least theoretically – to freedom of the press *vis-à-vis* the proprietor of the media. Only a few countries have introduced rules about this, and the rights they guarantee – the scope of the “internal freedom of the media”, that is within the organisation of the media, is not very wide.¹⁸ Without such protection, the desire for editorial independence cannot be fulfilled, since otherwise how can an editor be independent of the owner of their workplace or of the advertisers who contribute to the financial resources necessary to maintain their workplace? Editorial independence in this case is at most external – for instance, it may be exempt from government interference. The essence of internal freedom of the media is that a journalist should not be obliged to do or refrain from doing something that would be contrary to the professional requirements of their profession or media’s ethical norms, or, if they resist such instructions, they should not be disadvantaged under labour law (Baker, 1989: 262–266).

The European Media Freedom Act refers to the internal freedom of journalists and editors. According to the provision, “media service providers providing news and current affairs content shall take measures that they deem appropriate with a view to guaranteeing the independence of editorial decisions” (section 3 of article 6). However, this provision is not in fact normative. Media service providers must take measures “they deem appropriate” from the outset, and national media authorities cannot monitor these measures. The provision thus purely relegates the guarantee of editorial independence to the realm of self-regulation (Cole, Etteldorf, 2023: 31). Furthermore, the rule applies only to media that publish “news and current affairs content”, whereas entertainment and other content also play a significant role in shaping public opinion (Cole, 2024: 304).

14. For example, a refugee camp, as in *Szurovecz v Hungary* no 15428/16, judgment of 24 February 2020.

15. *Demokratischer Soldaten Österreichs and Gubi v Austria* no 15153/89, judgment of 19 December 1994.

16. *Nordisk Film & TV A/S* (n 17).

17. *Radio Twist AS v Slovakia* no 62202/00, judgment of 19 March 2007; *Nagla* (n 17).

18. French Act on the Freedom of the Press, article 2bis; Luxembourg Act on Expression of Opinion in the Media (Loi du 8 juin 2004 sur la liberté d’expression dans les médias), section 4; Hungarian Press Freedom Act (2010. évi CIV. törvény a sajtószabadságról és a médiatartalmak alapvető szabályairól), paragraph 7.

Various tax benefits for the press can also be regarded as additional entitlements that indirectly and financially support the operation of the press. These include a sales tax rebate or reduced rate for printed products in some countries. Another such benefit is the setting of discounted postage rates for sending printed products, which support the printed press (Barendt, 2005: 427-429).

The additional rights of the media are recognised without imposing additional duties on it. The provision of these privileges only affirms the hope that the rights will be effectively exercised by the media, thus facilitating the creation and protection of public interest content produced.

The other distinguishing feature of media speech (its potential dangerousness) is also subject to regulation. Obviously, the general restrictions on freedom of expression apply *mutatis mutandis* to speech in the media. The protection of reputation and privacy, restrictions on hate speech, etc. are determined in each legal system by taking into account the extent to which the speech can be considered as participation in discussion of public affairs. But, there are other rules related to media content.

Standards aimed at regulating the specific content of the press are most often enshrined in the press laws of several European countries, and violations of them give rise to criminal or civil liability. It should be noted that these rules typically impose obligations not only on the press, but also on media services, similar to the restrictions on freedom of expression imposed by laws of general application. Naturally, the exact content of such rules is very important, as are the ways in which judicial practice can relax their potentially strict application to protect public discourses. Typical rules of this type in press law relate to the rules of defamation,¹⁹ protection of privacy,²⁰ restricting hate speech²¹ and rules for the protection of minors.²²

Given that media services have a greater impact on their audiences and can therefore pose a greater threat to them, content regulation of media services is generally accepted in Europe. There is also some scope for harmonisation of the rules, and the most appropriate of such rules – a common European “minimum” – are also included in the Audiovisual Media Services Directive²³ (AVMS Directive), for example, hate speech, protection of minors and regulation of commercial communication. Due to the nature of the AVMS Directive, national rules and interpretations by public authorities or courts may differ in detail, and there may be scope for the creation of additional, specific national content rules on issues not harmonised by the Directive.

