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Regulation of Mass Media Activities during Elections

RESEARCH REPORT

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1. INTERNATIONAL STANDARDS ON FREEDOM OF EXPRESSION

There is a large and growing body of international standards on freedom of expression. The most important sources for these standards are legally binding treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Art.19 ICCPR

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - (a) *For respect of the rights or reputations of others;*
 - (b) *For the protection of national security or of public order (ordre public), or of public health or morals.*

Article 10 ECHR

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

These principles constitute the legal basis for the protection of freedom of expression. *“It is important to understand that this jurisprudence is directed overwhelmingly at regulating the behaviour of governments in relation to the media, rather than in regulating the media themselves.”*¹

Limitations to freedom of expression have to pass a three-level test in order to be considered legitimate under art.19 ICCPR and art. 10 ECHR:

- They must be provided for by law.
- They must serve one of the listed purposes.
- They must be necessary for attaining this purpose; in other words *“they must be proportional in severity and intensity to the purpose being sought.”*² Art.10 ECHR refers to necessity in a “democratic society”, which means that necessity has to be evaluated not just on the basis of the individual case, but against the requirements of a democratic society in general.

Beyond these treaty obligations, there are further relevant international and regional standards in the form of:

- political commitments, such as those of the OSCE,
- recommendations by political bodies (such as the Council of Europe’s Committee of Ministers),
- advise and comments by expert bodies with a role in providing authoritative interpretations of standards (e.g. the UN Human Rights Committee).

¹ ACE Project, Media and Elections: Legal Principles, available at <http://aceproject.org/ace-en/topics/me/mea/default>.

² M. Nowak, ICCPR Commentary, (Second Edition, 2005), page 460.

OSCE Commitments

Copenhagen 1990³

(9) The participating States reaffirm that

(9.1) everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards. In particular, no limitation will be imposed on access to, and use of, means of reproducing documents of any kind, while respecting, however, rights relating to intellectual property, including copyright;(...)

(10.1) respect the right of everyone, individually or in association with others, to seek, receive and impart freely views and information on human rights and fundamental freedoms, including the rights to disseminate and publish such views and information;

Moscow 1991⁴

(26) The participating States reaffirm the right to freedom of expression, including the right to communication and the right of the media to collect report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. They further recognize that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms.

(26.1) They consider that the print and broadcast media in their territory should enjoy unrestricted access to foreign news and information services. The public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards.

(26.2) The participating States will not discriminate against independent media with respect to affording access to information, material and facilities.

Recommendation 99(15) Committee of Ministers of the Council of Europe

Provisions related to the print media

The legal framework regulating media coverage of the election should not affect the editorial independence of the private print media, including their ability to express political preferences. On the other hand, public or state print media should be subjected to the obligation to fairness, balance, and impartiality. They should avoid any kind of discrimination or political bias in favour of, or against, candidates and political parties. If print media offer pages for paid political advertising, they should respect the principle of equal opportunity and non-discrimination for the contestants that want to purchase advertising space.

Provisions related to the broadcast media

The legal framework regulating electronic media during an election campaign should not impede the expression of pluralistic and diverse opinions and views. However, while respecting the general editorial independence of electronic media, the regulatory framework should also set rules forcing broadcasters – both private and public – to carry out fair, balanced, and impartial electoral coverage. These rules should be enforced during both the official campaign period and the period prior to the beginning of the official campaign (if the period prior to the official beginning of the election campaign is defined under national law).

Provisions for newscasts and current-affairs programmes should ensure fairness, balance, and impartiality. This normative framework can be either a result of self-regulatory mechanisms implemented by the media or a product of norms enshrined in the domestic electoral and media laws. Electronic media should not offer any privileged coverage to public authorities (including government officials). The bodies in charge of monitoring the compliance of the media with the provisions regulating electoral coverage should remedy such shortcomings.

As for other programmes, broadcasters should avoid giving an unfair advantage to politicians invited to talk shows or other similar programmes, as these programmes might also have a certain influence on the perceptions and behaviour of voters.⁵

³ OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990.

⁴ OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 3 October 1991.

⁵ Explanatory Memorandum to the Recommendation on measures concerning media coverage of election campaigns, Strasbourg 1999: “40. Certain types of programmes that are not directly linked to the campaign coverage, such as talk-shows, political parodies with puppets or ‘politically-motivated’ feature films should also be given attention because they might have an influence on voting intentions. Such programmes can sometimes give a candidate or a political party an unfair advantage. 41. This is again an area that primarily has to be addressed by

Allocation of free airtime to political parties and candidates on state-/publicly owned broadcasters is not compulsory. However, whenever free airtime is made available, it should be allocated on a non-discriminatory basis, observing transparent and impartial criteria.

When paid political advertising is allowed, all contestants should have the possibility to purchase airtime, on equal conditions with respect to their position in the schedule and the rates of payment. A paid political advertisement should be clearly recognizable as such by the public. Provisions limiting the amount of political advertising candidates and parties are allowed to purchase can be introduced in the regulatory framework.

Provisions related to both the print and broadcast media

It is not compulsory to introduce a period of electoral silence (usually 24 hours before the beginning of the vote) in the regulatory framework. However, when a provision that prohibits spreading of partisan electoral messages is present, all media should respect it.

In publishing opinion polls, the media should present results in an unbiased manner and should publish all available information, thus providing the public with the elements necessary to assess the poll. In particular, the media should report information on the political party or other organization or person that commissioned and paid for the poll, the organization conducting the opinion poll, the size of the sample of population, and the date and/or the period when the poll was carried out. Any restriction by member states on the publication/broadcasting of opinion polls on voting intentions on Election Day or a number of days before the election should comply with Article 10 of the European Convention on Human Rights. With regard to exit polls, member states may consider prohibiting reporting by the media on the results of such polls until all polling stations in the country have closed.

The right of reply

Given the short duration of an election campaign, any candidate or political party that is entitled to a right of reply under national law should succeed in exercising this right within the campaign period.

Measures to protect the media at election time

Public authorities should refrain from interfering in the activities of media professionals with a view to influencing the elections.

Public authorities should take appropriate measures for the effective protection of media professionals and their premises against attacks, intimidation, or other unlawful pressures on the media. However, this protection should not obstruct them in carrying out their work.

For the context of Ukraine the rules laid out by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression are of particular relevance⁶. The UN Rapporteur states that in pre-election periods, and in the interest of ensuring the most fully informed electorate possible, the state must ensure that media are given the widest possible latitude. This can be best achieved when, *inter alia*:

- Media inform the public about the political parties, candidates, campaign issues and voting processes; government media are balanced and impartial in election reporting, do not discriminate against any political party or candidate in granting access to airtime, and ensure that news, interviews and information programmes are not biased in favour of, or against, any party or candidate;
- The media are exempt from legal liability for provocative statements by candidates or party representatives; the right of reply is provided, as well as correction or retraction, in cases where defamation is alleged; the manner and extent of remedy is determined by an independent body;
- There is a clear distinction between news and press conferences related to functions of office and activities by members of the government, particularly if the member concerned is seeking election;
- Airtime for direct-access programmes is granted on a fair and non-discriminatory basis; the time allocated to parties or candidates is sufficient for them to communicate their messages

broadcasters themselves via internal guidelines. The Recommendation therefore only suggests that special care should be taken with entertainment programmes that may have an influence on voters, so that certain parties or contenders do not obtain an unfair advantage.”

⁶ “Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussain”, UN Doc. E/CN.4/1999/64 29 January 1999.

and for voters to inform themselves about the issues, party positions, qualifications and character of the candidates;

- Programmes provide an effective opportunity for journalists, current-affairs experts and/or the general public to put questions to party leaders and other candidates, and for the candidates to debate;
- Media, and especially government media, engage in voter education, including by providing information on how to use the voting process, when and where to vote, how to register to vote and verify proper registration, the secrecy of the ballot, the importance of voting, the functions of the offices under contention and other matters; and
- Print and broadcast media make available reports and programmes that will reach the largest number of voters possible, including in minority languages and for those who may have been traditionally excluded from the political process, such as ethnic or religious minorities, women and indigenous groups.

The UN Special Rapporteur also pointed out that any regulatory mechanism and body, whether for electronic or print media, should be independent from political parties and autonomous of government.

The OSCE Representative on Freedom of the Media, who follows relevant media developments in the participating States and promotes compliance with OSCE principles and commitments regarding freedom of expression, emphasized the following principles⁷:

- the use of criminal defamation laws, including their abuse by politicians and other public figures, is intolerable. Criminal defamation laws should be repealed and replaced with appropriate civil defamation laws;
- It is the responsibility of media owners to respect the right to freedom of expression and, in particular, the editorial independence of journalists;
- Broadcast regulators and governing bodies must be protected against political and commercial interference;
- Undue concentration of media ownership should be prevented through appropriate measures;
- There should be a separation of political activities from the media interests of those politicians and members of government who own a media outlet.

From this wide body of international standards the following principles can be derived:

- Prior censorship constitutes an unacceptable limitation of the right to freedom of expression, and the law should authorize limitations to this right only in exceptional circumstances.⁸
- Freedom of the media constitutes a fundamental prerequisite to freedom of expression. The press, and by extension the electronic media, have a dual obligation “to impart information and ideas on matters of public interest. Not only do they have the task of imparting such

⁷ Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, December 2002. Declaration available at http://www.osce.org/documents/rfm/2002/12/190_en.pdf.

⁸ The European Court of Human Rights stated that “the Contracting States enjoy a certain margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the case. Where there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established.” *Autronic AG v. Switzerland*, judgment of 22 May 1990, Series A no. 178, para. 61; [1990] 12 EHRR 485. Case available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695507&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of public watchdog.”⁹

- The right to freedom of expression includes freedom of political debate, the existence of which is “at the very core of the concept of a democratic society”.¹⁰
- States have an obligation to guarantee access to information, particularly with regard to information held by the government and any kind of public information.¹¹
- Freedom of communication in relation to public affairs and political discussion is indispensable to the accountability of political representatives and government officials.¹²
- The limits of criticism of politicians and representatives of the government are wider than those with respect to private citizens.¹³
- States and governments are subject to a double obligation in order to guarantee freedom of expression in a democratic society: they should refrain from interfering in the workings of the media, and, when necessary, they should impose positive measures to promote pluralism of the media and to protect them from attacks or undue pressures.¹⁴
- There should be enhanced protection for political opinions, the truth of which, unlike facts, cannot be proved or disproved.¹⁵
- The media have the duty to publish opposition views while respecting the criteria of balance and non-discrimination.¹⁶
- Access of candidates and political parties, particularly with respect to public media, should follow the principle of equality of opportunity.¹⁷

⁹ Lingens v. Austria, judgment of 8 July 1986, Series A no. 103 para. 41; [1986] 8 EHRR 407. Case available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695400&portal=hbkm&source=externalbydo cnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

¹⁰ Castells v. Spain, judgment of 23 April 1992, Series A no. 236, para. 43; [1992] 14 EHRR 445. Case available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695649&portal=hbkm&source=externalbydo cnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

¹¹ Declaration on the Freedom of Expression and Information, Council of Europe, Committee of Ministers, 29 April 1982: “The member states of the Council of Europe ... II. Declare that in the field of information and mass media they seek to achieve the following objectives: ... c. the pursuit of an open information policy in the public sector, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters.” Also see Council of Europe, Committee of Ministers, Recommendation (2002)2 to member states on access to official documents (2002).

¹² Australian Capital Television Pty Ltd v. The Commonwealth (1992) 177 CLR 106, [1992] HCA 45.

¹³ Lingens judgment, para. 42, op. cit., note 9: “the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.”

¹⁴ UN Human Rights Committee, General Comment on Article 19, adopted by the Committee at its 461st meeting on 27 July 1983, UN Doc. A/38/40, 109. Available at <http://www1.umn.edu/humanrts/gencomm/hrcom19.htm>; Özgür Gündem v. Turkey, no. 23144/93 ECHR 2000-III, para. 43; [2001] 31 EHRR 1082. Case available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696385&portal=hbkm&source=externalbydo cnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

¹⁵ Lingens judgement, para. 46, op. cit., note 9: “The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof.”

¹⁶ X and the Association of Z v. the United Kingdom, Admissibility Decision of 12 July 1971, 38 Collected Decisions 86 (1971). : “... the freedom to impart information and ideas, included in the right to freedom of expression guaranteed by Article 10, cannot be taken to include a general and unfettered right for any private citizen organisation to have access to broadcasting time on radio or television in order to express their point of view. It has indicated, however, that the denial of broadcasting time to one or more specific groups of persons may, in particular circumstances, raise a problem under Article 10 (considered in isolation or in conjunction with Article 14 prohibiting discrimination). Such a problem may, in principle, arise if, at election time for instance, one political party were excluded from broadcasting facilities while other parties were given broadcasting time. This broadcasting time may be subject nevertheless to certain criteria which are determined by the broadcasting company in the framework of its editorial policy.”

- Political parties and candidates have the right of access to state-/publicly owned media, particularly the broadcast media, during an election campaign.¹⁸
- The media have a duty to offer a right of reply to statements that are inaccurate or offensive, and affected parties must be able to exercise this right of reply during the campaign period. As a matter of fact, this obligation is particularly important during an election campaign, as all views should be presented and reported accurately in order to allow voters to make an informed choice.¹⁹
- Media should not be considered liable for publishing unlawful statements pronounced by politicians if they are not endorsing such statements.²⁰ International conventions and treaties explicitly classify advocacy of hatred, discrimination, and slander as unlawful statements and as such they prohibit them. However, responsibility should be ascribed only to the individual making such statements, not the media publishing them. Making media liable could lead to forms of prior censorship or self-censorship that are not favoured by international law.

2. LEGAL FRAMEWORK FOR ELECTION COVERAGE IN UKRAINE: COMMENTS AND RECOMMENDATIONS

The present analysis examines the main issues regarding election coverage. An exhaustive legal assessment of Ukrainian legal framework being beyond the scope of this paper; this overview aims at identifying the key areas where clarifications or amendments may be beneficial to a more effective and targeted regulation, in particular in relation to those areas that are the main topics of this report: free and paid access as well as editorial coverage.

¹⁷ Council of Europe, Recommendation No. R (99) 15 of the Committee of Ministers to Member States on Measures Concerning Media Coverage of Election Campaigns (adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of the Ministers' Deputies). Also Inter-Parliamentary Union, Declaration on Criteria for Free and Fair Elections, 1994: "(3) States shall respect ... that parties and candidates are free to communicate their views to the electorate, and that they enjoy equality of access to State and public-service media; that the necessary steps are taken to guarantee non-partisan coverage in State and public-service media". Also, Council of Europe, "Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report", adopted by the Venice Commission at its 51st and 52nd sessions (Venice, 5-6 July and 18-19 October 2002, CDL-AD (2002)023), para. 2.6 (bb): "Depending on the subject matter, equality may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections. Equality of opportunity applies in particular to radio and television air-time. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately-owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections."

¹⁸ Article 19, Guidelines for Election Broadcasting in Transitional Democracies, (London 1994): "The international standards and case-law make clear that governments have a negative obligation not to interfere with the imparting of information by the media or by willing speakers. While none of the international tribunals has directly examined the positive obligation of a government during a campaign period to broadcast views of political candidates on government-controlled channels, international norms discernible from a range of state practice confirm that this obligation is indeed widely-recognized. Several national courts have concluded that political parties are entitled to have access to broadcasting time as an essential aspect of the right to freedom of political communication, in light of the tremendous impact of radio and television on public opinion and the public service nature of government-owned media."

¹⁹ Guidelines on Media Analysis during Election Observation Missions, adopted by the Venice Commission, 21-22 October 2005.

²⁰ "Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussain", *op. cit.*, note 6.

The trend observed in Ukrainian media over the years has been towards a larger degree of freedom, but this has not necessarily translated into better election reporting by media, as stressed in all OSCE-ODIHR's Election Observation Reports. Indeed there seems to be the paradoxical situation of some media refraining from vigorous coverage of elections, because they are afraid of election legislation prohibiting them to "campaign", while other media engage in hidden political advertising. Self-regulation of media, monitoring of media conduct and enforcement of restrictions of the election law appear to be weak.

A reform of media legislation needs to take into account these developments. The increasing role of money in media reporting on elections would suggest that there is the growing need for more monitoring of the media and more effective enforcement of provisions of the election law. However, any reform needs to find a careful balance between better implementation of rules on the one hand, without, on the other hand, creating new risks for hard-won media freedoms.

The existing legal framework regulating media and elections is articulated and comprehensive. Nonetheless there are a number of areas that may need further clarification or that may benefit of amendments. Below a summary analysis of the problematic provisions identified within the laws.

2.1 COMMENTS ON UKRAINIAN LEGISLATION²¹

Unified text. Many of the articles regulating media campaign in the two laws analysed - Law of Ukraine on Elections of People's Deputies of Ukraine (hereinafter Law on Parliamentary Elections) and Law of Ukraine On the Elections of the President of Ukraine (hereinafter Law on Presidential Elections) contain similar provisions and broadly cover the same subject matter, even though some areas are regulated in a different manner (i.e. provisions regarding the organisation of debates, prohibition to campaign for media outlets, etc.).

It may be advisable to unify the existing provisions into a single document - Unified Election Code - so to avoid overlaps and inconsistencies between these two laws. A unified text would also enhance the transparency and accessibility of the rules for media coverage of the elections while providing the relevant stakeholders (candidates, parties, the media and election regulators) with a coherent legal regime.

Sections on media campaign. In both laws there is a specific chapter on election campaigns regulating propaganda both in the media and by other means. Some very specific provisions related to the media are included in articles dealing with campaigning by parties and candidates. This can be confusing and sometimes rules which are covered in the specific media sections are repeated here (e.g. the principle of equal condition to access the media is included in article 66 of the Law on Parliamentary Elections and then repeated again, in a different phrasing and context, in article 68).

²¹ This section is based on the analysis of three laws (unofficial English translation kindly provided by the OSCE Project Coordinator in Ukraine): Law of Ukraine on Elections of People's Deputies of Ukraine; Law of Ukraine on the Elections of the President of Ukraine; Law of Ukraine on the Procedure for Media Coverage of Activities of State Authorities and Local Self-Government by Mass Media in Ukraine. The general comments and background are also based on OSCE-ODIHR's Election Observation Mission Reports for period 1998-2007.

It would be advisable to separate more clear provisions on election campaigning by parties and candidates and regulation of media conduct during the campaign.

Detailed definitions. The legal framework for media during election campaigns would benefit from more detailed definitions of the different formats for election coverage. While the Laws list the items falling within campaign activities there is no clear explanation of key terms such as sponsorship and free access (defined “*airtime and print space at the expense and within the limits of funds from the State Budget of Ukraine allocated for the preparation to and conduct of the elections*”). Other definitions may be helpful to design a more transparent and uncontroversial legal regime for the media: for instance a specification regarding the media items to which the principle of equal conditions applies would provide guidance to journalists and media professionals when covering candidates. In addition, it may be useful to introduce some clarifications regarding journalistic activities that may breach the provision prohibiting media staff to campaign and support a contestant.

It would be advisable to include more detailed definitions and explanations regarding key issues regulated by the two Laws, including the concept of free airtime, sponsorship, equal conditions and what is considered undue campaigning on behalf of the media.

