

Freedom of expression and media regulation

Prepared for **Media freedom and independence: Trends and challenges in Europe**

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Freedom of expression and media regulation – the basics

- 📌 EU competences to protect media freedom and independence
- 📌 Constitutional foundation of regulatory alternatives
- 📌 Integrated notion of media
- 📌 Coordinated approach to regulation

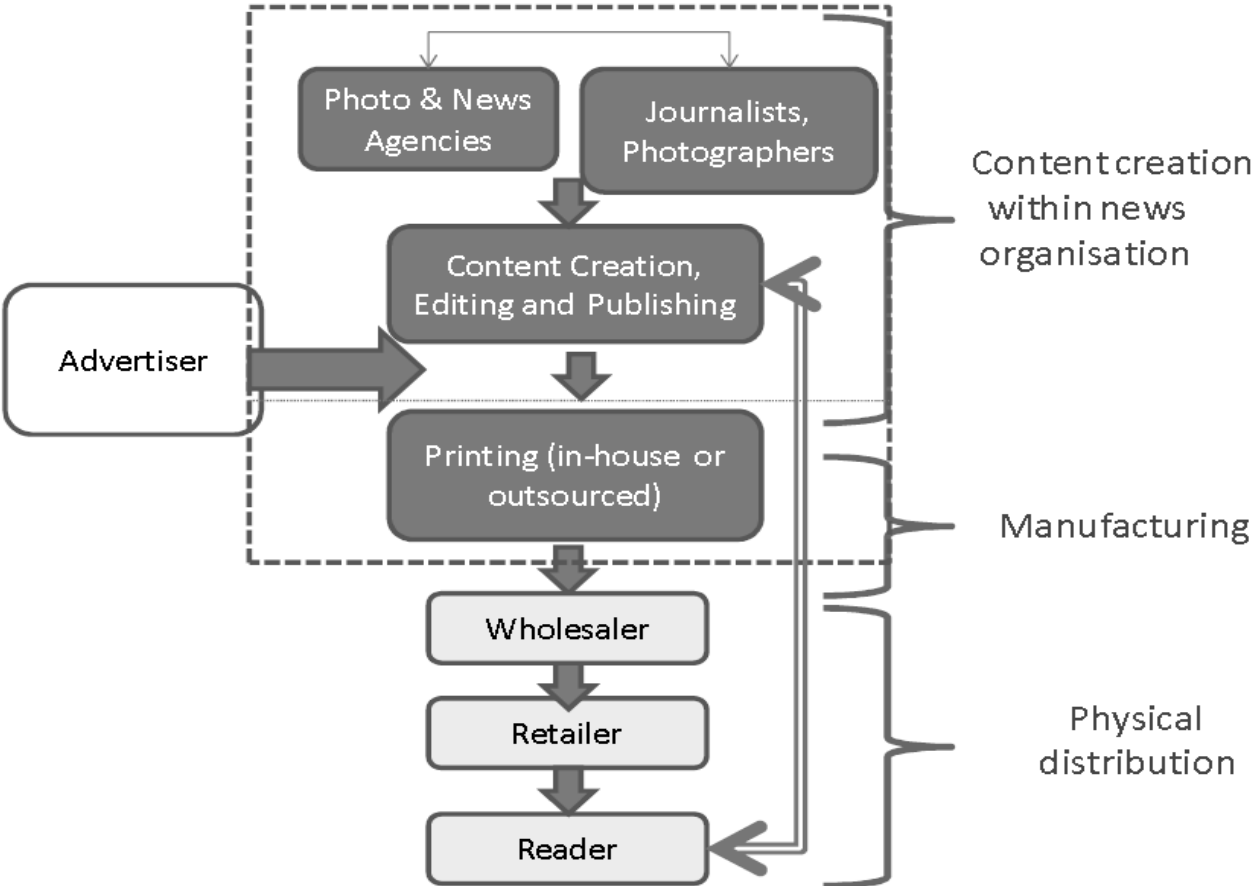
- 📌 Constitutional foundation of regulatory alternatives
 - Freedom of expression influence not only “what” is regulated but also “how” media is regulated
 - Freedom of expression confers and allocates the power to choose among different regulatory approaches
 - Alternatives between self-regulatory regimes based on multi-stakeholder participation and co-regulation in journalistic profession
 - Definition of standard-setting techniques and enforcement powers
 - Implications: freedom for national and transnational bodies to select different regulatory strategies within a coordinated framework

- 📌 Integrated notion of media
 - It reflects the changes in the supply chain
- 📌 The current regulatory fragmentation does not correspond to the news production process
 - Gray areas for what constitutes journalism
 - Transformations of the supply chain
 - Vertical integration: ownership integration within the limits of competition law
 - Contracting
 - Upstream (content producers)
 - Downstream (service providers)