19 French Press Law, article 29; Italian Act on the Press (Disposizioni sulla stampa, legge 47/1948), articles 12 and 13; Luxembourg Act on Expression of Opinion in the Media, articles 16 and 17; Maltese Press Law [Att dwar l-Istampa, XL (1974)], articles 11 and 12.

20. Luxembourg Act on Expression of Opinion in the Media, articles 14 and 15.

21. French Press Law, articles 23 and 24.

22. Italian Act on the Press, article 14; Luxembourg Act on Expression of Opinion in the Media, article 18.

23 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).

In order to avoid the harm and dangers that can be caused by the exercise of freedom of the press, steps can be taken not only through mandatory legal regulation, but also through self-regulation of the press.²⁴ The codes of conduct applied by self-regulatory bodies seek to influence the activities of the press in a broader variety of ways compared to legal norms. These codes may contain content requirements, such as respect for privacy, protection of minors and information on criminal offences, as well as elements that are missing from the legal framework, above all because enforcing them as a legal norm would presumably be incompatible with the constitutional protection of freedom of the press. These include rules that apply to the process of producing content and the information-gathering activities of the press, not only to the published content itself. So, the media enjoys special protection and also need to observe special limitations. As a consequence, media freedom is at the same time wider and narrower than general freedom of expression.

2.3. Media's social responsibility

Due to its close connection to a well-working democracy, the media, according to the theory of social responsibility, has “duties and responsibilities” when exercising its freedom. This wording is included in two documents that play an important role at the international level in the interpretation of freedom of expression and of the media: the ECHR (section 2 of article 10) and the International Covenant on Civil and Political Rights (section 3 of article 19). It is noteworthy that the texts do not mention these obligations explicitly in relation to freedom of the media, but generally consider that the freedom of expression is a right the exercise of which also entails a duty. The ECHR does not even mention the freedom of the media, yet the ECtHR clearly interprets these duties in relation to the media,²⁵ although it does not emphasise them in the case of individual speakers (Oster, 2015: 36).

Coe sums up the theory of the social responsibility of the media: in this conception, the media must act in the public interest, aiming to inform the public, which involves following standards of conduct that consider the rights of others. In return, it is entitled to additional protection compared to other individual persons exercising the freedom of expression or other media not involved in the provision of information in the public interest (Coe, 2018: 418-424). The privileges granted to the media and the additional duties associated with their exercise are thus in balance. Discussion in the public interest is a central element of any attempt to determine the content of media freedom, without which it would be pointless to talk about media freedom independent of freedom of expression (Lichtenberg, 1990: 102-135; Gibbons, 2012: 19-43). It is quite clear that speech on public matters enjoys special protection in the legal systems of all European states and in the case law of the ECtHR (Oster, 2015: 37-44). We expect the media to inform interested citizens properly about important public issues, although, due to this constitutional role, they can also be subject to stricter regulation than individual public speakers.

24. See, for example, Fielden (2012).

25. *The Sunday Times v the United Kingdom* no 6538/74, judgment of 26 April 1979; *The Observer and The Guardian* (n 9); *Jersild* (n 1), among other decisions.

According to the social responsibility theory, media freedom is a conditional right, which the media can only enjoy if they behave responsibly and ethically in the performance of their duties (Tambini, 2021: 126, 137, 145). The media is a public forum; it is a place to publish thoughts and information that concern the public, but not in the sense of streets, squares and other public spaces – it is not open to anyone.

However, the theory is not reflected in the legislation or the case law. According to the law, the media is free to report on what it wants, so it is possible to set up a newspaper to cover perfectly apolitical tabloid news or any topic. Referring to the duties and responsibilities of the media is usually a rhetorical trick, even if the text of international conventions or court rulings refers to it. Public interest content is indeed given greater protection by the courts, but this stems from the nature of the content and not from the identity of the speaker; as far as the limits of free expression are concerned, the media has no privileges compared to other speakers, just as it has no additional duties either.