Hidden advertising. There appear to be some gaps in the rules prohibiting hidden advertisement. There is also a risk of them being ineffective because they do not include any targeted investigation and enforcement mechanism.

In the context of Ukrainian elections hidden advertisement seems to represent an issue of serious concern. As a consequence it would be advisable to amend the existing articles on hidden advertising in so as to: broaden their subject matter to cover a wider range of programmes; widen its scope in order to include print media too; explicitly prohibit hidden advertising, elaborate specific definitions and cases where violations may be investigated and establish targeted sanctions for verified breaches.

Complaints system. The complaints system is rather articulated and includes targeted provisions regarding media coverage. However, the responsibility for consideration, investigation and sanctioning is shared between the Election Commission and courts, with the risk of creating competing procedures. In addition remedies against violations carried out by the media appear to be rather harsh and not based on a proportional system of sanctions.

It would be desirable to redefine the system for addressing complaints so to create a unified system where the Election Commission – supported by the relevant enforcement agencies – considers complaints, investigates and, in case of breaches, sanctions, while the examination of appeals against its decisions is left to the Courts. In addition, the remedies against violations should be more proportional based on the seriousness of the breach.

The regulator could have more effective tools for investigating issues of media coverage. These may include media monitoring activities during the election campaign carried out according to an impartial methodology by a competent body in order to be able to identify and address breaches of the laws and complaints promptly.

Inclusive approach in media regulation. Stronger involvement of media professionals in the regulatory process may be beneficial to a more professional coverage of the election process.

It is recommended to adopt an inclusive approach in media regulation. Participation could be based on a twofold strategy: on the one hand journalists and media staff may be involved in a consultation process regarding election reform in relation to media activities. Additionally,

systems of self-regulation (e.g. drafting a code of conduct, establishing internal adjudication and enforcement mechanisms) should be encouraged as they would represent a supplementary source of regulation freely determined by media professional themselves. Participation and self-regulation may promote greater awareness of the relevant regulation and journalistic standards while increasing the legitimacy and co-ownership of the rules in place.

2.2 LAW OF UKRAINE ON ELECTIONS OF PEOPLE’S DEPUTIES OF UKRAINE

Article 11. The Election Process

“(…) 2. The election process shall be performed on the following principles (…)

5.) freedom of the election campaign, equal access of candidates for deputies and parties (blocs) that are subjects of the election process to mass media irrespective of their form of ownership, except for media that are founded (owned) by political parties;”

This general provision suggests a right for complete equal access, while the special provisions in the later chapters introduce distinctions for the right to equal access.

Article 11 as a general provision should reflect the special provisions on media obligations more accurately.

Art. 66.5 - Coverage of the incumbent

“Official announcements during the election process about the activities of candidates for deputy that relate to their fulfilling of their official (service) duties (….) and which have been prepared according to the procedure envisaged by the Law of Ukraine “On the Procedure for Mass Media Coverage of Activities of State Executive Bodies and Bodies of Local Self-Government in Ukraine” (539/97-BP), shall not be regarded as part of the election campaign. Such official announcements must not contain commentaries with a campaign character, as well as video- and audio records, films or illustrating photos covering the activities of the said persons as candidates for deputy.”

The mentioned law (539/97-BP) lists a rather extensive list of events for which media coverage is mandatory, including official appearances of the Prime Minister and members of the Government. This requirement could potentially be exploited by an incumbent to gain additional visibility and to promote in an indirect manner achievements while in power.

For the election period it may be advisable to amend the provision by either narrowing down the list of mandatory events or foreseeing a sort of “right of reply” for opposition parties on the issues discussed in the coverage of the incumbent.

Art. 66.7 – Access to the media: the principle of equal conditions and equal access

“The election campaign at the expense of funds from the State Budget of Ukraine allocated for the preparation to and conduct of the elections shall be conducted in compliance with the principle of equal conditions with regard to the provision of equal print space in print mass media and equal air time on radio and TV to the parties (blocs) that are subjects of the election process.”

It is not entirely clear whether this provision applies to all the media or only the state-owned ones. The phrasing seems to suggest that the regime of equal access applies to both, an interpretation that is contradicted by other articles in the law (e.g. article 68.3).

It would be advisable to clearly state that publicly-owned media only must guarantee equal conditions for free access (election campaign at the expenses of funds from the State Budget of Ukraine)

Art. 68.1 –Equal conditions for media campaign

“The election campaign using mass media of all forms of ownership shall be performed in compliance with the principle of equal conditions and according to the procedure envisaged by this Law.”

Again, the provision is not entirely clear since it implies that all media and all genres of coverage are bound by the principle of equal conditions, apparently including editorial items too. But this interpretation is contradicted by article 68.12 providing that coverage of the election process in all mass media in interviews, discussions and debates, news and current affairs programs must be objective, unbiased and balanced.

It would be advisable to better define to which kind of coverage (free access, paid advertising, etc.) the obligation to equal conditions applies.

Art. 68.9 –Obligation to non discrimination for paid advertising

“A mass media outlet, which has provided airtime or print space to one party (bloc) that is subject of the election process, may not refuse to provide airtime or print space to another party (bloc) that is a subject of the election process on the same conditions. A mass media outlet may refuse to provide airtime or print space to a party (bloc) that is a subject of the election process in case the materials provided for distribution do not meet the requirements of paragraph five or nine of Article 71 of this Law.”

While the phrasing of the provision seems to allow mass media to choose not to publish/air paid advertising, it would be useful to make this possibility explicit and to define whether it applies to all media or only to private ones.

Art. 68.12 - Editorial coverage

“The coverage of the election process in mass media outlets of all forms of ownership in interviews, discussions and debates, information releases and in news and current affairs programs must be objective, unbiased and balanced.”

More detailed guidelines may be drafted to better define balance, objective and unbiased coverage in order to provide guidance to the media when reporting on the electoral process.

Art. 69.4 – Free airtime: amount and allocation

“Television and radio broadcasting organizations shall provide each party (bloc) that is a subject of election process with airtime for the conduct of their election campaign at the expense and within the limits of funds from the State budget of Ukraine allocated for the preparation to and conduct of elections, in a total volume of no less than 60 minutes on a nationwide TV channel and 60 minutes on a nationwide radio channel, as well as 20 minutes on regional TV channels and 20 minutes on regional radio channels in each of the regions. This time shall be given to the party (bloc) on each of the indicated channels in two equal parts of the total volume of the allocated time.”

The provision should specify clearly whether it is related to public media only, or all media.

Art. 69.11 – Obligation to archive election campaign material

“TV and radio broadcasting organizations shall make audio- and video records of all broadcasts that contain election campaign material and store them until [the expiry] of a thirty-day term after the day of the official announcement of the results of the elections.”

The provision should more clearly indicate whether the material to be stored includes all election coverage (news, current affairs, etc.) or only paid and free access. Storing all election coverage is preferable, in order to have a basis for addressing possible complaints.

Art. 70.5 – Right to purchase space in print media

“A party (bloc) that is a subject of the election process shall have the right at the expense of funds from its election fund to publish campaign materials in print media of any form of ownership which is issued in Ukraine, except for the mass media outlets specified in paragraph nineteen of Article 71 of this Law.”

This provision suggests that all the press is obliged to publish paid advertising by parties, whether it wants to or not. This would create a different regulation to electronic media.

It is recommended to specify whether print media have the right not to publish paid party advertising at all.

Art. 71.6 – Prohibition for media outlets to campaign

“It is prohibited for mass media outlets, their officers and officials and creative staff members to campaign for or against parties (blocs) and candidates for deputy nominated by them, or to disseminate information, which bears the characteristics of a political advertisement, free of charge or paid by sources that are not envisaged by law, and also to disseminate any information with the aim of urging voters to vote for or against a certain subject of the election process, during the election process in their materials and programs not covered by agreements, concluded in accordance with the requirements of paragraph ten of Article 69 and paragraph six of Article 70 of this Law.”

This article aims at avoiding any kind of media campaigning and bias in support or against candidates and parties. However, its phrasing may lead to confusion regarding the activities and comments falling under this provision. The provision seems to be over-restrictive and it presents three main problematic aspects:

1. It is applied to all media, in spite of the fact that private print media traditionally had the right to take a political position if they so wish.
2. There is no clear definition of the terms “campaign” and “disseminate information”.
3. As a consequence this gap could have an intimidating effect on journalistic freedom as editorial coverage – commentaries, critical comments on candidates or policies and any editorial item clearly distinct from news reporting - may be considered as campaigning.

It is recommended to better specify the scope of the prohibition to campaign by clearly stating which kind of activities fall under this article and explicitly stating that editorial coverage is outside the reach of application of this provision, being subject to the more general requirements of due impartiality, balance and fairness.

Art. 71.10 – Election disputes and remedies

“If a court, when considering an election dispute, determines a multiple or a single gross violation of the requirements of this Law by a mass media outlet the court shall adopt a decision to suspend the license temporarily (until the end of the election process), or ban the issue of the print publication temporarily (until the end of the election process).”

It is not entirely clear whether this article covers only the prohibitions listed in article 71 or rather all the provisions of Chapter VIII. In addition the sanctions foreseen appear to be harsh and they do not allow for a proportional response to violations.

It is recommended to specify the subject matter of this provision. If it covers the whole law then it is suggested to include it in Chapter XII. Furthermore it would be advisable to

introduce a range of proportional sanctions based on the gravity of the violation (e.g. from a warning via imposing a fine to suspension).

Art. 71.17 – Hidden advertising

“It is prohibited to include election campaign materials of parties (blocs), including political advertising, in informational TV and radio programs (news editions). All election campaign materials must be separated from other materials and indicated as such.”

This article appears to establish the prohibition of paid election propaganda disguised as editorial content, but it is not explicit. It sets forth two basic principles regarding paid advertisement: separation and labelling. Some amendments would strengthen the effectiveness of this provision while providing the regulator with guidelines and criteria on how to assess cases of surreptitious advertising.

Suggested amendments:

1) The subject matter of the provision may be broadened: at the moment the clause mentions only news, but other items may be included (documentary current affairs, etc.) so to cover all programmes whose sponsorship is not envisaged by article 66.7.

2) The scope of the provision may be widened too as at the moment it applies only to audiovisual media. As a matter of fact, hidden advertisement by any media outlet should be considered as an offence and a breach of basic journalistic ethics.

3) The provision may be re-phrased so to explicitly prohibit hidden advertising, elaborate specific definitions and cases where violations may be investigated and establish targeted sanctions for verified breaches. For a more detailed discussion about hidden advertising and possible remedies against it see Chapter 3, Section 3.2, c.

2.3 LAW OF UKRAINE ON THE ELECTIONS OF THE PRESIDENT OF UKRAINE

Art. 58.3 - Coverage of official authorities

“Official notices during the election process (without comments which may be of campaign nature, as well as video and audio-recordings, movies and photo illustrations) about the activities of the candidates to the post of President of Ukraine while they carry out their official (duty) authorities, envisaged by the Constitution of Ukraine or other laws of Ukraine, shall not be considered part of the pre-election campaign.”

This provision theoretically leaves the possibility to the incumbent and other candidates with official positions to exploit his/her position to gain additional coverage and to promote in an indirect manner his/her visibility for campaign purposes.

For the election period it may be advisable to amend the provision by either specifying that the coverage of official activity must be limited and based on professional criteria of newsworthiness or foreseeing a sort of “right of reply” for other candidates.

Art. 58.5 – Access to the media: the principle of equal conditions and equal access

“The pre-election campaign at the expense of funds allocated from the State Budget of Ukraine for the preparation and conduct of elections shall be carried out in compliance with the principle of equal conditions providing the candidates to the post of President of Ukraine with the same print space in the print media and air time on radio and TV.”

It is not clear whether this provision applies to all the media or only to state-owned ones. The issue is then clarified in article 60.3 setting forth the right for Presidential candidates to access state-owned media.

It would be advisable to clarify that state-owned media only must guarantee equal conditions for free access (election campaign at the expenses of funds from the State Budget of Ukraine).

Art. 60.1 – Equal conditions for media campaign

“The election campaign using mass media of all forms of ownership shall be performed in compliance with the principle of equal conditions and according to the procedure envisaged by this Law.”

The article is not clear as it seems to provide for all media and all genres of coverage to be bound to the principle of equal conditions, apparently including editorial items. If so, then such a provision might have a “limiting” effect on journalists’ freedom to report.

It would be advisable to better define to which kind of coverage (free access, paid advertising, editorial coverage, etc.) the obligation of equal conditions applies. If such obligation is applied to editorial content too then it is recommended to better specify what the concept of “equal conditions” entails and to issue more detailed guidelines for media outlets.

Art. 63.5 – Right to purchase space on all media

“A candidate to the post of President of Ukraine shall have the right, at the expense of his/her campaign fund, to publish campaign materials in printed mass media of all forms of ownership.”

The same comments as for art.70.5 Parliamentary election law apply here.

Art. 64.4 – Prohibition for state-owned media outlets to campaign

“It shall be prohibited for state and municipal mass media, their officials and officers, as well as creative staff, in their materials and programs, not covered by agreements concluded according to the requirements of part ten of article 61 and part six of article 63 of this Law, to campaign for or against candidates to the post of President of Ukraine, evaluate their pre-election programs or give preference to them in any form during the election process. The activity of these mass media may be temporarily suspended, in case they violate this requirement, by a court decision upon a submission of the Central Election Commission or the respective territorial election commission.”

This provision explicitly applies to state-owned media only while the corresponding article in the Election Law for the Parliament applies to all media. The rationale for the two different regimes is not clear. In addition the sanctions foreseen are harsh and might be detrimental to journalists’ editorial freedom of reporting and criticising. Three main issues should be here considered:

1. There is no clear definition of the terms “evaluate campaign programmes”.
2. This gap might have an intimidating effect on journalistic freedom as editorial coverage - commentaries and any editorial item clearly distinct from news reporting and containing analytical comments on candidates or policies - may be considered as forms of evaluation.
3. The sanctions against breaches appear to be rather harsh and they apparently do not allow for a proportional response to violations.

It is recommended to better specify the scope of the prohibition to campaign by clearly stating which kind of activities fall under this article and explicitly stating that editorial coverage is outside the reach of application of this provision, being subject to the more general requirements of due impartiality, balance and fairness. In addition it would be advisable to introduce a range of proportional sanctions based on the gravity of the violation (e.g. from a warning via imposing a fine to suspension).

Art. 64.10 – Hidden advertising

“It shall be prohibited to include pre-election campaign materials of candidates to the post of President of Ukraine or political advertisements in TV and radio news programs. Political advertisements must be separated from other materials and specified as such.”

See comments on Article 71.17 Law on Parliamentary Election, Section 2.2.

3. BEST PRACTICES FOR ELECTION COVERAGE²²

Best practices can be defined as the concrete regulatory measures - and the jurisprudence which emerged in relation to these measures - taken in different countries to guarantee a level playing field among election contestants and ensure that voters receive accurate, diverse and unbiased information on political alternatives. Case studies presented in the following section show that countries have adopted a variety of different legal practices and regulatory instruments and no model can be considered to be ideal, given that each country has a different context; yet they may provide inspiration to find appropriate solution for the Ukrainian context.

In spite of the diversity of national laws and regulations governing media during the election campaign, it is possible to identify common principles and rationales underpinning best practices. In this regard, media regulation tries to strike a balance between three intertwined sets of rights that come into play during the election process.

1. The rights of voters: voters have the right to be informed about political alternatives and candidates manifestoes so to have the possibility to make an informed choice. Even though the impact of media coverage on the electorate is a controversial issue, it is a widely accepted that “in a world dominated by mass communications it is increasingly the media that determine the political agenda, even in less technologically developed corners of the globe.”²³

2. The rights of candidates and parties: candidates and parties have the right to communicate their platforms and their views and they have also a right to access the media to inform the electorate about their policies and opinions on matters of public interest. Finally the media represent an important forum where candidates can debate and confront themselves.

3. The right of the media: the media have the freedom to inform the public about the election campaign and express their opinions on issues of public interest. They also have the freedom to cover all relevant election-related issues, to play an active role in the process of informing voters by offering them a diverse range of views, which include those of journalists and political analysts free to criticize politicians for their platforms or their performances. On the other hand they have the duty to inform voters in a correct, accurate, transparent, and balanced manner.

It is therefore crucial that state authorities – which are the ultimate guarantor for the diversity of news and views in the media, as pointed out by the European Court of Human Rights²⁴ - define a

²² Mirella Marchese – senior researcher at the Osservatorio di Pavia – has provided substantial inputs for this chapter and she has drafted the part regarding paid advertisement.

²³ ACE Project, *op. cit.*, note 1.

²⁴ “The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (see, for example, *mutatis mutandis*, the *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59). Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very

legal framework for election coverage able to ensure voters, candidates and the media with their respective rights.

Received wisdom suggests that it may be useful to structure the legal framework for election coverage according to a two layers approach:

- 1) general laws specifying rights and obligations of media and candidates such as the right to free airtime, principles for election coverage, provisions on the possibility to publish paid advertisement, etc.
- 2) specific implementing regulations issued on the occasion of each election setting forth rules and criteria of more specific nature such as the exact criteria for the allocation of free airtime to contestants of a given election and the formats that will be used to cover election contestants.

This approach provides more flexibility to respond to the needs of each election in terms of media coverage. It is noteworthy that the rules for covering Presidential elections and Parliamentary will differ a lot because of the number of contestants and a possible diversity of electoral systems. Similarly, coverage of a referendum campaign will be based on criteria that are different from the ones applied to local elections. Amendments to a law issued by the Parliament usually require too much time to be useful as a means to establish tailored and specific rules for media coverage at each election. Regulations, being administrative acts, can usually be amended more easily, although there should always be consultation with the relevant stakeholders, namely the media, candidates and parties. Therefore the Election Law or a more specific Media Law should contain the general provisions for election coverage while the Election Monitoring Body or the Media Regulator should issue related implementing regulations on the occasion of each ballot.

3.1 TYPES OF MEDIA AND ELECTION REGULATION

The level of regulation imposed for election coverage is different according to the type of medium: print and audiovisual media (radio and television) are subject to different systems of control and normally public media have stricter obligations regarding access than private electronic media. For the purpose of this document we will analyse the general obligations imposed on the media according to their ownership (public or private) and their nature (print or audiovisual).

3.1.1 Audiovisual media

Electronic media are usually subject to a higher degree of control by public authorities than print media as a consequence of the public service remit vested in the audiovisual sector. Such an approach is justified by two main rationales:

1. Televisions and radios use and benefit of airwaves and frequencies that are limited public resources. Therefore electronic media have the duty to fulfil a public interest function and provide with plurality and diversity of views.
2. All the media play a social role and have therefore a social responsibility towards the public and voters. Nonetheless in virtue of their nature and means of consumption broadcast media are

widely.” European Court of Human Rights, Informationsverein Lentia and Others v. Austria, judgment of 24 November 1993, Series A no. 276, para. 38; [1994] 17 EHRR 93. Case available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695731&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

assumed to have a wider impact and influence in the building of public opinion. Radio and television are considered more than a simple tool of communication, as they are an essential channel for promoting social, cultural, and political objectives. It is therefore important to regulate their activity to protect society against any risk of biased information.