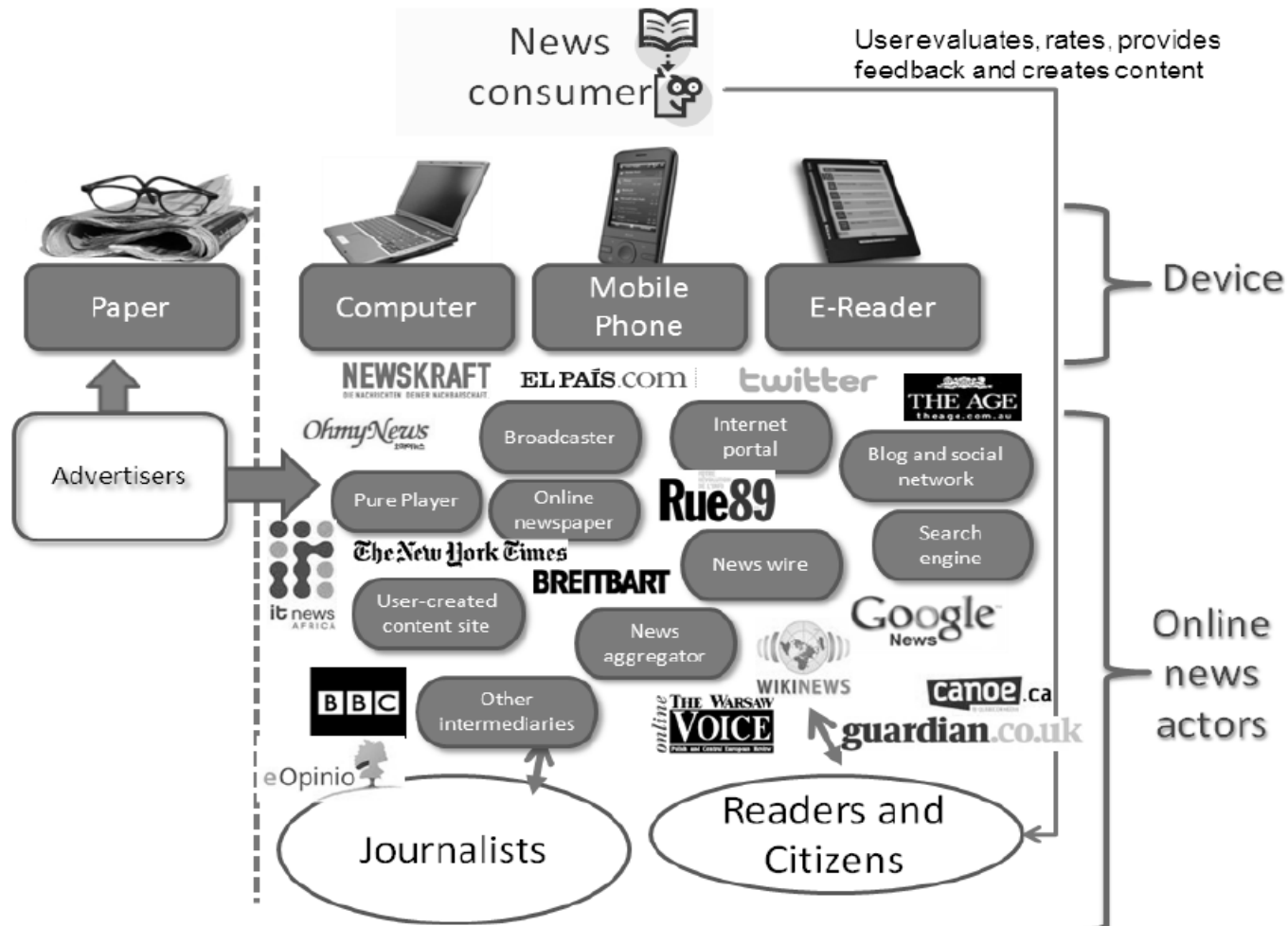
The new media and news supply chain

- 📌 News production process: from a structure that was based on two main actors (news agencies and publisher/networks) to a more fragmented structure that involves either new content producers and new intermediaries.
 - 📌 Dissemination has become a shared activity for users, readers and consumers.
 - 📌 User generated content space increased both in online versions of traditional media, also acquiring the form of collaborative relationships.
 - 📌 New intermediaries have entered the supply chain (e.g. aggregators or device providers)
- 📌 The situation is not stable and new trends are emerging, heading to the vertical integration of content production phase
- 📌 New business models have emerged modifying the identity of standard setters and the operation of private regulation.