The sole statutory obligation present in (almost) all European legal systems that may be mentioned here is the right of reply. Article 28 of the AVMS requires EU Member States to establish national legislation on television broadcasting that ensure adequate legal remedy for those whose personality rights were infringed by the communication of false facts. Such regulations are known throughout Europe, but their scope is usually much wider; they typically impose obligations on radio, printed and online press alike (Ho Youm, 2008). The legal systems of all EU Member States provide for a right of reply against the media,²⁶ and Greece, Portugal and Slovenia even enshrine it in their constitutions.²⁷

But the reference to social responsibility is not merely rhetorical in the case of media services. They still do not have any general obligation to serve the public, the media remains free to report on what it wants, so it is possible for them to fully avoid public interest stories. But the theory of the social responsibility of the media is translated into specific regulatory approaches in media regulation. The resulting rules aim to ensure wider access to the media. In fact, “access” to the media does not imply a specific, general and unconditional right for anyone to appear in the media or to express their opinions. Access is either conditional (for example, in the case of political advertising, paid advertising, the right of reply), or it is aimed at increasing the diversity of opinions and content in the media, and does not favour a specific speaker (for instance, requirement of impartial news coverage, quota or must carry rules). It may involve promoting market entry (for example, rules on the acquisition of broadcasting rights, restrictions on ownership concentrations) or helping individuals to navigate the media world (mandatory subtitling for people with hearing disabilities, initiatives to increase media literacy).

26. See, for instance, French Act on the Freedom of the Press, articles 12 and 13; Italian Act on the Press, article 8; the Dutch Civil Code (Nederlands Burgerlijk Wetboek), article 6-167.

27. See the Greek Constitution (Σύνταγμα της Ελλάδας), section 5 of article 14; Portuguese Constitution (Constituição da República Portuguesa de 1976), section 4 of article 37; Slovenian Constitution (Ustava Republike Slovenije), article 40.

3. Platforms as right-holders of media freedom

3.1. Platform speech and media speech

Online platforms, given the unimaginable amount of data they transmit, manage the mass of information they collect, not only using human resources but primarily with the help of algorithms. In the case of online platforms, the decisions directly affecting the flow of information (filtering, removing, prioritising or demoting content; that is, deciding on its visibility to users) are usually made by algorithms, so the legal status of such decisions, and the definition of the nature and subject of rights and obligations, is a fundamental issue. The algorithm is a kind of editor, which presents something to the user based on the decision of its creator and the information gathered on the user in the course of their using the service or when using other services earlier (information related to the user's interests and preferences) (Halpern, 2011).

The activity of social media platforms in compiling a personalised content stream for each user each time they log in (selecting some of the content potentially available to the user) is not only functional, but also carries a meaningful message in itself. Search engines also actively intervene in the flow of information. The results list is the outcome of editorial decisions, and the search engine selects content and may make certain content invisible in its own system or show other content to the user in a prominent place.

Some authors argue that online platforms and search engines can be seen as media companies, which thus naturally make editorial decisions (Goldman, 2006: 189). They are similar to legacy media, in the sense that they decide what information to publish and how to publish it: search engines, social media and video-sharing platforms are also gatekeepers, and really powerful ones at that, because they know the habits of their users and the online content providers depend on them to a large extent, as they receive a large proportion of their visitors from these gatekeepers.

Philip Napoli and Robyn Caplan (2017) argue that large online platforms should not be deemed technology companies. These companies base their identity on the notion that they do not produce content themselves but merely contribute to the publication of their users' content or list links to such contents at the request of the users. The authors identify a number of features that make the operations of these companies media-like: not only the production of content but also its distribution is of paramount importance for the public, and this also constitutes part of the activities of media companies. These companies use human resources, either to make certain editorial decisions or to configure algorithms to make automated decisions but, in any case, human editorial decision-making is crucial to these services, which (like legacy media) aim to provide their audience (users) with what they are interested in, and cannot be considered neutral to user content. Furthermore, their main source of revenue is advertising, just as it is for the media (Napoli, Kaplan, 2017). Napoli even calls social media platforms news organisations, because of their editorial activity and gatekeeping interventions (Napoli, 2019: 11-14).

Can online platforms have editorial rights without producing and commissioning "their own" content? One of the main elements of the concept of media is editorial activity. If the activities of platforms are similar to media editing, they can then be subject to regulation similar to that of media, but if not, they can be regarded as technology companies that are not entitled to the right to freedom of expression.