The main difference within the electronic media is between those that are publicly and privately owned. This distinction has consequences for the degree of control and regulation imposed on them by national authorities.

a. State-/publicly owned broadcasters²⁵

The idea of public-service broadcasting²⁶ is based on the principle that the private sector alone cannot ensure pluralism in the broadcast sphere. As stressed by the German Federal Constitutional Court in a decision in 1981: “*Broadcasting in contrast to the press could not be governed by market competition alone in order to achieve complete information and the forming of public opinion by the citizen*”²⁷.

The power of this idea and of its consequent implementation vary according to different regional contexts: the European system of a strong public-service broadcasting model contrasts with the experience of the United States, where public-service broadcasters are far less significant – both in terms of reach and financial resources - than private ones.

While all media are expected to provide responsible and professional coverage, state-/publicly owned media must uphold more rigorous standards since they belong to all citizens. Citizens pay fees or taxes to support public-service broadcast – and to sustain publicly-owned press - and therefore the public media have the legal and moral obligation to serve the interest of the general public, not partisan or private interests. Using state-/publicly owned media to promote a certain political party or candidate is therefore an illegitimate manipulation using the public’s own resources. In this regard, public broadcasters are bound to higher standards of responsibility in relation with the principles of universality, diversity, independence, distinctiveness and accountability.²⁸ The stricter regulation imposed on these broadcasters – including rules related to election coverage - is then justified by the need to protect them from undue interference or control by the government and partisan interests, thus enabling journalists to freely operate according to their obligation to the public. Publicly funded broadcasters should provide a complete and impartial picture of the entire political spectrum in their coverage of an election.²⁹

²⁵ Public broadcasters are financed with public money, and they offer a universal service (for the entire public) and are accountable to the nation as a whole. They do not back or favour any party or the government. State broadcasters are also financed with public money but they are owned by the state or the government and are under the direct control of their owners. What is important here is the fact that, whatever their ownership, these broadcasters, being mainly financed with taxpayers’ money, either as an allocation from the state budget or as a fee paid by citizens, have stronger obligations than private ones with regard to their production and coverage.

²⁶ At the 4th European Ministerial Conference on Mass Media Policy, ministers of the member states of the Council of Europe acknowledged that public broadcasting was a decisive factor of plural communication accessible to all (Prague, December 1994).

²⁷ E. Drück, “Germany”, in B.-P. Lange and D. Ward (eds.), *The Media and Elections: A Handbook and Comparative Study* (London: Lawrence Erlbaum Associates, 2004).

²⁸ European Council, Treaty of Amsterdam, Protocol on the System of Public Broadcasting in the Member States, 1997. Council of Europe, Recommendation No. (96) 10 of the Committee of Ministers to the Member States on the Guarantee of the Independence of Public Service Broadcasting.

²⁹ Council of Europe, Recommendation No. R (99) 15, *op. cit.*, note 17.

b. Private broadcasters

Although broadcasters owned by private interests are commercial enterprises, they are generally asked to comply with certain public service obligations - particularly during an election campaign – as a result of their use of public commodities (airwaves and frequencies). The licence they are provided with, which is assigned on a periodic basis by a public authority, may therefore include certain requirements in relation to news, information, current-affairs programmes and voter education.

Public service remit for private televisions in the United Kingdom

The license granted by the British regulator – the Office for Communications (hereinafter Ofcom) – to the fifth analogue national TV station Channel 5, which is private, explicitly requires the channel to broadcast free airtime to political parties³⁰. The same public service remit is present in the license issues to the other private television ITV.

Private broadcasters should also abide by professional standards of impartiality in their news and current-affairs programmes and - irrespective of their audience share, coverage area, or whether they operate thematic or pay channels - should offer fair and accurate coverage of politics and elections.³¹

Generally, the obligations of private broadcasters during the election campaign are more variable and more difficult to define than those of public media. The degree of editorial freedom that should be accorded to private broadcasters is related to the overall set-up of the media system: best practices adopted for the regulation of coverage by private media are related to the degree of diversity and autonomy in the media landscape. In other words, a plurality of private channels with different owners and managed by professional journalists may ensure that candidates are fairly and equitably covered with no need for stringent rules. On the other hand, concentration of media ownership or lack of independent private media may require stronger regulation.

Conflict of interest in Italy

Until 2000 the system of rules in place for election coverage on TV was fragmented and rather approximate. Particularly in the existing law (Law 515/93) there was an “uncovered period” between the day fixed for election meetings and the official start of the campaign 30 days before voting. During this lapse of time it was possible “by exploiting the media (...) acquire dominant resources and positions³²” detrimental to the principle of equal opportunities among election contestants. Mr. Berlusconi, owner of the only Italian private TV network and head of the main conservative party Forza Italia, exploited this possibility by using his TV channels for propaganda and campaigning. Consequently in 2000 a new Law was issued (Law 28/2000) with more stringent rules imposed on public and private channels so to limit the use of TV stations for campaign purposes.

In principle, even if the regulatory system in place may differ for public and private media, there are still areas of the law or regulations that are likely to affect both sectors. These may include:

- regulations on the reporting of opinion polls,
- laws on "hate speech", defamation, media liability for the statements of politicians and other related issues,
- provisions on election silence before or during the election,
- the procedure for hearing complaints against the media by the public or political parties,
- journalists' right of access to election events.

³⁰ Ofcom, Channel 5 License, Section 2 Clause 14, available at <http://www.ofcom.org.uk/tv/ifi/tvlicensing/c5/c5drl.pdf>.

³¹ Council of Europe, Recommendation No. R (99) 15, *op. cit.*, note 17.

³² E. Bettinelli, *Par Condicio: Regole, Opinioni e Fatti* (Torino: Einaudi, 1995).

3.1.2 The Press

The private press sector normally enjoys a lower degree of regulation, following a free-market model where differing editorial policies and political alignments openly compete.

The arguments used to justify this approach are:

1. Print media do not benefit from a public and limited commodity such as airwaves. Therefore, their public obligation to impartiality and balance is commensurately less than that of electronic media;
2. Print media have lower set-up costs than electronic media; therefore, diversity of the print media is easier to achieve.
3. Since its origin, newspapers have tended to be an independent source of information, at times an adversary of the authorities, and a watchdog of the government. The historical role of fourth estate of the press leads to disfavour any tight control on behalf of state authorities.

While the publicly funded press should comply with the same public service obligations as the public broadcasting service (balance, impartiality, fairness, allocation of free space), private print media are generally entitled to a larger degree of partisanship than the publicly financed press and the broadcasting media. They have the right to have their own political agenda and it is generally accepted that the press may openly express a political opinion.

Also, the general practice of self-regulation adopted by the print media (through codes of conduct and press councils) can be interpreted as evidence that the press does not need to be bound by rules set by external bodies and that the media can be responsible for their own editorial.

Nonetheless, freedom of expression is not an absolute right and private print media too may be bound to certain duties mainly expressed in the form of negative regulation such as a ban on paid advertisement or the obligation of non discrimination when paid advertisement is permitted. Also other laws – such as defamation laws or laws against hate speech and xenophobia – may influence the extent to which newspapers can cover candidates and elections.

Laws against Racism, Xenophobia and Denial of Genocide in Belgium

The Belgian Federal legislation presents provisions that have an impact on media activity, namely the Law 30 July 1981 - on the repression of certain acts inspired by racism and xenophobia – that sanctions any publicity given to the intention of resorting to discrimination, hate or violence against groups and individuals on the basis of their race, colour, national or ethnical origin. Similar provisions are included in the law against the negation, minimisation or justification of the Jewish genocide. Many newspapers directly incorporated these provisions in their statutes and editorial codes and as a consequence they refused to publish the manifesto of the far right- wing party Vlaams Belang claiming that the ideas contained in the party's platform were in breach of the aforementioned laws.

3.2 BEST REGULATORY PRACTICES FOR ELECTION COVERAGE³³

A recurrent problem during an election campaign is the extent to which media should be regulated in their coverage of candidates and parties. Media coverage of elections encompasses diverse and rather complex issues that can be addressed either by external regulation or self-regulation, or even left unregulated.

³³ The best practices presented here are principally referred to audiovisual media unless otherwise specified.

One of the main points of controversy is whether external regulation or self-regulation is required. Journalists do not generally support any kind of external restrictions or impositions that are perceived as limiting their editorial freedom. On the other hand, the autonomy of the media system may not be sufficiently strong to protect journalists and editors from the pressures of political authorities, media owners or advertisers. In these contexts then external regulation may guarantee such autonomy by creating rules and a system of enforcement able to guarantee fair, balanced and unbiased information.

Another issue related to the legislation of election coverage relates to the areas of regulation. What genres of programmes or press coverage should be regulated? According to which criteria? Media regulation for election coverage normally focuses on three main areas:

- free access,
- paid access and
- editorial coverage.

In the following sections definitions of the three areas and basic guidelines for regulating each of them will be discussed.

3.2.1 Free Access

The expression “Free Access” encompasses a number of different genres of programmes and journalistic formats. Even though it is normally labelled as free, this kind of access may be well funded through the state budget as it happens in Ukraine. What matters here in terms of definition is that parties and candidates do not have to rely on their funds to purchase this space or airtime. The different formats falling under this category have a number of features in common:

- There is no or limited journalistic mediation or editorial control on the message put across by candidates and parties.
- Their main objective is to convey candidates’ message to voters, to inform about political alternatives available to citizens and to discuss issues related to the electoral process.
- They are provided to parties and candidates free of charge and their costs are normally covered by State budget.

It is a practice in many countries for the public media – and sometimes private broadcasters too - to provide airtime for free to political candidates or parties to communicate their messages to the electorate. *“It is considered to be a direct form of communication between politicians and voters, without any intermediary role by the media. One of the main advantages of giving free airtime is to allow smaller parties or minor candidates to have an opportunity to deliver their electoral messages, as they otherwise do not get significant coverage by the media. Contrary to paid airtime, which is sometimes not affordable for small parties or minor candidates, a lack of finances should not be an obstacle to access the airways. In addition, free airtime can to a certain extent substitute for a lack of balanced coverage by certain media”*³⁴.

We can identify two main types of Free Access during the electoral campaign:

A) **Party Election Broadcast** (hereinafter PEB): a PEB is a television or radio broadcast of variable length made by a political party or a candidate to communicate their platforms to the electorate. The corresponding format for the press is the publication – as a whole or in an

³⁴ Venice Commission, *op. cit.*, note 19.

abridged version – of the parties’ manifestoes, candidates’ profile or a party-produced print advertising³⁵.

PEB should be granted to all parties registered for elections³⁶ on a non-discriminatory basis by establishing clear, unambiguous and transparent rules. The amount of time allotted must allow candidates to effectively communicate and illustrate their platforms to the public and they should be aired when and where they reach the largest audience. They should be clearly labelled as party advertising so that viewers are fully aware of the partisan nature of the broadcast.

As a principle, public media should carry PEBs, while private broadcasters may be required or not under certain conditions. Private print media are not usually obliged to publish direct access material free of charge unless they wish so.

The main questions related to PEB include:

1. The criteria for allocation of PEB. When determining the allocation and length of the slots the media regulator can choose between two different principles: either **equality or equity**. Equality means that every party or candidate gets the same amount of time or space for access. Equity means that everyone gets proportional access based on clear and uniformly applied criteria (e.g. number of seats in Parliament or number of candidacies filed). What is the best approach? There is no straightforward answer; however in principle when the number of contesting parties is limited, strict equality may be applicable. For presidential elections, referenda, and for first democratic elections, the criteria of strict equality better fits the need to provide all contestants with a level playing field. When the number of contesting parties and candidates is high, a proportional formula may be adopted. The rules for defining the proportions can follow a number of criteria: votes obtained by parties in the same kind of past elections, the number of seats in parliament, a threshold based on the number of candidacies filed in a minimum of constituencies.

France

In France all candidates and parties have the right to receive free airtime on public electronic media. Each candidate is given a certain amount of time according to the type of election (Parliamentary, Presidential or European) and according to the position of a party in Parliament as specified in article 16 of the modified Law of September 30, 1986. The strict equality method is applied for Presidential candidates, while an equity system is in place for Parliamentary elections.

a. Presidential Elections: for the first round candidates have the right to no less than 15 minutes each; for the second round 1 hour for each candidate is provided but this amount can be reduced by the Conseil Supérieur de l’Audiovisuel (CSA) according to the number of candidates.

b. Parliamentary Elections: for the first round parties represented in Parliament have the right to a total of 3 hours to be equally split between opposition and government parties (1.5 hours airtime each). For the second round, a total of 1.5 hours has to be equally split between opposition and majority parties (45 minutes each). Other parties with at least 75 candidates have the right to 7 minutes each for the first round and 5 minutes for the second round³⁷.

Albania

In Albania, during the 2003 Parliamentary Elections, the Central Electoral Commission allotted PEBs on public radio and television according to a proportional formula. Parties that got more than 20% seats in Parliament – the Socialist Party and the Democratic Party - had the right to a total of one hour PEBs,

³⁵ For simplicity we will refer to PEBs to indicate free access on both audiovisual and print media.

³⁶ Nonetheless there are cases where it is technically impossible to provide all contestants with PEB slots.

³⁷ E. Mauboussin, “France”, in B.-P. Lange and D. Ward (eds.), *The Media and Elections: A Handbook and Comparative Study* (London: Lawrence Erlbaum Associates, 2004).

while parties with less than 20% of seats in Parliament received a total of thirty minutes each. Ten minutes were allotted to non-parliamentary parties and independent candidates.

A potentially controversial issue is the provision of **access to independent candidates**, when there is a large number of them. In those cases it may be beyond the capacity of broadcasters to give all of them free airtime

Independent candidates and right to PEBs: Huggett v United Kingdom³⁸

The European Convention on Human Rights and its related jurisprudence do not provide for a right of access for all individual candidates to the public broadcast media, as is clear from an admissibility decision by the European Commission on Human Rights in relation to the petition filed by an independent candidate. The candidate, running for European elections, sought to challenge the fact that the British Broadcasting Corporation (BBC) had not given him direct access during an election on the basis that only parties contesting at least 12.5% of the seats in an election were given slots. The Commission rejected the complaint as manifestly ill-founded and therefore inadmissible on the basis that the criteria applied by the BBC were neither arbitrary nor discriminatory.

2. Responsibility for the allocation. There is no single model for assigning the responsibility for allocation of PEB. In some countries the media regulator issues general instructions for the allotment whose implementation is then left to broadcasters in consultation with stakeholders (e.g. in the UK the Broadcasters' Liaison Group comprises representatives from broadcasters who make airtime available to registered political parties. Each broadcaster is responsible for deciding the allocations made available to a political party in liaison with the Electoral Commission and the media regulator Ofcom to ensure a consistent approach.). In other countries it is the media regulator itself which is in charge of organising and supervising the official campaign on radio and television including setting forth the production, broadcasting and scheduling conditions for PEBs (e.g. France where the Audiovisual Council CSA organizes and monitors PEBs for each election). In other countries it is the Election Monitoring Body that is in charge of allocation of PEBs (e.g. in Poland where the National Election Commission is in charge of regulating the broadcasting of free slots). Whatever model is adopted, its success will depend in large measure on the credibility and impartiality of the regulating body that allocates the broadcasts. This suggests that it may be useful to allow political parties' involvement in drawing up the regulations governing media and elections.

3. Length, timing and channels. The process for deciding the **timing** of airing or of publication of free direct access needs to be fair and transparent. PEBs should be aired/published when they reach the largest audience, normally peak time. The order of appearance should guarantee non-discrimination against any of the parties (like broadcasting incumbent party's PEBs in peak time and relegating opposition's PEBs to low-audience time bands). This can be achieved by holding a lottery to establish the order of broadcasting/publication or the rotation of the parties according to a defined schedule. Another method used for audiovisual media – now abandoned due to the proliferation of channels and the consolidation of the principle of free viewing - was the simultaneous broadcast of PEB on all channels.

Timing of PEBs in the UK

According to the British media regulator Ofcom's Rules on Party Political and Referendum Broadcast, TV election broadcasts by the major parties (Conservatives, Labour, the Liberal Democrats and Northern Ireland major parties) must be carried in peak time (6.00pm – 10.30pm), as must SNP and Plaid Cymru broadcasts on ITV in Scotland and Wales, and all referendum broadcasts. Minor parties' broadcasts

³⁸ R. J. Huggett v. the United Kingdom, Application N. 24744/94, (1995).

*should normally be carried in the period 5.30pm to 11.30pm. Similar provisions apply to national radios*³⁹.

The second area of debate is related to the **length** of the slots, particularly on audiovisual media. There are competing approaches: the purpose of legislation has generally been to ensure that slots are long enough for parties to formulate their message in an exhaustive manner. However, the 10/15-minute PEB is often considered too long to really catch viewers' attention and parties sometimes reduce their time allocation in order not to lose the voters' attention (as in the UK prior 2003 Communications Act where the major parties had the right to 10 minutes but they normally used only half of them). An alternative to this system is to specify exactly the total time available leaving to the party the choice whether to use it all or not; if they opt for the latter option, then they lose the time not exploited. This system is generally disfavoured: it creates organisation problems for the media regulator as well as the media as it makes planning on the part of a broadcaster almost impossible. A third approach might represent a compromise between the previous two. Parties could be given a total allocation of broadcast time in accordance with an agreed system. That time allocation could then be broken into different length time slots, allowing parties a mixture of lengthy and reasoned argument on the one hand and quick advertising messages on the other.

PEB length in France

*The CSA has divided free direct access available to parties into two kinds of formats, one longer and another shorter. In the ruling Horblin et al. of October 20, 1989 (request No. 108 130) the Court supported the CSA's discretion to distinguish between short and long programmes on the public channels. It considered that the division enabled the lesser known parties to appear on TV at the beginning and the end of the campaign and it provided them with a peak time slot for their broadcasts, as well as other times in the schedule*⁴⁰.

The third issue is related to the **media outlets** where PEBs are aired or published. In principle they should be the most popular ones so they can reach the widest audience. It is therefore advisable to air/publish PEBs in the main nation-wide outlets in order to enable parties and candidates to target the largest number of voters. It is also crucial not to discriminate among parties by broadcasting, for instance, incumbent party's PEBs on the most popular channel while airing opposition's PEBs on a niche station.

4. Responsibility for the format and content. In principle any kind of prior censorship of formats and contents of political expression should be avoided. However, in order to make sure that a serious message is put across and that no illegal material is made public, a certain level of regulation may be justified as long as it complies with the principles set by international law regarding limitations of freedom of expression (necessity, legality, proportionality, legitimacy). Therefore the regulatory body may determine the **format** of PEBs to ensure that a serious political message is conveyed or that the conditions of equality among candidates are met.

Control over **content** is much more problematic. Although there is a general presumption against such regulation, media have the right to protect themselves against the dissemination of any illegal or improper material (particularly with regard to hate speech, libel, copyright and defamation). One of the possible solutions is the drafting by the regulatory body of a precise and publicly available list of restrictions of what candidate can say during their PEBs. An alternative

³⁹ Ofcom's Rules on Party Political and Referendum Broadcast, clauses 15 and 16, available at <http://www.ofcom.org.uk/tv/ifi/guidance/ppbrules/ppbrules.pdf>.