Supply chain – traditional



Supply chain – now



Coordinated approach to regulation

- Public & private
- Multi-level framework

Public – private regulation in media

- 📌 The field covered by media regulation is very wide.
- 📌 Several factors segment media regulation:
 - 📌 distinction between media (i.e. service provision) and electronic communication (i.e. technical infrastructures),
 - 📌 distinctions across media sectors (press, broadcasting and new media).
- 📌 Although technical convergence and market developments will fade out these distinctions; however, **segmentations** are still reflected in the type of regulation in force.
- 📌 The boundary between public and private regulation is not neat: several shades between the two extremes exist, depending on the **type of actors** involved in the regulation and the **role** they carry out within the regulatory process.
- 📌 Several are the ‘regulatory cocktails’ that flourish at national level which also are deeply intertwined with the European interventions in the field, providing for incentives to different forms of regulation.

The state of the art in Mediadem countries

Type of activity / type of media		Rule making	Monitoring	Enforcement
<i>Press</i>		<ul style="list-style-type: none"> • Industry associations and professional associations • State provides for framework regulation on privacy, libel, etc. 	<ul style="list-style-type: none"> • Industry associations and professional associations • Little involvement of NGOs 	<ul style="list-style-type: none"> • Industry associations and professional associations • Courts
<i>Broadcasting</i>		<ul style="list-style-type: none"> • State bodies and media independent regulatory authorities • Industry associations (e.g. advertising, children protection) and professional associations 	<ul style="list-style-type: none"> • Media independent regulatory authorities • Industry associations and professional associations 	<ul style="list-style-type: none"> • Media independent regulatory authorities • Courts • Industry associations and professional associations
<i>New media</i>	<i>e-versions of traditional media</i>	<ul style="list-style-type: none"> • State bodies and media independent regulatory authorities • Industry associations and professional associations • State provides for framework regulation on privacy, libel, etc. 	<ul style="list-style-type: none"> • State bodies and media independent regulatory authorities • Industry associations and professional associations 	<ul style="list-style-type: none"> • Media independent regulatory authorities • Industry associations and professional associations • Courts
	<i>media with online presence only</i>	<ul style="list-style-type: none"> • Single media company • State provides for framework regulation on privacy, libel, etc. 	<ul style="list-style-type: none"> • Single media company 	<ul style="list-style-type: none"> • Courts

Relevant features (1) – independent regulatory authorities

📌 Independent regulatory authorities (IRAs)

📌 Independence

📌 The allocation of regulatory power has been unevenly balanced towards political bodies, so as to keep the key decisions within government; whereas in others, though delegation of powers applies, the IRAs themselves do not escape from a political connotation.

📌 Working independence is more difficult to achieve in countries with a recent tradition of authoritarian government where the cultural conditions for such independence will not have taken root. However, also in those countries where more trust is allocated on IRAs, the relations with government and with other institutions may be complex.

📌 Coordination at national and European level

📌 The implementation of AVMS Directive at national level has required an effort by the communication IRAs, so as to adapt the rules and sectoral distinctions previously in force to the modified legislative framework.

📌 However, different interpretations of the requirements to identify audiovisual media service providers, and in particular of the editorial control criteria have been adopted.

📌 The Contact committee (ex art 29 AVMS) did not improve the collaboration and the exchange of best practices, though listed in its tasks. Up to now limited normative guidance has been provided on what would constitute legitimate implementation or adopting a critical assessment of the arrangements adopted in Member States

Relevant features (2) Role of courts

- 📌 The role of **European and national courts** is addressing and solving media related issues is increasing
 - 📌 Enforcement activity is not limited to sanctions in case of breach, rather it is coupled with a **gap-filling role**
 - 📌 Courts not only solve conflict between regulatees
 - 📌 Courts define the allocation of regulatory powers among regulators: either between IRAs or between IRAs and private regulators
- 📌 Courts provide a relatively high level of trust as regards independence, vis-à-vis other regulatory bodies.
- 📌 However, access to courts is limited by financial considerations, by issues of standing, etc.
- 📌 Moreover, the case-by-case nature of their jurisdiction may make it difficult to develop general, forward-looking rules.
- 📌 The role of courts should be then supporting the activity of other regulatory bodies, in particular where they are complemented by private regulation.

Relevant features (3) Professional regulation

- 📌 A relevant part of **media regulation field concern journalistic profession**
 - 📌 Legal form of regulation
 - 📌 Rule-making activity has been historically allocated to professional associations as implementation of the principle of freedom of expression.
 - 📌 The recent cases of failures in monitoring and enforcing ethical rules among journalists, however, triggered a choice between self-regulatory regimes based on stakeholders participation and co-regulatory regimes based on delegated competences
 - 📌 Difficulties in the governance of national differences affects not only freedom of expression but also freedom to provide services
 - 📌 Scope of regulation
 - 📌 Due to technological developments, new issues concerning the definition of journalist have emerged, namely the **boundaries between professional and non-professional journalism**.
 - 📌 Both public and private regulation struggle to find criteria that allow (or hinder) the inclusion of “public communicators” who disseminate newsworthy information to others within the definition of journalism.
 - 📌 These transformation call for **reform of both governance and instruments of professional regulation**.