The European understanding is that editorial freedom also implies editorial responsibility, a responsibility which is defined in the EU's AVMS Directive (subsection c) of section 1 of article 1). Accordingly, the editor of a media service is the person who selects and organises the programmes to be published, without whom these programmes would not reach the audience. Based on the principle of editorial responsibility, the media can be held liable for illegal content published. The activity of platforms differs from this by its very nature. Users mass-produce content and share content independently of the platform, and platform providers generally do not intervene in this process. Nevertheless, in some important respects, this activity is similar to editing: platforms do not usually decide whether to publish certain content before it is published, but they can decide to remove certain content afterwards (either voluntarily or based on a legal obligation). Moreover, they can prevent content from being published in certain cases (by pre-filtering), or they can present some content to their users and hide other content in ways that make it almost impossible to find, and they can generally influence the content that is presented to their users according to their own criteria.

The EU law encourages platforms to take action against illegal content that they become aware of, and holds them liable for failing to do so,²⁸ and obliges search providers to remove links to data that are no longer relevant, at the request of the data subject (the "right to be forgotten").²⁹ These obligations make it clear that the platforms are considered editors, as the legislation itself imposes this action. In addition, regulation allows platforms to edit content at their own discretion. It is therefore reasonable to conclude that the providers of the most influential online platforms, such as Meta's several services, YouTube or TikTok, and Google's search engine are media companies.³⁰ Still, we do not expect the same from online platforms as we do from legacy media. Platforms do not operate according to the ethos and ethical and professional rules of journalism and media editing.

3.2. Platforms' liability for infringing user speech

The European Union adopted the Digital Services Act (DSA) in 2022,³¹ which replaces, to a large extent, the Directive on electronic commerce regarding liability rules for platforms, and puts the regulation of online platforms on a new footing. The new rules are much more detailed than their predecessor. The rules aim to protect users from the excessive power of platforms and applies directly in all EU Member States. Similarly to the E-commerce Directive, the DSA essentially leaves the notice and take-down procedure intact as the basis for the platforms' liability (article 6). It also allows for the possibility of further moderation in line with the rules set by the platforms (article 7). It still does not impose a general monitoring obligation on them

28. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), articles 12-15; DSA, article 6.

29. See GDPR, article 17.

30. See, for instance, Balkin (2014: 2296-2342, 2304).

31. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

(article 8). So, EU regulation forces the platforms into a decision-making role with regard to user content.

The nature of the “infringing” character of content raises an immediate problem: the obligation to remove it is independent of any judicial or other official procedure aimed at finding infringement, and the hosting provider must act before such a decision is taken, if any legal action is taken at all. It is therefore up to the platform itself to judge the infringement, and the procedure leading to this decision on the one hand lacks the guarantees of the rule of law (while it may also affect freedom of expression), while on the other hand it encourages the platform to delete content in any cases where there may be any concern, in order to remain exempt from liability. It would undoubtedly have been a more reassuring solution – but difficult to reconcile with the speed of online communication – if liability could only be established for failure to remove content that the court or other public authority had found to be infringing (Mulligan, 2013: 175).

3.3. The private regulation of online platforms

Platforms can also act and decide on user content on the basis of rules of their own making. The DSA adopted in the EU, and the Online Safety Act 2023 in the UK, explicitly empower them to do so. In fact, the UK legislation also makes it compulsory for large platforms to remove content that does not comply with their own policies,³² while the DSA provides notifiers with legal remedies if removals are not carried out.³³ Jack Balkin calls this instrument “private governance” (Balkin, 2018: 1179, 1182), others use the more reprobating term “private censorship” (Heins, 2014), but I prefer the use of the term “private regulation” instead.

Platform providers may have several reasons for applying private regulation. By removing harmful or dangerous content, they may aim to avoid stricter legislation and protect their economic interests. They want users to feel safe while using their platforms, and allow them to avoid offensive, outrageous, disturbing content, and as a result, spend as much time as possible on the platform. Moderation and content deletion through private regulation, which significantly exceeds the amount of moderation that platforms are required to do by law, is not done in light of the legal limits on free speech. In other words, content that would otherwise be protected under the law can be deleted under private regulation, while content that oversteps the protected boundaries of freedom of expression will not necessarily be removed, as long as the platform provider has not been specifically notified of it.