⁴⁰ E. Mauboussin, *op. cit.*, note 37.

might be not to supervise the content at all, thus leaving candidates the responsibility for PEBs with the possible risk of having their slots refused by the media. As the UN Special Rapporteur on Freedom of Expression and Opinion pointed out, the media should not be held legally liable for unlawful statements that they report in the course of election campaigns⁴¹; such liability should lie solely with the political party that submitted the material. “*The assumption that the media may not be prosecuted in a civil or criminal suit for reporting the words of politicians reinforces a trend that was laid down by, among others, the Spanish Constitutional Court. This approach stresses the right of the public to be informed about what politicians say - even if it is unlawful and potentially incites violence*”⁴².

Content regulation of PEBs in France, UK and BiH

In France content-related regulations are rather strict, in particular to limit the incumbent's advantage. For example, in 1988 Presidential Elections candidates were not allowed to use national symbols (such as the anthem or the flag), or to show the places where they perform their official duties.

In the UK, Ofcom's Rules on Party Political and Referendum Broadcast⁴³ state that, while editorial control of PEBs rests with parties, broadcasters are responsible for ensuring that broadcasts comply with the terms of the Broadcasting Code. Broadcasters are also advised to seek legal indemnities from parties and referendum organisations, against defamation, breach of copyright and similar legal risks. Broadcasters are advised to issue guidance on the acceptability of content and technical matters. In addition, broadcasters and the media regulator have set forth a number of rules prohibiting certain types of contents and imposing strict technical standards in programme making⁴⁴.

Provisions on hate speech in the 2002 general elections in Bosnia and Herzegovina explicitly prevented the media from using any material that, in its content or tone, could present a clear and immediate danger of inciting ethnic or religious hatred among the communities or any other type of disorder that would hamper the election process. This regulation might appear to be a strong limitation of the freedom of expression of individuals during the election campaign. Nevertheless, it represents a legitimate attempt to set rules on this matter in a country where the media played a substantial role in fomenting racial hatred during the civil war.

Broadcasters might refuse to air PEBs when such slots openly breach criminal laws or other national laws and the broadcasters might therefore be considered a *de facto* accessory to the violation. Therefore in principle broadcasters and newspaper should have the power to reject PEBs but the ground for refusal should be specified in clear and unambiguous guidelines and subject to judicial review.

Germany and the jurisprudence of the Federal Constitutional Court on PEBs refusal

After the refusal of airtime, some parties resorted to courts to oblige broadcasters to air their slots. The Federal Constitutional Court stated: “It is not within the power of broadcasting station to deny an election slot with the argument that its content appears unconstitutional, since the competence to decide upon the unconstitutionality of a party and its announcements lies only with the Federal Constitutional Court. The station has however the right to expect that the party uses its airtime only for legal campaigning and in particular that no relevant and evident breach of criminal law will take place. The

⁴¹ “Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussain”, *op. cit.*, note 6.

⁴² ACE Project, Media and Elections: Media Liability for Reports of Unlawful Statements, available at <http://aceproject.org/ace-en/topics/me/mec/mec03/mec03d/mec03d02/view>.

⁴³ Ofcom's Rules on Party Political and Referendum Broadcast, clauses 3 and 4, *op. cit.* note 39.

⁴⁴ See Broadcasters' Liaison Group, Production Guidelines, available at <http://www.broadcastersliaisongroup.org.uk/guidelines.html>.

station is therefore entitled to control the content of the slot and – in the case of such a breach of the law – to refuse transmission”⁴⁵.

5. Conditions of production: in order to establish a level playing field among political forces, resources for the production of PEBs may be made available to all parties so to avoid penalizing parties with limited financial resources. Resources can include either the access to public media’s production facilities such as cameras and studios or financial contributions for the production allocated by election authorities to parties in proportion to the amount of airtime allotted to them.

PEBs production conditions in France

In France for instance, the CSA plays a central role in the production of PEBs. It ensures that “strict equality of treatment of the candidates is respected. For this purpose, each candidate must be allocated the same means and conditions of production, equal access to time for recording, the same number of cameras, and an equal number of studios and facilities which are specially fitted for this purpose, to which all candidates have access to. Throughout the campaign the CSA oversees that the recording, production, and broadcasting conditions for the programme are of good quality and consistent for all of the candidates”⁴⁶.

6. Obligations imposed on private broadcasters. Many countries apply different sets of obligations to private media in relation to PEBs. There are a number of regulatory models:

- i. the first is a system for private broadcasters where they are not obliged to air any PEBs. This was the case in Italy prior to the 2000 reform: before the new law was introduced the state broadcaster, RAI, was in charge of airing free direct access broadcasting, while private broadcasters were not under this obligation and they were also permitted to carry paid advertising.
- ii. A second model is to impose a number of public service obligations on the private broadcast media as a term of their broadcasting license. This model is applied in the UK where terrestrial commercial broadcasters are obliged by the terms of their licenses to air PEBs (see case study Section 3.1, b.).
- iii. A third regulatory option is leaving the private broadcasters with the choice whether to adopt the public service obligation to air PEBs. If the private broadcasters choose to air slots free of charge, then they must do this on the same terms as the public media and without discrimination against any political party. This is the system now in place in Italy where the broadcasting of PEBs on private national televisions is facultative but subject to the provisions set forth in Law 28/2000 on Political Communication.

The second and third models pose questions related to the payment for airtime that can become a sensitive matter. The basic question is: who will pay and how? The lack of any kind of reimbursement for media outlets may have negative effects on their financial situation, especially in elections where there are many contestants and therefore the total amount of time allotted is large. The election administration may allocate part of its budget to cover this kind of airing costs following a system where the lowest advertising rate - because the profit margin is excluded - is reimbursed to broadcasters.

Obligations of private broadcasters in Croatia and BiH

During Croatia Parliamentary Elections in 2007 private broadcasters complained to the OSCE/ODIHR Election Observation Mission that the regulation for election coverage were overly complex and

⁴⁵ Federal Constitutional Court, vol. 47, 1978, p. 198 in E. Drück, p. 69, *op. cit.* note 27.

⁴⁶ E. Mauboussin, *op. cit.*, note 37.

prescriptive. Particularly the allocation of free airtime to all elections contestants resulted in lengthy broadcasts that were financially burdensome for commercial outlets depending on advertising to generate revenues.

A similar concern was expressed by private broadcasters in BiH during 2002 General elections. According to the Election Law during the thirty days prior to election day, all broadcast media had to provide free broadcast time for all contestants and only commercial media which did not broadcast any political programmes or news could benefit of an exemption. In addition, all broadcasters were required to air statements and information by the Election Commission of BiH free of charge in order to inform voters about the electoral process. The allocation of a large amount of free airtime represented a financial burden for private broadcasters, also due to the large number of parties contesting elections and entitled to PEBs.

7. Obligations imposed on the private press. As discussed in the previous section, private print media are bound to less stringent obligations for election coverage and they are not normally obliged to carry free advertisement for candidates and parties. In some countries political messages free of charge in the commercial outlets are facultative but in case a newspaper decides to provide space for free to a candidate then it must guarantee the same opportunity to all the other candidates according to the same rules and conditions.

Free messages in the press in Germany

In Germany the press can publish the campaign manifestoes of the main government and opposition parties free of charge as a reference material for readers. It is in the editorial discretion of the editor-in-chief as to whether the manifestoes or the general programmes of smaller parties should be published or not⁴⁷.

8. Right to complain or appeal. In case of controversy regarding a PEB (e.g. a media outlet refusing to air the slot), the affected party should have the right to seek for remedy with a competent body. This could be either the body in charge of regulating media during the election campaign or a judicial body. The media or the complainants should have the right to contest decisions of the implementing body through a timely, accessible, and prompt judicial appeal mechanism.

B) **Other Election Programmes:** this category includes all the programmes - debates, roundtables, interviews – whose main focus are election platforms and candidates. Their format can vary according to the specific editorial lines and legal requirements in place, but what they have in common is the fact of presenting a higher level of editorial control than PEBs and the presence of some form of journalistic mediation.

The first issue regarding this genre of programmes is whether they should be regulated **by law** or rather they should be **under the broadcasters' editorial responsibility**. Because of their structure and length, discussion programmes, interviews or debates are an important tool for the campaign as they give candidates the possibility to elaborate on their views and messages on a more reasoned way than PEBs. Debates also enable the public to make direct comparisons between candidates. These types of programmes should be organized in a fair manner. *“While these shows are an exciting opportunity for the expression of diverse ideas, if left totally without some balanced views, they can mislead, misrepresent, and misinform many viewers. Although it could be dangerous to assign government the power to adjudicate “fairness” in the marketplace*

⁴⁷ E. Drück, *op. cit.*, note 27.

of ideas, it is also dangerous if a talk-show host or moderator does not allow for a diversity of views”⁴⁸.

In this respect there are three main regulatory models:

a) strong external regulation where the body in charge of media regulation during the election campaign sets forth detailed rules for the organization of these programmes.

The regulation of election programmes in Italy

The Law on Political Communication 28/2000 provides that national radios and TV franchisees are obliged to offer political programmes free of charge and must ensure impartiality and equality of access for all political persons and matters. The Authority for Communications AGCOM and the Parliamentary Control Commission AGCOM (the institutional media regulatory body supervising the behaviour of the public-service broadcaster RAI) define then more specific rules for the implementation of the legal provisions for each election.

For 2008 Parliamentary Elections, the Authority provided that political programmes had to ensure equality of opportunities and fair coverage to all contestants. The regulation also set the timing and the schedule for such programmes, while giving the possibility to the public service broadcasting to organise and air debates between the candidates to premiership⁴⁹.

b) a mix of external regulation and self-regulation where the body in charge of media regulation during the election campaign sets forth general guidelines for the organization of these programmes while the practical arrangements (for instance, deciding the format, the number of participants, the length, etc.) to achieve balance and fairness is left to the initiative of the broadcasting organization itself.

The regulation of election programmes in the UK and the US

The UK presents a system where the controls of the media regulator are rather lenient and broadcasters have the editorial responsibility for the organisation of election programmes. For private channels, the media regulator Ofcom issued a Broadcasting Code providing that due weight must be given to the coverage of major parties during the election period. Broadcasters must also consider giving appropriate coverage to other parties and independent candidates with significant views and perspectives. It is then left to broadcasters the choice on how to achieve due weight and appropriate coverage⁵⁰. Analogously, the BBC’s Editorial Guidelines for Elections state: “Our commitment to impartiality and fairness is under intense scrutiny when we report election campaigns. (...) We should make, and be able to defend, our editorial decisions on the basis that they are reasonable and carefully and impartially reached. To achieve this we must ensure that (...) news judgements at election time are made within a framework of democratic debate which ensures that due weight is given to hearing the views and examining and challenging the policies of all parties (...) The way in which due accuracy and impartiality is achieved between parties will vary. It may be done in a single item, a single programme, a series of programmes or over the course of the campaign as a whole. But content producers must take responsibility for achieving due accuracy and impartiality in their own output and not rely on other BBC services to redress any imbalance for them”⁵¹.

The United States are quite a unique example in the degree of freedom from government control over all media based on the strength of the protection guaranteed to free speech and freedom of the media under

⁴⁸ Venice Commission, *op. cit.*, note 19.

⁴⁹ Delibera n. 42/08/CSP, Disposizioni di attuazione della disciplina in materia di comunicazione politica e di parità di accesso ai mezzi di informazione relative alle campagne per le elezioni della Camera dei Deputati e del Senato della Repubblica (Implementing Regulation on Political Communication and Equity of Access to the Media for Parliamentary Elections), available at http://www.agcom.it/provv/d_42_08_CSP.htm (Italian version).

⁵⁰ Ofcom’s Broadcasting Code, Section 6 “Elections and Referenda”, available at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/elections/>.

⁵¹ BBC Editorial Guidelines, “Broadcasting during Elections”, available at <http://www.bbc.co.uk/guidelines/editorialguidelines/edguide/politics/broadcastingdur.shtml>.

the First Amendment. Nevertheless, Presidential Debates are not under the editorial control of the broadcasters; rather they are organised and conducted by the nonpartisan Commission on Presidential Debates (CPD). The CPD ensures that general election debates are held every four years between the leading candidates for the offices of President and Vice President of the United States. The CPD sponsored a series of debates in each of the past five general elections. The CPD develops nonpartisan, objective criteria upon which it will base its decisions regarding the selection of candidates to participate in its debates. The purpose of the criteria is to identify those candidates who have achieved a level of electoral support such that they are realistically considered to be among the principal rivals for the Presidency. In connection with the 2008 general election, the CPD will apply three criteria to each declared candidate to determine whether that candidate qualifies for inclusion in one or more of the CPD's debates. The criteria are (1) constitutional eligibility, (2) ballot access, and (3) electoral support. All three criteria must be satisfied before a candidate will be invited to debate⁵². While the choice of candidates is up to CPD, the rules for the conduct, the place, the dates as well as the subjects of the debates are set forth by candidates generally through a very detailed Memorandum of Understanding⁵³.

c) a self-regulatory system, where the responsibility to ensure balance and equality of treatment is entirely left to the professional judgment of journalists.

Self-regulatory measures: Slovak parliamentary elections in 2002 and Canada

During the Parliamentary Elections in 2002 all the registered political parties and a majority of media outlets voluntarily agreed to adhere to a Code of Conduct for the Media and Political Contestants drafted in cooperation with civic society organisations. By signing the Code, political parties and the media made a commitment to accept, respect, observe, and contribute to free and fair elections. While the Code was not a legally binding document, it put public pressure on those who violated the rules, that were much more closely followed by all those who had signed the Code. Breaches of the Code were assessed by an independent panel of civic society organisations and media experts.

In Canada, the media election consortium is a co-operative, non-profit group of broadcast networks and news agencies that organises, with the political parties' agents, the national television debates among the most prominent party leaders. These debates are cornerstones of the campaign, as they are broadcast on the main English and French language broadcast media and thus ensure a wider exposure to the party leaders. For 2006 Parliamentary election, four national debates took place, two in English and two in French and the consortium enjoyed total autonomy in their organisation since there are no formal legal provisions regulating political debates during an election⁵⁴.

Independently from the system of regulation, a consultation process with the stakeholders (media, parties and candidates) regarding rules and practical arrangements represents a good practice to create a legitimate and shared regulatory environment.

A second issue in relation to election programmes is **whether regulation should be imposed only on public media or also on private broadcasters**. The general trend is to define a certain level of obligations to publicly-founded media while private outlets may be subject to a lighter touch regulation: they have the choice whether to produce programmes on elections and candidates. Once they decide to do so, they should comply with the same principles of balance, non discrimination and impartiality regulating the public media. As in other areas a number of regulatory systems are in place with different obligations for private broadcasters. For instance, in France all broadcasters must comply with the rules on fairness set by the CSA, while in

⁵² Commission on Presidential Debates, Nonpartisan Candidate Selection Criteria for 2008 General Election Debate Participation, available at <http://www.debates.org/pages/candsel2008.html>.

⁵³ For an example of Memorandum, see the one signed during 2004 Presidential Elections by George Bush and John Kerry, available at <http://www.gwu.edu/~action/2004/deb04main/debateagreement.pdf>.

⁵⁴ OSCE – ODIHR, Election Assessment Mission to 2006 Parliamentary Elections in Canada, Final Report, available at http://www.osce.org/documents/odihr/2006/04/18710_en.pdf.

Germany private broadcasters can use their full editorial discretion when organising debates and roundtables as long as they adhere to professional standards for coverage.

A third area of controversy is related to the **allocation of time** in particular as for the choice between **equality or equity** and the criteria to assign this airtime. The same considerations as to PEBs apply here and we suggest to refer to Section A of this section for further discussion on this point.

Germany: editorial freedom in election coverage

In two judicial cases, certain parties demanded that their candidates be allowed to take part in an election programme to which only spokespersons of the parties represented in Parliament had been invited. In both cases, courts held that stations were free to decide in what way they wish to inform the voters about electoral issues and the position of candidates. However, if a broadcaster decides to invite representatives of campaigning parties to debate and expose them to questions of journalists, audience or competitors, then the editorial discretion of the station is more limited. These programmes are intended to give a general overview of the position of the parties and to present candidates and therefore they have to include all parties. Only fringe groups and parties with no relevance (on the ground of membership, past election results or other similar objective criteria) can be left out⁵⁵.

Another issue is related to the **timing of airing/publication and the outlet** where these programmes are made public as well as their structure. The same considerations as PEBs apply here: these items should be aired when they reach the largest audience, normally peak time. They should be the most popular national outlets. Election programmes should be broadcast/published in the main nation-wide media in order to enable parties and candidates to target the largest number of voters. In addition the structure of the debate or interviews should guarantee non-discrimination against any of the parties by leaving each of the candidates' time or space enough to express their message.

Finally some considerations should be elaborated in relation to best journalistic practices to achieve **due impartiality and balance**. In this regard, experience suggests that while the journalists hosting the programme have the duty to be impartial, non-political guests, such as other journalists, political analysts, experts, and ordinary citizens, can express their own personal opinions. What is important is that a variety and a balance of opinions is presented on controversial topics. In addition participation in these programmes should not be conditional upon the payment of any fees. Anchors, presenters and show-people who are also candidates should be prevented from appearing on video in their professional duties (on this point see also Section 3.2.3 Editorial Coverage, Current Affairs Programmes).

3.2.2 Paid access and political advertising

a. Paid political access, an overview of the main positions

Paid political access is an opportunity for all political parties or candidates to disseminate their messages through the media. While voters undoubtedly need as much information about contestants as possible to make an informed choice, paid advertising may give an unfair advantage to those parties or candidates who can afford to purchase more airtime or space. The debate concerning paid political advertising is ongoing, the positions reflecting cultural, historical and political traditions⁵⁶.

⁵⁵ E. Drück, *op. cit.*, note 27.

⁵⁶ Venice Commission, *op. cit.*, note 19.

Whereas in some countries paid advertising is the main mean of direct access for candidates, many European countries explicitly prohibit it. In principle “*Broadly speaking, countries with a long tradition of public ownership of broadcasting, such as France, the United Kingdom, and Denmark, have tended to be hostile to paid political advertising. Those with a stronger commercial broadcasting tradition - the United States represent the extreme - have tended to regard political advertising as natural. It is notable that the European country where commercial broadcasting is most dominant - Finland - should also be the one where unrestricted political advertising is permitted*”⁵⁷. Paid political advertising is forbidden by law in a number of countries including Belgium, the Czech Republic, France, Germany, Ireland, Malta, Norway, Portugal, Romania and the UK. The ban on paid political advertising can range from a wide-reaching prohibition regarding both print and electronic media (like in Romania), to a ban with a less restricted scope limited to all electronic media (Turkey where political advertising is permitted only in the press) or to some specific audiovisual outlets (like Spain).

Spain

In the case of Spain paid political advertisements are not permitted on public TVs and radios and on private TV channels. The ban does not include private radios. The reason for a prohibition that refers to private televisions as well as to public broadcasters lies in the legal status of commercial TVs. The Act 4/1980, 10 January 1980, of the Statute of Radio and Television defined television, as an “essential public service legally entitled to the State”; this conception has guided the whole regulation of the medium in Spain, including campaign regulations. In the case of commercial TVs, any private initiative appears as an administrative temporal concession of the Government, through the modality of public contest, giving private TVs the legal status of a public media.

The two contrasting positions regarding paid advertisement on audiovisual media can be summarised as follows:

a. Against paid advertisement: “*The argument against paid advertising is primarily based on the fact that it does not guarantee equal opportunities among contestants. Allowing parties to purchase airtime dramatically increases their campaign expenses thus favouring the richest and biggest parties. Paid advertising risks increasing the advantage of the ruling party over the opposition in those nations in which government positions are a basic source of financing. Also paid advertising, because of its proximity to commercials and the recourse to emotive appeals, risks misleading voters, thus depriving them of the possibility of making an informed and rational choice. Because of their nature, paid adverts favour image and neglect substance, simplifying complicated issues and impoverishing the content of election communication. Finally the usage of paid slots may undermine the autonomy of the media from parties’ influence, particularly regarding private broadcasters whose main source of finance is advertising*”⁵⁸.

b. In favour of paid advertisement: “*The argument in favour of paid advertising lies in the protection of freedom of expression. From this perspective, political parties should not be limited in their right to have access to the media and any kind of restrictions on paid advertising should be considered an undue limitation of the individual right to freedom of expression*”⁵⁹. Many of the countries which allow paid political advertising foresee certain legal restrictions to guarantee that all contestants receive the same treatment and have access to advertising space under the same conditions. Limits generally include also specific restrictions concerning the

⁵⁷ ACE Project, Media and Elections: Paid Political Advertising, available at <http://aceproject.org/ace-en/topics/me/mec/mec04/mec04b>.

⁵⁸ Ibidem.

⁵⁹ Ibidem.

amount of political advertising that a candidate or a party can purchase. The rationale behind the regulations of paid advertising is to create a more level playing field among parties and to decrease the amount of money involved in campaigns.

The issue of paid advertising is less controversial for private print media. Nevertheless, the press should follow the principle of equal opportunities: paid advertising must be guaranteed on an equal basis to all contestants by offering consistent and equivalent rates. Print media should identify material that has been paid for in a clear manner. Limits to the quantity of paid advertising parties are entitled to purchase may be imposed, as well as limits to the amount of paid pages the media can publish daily. In spite of these general guidelines national legislations differ a lot and often allow the press a wider degree of discretion.

Germany

There is no provision ensuring a right to paid advertisement in the private press in Germany. Newspapers are therefore entitled to deny paid space to parties. An exception to this general principle is when such denial happens in monopolised markets: "If for instance a party or candidate in a local election is denied paid access by the only outlet in the electoral district in question they may go to court to seek an injunction on the grounds of abuse of discretion and monopoly position"⁶⁰.

Belgium

In Belgium newspapers are entitled to refuse campaign ads if they are in conflict with their editorial statute or corporate charter. During 2007 Federal Elections the far.-right wing Vlaams Belang filed a law-suit against five newspapers that rejected their advertisement. In its decision, the Brussels Commercial Court considered political or ideological reasons as a legitimate basis for the refusal of a campaign advertisement, an argument advanced by three of the five newspapers. On the contrary, the Court did not regard practical and economic reasons as a sufficient ground for refusal, as invoked by the two other dailies. The Court therefore ordered the two newspapers to publish the Vlaams Belang's ads"⁶¹.

b. Political advertising: definitions and issues

The first area of debate regarding political advertising is related to its **definition**. Different national legislations define political advertising using different terms. In a number of countries there is no legal definition of political advertising as such, in others the regulatory authorities coined their own terms to clearly identify paid-for political space within the election campaign time frame.

The attempt to define the notion of political advertising needs to deal with two issues:

1. Direct access airtime/space: direct access time/space is considered to be a direct form of communication between politicians and voters, without any intermediary role by the media. Direct access time can be free-of-charge or paid for. The legal status of the two is different and pre-election campaigning regulations should be designed to be as clear and simple as possible on the distinction.
2. Political advertising and commercial advertising: do the provisions on commercial advertising provisions apply to election and political marketing? In some countries political advertising is subject to the general legal provisions on advertising including restrictions on the quantity of spots that can be aired per hour or limitations on the number of campaign spots in relation with non-political spots. In others it is subject to a separate regulatory regime (e.g. UK) even though in most cases a mix of the two regulatory systems applies.

⁶⁰ E. Drück, *op. cit.*, note 27.

⁶¹ OSCE – ODIHR, Election Assessment Mission to 2007 Federal Elections to Belgium, Final Report, available at http://www.osce.org/documents/odihr/2007/10/27430_en.pdf.

Political advertising can be defined as: a depiction of a political party, candidate, party logo, party program and activity which is paid for or otherwise compensated. Any print and broadcast material aimed at enhancing or diminishing the popularity of a political force should be considered advertising if there is a payment or some other compensation received. This definition encompasses both traditional slots and other forms such as sponsorship.

The first problem lies with the **notion of “political nature of the message”**. Advertising on social issues may be considered of political nature and therefore subject to restrictions applicable to political advertising.

The judgement of European Court of Human Rights in *VGT Verein Gegen Tierfabriken v. Switzerland*⁶², may have consequences on the countries which have a complete ban of political advertising as it is relevant for a number of aspects:

- Concept of political advertising: The Court stated that a slot could be regarded as "political", when it reflects controversial opinions pertaining to modern society in general, lying at the heart of various political debates - rather than inciting the public to purchase a particular product, and it does not necessarily need to be linked to a political party.
- Impact of the different regulatory treatment of political advertising for broadcasting and the press: further to Art. 10 (2), the exercise of the right to freedom of expression may be subject to restrictions if several conditions are met including when restrictions are necessary in a democratic society. This implies that the existence of a “pressing social need” is necessary to refuse to broadcast the commercial. The Court found that a prohibition of political advertising, which applied only to certain media (i.e. broadcasting but not the press), did not appear to be a particularly pressing need. However, the Court did not exclude that a prohibition of “political advertising” may be compatible with the requirements of art. 10 in certain situations. Nevertheless, the interference in the freedom of expression must be justified in a “relevant and sufficient manner”.

In sum, after the VGT’s decision, a ban on political advertising may be considered in line with Article 10 but state authorities will have to provide sound arguments to justify it and will have to elaborate a clear and sound definition of what is paid advertising.

The UK

The Make Poverty History (MPH) campaign is a British and Irish coalition of charities, religious groups, trade unions, campaigning groups and celebrities to increase awareness and pressure governments into taking actions towards relieving absolute poverty. TV ads ran for many months on British channels, urging people to speak to their representatives about stopping poverty. However, Ofcom banned the ads, deciding that the ads were "wholly or mainly political" in nature, since they aimed to "achieve important changes". In its decision, Ofcom stated:

a) MPH is a body whose objects are wholly or mainly of a political nature. In particular, MPH in its manifesto explains its objectives in the three identified areas of policy change: trade, debts, aid. MPH's website also encourages visitors to email the Prime Minister, Tony Blair using the MPH template to persuade him to use his international leadership to deliver crucial changes. Therefore MPH has expressly characterised itself in its manifesto as an organisation which seeks to achieve important changes to the policies of the UK government and those of other western governments. Lord Woolf states that when a regulatory authority approaches the question: what is the nature of a body's activities, and in particular whether they are to be regarded as objects which are "wholly or mainly political", he would expect the regulator to do "no more than examine its [the organisation's] statement of its objects". In

⁶² *GT Verein gegen Tierfabriken v. Switzerland*, Application N. 24699/94, (2001).

Ofcom's view, there is no doubt that the objects in MPH's manifesto (its "statement of objects") are wholly or mainly political

b) The MPH advertisements are directed towards a political end (...). Since the only call to action in this case is to visit the MPH website, and since the MPH website is fundamentally about supporting the lobbying and campaigning objectives of MPH, we consider that the advertisements are indeed "directed towards a political end"⁶³.

A second problematic issue is related to the notion of **third party advertising**. Many European countries have no regulatory frameworks which limit independent groups from spending money on behalf of a party and candidate. There are numerous definitions of "third party" organizations. One issue to consider is whether third party groups that are organised around an issue and those that are organised around a party should be treated the same. In Britain, so-called party foundations have been regulated by requiring parties to define them as accounting units in their organizational structure included in the global party accounts. In order for finance regulation to be effective, third party organisations need to be clearly defined and regulated.

Latvia

A controversial feature of the election campaign in 2006 was the use of "third-party" campaigning. In the Latvian context, third-party campaigning occurs when an organisation other than a political party campaigns for or against a political party, alliance or candidate. Three highly visible third-party campaigns were identified by the OSCE/ODIHR mission: The "Society for Freedom of Expression" placed TV advertisements praising People's Party ministers and was openly financed by Mr. Andris Skele, former Prime Minister and founder of the People's Party. During the campaign period the founder of this organisation, Mr. Jurgis Liepniks, was employed as Head of the Prime Minister's Office. Mr. Liepniks' involvement in "Society for Freedom of Expression" drew much criticism. Two days after election day, he resigned from his post at the Prime Minister's Office. The Pa Saulei organisation ("Towards the Sun") placed commercials promoting the First Party/Latvia's Way electoral alliance, and a campaign against Mr. Aivars Lembergs was conducted by an organization called To the City and the World. The legality and legitimacy of third-party campaigning on behalf of political parties and candidates was publicly criticised during the pre-election period by some political parties, NGOs, and others stakeholders as an attempt to circumvent campaign finance regulations. Some interlocutors stated that third-party advertising should be considered as a donation in kind to political parties and declared as campaign spending, thus potentially putting these parties in violation of the applicable campaign contribution and spending limits. However, other political parties and individuals stated their view of third-party advertising as a legitimate exercise of freedom of speech that is not prescribed by law⁶⁴.

With regards to paid advertisement a number of guidelines can be identified:

1. Non-discrimination requirement. The media should be required to provide paid campaign messages on a non-discriminatory basis. They should provide equal opportunities to parties and candidates; in other words, if they decide to sell time/space to one party/candidate then they must give the opportunity to others to purchase airtime at similar terms and under the same conditions. Consistent and equivalent rates should be offered to all contestants. Paid airtime/space should be available at the lowest rate normally charged to commercial advertisers.

United States

The Federal Communication Act of 1934 as amended provides that broadcasters have to offer equal time to all candidates for federal office. This must be available at the lowest rate charged to non-political

⁶³ Ofcom Broadcast Bulletin 43 (September 2005) - Make Poverty History (Various Broadcasters), available at http://www.ofcom.org.uk/tv/obb/prog_cb/pcb52/issue43a.pdf.

⁶⁴ OSCE – ODIHR, Limited Election Observation Mission to 2006 Parliamentary Elections in Latvia 2006, Final Report, available at http://www.osce.org/documents/odihr/2007/02/23213_en.pdf.

advertisers. *Equal opportunity implies that broadcasters making available time for purchase to one candidate must give the opportunity to others. These two key principles (non discrimination and lower rate rule) have been adopted by a number of other national legislations. These are crucial principles, which ensure that political advertising does not entirely become the preserve of those with the biggest campaign funds.*

Latvia

The “Law on pre-election campaigning before Saeima elections” regulates media coverage during the campaign. Political parties and individual candidates are entitled to place paid advertisements with public and private broadcasters. Broadcasters must provide all parties with equal conditions in terms of price and position in the broadcasting schedule⁶⁵.

2. Campaign spending ceilings/Monitoring campaign expenses. Limits to the quantity of paid advertising parties are entitled to purchase may be imposed to avoid that none of the parties is able to purchase its full allocation. Limits can be also set to the amount of airtime media are allowed to broadcast daily. Another way to regulate paid political advertising is to impose campaign spending ceilings (i.e. limits may be established on the amount of resources a list can spend for political advertising in the media in relation with its total campaign expenditure). In order to effectively monitor campaign spending, accounting of the advertising expenditures made during the election period by parties and candidates should be clearly identified in the financial reports to the relevant authority.

Many countries have introduced limits to paid ads as a standard guarantee of the principle of equal opportunities. This is a position in contrast with US jurisprudence that considers any kind of limits to political advertisement as unconstitutional, being a violation of the First Amendment: in the landmark case *Buckley v. Valeo* the Supreme Court held that limits to campaign expenses by candidates “*heavily burden core First Amendment expressions*” and “*The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive or unwise*”⁶⁶. Even though controversial, this decision determined the structure and the framework (or lack of it) for political campaigning in the media in the US.

At European level, the Council of Europe has taken a more flexible position: “*When paid political advertising is allowed, all contestants should have the possibility to purchase airtime, on equal conditions with respect to their position in the schedule and the rates of payment. Provisions limiting the amount of political advertising candidates and parties are allowed to purchase can be introduced in the regulatory framework*”⁶⁷.

Canada

“The Canadian Radio-Television and Telecommunications Commission (CRTC) has devised the following rules for allocating time for paid political advertising:

- *There is a limited total amount of time to be purchased - set at six and a half hours in 1990.*
- *Only parties properly registered with the election authorities are eligible to purchase time.*
- *The CRTC then calls a meeting of the representatives of all eligible parties to divide the time among them. If the party representatives are unable to reach agreement, then the CRTC makes its own allocation. In the 1979 and 1980 general elections the formula agreed by the party representatives was composed of the proportion of the vote each party received in the previous general election; the number*

⁶⁵ Article 7. (1) of the law states that if Latvian Radio or Latvian Television grants paid broadcast time all contestant should be given the opportunity to use equal broadcast time at hours of comparable worth and at a cost which is in line with the pricing provided for by Latvian Radio and Latvian Television for the use of broadcast time for campaigning as published in the procedure set by this Article. Not later than 270 days prior to election day, Latvian Radio and Latvian Television shall publish in the newspaper “*Latvijas Vēstnesis*” the pricing of broadcast time for campaigning from the 270th day before election day until election day.

⁶⁶ *Buckly v. Valeo*, 424 U.S. 1, (1976).

⁶⁷ Council of Europe, Recommendation No. R (99) 15, *op. cit.*, note 17.

of seats held in the national House of Commons before dissolution and the number of candidates nominated in the previous elections, with the first two factors double-weighted. This method allows flexibility between elections so that, for example, a different formula could be utilised in the event of a new party fielding candidates at any particular election.

- Once the total time has been allocated, each party is free to purchase as much of its allotted time as it wishes and to use that time as it wishes. However, the overall spending limits set on election spending mean that usually none of the parties is able to purchase its full allocation”⁶⁸.

Serbia

Private electronic media are not entitled to sell more than 120 minutes of paid advertisement per day, only 30 minutes of which could be during prime-time, from 18.00 to 22.00.

Spain

Limits are established by the Election Law on the amount of resources a list can spend for political advertising in the print and on commercial radios in relation with its total campaign expenditure. Political advertising in the media shall not exceed 20% of a party’s total campaign expenditure.

3. **Restrictions on content.** Many of the considerations regarding prior censorship of PEBs apply here too. In principle there is a general disfavour towards any kind of prior censorship of political messages. However, the media have the right to protect themselves against the dissemination of any illegal or improper material (such as material likely to incite racial or religious hatred, defamation in the form of libel⁶⁹, etc.). One of the possible solutions – as already mentioned in the previous section- is the drafting by the regulatory body of a precise and publicly available list of restrictions of what candidate can say during their slots.

These limits should be consistent with the principles set by international standards (necessity, legality, proportionality, legitimacy). An alternative might be not to supervise the content at all, thus leaving the responsibility with the candidates and the consequent possible risk of having their slots refused. Whatever regulatory system is adopted an appeal process should be in place to protect the right of candidates in case of refusal.

United States

The Federal Communications Commissions (FCC)- the body administering the federal Communications Act (FCA) - allows no station censorship of the content of political advertisement based on the First Amendment prohibition of any restraint on content and format of political speech. Therefore broadcasters are held to be exempt from any claim of libel or slander arising from a paid advertisement aired on their station.

Croatia

An Ethics Commission is established under the law (Articles 90-93 of the Electoral Law) during the electoral period as a “supra-partisan” body to address the “election advertising” and related behaviour of election participants under an Election Code of Ethics. During the 2007 campaign the Ethics Commission agreed with the refusal of some TV channels not to broadcast a right-wing political party slot claiming that the Prime Minister had “sold” indicted war criminal general Ante Gotovina to the International Criminal Tribunal for the former Yugoslavia (ICTY) to secure Croatia’s acceptance as an EU candidate. Decisions of the Commission are not legally enforceable; nevertheless they might affect the rights and interests of election participants and others⁷⁰.

⁶⁸ R. Carver, in ACE Project, Media and Elections: Canada - Paid Political Advertising, available at <http://aceproject.org/ero-en/topics/parties-and-candidates/canadapoladv>.

⁶⁹ The term “Defamation” refers to a false statement that injures someone's reputation and exposes him to public contempt, hatred, ridicule, or condemnation. If the false statement is published in print or through broadcast media, such as radio or TV, it is called libel. If it is only spoken, it is called slander. Because of the wider reach of the printed word, libel is generally considered the more serious offence of the two.

⁷⁰ OSCE-ODIHR, Limited Election Observation Mission to 2007 Parliamentary Elections in Croatia, Final Report, available at http://www.osce.org/documents/odihr/2008/04/30928_en.pdf.

4. Transparency/Labelling. Any paid political advertisement appearing in print media or broadcast shall be clearly identified or marked as a paid advertisement. Media should identify in a patent manner paid space or party sponsored slots in order to allow voters to be aware of the propagandistic nature of the programme. Such a position is clearly expressed by the Council of Europe: “A paid political advertisement should be clearly recognizable as such by the public”⁷¹.

United States

The Federal Election Campaign Act requires to clearly identify sponsorship in political advertisements. Additionally the FCC requests that political slots carry a disclaimer identifying who is paying for them (the party, the candidate or any other supporting groups).

Serbia

According to the General Binding Instructions for Radio and Television Stations on Conduct of the Local, Provincial and Republican Parliamentary Elections of 2008, all pre-election programs, reports, advertisement blocs, and polls on television must be clearly marked as “election program”, and paid airtime must continuously carry the disclaimer “paid time”.

5. Schedule and placement. Paid advertisement should not be placed in a way to mislead audiences about its election propaganda nature. In order to avoid such confusion some national legislations provides specific limits regarding the genre of programmes that can be interrupted by paid slots.

FYR Macedonia

For the extraordinary Parliamentary Elections in the FYR Macedonia in 2008 the Broadcasting Council adopted a provision to regulate the placement of paid political advertising in the programme schedule during the election campaign, which stated: “Paid political advertising may not be broadcasted during news, other daily informative programs, special informative programs, during children, school and educational programs, as well as during live broadcasts of religious, sporting, cultural entertainment and other events.”

6. Third party ads and disclosure statement requirement. The principles of transparency and fairness apply to all participants in the electoral process. Third parties - persons or groups who are not candidates or registered parties and pay for a communication that promotes the success or defeat of a political contestant - are often used as a way of evading legal limits on campaign expenditures. Transparency measures may thus be imposed on election advertising by third parties. For instance, any third party electoral propaganda must include the words “paid for by” and the name of the person or group who paid for the purchased space.

United States

In the US a specific category of ads is labelled as “issue ads” because they address issues rather than advocate for or against a candidate. For this purpose the Bipartisan Campaign Reform Act⁷² (BCRA) established a new category of paid messages labelled as “electioneering communications” and tried to bring them within the Constitutional reach of Federal Election Campaign Act⁷³. The BCRA prohibits corporations and trade unions from running or indirectly financing electioneering communications identifying or targeting a federal candidate within 60 days of a federal general election. Electioneering

⁷¹ Council of Europe, Recommendation No. R (99) 15, *op. cit.*, note 19.