The standards, policies and service terms and conditions applied by social media platforms result in decisions made in bulk, and they cannot be matched by any lengthy legal proceedings that might be launched in individual cases. Compared to legal regulations, private regulation is typically stricter, along with more permissive content regulation in some areas (for example, reputation infringement is typically not prohibited by platform rules), which fundamentally affects users’ freedom of expression (Thai, 2020). The other main problem is the lack of a fair and transparent

32. Online Safety Act 2023, section 73.

33. DSA, articles 20–22.

decision-making process, in other words, the lack of constitutional guarantees in legal proceedings.

The contract between the platform and the user is the legal basis on which the platform can interfere with its users' freedom of expression. The terms of these contracts are determined by the platform itself, and the user cannot request to change them. Moreover, the platform can unilaterally modify the contract after its conclusion, and the contract is concluded with the same content for all users. If the user decides to register on the platform, and accepts the terms and conditions with a few clicks, they will be subject to private regulation (Fradette, 2013–2014: 953–957, 977). However, the platforms are also bound by private regulation, and cannot deviate from the rules of the contract they themselves have drawn up.

In some cases, national governments and the EU encourage private regulation by platforms. In relation to hate speech, the EU took the initiative in 2016, and asked for tougher action by platforms. The result was the Code of Conduct on countering illegal hate speech online, signed by Facebook, Microsoft, Twitter and YouTube.³⁴ The Code represents an attempt by the EU to force platforms to take effective action against hate speech, regardless of whether the content is illegal. In the Code, the platforms have committed to an effective process, to the proper examination of notifications and to deciding on content not only in light of their own rules and policies but also national legislation transposing the Council Framework Decision on hate speech.³⁵

The expectation of action against content that is not illegal but still deemed “dangerous” or “harmful” (“lawful but awful” – Keller, 2022) is a weak point in the cooperation between platforms and public policy makers. While states are reluctant to tighten the framework for freedom of expression, they seem to expect platforms to take action against content that is protected by law, but which is nonetheless considered dangerous or harmful. While a platform does this by its own choice, without state coercion, to protect its users, this choice is also protected by law. However, when the EU or the states responsible for tightening the limits of free speech encourage it, such restrictions on free speech raise concerns. Beyond hate speech, the problem is best illustrated by disinformation, which is now co-regulated in the EU.³⁶

A gentler solution than deletion is when a platform flags content that is of concern to the platform for some reason. This flagging (labelling) can take the form of information provided about the specific user content, such as the result of a fact-check or a warning about possible sensitivities related to viewing or reading it (Morrow et al., 2022). For example, some of President Trump's posts were also tagged by Twitter before being deleted, drawing attention to the fact that the platform believed they contained falsehoods (Conger, Isaac, 2020). Labelling following fact-checking makes the platforms somewhat “media-like”, in that they explicitly react to and quasi-

34. Countering Illegal Hate Speech Online, #NoPlace4Hate. European Commission, 2018, http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300.

35. Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expression of racism and xenophobia by means of criminal law, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008F0913>.

36. 2022 Strengthened Code of Practice on Disinformation, <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>.

discuss content with their users, inserting their own opinion into their users' content.

The Digital Services Act, unlike its predecessor, sets out detailed rules on contracts between the platform and its users. Under article 14, users must be provided with adequate information on, *inter alia*, the policies, procedures, measures and tools used in the content moderation process. The legislation seeks to protect the users' rights, including their freedom of expression, as platforms need to give "due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter" (section 4 of article 14).

The law also imposes transparency obligations on platforms, including in relation to their moderation activities (article 15). They must make it possible for users to report illegal content or content that contravenes their rules (article 16), and must justify the measures they take against user content, "including removal of content, disabling access to content, or demoting content", and the suspension or termination of the provision of services, as well as the suspension or termination of the user account (article 17).