⁷² The Bipartisan Campaign Reform Act of 2002 (BCRA, McCain–Feingold Act, Pub. L. 107-155, 116 Stat. 81, enacted 2002-03-27) is a US federal law that amended the Federal Election Campaign Act of 1971, which regulates the financing of political campaigns. Its chief sponsors were Senators John McCain (R-AZ) and Russell Feingold (D-WI). The law became effective on 6 November 2002, and the new legal limits became effective on 1 January 2003.

⁷³ The FECA requires for sponsor identification in ads.

communications that are coordinated with a candidate are treated as a contribution and limited according to the contribution limits to election expenses⁷⁴.

7. **Institutional advertising.** As a best practice, during election periods public service advertising – publicising some public services promoted by government agencies – should not be aired so to avoid any controversy regarding their value (public information or hidden propaganda?). If broadcast is allowed these kinds of ads should not be considered in principle campaign advertising unless they clearly promote a particular party or candidate, in which case they can be classified as a misuse of administrative resources and as such they can be subject to sanctions and complaints as set forth by relevant laws and regulations.

Italy

The Law on Political Communication prohibits all public administrations to carry out activities of public communications for the whole election period. The only exception to this rule is for “impersonal communications necessary for the fulfilment of institutional functions”.

c. Hidden advertising

The very complex problem rests in the malpractice of advertising material that is not appropriately labelled as such and presented as regular editorial coverage. This practice is obviously against professional standards and journalistic ethics: hidden advertising in a media outlet represents a clear breach of basic journalistic values.

The first question is the **definition and nature of hidden advertising**. This is different from the practice of media bias. The latter can be defined as a real or perceived predisposition of journalists within the mass media, in the selection of events and actors to be reported and how they are covered, but it is not based on the exchange of money or other goods. The term usually refers to a pervasive or widespread bias contravening the standards of journalism, rather than the perspective of an individual journalist or article. Also, hidden advertising must not be confused with “political marketing”. While the former is a type of bribery, based on the exchange of money or other benefits between candidates-politicians and the media, the latter is a form of information management used by communication specialists hired by parties to influence voters about political issues, particular candidates for public office, or public issues⁷⁵. The nature of political marketing is highly controversial, this form of communication being regarded as propaganda aimed at influencing the behaviour of large numbers of people. In this regard, the media are often seen as “tools” – rather than partners in crime - for the implementation of marketing strategies by spin doctors and communication specialists⁷⁶. There is an important difference between the two also in terms of regulation: while forms of control for the former can be established, legal control for the latter can be hardly defined being political marketing a strategy of campaign to achieve visibility and to influence voters. For instance, how can the legislator sanction the organisation of events aimed at attracting media attention?

It is therefore important to clearly identify what kind of messages falls in this category so to avoid over restrictive regulations and sanctions.

Armenia: episodes of alleged hidden advertising

⁷⁴ L. Lee Kaid – C. A. Jones, “United States of America”, in B.-P. Lange and D. Ward (eds.), *The Media and Elections: A Handbook and Comparative Study* (London: Lawrence Erlbaum Associates, 2004).

⁷⁵ P. Kotler and N. Kotler (1999). *Political marketing: generating effective candidates, campaigns, and causes*. In Bruce I. Newman (ed.) *Handbook of political marketing*. (Thousand Oaks.: Sage Publications, 1999).

⁷⁶ P. Norris., J. Curtice, D. Sanders, M. Scammell, and H.A. Semetko, *On Message. Communicating the Campaign*. (London: Sage, 1999).

During 2007 Parliamentary Elections many civil society groups expressed concern that the regional television companies refusing political advertisement attempted to escape the attention of election monitors and gain a chance to provide hidden advertisement. In this regard, Boris Navasardyan, chairman of the Yerevan Press Club, stated: "It is an opportunity to selectively decide whom to advertise as there are no legal grounds to blame them for creating unequal conditions". According to many monitors, prior to the start of the official campaign the television channels were already filled with that kind of hidden political advertisement, which is a violation of Article 11 of the RA Law on Television and Radio. The International Research and Exchange Board – an international non-profit organisation providing leadership and innovative programs to improve the quality of education, strengthen independent media, and foster pluralistic civil society development –reported that some channels violated the law in favour of various pro-governmental parties and none of the television companies brought to responsibility for such "advertorials"⁷⁷.

In general terms, hidden political advertising can be defined as information regarding politicians and parties against pay or other agreement with the purpose of influencing viewers and not as a result of a journalistic evaluation.

Latvia: Hidden advertising at a glance. How to identify it

During 2006 Parliamentary Elections hidden advertising became one of the most controversial issues in terms of regulation.

Legal provisions

The current Law on Radio and Television (Section 2, Paragraph 13) defines hidden advertisement as:

"hidden advertising is the performance, for the purposes of advertising, of such a representation in a broadcast by means of sound or image, of goods, services, the name, the trademark, or the type of activities of a producer of goods or a provider of services, which by its nature may mislead the audience. Such a representation shall be deemed to have been deliberately performed, especially in the case, if payment or some other kind of remuneration has been received for it."

Definition

The Public Policy Centre "Providus" carried out an analysis of cases of possible hidden advertising in the media. The project was established the first time for the municipal elections 2001, repeated prior to the parliamentary elections 2002 and the municipal ones in 2005. According to their project methodology hidden advertising can be described as: an advertising of a political party (or of a candidate, party activities, party beliefs or party logo), without clearly marking the material as paid and presenting it as a daily programming of a TV/radio or a daily article in a paper with the aim of enhancing or diminishing the popularity of a political force. The word advertising here means paid or otherwise compensated.

Providus project did not take into account as possible case of hidden advertising in the print media editorials, columns or other comment-type articles which are clearly separated from the news and express the opinion of the editorial staff, other authors or the readers, based on the assumption that newspapers may have their political opinion.

Examples

Providus set specific criteria in order to identify cases of possible hidden political advertising.

Examples of possible cases of political hidden advertising as described by Providus included:

- Appearance of a party logo or symbol that are not connected with the specific article or report.*
- Appearance or mentioning of a party or candidate without an obvious reason and not newsworthy.*
- Repeated publication or broadcasting of a report/article featuring a candidate.*
- During an interview, a journalist asking questions in order to enhance the positive characteristics of a candidate.*

Problems in the definition

Extensive visibility or not newsworthy coverage for a party/candidate can be the result of the sympathetic attitude of the media towards a political party. In this case the extensive or favourable coverage can be described as media bias. Not all media bias qualifies as hidden advertising.

⁷⁷ IREX, Television: How is the great persuader performing pre-May 12?, available at http://www.irex.org/newsroom/inthepress/07/0419_ArmeniaNow.asp.

Also since it is not possible to establish by analysing the media material if a payment or compensation actually exists, Providus used the phrase POSSIBLE cases of hidden advertising. That is to say that they work on the assumption that the material monitored may be the result of a deal (payment or compensation), but without the assumption of the validity of this claim”⁷⁸.

It is problematic to ascertain the **effects** of hidden advertising on voters and citizens. In this respect, a key issue is whether the cases of hidden advertising are detected or not as this element will influence to a great extent the perceptions of the public and their trust both in the media and in political actors. On a general level it is possible to identify likely short term and long term consequences:

Table 1 Possible effects of hidden advertising⁷⁹

| | Short-term effects (if not detected) | Long-term effects (if detected) |
|----------------|--------------------------------------------------------------------|-------------------------------------------------------------------------|
| On contestants | More consensus | Less consensus Loss of credibility |
| On public | Receives biased information Choice flawed by faulty information | Loss of trust in the media Loss of trust in contestants and policies |
| On media | More income | Less income Loss of credibility |

Hidden advertising itself presents a number of challenges with regards to its **regulation** and **enforcement**. While the legislator can foresee measures aimed at discouraging and banning this practice, the possibility to enforce such provisions seems more complex. In many cases it may be impossible to prove that a candidate paid a journalist or a media outlet to receive more positive or larger coverage. Like in many other areas of corruption, finding actual evidences of the offence is difficult and the regulator may not have the investigative resources leading to prosecution.

Latvia: monitoring the cases of alleged hidden advertising

During 2001 Local Elections, the civil society organisation Providus monitored election coverage on 12 national and regional newspapers and 4 national TV stations. The aim of the project was to find out whether there was journalistic coverage that could be classified as hidden political advertising. The main conclusion was that the monitoring detected cases that did not automatically imply that they were hidden political advertising. However those cases showed that professional and ethical principals in journalism were breached and this could be both a result of ‘buying the media’ and/or lack of professionalism. The main results showed that many programmes displayed cases of possible hidden advertising:

⁷⁸ M. Marchese, Internal Explanatory Note on Hidden Advertising for the OSCE – ODIHR, Limited Election Observation Mission to 2006 Parliamentary Elections in Latvia 2006.

⁷⁹ This table is based on a template elaborated by the Centre for Public Policy Providus (Latvia).

Table 2 Possible cases of hidden advertising in Latvian television programmes

| TV channel | Program | Number of suspicious cases (in actual numbers) |
|------------|-------------------------------------------------|---------------------------------------------------|
| LNT | "LNT Brokastis" | 80 |
| LTV-2 | "Biznesa ekonomika, Diskusija. Apskats. Smaids" | 37 |
| LTV-2 | "Medicīna un mēs" | 8 |
| LNT | "Velešanas gaidot" | 8 |
| LNT | "Viļņa Rullīša sarunas" | 8 |

Source: Providus, Media Monitoring of 2001 Local Elections in Latvia

The project identified a number of practices that may suggest that broadcast information was actually hidden advertising:

- several interviews with certain candidates were broadcast in TV programmes while other prominent contestants were not invited at all;
- invited candidates were asked simple and pleasant question;
- several "portrayal interviews" of selected candidates were broadcast;
- leading journalist increasingly used positive superlatives when describing their selected guests;
- the politicians were often not presented as persons that were candidates for local elections;
- advertising interrupting the programmes was very similar to the editorial material broadcast during the programme.

A key dimension related to detection and investigations of hidden advertising is the issue of **media ownership** and the role that media tycoon can play in influencing editorial choices. As a matter of fact, unlabelled propaganda is even more hardly verifiable when a candidate is also the owner of a television or radio station that openly supports him or her. In such cases it might be extremely difficult to ascertain whether the support is the outcome of an autonomous editorial choice or rather is the result of financial and professional pressures. In addition, given the proximity between the ownership and media professionals, investigations regarding hidden advertising may be more burdensome as access to documents and financial evidences may be hampered or misguided (e.g. by falsifying financial accounts of the media outlet).

In spite of this limits, a few options are available to the election monitoring bodies or media authorities to address this phenomenon. Targeted provisions against hidden advertising may be included in election or media laws, specifying which cases are considered to be potentially hidden ads and how such cases will be examined. Additionally sanctions against corruption – as set forth in the relevant criminal or corruption laws - may be foreseen in relation to media bribery.

Stronger regulation of editorial matters, by determining the degree of coverage for each contestant, represents another possible way to address the problem of hidden ads, even though many would argue against it as being too draconian. As a matter of fact, control over editorial programmes does not ensure that hidden advertising is not broadcast, rather it poses an indirect limit to the amount of airtime candidates can influence through bribery. Some countries have introduced a requirement of equality of treatment for parties and candidates in news and current affairs programmes. The regulator monitors then election coverage and may impose sanctions in case of breaches.

France

The French regulator CSA is responsible for monitoring and evaluating compliance to the measures for the terrestrial national channels. This enables speedy and efficient calculations to be made and any broadcaster which breaches the balance and fairness rules can be notified and the imbalance can be addressed as soon as possible. For each candidate the CSA calculates the speaking time granted to him or her on the terrestrial national channels together with the total airtime that is allocated to the candidates (the speaking time of the candidate together with the commentary and analysis on the candidate). The CSA therefore measures speaking time and the amount of airtime allocated that is related to various topics devoted to the candidates. This enables the CSA to check if airtime is equal among the various candidates. Other broadcast media are required to submit details to the CSA about the speaking time on their channels to allow the CSA to monitor compliance to the rules and regulation.

Candidates and political organisations are entitled to write to CSA to call its attention to alleged unfair treatment of their candidates. The CSA acts here as a mediator between broadcasters and parties: for each claim it carries out an investigation⁸⁰.

Additionally, many countries explicitly prohibit the participation of candidates and politicians in programmes other than election related items (e.g. entertainment, sport, documentary films, etc.) during the election period.

Finally, the media's professional bodies and civil society organisations have an important role to play in combating the practice of hidden advertisement. Their involvement and support in regulation and campaign against this custom represent an effective tool to reduce it. Media organisations should be encouraged to adopt codes of conducts and sanctions against their members that accept money and other benefits for covering candidates and parties while non partisan NGOs should be supported in their efforts against hidden propaganda.

Moldova: civil society groups against paid advertising

The Civic Coalition for Free and Fair Elections – “Coalition 2007” is an organisation whose main aim is contributing - through assistance, activities, monitoring and analysis - to the conduct of free and fair local elections, as one key democratic element for Moldova. They issued a Charter of Free and Fair Elections that includes, among other provisions, a specific requirement against hidden advertising.

Clause 15 states that election advertising shall be paid for only from legal sources of funding existing in special election accounts and the subjects of the election process (candidates and parties) shall refrain from cash payments for services rendered to them. Clause 16 expressly prevents the media and journalists from carrying out hidden election advertising or negative advertising in the form of tendentious and unilateral stories, analyses or commentaries containing unverified or false information.

The observation of the provisions of the present Charter was supervised as part of monitoring programs of the Civic Coalition for Free and Fair Elections – “Coalition 2007”. The subjects of the election process who agreed with the principles of the Charter of Free and Fair Elections exchanged information concerning compliance with the Charter and other issues that appeared during the preparation, organisation and conduct of elections. The organisations working for the monitoring programs of the Civic Coalition for Free and Fair Elections - “Coalition 2007” - publicised the names of the election subjects who violated the principles and standards of the Charter.

Albania: lack of awareness regarding the regulation and the professional standards on paid advertising

During 2003 Local Elections, the ODIHR Election Observation Mission found out that local televisions sold airtime in talk shows and debates to candidates. The practice was not concealed as brochures with rates and conditions were available on request. This form of hidden propaganda breached the law on paid advertising during the election campaign in terms of limits to paid airtime that televisions were allowed to broadcast and in terms of labelling of campaign material. However, when questioned about this issue, local broadcasters declared they were not aware of any regulations in this regard and it was

⁸⁰ E. Mauboussin, *op. cit.*, note 37.

their right to sell airtime to election contestants. Such statements revealed on the one hand a complete lack of awareness of relevant regulations and on the other a deficient understanding of professional responsibilities and duties of the media towards the public.

3.2.3 Editorial coverage

This third category can be defined as programmes under the editorial control of the media outlet and where the mediation of journalist plays a central role. Programmes falling within this category include news bulletins, current affairs programmes, talk shows, discussion programmes. The subjects covered by these shows may be politics, issues of public interest as well as elections and the choice of their topic is – or should be - normally based on the criteria of newsworthiness. The regulation of this genre during election periods is often problematic as the right of the media to freely report and candidates' right to equitable coverage seems sometimes in conflict. Additionally, journalists generally perceive any attempts to regulate their activity as an undue interference by public and political authorities.

Journalists often face a number of ethical and professional dilemmas when reporting on elections and on candidates. The main one is related to the conflict of newsworthiness versus balanced coverage. Professional standards normally require the media to cover those events that are interesting and relevant for the public, on the basis of their professional judgement and practices. On the other hand voters need diverse and complete information regarding political alternatives and not all of them are likely to be newsworthy (e.g. small political parties may not have public events attracting media attention). How can the media balance between their news-gathering role and their public service function?

This issue is particularly sensitive as it puts into question the freedom of the media to report and the criteria on which reporting is based. In most of national regulations there is a provision regarding the requirement for broadcast media to be impartial, accurate, fair and balanced in their election coverage. The definition of these terms may be problematic as the same word can mean different things for different audiences. What is the meaning of balanced and objective coverage? Is balance equitable coverage independently of news value? And doesn't the requirement of balance conflict with the right to report?

To solve these impasses, many media organisations have drafted internal codes of conduct to clarify these terms. Also, where some level of external regulation is imposed on media outlets, the regulator has issued guidelines and recommendations on the implementation of these principles.

UK

Both the public and private terrestrial broadcasters have adopted codes of conduct specifying in detail how to achieve balance, impartiality, objectivity and fairness in editorial reporting. The BBC's Editorial Guidelines set forth a number of principles that inform editorial coverage.

Principles of political impartiality

We must treat matters of public policy or political or industrial controversy with due accuracy and impartiality in our news services and other output.

We must not express an opinion on current affairs or matters of public policy other than broadcasting.

We must not campaign, or allow ourselves to be used to campaign.

Chief Adviser Politics advises on all matters in this section of the guidelines.

Broadcasting during elections

Our commitment to impartiality and fairness is under intense scrutiny when we report election campaigns. All political parties will seek to influence editorial decisions. Content producers should take all complaints seriously and be aware that anything they say may be construed as "BBC policy". We

should explain that general complaints or allegations of bias must always be dealt with at a higher level, and refer them accordingly. We should make, and be able to defend, our editorial decisions on the basis that they are reasonable and carefully and impartially reached. To achieve this we must ensure that:

- news judgements continue to drive editorial decision-making in news based programmes.*
- news judgements at election time are made within a framework of democratic debate which ensures that due weight is given to hearing the views and examining and challenging the policies of all parties. Significant minor parties should also receive some network coverage during the campaign.*
- they are aware of the different political structures in the four nations of the United Kingdom and that they are reflected in the election coverage of each nation. Programmes shown across the UK should also take this into account.*

The way in which due accuracy and impartiality is achieved between parties will vary. It may be done in a single item, a single programme, a series of programmes or over the course of the campaign as a whole. But content producers must take responsibility for achieving due accuracy and impartiality in their own output and not rely on other BBC services to redress any imbalance for them⁸¹.

Belgium

The CSA (Conseil Supérieur de l'Audivisuel) is the regulator for audiovisual media in the French-speaking Community. For the election period, the CSA issues non-binding Recommendations directed to all audiovisual media and covering the three months period campaign. The Recommendations refer to a number of general principles, some of legal nature, others inspired by journalistic best practices. Among the former, the recommendation to refrain from giving access to political groups or parties whose manifestos and ideologies are in breach of the federal laws against racism and xenophobia. As suggested by the Recommendations, the majority of broadcasters adopt then an internal plan for election coverage that is normally publicly available. Other relevant provisions include the necessity to broadcast balanced and pluralistic debates among candidates of the main parties and to provide information on parties that for legitimate reasons were excluded from debates. The public service broadcasting RTBF adopts a very detailed election plan which adopts the principle of proportionality to regulate the access and the coverage of candidates in newscast and debates.

The following section will explore three main issues related to this genre of programmes: the role of professional standards, the advantage of the incumbent and the types of regulation available.

a. The role of professional standards

Professional standards for journalism and deontological codes are a crucial reference for standard setting in this area of media coverage.

Fairness, balance and impartiality are of particular importance in these programmes as many citizens form their voting intentions on the basis of the information they receive from news and current affairs programmes. *“In principle, broadcasting media should cover elections and candidates according to professional and ethical standards. Journalists should not favour or disfavour any political party or candidate and should avoid commenting on politicians’ statements or activities in newscasts. A basic principle of journalistic ethics is the necessity of differentiating between news and opinion. It is vital to ensure that the two forms of journalism are not mixed together. A piece of news is information about facts and data, whereas an opinion implies thoughts, ideas, faith, or attitudes on the part of the companies running the media, editors, or journalists. Differentiation between information and comment implies that a message should allow receivers to tell facts from opinions.*

Editorial programmes should also provide viewers with diversity of views and voices and not to discriminate among parties and contestants. They should offer a balanced presentation of

⁸¹ BBC Editorial Guidelines, Politics & Public Policy, available at <http://www.bbc.co.uk/guidelines/editorialguidelines/edguide/politics/principlesofpol.shtml>.

information on political subjects. Balance means that each party has an opportunity, proportional to its political weight to present facts or to comment on any given event or issue. If a party refuses to comment on a particular issue, or if all attempts to contact a party representative fail, this should be mentioned in the news item.

The media should provide accurate, fair, and undistorted information on electoral contestants. Journalists, editors, producers, and proprietors should make sure that the information they publish is truthful and ethical. The facts should be presented without distortion and in their proper context. If a report is published that is inaccurate, a correction should be published with equal prominence as soon as possible.

All media should permit replies and corrections within their programmes or publications during an election campaign period. This rule relies on the same principle of balanced and fair treatment of the contestants, which should be respected by all media during a campaign. If a political subject is attacked by another politician (or anybody else) in a programme where he/she is not present, it is reasonable to offer the person attacked a chance to reply in the following days.

So far as is reasonably possible, the media should also ensure that every piece of news contains only facts that are verified by independent sources identified in the news item. The media should not distort facts. In determining the order of importance of the individual pieces of information, the media should impartially and objectively distinguish between relevant and irrelevant information. Journalists must not accept or ask for financial rewards for covering the activities of parties and candidates.

The media should not manipulate pictures or sound so that the choice of words or other means of expression, a change in tone, a shift in stress, or editing distorts the meaning or value of the report. The media should not broadcast a report based on unverified information, rumours, or with the intention of creating a scandal. If a media outlet decides that such a story is still important enough to publish despite the fact that it cannot be verified, it should do so with a warning saying that the facts could not be verified⁸².

b. The advantage of the incumbent⁸³

The particular controversial issue in this area of broadcasting is related to the advantage of the incumbent government. Being part of the government means more attention from the media because of their need to cover the Ministers activities which may include official events, meetings, and the implementation of policies. Events can be genuine and relevant (such as national celebrations or anniversaries), genuine but marginal (such as the opening of public buildings), and pseudo-events (occasions created or managed by the government with the aim of getting better or wider media coverage). The government is also the main policy maker, and coverage is necessary to keep the public informed.

Members of the executive act in the interest of the whole nation, but, on the other hand, they often represent a political party. This dual identity becomes particularly problematic during an election campaign in relation to two rights:

1. The right of equal opportunity to access for candidates, a right that has to be balanced with the freedom and obligation of the media to cover government activities;

⁸² Venice Commission, *op. cit.*, note 19.

⁸³ This section is an integral part of the Venice Commission's guidelines, *op. cit.*, note 19.

2. The right to equal treatment for candidates. News related to the incumbent government may sometimes be framed in a positive light because of the kind of events covered (for example, official meetings, international summits, etc.).

This is a trend that can often be observed in transitional democracies, where members of the government can try to disguise election campaign activities or propaganda within the framework of their institutional activities or public information campaigns. During an election campaign, it is not rare to observe government ministers inaugurating buildings, giving speeches to students, organising international meetings, or launching a new programme against drug addiction to obtain additional coverage by the media. The distinction between the two kinds of activities is not always simple to define, even for the independent media.

In principle, however, while there is universal recognition that incumbency has certain advantages, incumbent candidates should not misuse state resources, whether material or human, to promote their political parties or candidatures. Therefore the media should be consistent in separating the activities of incumbent powers from the activities they pursue as the representatives of political parties running in an election. Public authorities should not enjoy any privileged treatment on the part of the media during election campaigns. The ability of the media to resist this influence largely depends on their strength and autonomy. In contexts where the media system is not strong enough to counterbalance the influence of political power, measures to protect journalists' autonomy may be needed to limit or prevent the government's advantage. Strict rules for government coverage in broadcast media can include:

- measures such as banning ceremonies attended by the government,
- a right of reply by opposition parties to news of public interest, and
- setting proportions of coverage among government, majority, and opposition parties within news coverage and information programmes.

France: regulation for the coverage of government officials

In order to reduce any risks of manipulative use of official positions, France's broadcasting authority, the CSA, issued very detailed rules for the presidential election of 2002. In particular, the interventions of any candidates holding an official position were regarded as electoral communications and therefore calculated within the airtime allocated to that candidate. The same rule was applied for officials who were not candidate but who supported one of the presidential candidates. The only exception to this norm was when candidates were talking as part of their institutional duties (without mentioning their past activity or their political platform).

In addition, the CSA prohibited candidates from using their allocated airtime to show footage of themselves inside official buildings, as this might benefit those candidates holding official positions. As the CSA stated, "This restriction aims at impeding any misappropriation of official symbols by a candidate. It allows the application of the basic principle of neutrality of the State towards candidates, which is the corollary of the principle of equality."⁸⁴

c. Regulatory models: self-regulation, co-regulation and external regulation

The duty to fairly report on political alternatives is particularly impingent on public media. Some national legislations set out this broad obligation in the broadcasting law or election law. In other countries a general obligation of balance and fairness is established in the founding charter of the public media. In both cases the public media are then free to define their own practical and professional arrangements to achieve such balance and fairness (for instance the UK). Other countries have adopted a more stringent regulatory approach, by defining in details rules for

⁸⁴ Unofficial translation from the CSA's report "Election du Président de la République, Rapport sur la Campagne Electorale à la Radio et à la Télévision", Paris, 2002.

coverage, content and allocation of time devoted to political actors and candidates (like in Albania). In this case, the distinction between election related programmes (discussed in Section 3.2.1) and current events programmes becomes more blurred as similar rules will often apply to both thus limiting the editorial discretion of the media.

These two diverging approaches reflect to a certain extent national different historical and political traditions and experiences. The need for very strict control over election coverage is often justified by “*the history of bias and unprofessional reporting by state and government-controlled media. On the other hand, the impulse towards microscopic content-regulation is itself part of the legacy of political dictatorships. How far regulatory authorities should prescribe how the publicly-funded media report - and how far the media will best learn by making their own mistakes - is an imponderable question to which every new democracy will have to find its own answer*”⁸⁵.

The Council of Europe has acknowledged the legitimacy of both approaches: “*Provisions for newscasts and current-affairs programmes should ensure fairness, balance, and impartiality. This normative framework can be either a result of self-regulatory mechanisms implemented by the media or a product of norms enshrined in the domestic electoral and media laws. Electronic media should not offer any privileged coverage to public authorities (including government officials). The bodies in charge of monitoring the compliance of the media with the provisions regulating electoral coverage should remedy such shortcomings. As for other programmes, broadcasters should avoid giving an unfair advantage to politicians invited to talk shows or other similar programmes, as these programmes might also have a certain influence on the perceptions and behaviour of voters*”⁸⁶.

The regulatory approaches can be classified in three main models:

1. Self – regulation is the system by which a media organisation deals with its own disciplinary and legal issues, without being publicly regulated by an external body. This model applies normally to the private press that issues internal codes of conduct and guidelines on professional ethics. Often the regulatory body in this system are voluntary media councils or press councils acting as complaints mechanisms for members of the public (including candidates) who have a grievance about the way a newspaper or broadcaster has covered a particular issue. They may also conduct training of journalists.

United States

*Many voluntary associations of mass-communication specialists have adopted codes of ethics or standards of practice that govern the conduct of their members. Electronic journalists also are signatories of a number of codes including the Code of Ethics and Professional Conduct of the Radio-Television News Directors Association UNCLEAR Sentence. This Code calls for news professionals to conduct themselves according to specific standards in six areas: public, trust, truth, fairness, integrity, independence and accountability*⁸⁷. In addition, there are specific legal provisions exempting news from obligations normally imposed on electronic media during the election period. As a matter of fact the 1934 Communications Act places some obligations on television and radio broadcasters: Section 315(a) of the Act states that if a broadcaster permits a candidate to use broadcast time, the broadcaster “shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station”, except where the initial broadcast was a documentary, interview, or news coverage of the candidate. The text of the exemptions states: “(1) bona fide newscast, (2) bona fide news interview, (3) bona fide news

⁸⁵ ACE Project, Media and Elections: Balanced News Coverage, available at <http://aceproject.org/ace-en/topics/me/mec/mec04/mec04e>.

⁸⁶ Council of Europe, Recommendation No. R (99) 15, *op. cit.*, note 19.

⁸⁷ L. Lee Kaid – C. A. Jones, *op. cit.*, note 73.

documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection (315(a)).

2. Co – regulation is the model combining elements of self-regulation (and self-monitoring) and traditional public regulation to form a new and self-contained regulatory system for election coverage. In this system, the regulatory body often supervises the implementation of rules freely determined by the media.

Belgium

Each Community (French, Flemish and German) has its own specific regulatory framework for election coverage. In spite of their diversity, all three legal structures in place foresee a high level of self or co-regulation for election coverage: media regulatory bodies are in charge of issuing recommendations of non-binding nature for election coverage and examining complaints during the election campaign. Broadcasters elaborate then their internal election coverage plans and their professional codes of conduct. In particular the Flemish regulator the Vlaamse Geschillenraad (VG) strongly reflects some aspects of co-operation, as a part of its supervisory task is to decide on complaints with regard to “the rules of journalistic ethics”, these rules being provisions, standards and principles of self-regulation which are not formulated in statutory law, but are developed by professionals in the sector of media and journalism. In relation to this aspect, the Vlaamse Geschillenraad is partly composed of professional journalists⁸⁸. The rules of journalistic ethics to which the Broadcasting Act refers are indeed not prescribed by statutory law but are to be found in codes which have been adopted by professionals in the sector of media and journalism, both at international and national level, such as: International Federation of Journalists’ Bordeaux Declaration, the Munich Declaration approved by the Journalists’ Unions of the 6 countries of the European Union and the Code of principles of journalism, accepted by the Belgian Association of Professional Journalists (AVBB), The Belgian Association of Newspaper Publishers(BVDU) and the National Federation of Information Magazines (FEBELMA) in 1982. The interpretation and the concrete application of the standards of journalistic ethics has been developed by the former Council of Ethics of the Belgian Association of Professional Journalists (1995-2002) and more recently, since December 2002 by the Council for Journalism. In deciding on alleged infringements the VG is assumed to apply the provisions of these codes, along the lines of the “jurisprudence” of the former Council of Ethics and/or the actual Council for Journalism.

3. External regulation is the system where rules and laws issued by public institutions - or a mix of the two, such as the Parliament and the media regulator – govern the activity of broadcasters during the election period. In this regard a few best practices can be identified for the two main genres where editorial control should enjoy the widest latitude:

News

The public/state media have an obligation to produce fair, objective, and balanced coverage of current events and election-related news. In countries where freedom of expression has a stable tradition, all the political actors trust the system, and where there is a well-established practice of self-regulation, no other external provision may be required.

In nations with a history of government control over the state media or where there is a lack of confidence among political parties, journalists, and institutions, stricter regulation may be necessary in order to protect public media from undue interference. Many approaches can be used to ensure a diversity of voices: opinions of the government or the majority party should

⁸⁸ F. Jongen – D. Voorhoof – A. Braeckman, “Co-Operative Regulatory Systems in the Media Sector of Belgium“ in Study on Co-Regulation Measures in the Media Sector, Study commissioned by the European Commission, Directorate Information Society, Unit A1 - Audiovisual and Media Policies, Digital Rights, Task Force on Coordination of Media Affairs (Tender No. DG EAC 03/04).

be counterbalanced by the opinion of the opposition; coverage of public events or statements made by the ruling parties on issues of public interest should be counterbalanced by coverage of the opposition parties' views, and vice versa. Comments – either reported by the presenter or made by external experts – should be clearly distinguished from facts, and they should reflect a variety of views. The regulator may also issue rules and recommendations clarifying the notion of fairness and balance and specifying the criteria for establishing the amount of coverage for each contestant.

The main issue regarding private broadcasters is related to the balance between their nature as a commercial enterprise and their use of national public airwaves, which creates certain obligations in terms of providing a public service. From a theoretical point of view, the private media as a whole should guarantee pluralism of information, views, ideas, and opinions.

In principle, several independent media, with diversified editorial lines, can serve the purpose of producing a pluralistic system of information and access (external pluralism). However, in case of a high concentration of ownership in the private sector (monopoly/oligopoly) or a limited number of private broadcasters, regulation may be required to ensure a minimum level of pluralism in the coverage of contestants (internal pluralism). Whatever degree of editorial freedom private broadcasters enjoy, journalists should adhere to professional standards of coverage, as well as to professional ethics.

Current affairs and other editorial programmes

Public broadcasters, in order to comply with their obligation to provide voters with sufficient and effective information, should arrange programmes based on issues of public interest. These programmes should be largely under the editorial control of the media regarding the choice of topics and the format. However, if the programme is related to elections, then the distribution of time should guarantee equality of opportunity to all contestants, as well as the coverage of a plurality of views. Therefore, the same principles guiding the allocation of free airtime among contestants may be applied in order to ensure their right of access and debate. Participation in these programmes should not be conditional upon the payment of any fees.

Private broadcasters have the freedom – and sometimes the obligation - to produce current affairs. Once they decide to do so, they should comply with the same principles of balance and impartiality regulating the public broadcaster. Participation in these programmes should not be conditional upon the payment of any fees.

If this third regulatory approach is followed, then the regulators must be extremely careful in the drafting process and in the following interpretation of rules so not to unnecessarily curtail media freedom to report and exercise their editorial judgement. This is particularly important for news programmes where journalistic standards and criteria should drive the selection of subjects and areas of coverage.

Spain

The public audiovisual service RTVE is required in its news and informative programs to report on election contestants according to a proportional criterion, on the basis of the parties' previous election performance. The specific allocation of time among the political forces in informative programs is decided by the Election Commission (JEC), after having considered the Election Coverage Plan presented by RTVE. During 2008 elections, in its session held on 14 February, the JEC reiterated that the proportional allocation of campaign news coverage on RTVE shall be guaranteed on daily basis during the official election period and that the proportional criterion had to prevail over any other. It has to be noted that the JEC here applied criteria set for free airtime to news, although there is no

legal requirement to do so. In this respect three journalists associations, the Madrid Press Association and the Journalists Association of Catalonia and of Galicia, presented a legal appeal to the Supreme Court, arguing that the JEC decision impede public media to freely operate in its news reporting and that the measure envisaged by the election board is a threat to freedom of expression as enshrined in article 20 of the Spanish Constitution. Many stakeholders expressed dissatisfaction concerning the JEC decision and claimed that fair, objective and balanced reporting of election-related news should be achieved through the adoption of self-regulations and code of conducts based on the principles of journalistic professional criteria, rather than imposed by rigid external regulations.

Finally, an important aspect of these kinds of programmes is related to the position of media professionals running in the elections as candidates. A widely applied regulatory practice is to prevent anchors and journalists contesting elections from appearing in video in their professional duties. This provision is present in a number of legal national frameworks and internal editorial codes and it falls in line with the principle of equality of opportunities among election contestants.

Turkey

Throughout the election period during 2007 elections on the private channel ATV, Ibrahim Tatlisser, a popular presenter and a candidate, continued his weekly entertainment show, the Ibo Show. Mr. Tatlisser's case was not an isolated one. The Turkish Radio and Television Supreme Council (RTUK), after consultation with the Supreme Board of Elections, stated that appearances by actors, singers or other entertainers as candidates presenting shows could continue, but no political communication on election related issues or propaganda was to be allowed. Actors, presenters or other media professionals presenting TV programmes whilst running for elections, should be assigned such duties as not to gain unfair advantage from their media exposure.

Latvia

The Election Law in Article 13 states: (1) Starting on the 60th day before election day, employees of Latvian Radio or Latvian Television and other persons who have been nominated as candidates or who prior to elections have publicly declared their participation in a political organisation or an association of political organisations are barred from participating in Latvian Radio or Latvian Television broadcasts, preparing commentaries and reportages and conducting interviews.

3.2.4 Regulatory bodies and complaints procedures

A brief overview of the main options in terms of media regulatory bodies may provide some guidance regarding enforcement and transparency of rules for election coverage.

As a general principle, the body supervising and enforcing the regulation for media coverage during elections should be independent, credible, and legitimate for all competing political forces. The appointment of its members must not be under the exclusive control of the government, but rather it should comply with the principles regulating the appointment and the activity of the overall election administration. These principles include the need for⁸⁹:

- Members to be suitably qualified and impartial;
- Appointment procedures to be transparent;
- Members to behave independently and impartially;
- The public (including the media, parties, domestic and international observers) to have access to documents and decisions;
- Protecting members against arbitrary removal.

⁸⁹ OSCE/ODIHR, Existing Commitments for Democratic Elections in OSCE Participating States, Warsaw, 2003.

There is not a single system for the media regulatory body; nonetheless it is possible to classify the main options in four main models:

- A self-regulatory body, such as voluntary press councils in most states.
- A permanent media regulatory body. This body can work autonomously or in a joint effort with the election administration.
- A body specifically created for the election period, the task of which is to regulate and supervise media coverage only during the election campaign.
- The main election administration body, such as the central electoral commission.

“The regulatory system will in many cases have a considerable influence on the independence and professionalism of the media. A system that is under tight governmental control is unlikely to promote pluralism and diversity among the media. A voluntary system, or one with strong legal or constitutional guarantees of independence, can safeguard pluralism in the media from government interference and can help to develop professional skills and standards. An independent and trusted regulatory body can be important in an election, since it may take on some or all of the specialized functions involved in regulating the media during an election campaign”⁹⁰.

The regulatory body should have the experience, facilities, know-how, and mandate to monitor respect of the rules, investigate alleged violations, and impose effective remedies when violations take place. It should act upon candidates’ and parties’ complaints or whenever it records a violation, regardless of whether it has received any complaints.

Procedures should be established to receive and act on complaints from candidates and political parties about unfair or unlawful media coverage. These procedures should be timely, clear, and accessible in order to give complainants a prompt remedy. Sanctions imposed by the supervisory body should be commensurate with the gravity of the offence committed by the media outlet. These should not include imprisonment or any measure that could prevent the media from carrying out their activities or encourage self-censorship among journalists.

The media or the complainants should have the right to contest decisions of the implementing body through a timely, accessible, and prompt judicial appeal mechanism.

3.3 REFERENDA AND LOCAL ELECTIONS

In this section a brief overview of the main problems and legal issues related to municipal elections and referenda will be provided. The best practices for media coverage of election campaigns presented in the previous chapters broadly apply to all kind of elections, from presidential races to municipal ones. However, regulatory measures are to some extent determined by the nature of the election and it is therefore useful to explore these specific matters in a more detailed manner.

3.3.1 Local elections

Two specific areas of discussion are generally related to local elections:

1. The coverage of non-contesting actors. The coverage of political events and politicians not directly related with the areas where the local elections are taking place represent a major challenge for regulation. In pre-election periods for regional or municipal elections, particular

⁹⁰ ACE Project, Media and Elections: Existing Media Regulatory Frameworks, available at <http://aceproject.org/ace-en/topics/me/meb/meb06/default>.

care should be taken in respect of the coverage of national political representatives who are not running for the local races. In fact, coverage of national political actors could have an impact on local areas and have influence on the final outcome.