The Digital Services Act requires platforms to operate an internal complaint-handling system (article 20). In addition, a user who is subject to a restriction can seek redress through an independent out-of-court dispute settlement body (article 21). The regulation also sets out the rights of "trusted flaggers", whose reports of illegal or infringing content must be given priority by the platforms (article 22). The recommender systems through which the platforms prioritise and demote content must also be operated in a transparent fashion (article 27).

3.4. Risk management by online platforms

Additional obligations are imposed on very large online platforms and operators of very large online search engines. These are services that are used by at least ten per cent of the total EU population, currently at least 45 million users in EU Member States (section 1 of article 33). These platforms must carry out a specific risk assessment in relation to the systemic risks associated with their operation, such as risks to fundamental rights, public discourse (public debates), electoral processes, children, or in connection with the publication of violent content (article 34). Very large online platforms must mitigate these risks by introducing systemic measures (article 35).

The first examples of what the European Commission means by risk management have already emerged. In examining the platforms' response to Russian disinformation campaigns, the Commission published a detailed study on how to identify and manage the risk under the DSA, concluding that the platforms have only done what was expected of them to a limited extent.³⁷ In the run-up to the European Parliament elections, the Commission issued a Communication in March 2024, providing guidance to very large online platforms and very large online search engines on what they need to

37. *Digital Services Act - Application of the Risk Management Framework to Russian Disinformation Campaigns*. Luxembourg, European Union, 2023, <https://data.europa.eu/doi/10.2759/764631>.

do about systemic risks related to the election process.³⁸ The document, while not formally binding, makes a number of recommendations to the platforms concerned regarding their activities. For example, it recommends that platforms ensure access to official information on the electoral process, engage in media literacy initiatives, place fact-checking labels on disinformation and examples of foreign information manipulation and interference that have been identified by independent fact-checkers and fact-checking teams of independent media organisations, and they urge users to read content and evaluate its accuracy and source before sharing it. In addition, the Commission also recommends that platforms designate official accounts, as well as accounts providing authoritative information on the electoral process, accounts that provide official and credible information on elections, as well as user accounts controlled by Member States and third countries, or that are controlled by organisations controlled or funded by third countries. Platforms should provide tools and information to help users assess the trustworthiness of information sources, such as trust marks focused on the integrity of the source based on transparent methodologies, and which were developed by independent third parties. It also refers to the platforms' recommender systems, and the treatment of political advertising, which they must label in a clear, prominent and unambiguous way.

The European Commission therefore expects platforms to identify and flag disinformation and to take steps to ensure that credible information is widely disseminated. While risk assessment and management are mandatory under the DSA, the specific and detailed obligations cannot be derived from the text of the DSA alone. Although the European Commission does not formally impose these measures as directly enforceable legal obligations, they do seem to have the potential to be binding. Indeed, if the Commission later finds that a platform has not complied with the risk management related obligations defined under the DSA, and relies on its own previous documents to identify these obligations, it will give them quasi-legal force, and may use them as a basis for finding that platforms have acted in breach of the DSA, including by imposing fines. This understanding of risk management makes platforms more media-like, as it expects platforms to judge and sometimes react to user content in a way that is similar to the editorial practices of media (deleting, labelling, commenting on the content, etc.).

3.5. Platforms' recommendation systems

There is another issue worth discussing when one assesses the effect of the platforms' activities on free speech. The prioritisation of content presented to individual users by the platform – the highlighting and privileging of certain content and the hiding of others – has a much greater impact than private regulation, and affects the overall range of content on offer. Through these means, the platform increases the popularity and impact of highly visible content, but is also able to marginalise other content, reducing its impact, even without deleting it. All this is done in order to provide a personalised service and to serve individual user needs. It is closely linked to and based upon the data collected about the user, their previous online

38. Communication to the Commission, "Approval of the content of a draft Communication from the Commission on Guidelines for providers of very large online platforms and very large online search engines on the mitigation of systemic risks for electoral processes pursuant to the Digital Services Act (Regulation (EU) 2022/2065)". Brussels, 26.3.2024, C(2024) 2121 final.

presence and their profile as known by the platform. Users thus unwittingly influence the content of the service provided to them, without actually expressing their will in this respect, while the platform itself also has an active impact on the users' will, and is able to influence the users. All this has several consequences, not only for the user's choices as a consumer but also for the debate on public affairs, access to information and diversity of opinions, so for the quality of the democratic public sphere.

The definition of content moderation in the DSA also covers prioritisation decisions and, within them, shadow banning (section t) of article 3). Shadow banning can therefore be seen as a type of moderation decision (as a measure affecting the availability, visibility and accessibility of information). It is also explicitly mentioned in the recitals: "Restriction of visibility may consist in demotion in ranking or in recommender systems, as well as in limiting accessibility by one or more recipients of the service or blocking the user from an online community without the user being aware («shadow banning»)" (Recital 55).

As Paddy Leerssen (2023: 5) has pointed out, the DSA interprets shadow banning narrowly, as a means of suspending a user account, rather than as a means of adversely affecting visibility in general. Notwithstanding this, decisions taken in the course of prioritisation activities that are detrimental to a user must be treated in the same way as moderation activities aimed at deleting content; in other words, the user concerned must be informed of the decision, be given reasons for the decision and the opportunity to appeal. If these elements cannot conceptually be built into the shadow banning process (given its "shadowy" nature, that is, its secrecy, which precludes notification to the user concerned), then the use of shadow banning is essentially prohibited by the DSA (Leerssen, 2023: 7). However, it is important to underline that the DSA rules only consider to be moderation those prioritisation activities that disadvantage a user by an explicit decision, while the general selection that underlies the operation of the platforms is subject to much less stringent rules. Based on article 14 of the DSA, decisions taken in the course of prioritisation actions that unduly and adversely affect freedom of expression may give users grounds to claim a breach of contract, even in the absence of an individual moderation decision by the platform, although it is questionable whether it will be possible to argue successfully in various forums that the general settings of the platform have caused the violation of freedom of expression or endangered media pluralism.

The Digital Services Act seeks to expand the possibilities for users to control the recommender systems (prioritising activities) of the platforms. The recommender systems of platforms must be transparent to users and must explain "why certain information is suggested to the recipient of the service" (section 2 of article 27). Where possible, platform providers must also make available to their users "a functionality that allows the recipient of the service to select and to modify at any time their preferred option" (section 3 of article 27). Based on the regulation, the very large online platforms and the very large online search engines must allow their users to opt out of the profiling-based operation of their recommender systems. Users can choose not to be served content by these recommender systems, which are key to accessing content, based on their profile made by the platform, that is, the data collected about them (article 38). Of course, it is questionable how many users will take advantage of this option, which does not limit the platform's ability to enforce other aspects of prioritisation.

4. Media privileges against online platforms

The elements of platform regulation aimed at media diversity explicitly give the media rights *vis-à-vis* platforms. The 2018 amendment of the AVMS Directive gives Member States the possibility to require media services to be adequately visible, accessible and prominent for providers of services that distribute their programmes or provide access to the audience, such as cable operators, platforms or electronic programme guides. According to the Directive, “Member States may take measures to ensure the appropriate prominence of audiovisual media services of general interest” (article 7a). The aim of ensuring this possibility is to protect media pluralism, freedom of expression and cultural diversity (recital 25).

The first national legislation with this mandate was adopted in Germany.³⁹ The German rule obliges social media platforms, video-sharing platforms and search engines to be non-discriminatory in terms of content and to give preference to public service content while not restricting users’ preferences. These provisions are intended to promote diversity of content on the platforms and to protect traditional media from the platforms. Recommendation systems should operate in a transparent and non-discriminatory way. Video-sharing platforms should give priority to content from public service media providers, and make it easy to find. Other platforms must not unfairly discriminate or treat journalistic content providers differently, directly or indirectly, where the platform has a potentially significant influence on their visibility.⁴⁰ Some other Member States have also introduced similar measures following the adoption of the Directive.⁴¹

The European Media Freedom Act provides additional protection for traditional media against online platforms. The Act provides, in addition to the obligations under the DSA, that if a platform decides to suspend its service to a media service provider for breach of its rules or to limit the visibility of its content (online press is also considered a media service under the regulation in this respect), it must inform the media service provider before taking its decision, and give the media service provider the opportunity to respond (section 4 of article 18). Platforms must deal with complaints from media service providers as a matter of priority and without delay (section 5 of article 18) and, in the absence of agreement, engage in a meaningful and effective dialogue with the media service provider (section 6 of article 18). The right of final decision remains with the platform, with the possibility of dispute resolution under the DSA being provided to the media service provider (section 7 of article 18). However, the regulation does not mention speakers outside the traditional media, so citizen journalists are not entitled to additional protection (Seipp, Ó Fathaigh, van Drunen, 2023). The EMFA also ensures the right of users to personalise the audiovisual media content available to them according to their interests or preferences (“right

39. German Interstate Media Treaty [Staatsvertrag zur Modernisierung der Medienordnung in Deutschland (MStV)], as amended in 2019; see Natali Helberger, Paddy Leerssen and Max Z van Drunen, “Germany Proposes Europe’s First Diversity Rules for Social Media Platforms”, *LSE*, 29 May 2019, <https://blogs.lse.ac.uk/medialse/2019/05/29/germany-proposes-europes-first-diversity-rules-for-social-media-platforms>.

40. German Interstate Media Treaty as amendment in 2019, articles 84, 93 and 94.

41. *Ensuring Prominence and Access of Audiovisual Media Content to all Platforms (Findability)*. ERGA, 2021, https://erga-online.eu/wp-content/uploads/2021/01/ERGA_SG3_2020_Report_Art.7a_final.pdf.

to customise the media offering”), which also applies to access via online platforms (article 20).

The Online Safety Act 2023 of the UK also aims to protect traditional media from interference by platforms. The Act also explicitly protects “news publishers”. If a platform wishes to act against them, it must notify them and give adequate reasons for its action. The decision restricting journalistic content must be weighed against freedom of expression. Platforms need to inform news publishers on their decision taken and the reasons for the decision must be given (sections 18 and 19). Only recognised news publishers and their staff may publish “journalistic content” (subsection 10 of section 19), and recognition is subject to authorisation by the media authority and compliance with conditions laid down by law (subsections 1 and 2 of section 56). These conditions preclude non-professional media, that is, citizen journalists, from receiving additional protection. The aim of these rules is to put the media in a better position to help them reach audiences.

5. Conclusion

“Traditional” media freedom is a human right that is separate from freedom of expression. The public interest obligations and social responsibility of the media are generally not recognised in legislation. The mention of media obligations is more a statement of aspirations, of an ideal to be achieved, and its usefulness in this respect should not be underestimated. An exception is the regulation of media services, which may in certain cases contain rules aimed at providing adequate information, but these are only relevant if the media concerned wish to play their part in providing information. However, the media have additional rights linked to the exercise of its freedom. These are not only for the media providing information on public affairs but can also be applied generally.

In view of the increased danger of speech in the media, other content-related obligations (prohibitions) may be imposed in addition to the general limits on freedom of expression. Press laws may also contain specific content regulation provisions for the press, but content-related rules are typically the basis for civil and criminal court proceedings, so their location in press laws is of technical importance only. Although media services are generally more strictly regulated than the press, in most cases the stricter rules are only imposed on media reporting on public affairs, and whether or not to do so is generally left to the discretion of the media service concerned. The strictness of media regulation is therefore not universal in this respect, nor does the social responsibility of the media extend in its entirety to all media services.

The activities of platforms and traditional media differ in a number of respects, but given their similar characteristics, in particular their role in the public sphere, the regulation of these media should also have similar objectives, in order to ensure access to information, equality of speakers, and equality of opinion.

European legislation forces platforms to take action against illegal user content. It also allows them to create private speech codes, and enforce them against their users (private regulation). In fact, by applying the latter, platforms delete much more content, making their obligation to act against illegal content of secondary importance. The new regulation has filled a gap left by the previous one by providing some guarantees that platforms cannot abuse the right to moderate user content.

The prioritisation activity of platforms is a key determinant of how users perceive the content that is potentially available to them. This phenomenon clearly raises the potential applicability of new rules similar to those for access to the media, as known from media regulation, but adapted to platforms. Some elements of this have already emerged in Europe, but the issue remains to be addressed.

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