In particular, journalists should be aware of the potential propagandistic nature of the visits of governmental officers to areas holding local elections. During a local election campaign Ministers will have to continue to carry out their ministerial duties but they may seek to use the benefits of their elected office as part of the campaign. Therefore journalists should be able to determine whether the visit is for government or party/electoral purposes.

Consideration should be given to include a provision that specifies that, when the campaign is for local elections, fairness and balance should be guaranteed also when covering political actors that are not directly involved in that particular election. Also, undue coverage must not be given to visits and “institutional” events with campaigning purpose⁹¹.

2. The role of local media. Where a media system is strong and influential at regional or provincial level, local media can play a significant role during municipal elections by allowing local candidates to directly reach their electorate at constituency level. For this reason specific measures in relation to local media outlets may be established by the regulator. Similarly to the legal regime for general elections, the regulation generally targets main areas: the right to free access and the related allocation of airtime, editorial coverage and paid advertisement.

Italy and the regulation of local broadcasters

In Italy the regulation of local broadcasters is defined by a mix of statutory rules and self-regulation and it is applied for all kinds of elections⁹². The supervision of media coverage by local broadcasters is attributed to sectoral bodies established within the regional Parliament (Consiglio Regionale). These institutions are known as CoReCom (Regional Councils for Communications) and they are in charge of enforcing and monitoring the existing regulation. CoReComs have also the faculty of issuing guidelines for local broadcasters based on statutory provisions and the implementing regulations issued by the Authority for Communications (AGCOM). The provisions regulate the access to paid and free airtime as well as programmes under the editorial responsibility of the broadcasters.

3.3.2 Referenda

The regulation for media coverage of referenda has specific features related to the very nature of this type of consultation. As a matter of fact, referenda are ballots related to issues on which political parties, but also other organisations (e.g. civil society, trade unions, lobby groups) often take a public and explicit position. Campaign regulations may be adopted on a number of levels to guarantee that there is equality of opportunities between groups campaigning for and against the matter at stake.

In this respect, three main issues are relevant:

1. The allocation of airtime and space. The distribution of airtime and space between the two opposing positions (“yes” and “no”) is here crucial. Normally the general rules for referenda is included in the laws regulating media coverage of elections while specific instructions may be

⁹¹ See Section 3.2.3 b.

⁹² Legge 6 novembre 2003, n. 313 "Disposizioni per l'attuazione del principio del pluralismo nella programmazione delle emittenti radiofoniche e televisive locali", available at http://www.agcom.it/L_naz/L_313_03.htm (Italian version); Delibera n. 43/04/CSP “Attuazione dell'articolo 11-quater della legge 22 febbraio 2000, n. 28, relativo al Codice di autoregolamentazione delle emittenti radiofoniche e televisive locali”, available at http://www.agcom.it/provv/d_43_04_CSP.htm (Italian version).

then issued on occasion of each referendum. The good practices and regulatory principles presented in the previous sections apply also in relation to media coverage of referenda. In addition, when allocating free access a principle of strict equality should be adopted in relation to the two contrasting positions and the organisations supporting each of them. The same principle of equality should inform programmes under the exclusive editorial responsibility of broadcasters.

Montenegro and 2006 Referendum

The framework for the referendum in 2006 was established by a lex specialis, the Law on the Referendum on State Legal Status (LRSLS), which was adopted by the Parliament of Montenegro following the extensive consultations between the two sides of the referendum issue. It provided citizens with the right to be informed in a truthful, timely and unbiased manner, under equitable terms, about the referendum process and different referendum options. The LRSLS also required media to provide assistance to voters in making an informed choice through specific information programs and public debates in which both sides of the referendum campaign would take part. The public broadcast media were under an obligation to provide equal presentation to the different referendum options, to publish and adopt regulations on their coverage of the campaign, and all media outlets did so before the launch of campaign activities⁹³.

2. The coverage of the boycott front. Many referenda require a threshold (usually 50 per cent plus 1 of registered voters) to validate the result of the procedure. This means that the forces calling for a boycott may play a key role in influencing participation in a consultation where voter turnout is of particular relevance. In principle along with the two main positions (yes or no) the media should also represent the opinion of those opposed to using referenda as a method to decide certain issues. Normally national legislations do not explicitly contemplate provisions ensuring free access to boycott campaigns. However many laws and regulations on media coverage of elections include provisions regarding fairness, accuracy, impartiality and balance; these principles should then be applied so to cover all positions regarding a referendum, including those of the boycott front.

3. The role of the government. A key issue is whether the government is allowed to campaign for one of the sides of the referendum. There is no standard practice in this regard. Some countries pose no limitations in this respect while others provide for an explicit ban on Government's campaigning for referenda (like in Ireland). Where government is allowed to campaign there should be no exploitation of the institutional role held by its members. In this respect the principles presented in the section related to the advantage of the incumbent apply (see section 3.2.3, b.). A best practice in this area of regulation is to include legal provisions regarding criteria and procedures by which entities and organisations qualify as "permitted participants" to the campaign. This facilitates the allocation of free airtime and editorial coverage by the media.

UK

The Ofcom's Broadcasting Code provides that due weight must be given to designated organisations in coverage during the referendum period. Broadcasters must also consider giving appropriate coverage to other permitted participants with significant views and perspectives. According to the definition given by the Code, designated organisations and permitted participants are those that are designated by the Electoral Commission⁹⁴.

FYROM

⁹³ OSCE-ODIHR, Referendum Observation Mission to 2006 Referendum in Montenegro, Final Report, available at http://www.osce.org/documents/odihr/2006/08/20077_en.pdf.

⁹⁴ Ofcom's Broadcasting Code, Section Six: Elections and Referendums, available at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/elections/>.

According to ODIHR's report, "the absence of a clear regulatory framework for the campaign, and the decision to consider that any institution and individual could participate in it, promoted the intervention of many subjects and parts of the community who customarily would not participate in campaigning. (...). The Recommendations for Electronic Media Coverage of the Referendum were adopted by the Broadcasting Council as an attempt to overcome the legal gaps in the existing legislation for the referendum and to try to ensure a level playing field between individuals or organizations campaigning for and against the referendum. Under these Recommendations, the electronic media should cover different positions on the referendum in a balanced way. Special obligations were established for the public media, as well as for publishing the results of opinion polls and for paid propaganda. However the lack of registration requirements for potential campaigners, and the consequent possibility for any individual or institution to campaign, proved to be problematic for the broadcasters with regard to determining the balanced amount of coverage they had to provide in order to be in line with the Recommendations"⁹⁵.

3.4 DIGITAL MEDIA

The previous sections have explained the rationale for higher levels of regulation imposed on audiovisual media in comparison to the press. One of the main justifications is the need to guarantee the fair allocation of limited public resources (airwaves and frequencies). The globalisation of mass communications and the technical developments brought by digital technology have modified this argument, to an extent, as the increase of the number of frequencies available seems to offer greater scope for media diversity. However, these changes only highlight a new set of issues affecting media freedom, including the concentration of media ownership, the "digital divide", with the consequent need to take steps to guarantee universal access, and the need to protect the audiences from market failures in providing a diversity of contents and views.

The new media potentially offer political parties and candidates' opportunities to diversify their campaigns for different target audiences in a very simple and effective way. A digital model, opposed to the traditional analogue broadcast model, facilitates the dissemination of specific messages to certain segments of the population and provides for a plurality of channels for communication.

The regulation of the new media presents a number of challenges linked not only to the justification for state intervention but also related to technical aspects of enforcement, conflicts of laws and problems of jurisdiction. This section will briefly analyse the main issues at stake in this area. For the sake of simplicity the expression digital media refers to media outlets that are supported by digital technology rather than analogue means. These include radios and televisions broadcasting on cable, satellite and mobile devices. In this context, it is important to distinguish between national and foreign broadcasters.

The legal regime for national digital media in the context of elections is normally similar to the one applied to analogue broadcasters. Public digital broadcasters may have stricter obligations than private digital broadcasters and sometimes for the latter a lighter touch regulation than private analogue media is applied: for instance, in the UK private digital broadcasters are not obliged to air PEBs while analogue televisions and radios are. Still, some of the rules for election

⁹⁵ OSCE - ODIHR, Election Observation Mission to 2004 Referendum in FYROM, Final Report, available at http://www.osce.org/documents/odihr/2005/02/4221_en.pdf.

coverage may be in force for all audiovisual media, no matter the platform they use to broadcast; these may include the ban – if any – on paid political advertising, silence period prior to the election day, restrictions on hate speech and inflammatory language.

The regulation of foreign media broadcasting – either as an unintentional spill-over effect or as targeted broadcast - presents more problematic aspects related to three main issues: problems of jurisdiction and conflict of laws, justification and enforcement. No clear-cut legal orientation has emerged yet in this area.

1. Jurisdiction and conflicts of laws. If the signal of a channel established in country A reaches the territory of country B (the ‘footprint country’), a clear identification of the applicable law is crucial, particularly when a conflict between national laws on content issues emerges. Broadcasting has always had a transfrontier aspect because airwaves do not stop at frontiers. Today's reality is that cross-border reception of television and radio has greatly increased thanks to cable and satellite networks and this has contributed to the free flow of information. On the other hand, no harmonised legal regime exists with regards to political coverage and there might be cases where the content aired by a foreign broadcaster is patently in breach of the laws of the footprint country.

On a general level, the norms and jurisprudence set forth by the Council of Europe may provide valuable guidance in relation to the issues of jurisdiction and the permissible ground to block reception. The European Convention on Transfrontier Television (ECTT)⁹⁶ is the first international treaty creating a legal framework for the free circulation of transfrontier television programmes in Europe, through minimum common rules, in fields such as programming, advertising, sponsorship and the protection of certain individual rights. It entrusts the transmitting States with the task of ensuring that television programme services transmitted comply with its regulations. In return, freedom of reception of programme services is guaranteed as well as the retransmission of the programme services which abide by the minimum rules of the Convention. The Convention applies to all transfrontier programmes regardless of the technical means of transmission used (satellite, cable, terrestrial transmitters, etc.). Its main provisions cover inter alia: freedom of expression, reception, and retransmission, the right of reply and – relevant here – responsibilities of broadcasters: “*The broadcaster shall ensure that news fairly presents facts and events and encourages the free formation of opinions*”⁹⁷.

For the determination of the applicable law the ECTT sets forth the basic principle of the “place of establishment” of the broadcaster: in other words the jurisdiction over a broadcaster rests with the State Party where the medium is established⁹⁸. In this regard, the ECTT makes clear that jurisdiction over a broadcaster rests with the country of origin.

Chapter VIII of the ECTT establishes complaining rules and procedures: a State Party which is in the footprint of a transfrontier broadcast can address violations and breaches of the ECTT and, for serious infringements, can provisionally suspend the retransmission of the incriminated programme service. Nonetheless, such a suspension is not allowed in relation to alleged breaches of the provision related to fair and free formation of opinions. In this regard, the Convention

⁹⁶ European Convention on Transfrontier Television, Strasbourg, 5.V.1989 Text amended according to the provisions of the Protocol (ETS No. 171) which entered into force on 1 March 2002, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=132&CM=8&DF=9/10/2008&CL=ENG>.

Ukraine is a signatory of the Convention but has not ratified it yet.

⁹⁷ ECTT, Article 7.3.

⁹⁸ The ECTT defines a very detailed set of criteria to determine the place of establishment. See Article 5 – Duties of the transmitting Parties.

does not contemplate breaches of fairness and accuracy as an acceptable ground for restricting freedom of reception.

However the ECTT's scope does not cover a number of subject matters, including restrictions on election broadcast – i.e. ban of political advertising, silence period, publication of opinion polls - thus leaving room for a possible legitimate action on behalf of the receiving State Party.

2. Justification. Freedom of expression and the basic principle of free flow of information are not absolute rights and they can be subject to restrictions. The jurisprudence of the European Courts of Human Rights stresses how limitations of cross-border broadcast must comply with the European Court's test. Restrictions are usually considered in line with Article 10 when they deal with the respect of minimum standards for basic taste and decency/depiction of violence/incitement to violence (Article 7 of the ECTT explicitly contemplates this case). For instance, in 2004, the French State Council, the highest administrative Court in France, ordered the French-based Eutelsat Company to shut down the Lebanese Al-Manar broadcasts⁹⁹ following accusations that its programmes were anti-Semitic and could incite hatred¹⁰⁰.

National sovereignty and transfrontier broadcasting can clash in a number of cases and three main situations may occur:

- a. The incidental cross border broadcasting from country A to country B using frequencies lawfully held by country A is generally deemed lawful. Incidental cross border broadcasting is wide-spread in Europe, given the large number of states on a small territory.
- b. A broadcasting originating from country A to country B using frequencies lawfully held by country B is considered unlawful. In other words, the prohibition preventing foreign channels to broadcast in a country without licence is generally considered a justifiable interference on the ground that it protects the international and national telecommunications order. On the same line are Article 10.a¹⁰¹ of the European Convention of Human Rights and the jurisprudence of the European Court of Human Rights. The Court held that national licensing systems were required not only for the orderly regulation of broadcasting enterprises at national level, but also in large part to give effect to international rules. The interference is in the Court's view prescribed by law and had a legitimate aim: the protection of the international telecommunications order and the protection of the rights of others¹⁰².
- c. The intentional targeting of the public of country B by a broadcast from country A using frequencies lawfully held by country A is still an unsolved issue, depending on the approach taken by individual states. According to the European Court of Human Rights, if a broadcaster is established in a state abroad with the apparent intention to evade the rules which apply to the domestic broadcasting system, then the prohibition on reception is justified as being necessary for the legitimate aims of protecting the pluralistic and non-commercial broadcasting system and protecting the diversity of expression of opinion¹⁰³.

⁹⁹ Al-Manar is the satellite television station of Hezbollah, broadcasting from Beirut, Lebanon and offering high production news, commentary, and entertainment in the service of what Hezbollah believes is Islamic unity and resistance.

¹⁰⁰ See the Ordonnance du juge des référés du 13 décembre 2004 N°274757, Président du Conseil supérieur de l'audiovisuel, available at http://www.conseil-etat.fr/ce/jurisprd/index_ac_Id0460.shtml (French version).

¹⁰¹ 1.a (...) This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

¹⁰² *Groppera Radio AG and Others v. Switzerland*, Application N. 10890/84, (1990).

¹⁰³ *Cable Music Europe Ltd v Netherlands*, Application N. 18033/91 (1993) – European Commission of Human Rights, admissibility decision.

It is problematic to ascertain whether foreign broadcast's unprofessional or biased election reporting regarding another country may justify a block of the channel or sanctions against it. In other words, election coverage by a foreign media not in line with national laws might not be considered "necessary" enough to support the legitimacy of a ban. On the other hand a number of countries have specific requirements regarding foreign broadcasting. For instance Canadian legislation sets forth a prohibition against placing election advertising on any channels outside Canada¹⁰⁴. As a matter of fact provisions related to certain areas such as political advertising, the publication of opinion polls, election silence period may be considered as legitimate restrictions in spite of the fact that their enforcement might not be so easily achievable.

3. Enforcement. The actual possibility of sanctioning foreign broadcasters who breach national rules on election coverage is a crucial issue. Sanctions may be enforceable against foreign media having premises and assets in the country of reception (e.g. by imposing fines to their editors, or suspending their signal). Enforcement may become more burdensome and time consuming for TVs and radios whose offices are located outside the footprint country and whose signal is beyond the technical reach of the receiving state. When special decoder equipment is needed then the footprint country has the means to suspend or block the reception of foreign channels. But once again, a solid legal ground is required for such restrictions. Additionally, penalties against foreign enterprises – and media do represent economical entities – might open the way to political repercussions and tensions between the countries involved.

There are a number of best practices that can be useful to overcome the problems illustrated so far in relation to transfrontier broadcasting. As cross-border broadcast touches upon national sovereignty of states, such practices are mainly based on negotiation and agreement rather than on law enforcement.

If national legislation requires foreign operators to ensure that all of the services they carry comply with certain content standards, major international broadcasters will argue that it is difficult to expect them to shape their programmes according to the laws of each individual jurisdiction. A compromise, used by broadcasters themselves, is to tailor their services to their major geographic markets (e.g. Africa, Middle East, etc.)¹⁰⁵. To overcome legal controversies, many international broadcasters have also set internal guidelines for coverage of overseas elections: an example is BBC. Its editorial guidelines provide that: *"The principles of fairness and impartiality which underlie our coverage of UK elections should also inform our election reporting in other countries. When we report elections overseas we may need to take into account the circumstances under which the particular election is being held, especially where serious questions are raised about the openness or fairness of the electoral process. Additional issues may arise when we are broadcasting to the actual country in which an election is taking place. We owe a special responsibility to audiences who are about to vote. We may need to consider the timing of the re-transmission on international services of programmes originally made for the UK audience. The closer to the election date the greater the need for care. If it is considered that a programme could have an undue and unfair influence on the election, then we should delay transmission until after polling"*¹⁰⁶.

¹⁰⁴ Canada Elections Act, Section 330.

¹⁰⁵ E. Salomon for the CBA and UNESCO, Guidelines for Broadcasting Regulation, available at <http://www.cba.org.uk/documents/guidelines.pdf>.

¹⁰⁶ BBC Editorial Guidelines - Reporting overseas elections, available at <http://www.bbc.co.uk/guidelines/editorialguidelines/edguide/politics/reportingoverse.shtml>.

Also, national authorities of a country where elections take place may make direct agreements with foreign broadcasters transmitting in their territory; this is what happened during 2006 Referendum in Montenegro. The Law on the Referendum on State Legal Status (LRSL) appealed to all privately-owned media, as well as any foreign media available in Montenegro, to adopt a Code of Conduct that promoted fair and equal coverage of the referendum campaign. The Code of Conduct was signed by one third of Serbian media outlets available in Montenegro, including the public broadcaster RTS and three daily newspapers¹⁰⁷.

Another strategy is to develop international agreements with other countries within a satellite's footprint, and in particular with those from where services are uplinked. The intention would be to agree a set of minimum content standards, which would apply to all services. This is what has been achieved within the European Union, under the Directive: Television Without Frontiers, even though the Directive does not touch upon the issue of media coverage of elections.

Finally, media regulators of different countries may consult and discuss issues related to election coverage so to provide guidance on how to cover foreign elections to their national media broadcasting.

3.5 THE INTERNET

The present section will discuss regulation exclusively in relation to online media. This category includes televisions, radios and newspapers published on the web where editorial decisions are taken on the basis of traditional standards of journalistic organisation, while it does not cover websites of other nature such as blogs and party pages¹⁰⁸.

A potentially controversial issue related to the role and obligations of the Internet in the electoral process deals with what regulations should be imposed on websites, particularly with regard to silence periods and opinion polls. The matter is part of a wider debate about the degree of freedom the Internet should enjoy and the extent to which regulations can realistically be applied to this medium. In general, controls over the Internet are accepted when touching upon certain areas as hate speech and protection of minors, while any other forms of interference over the freedom of Internet in relation to election coverage has been widely frowned upon.

“The practices and principles of media behaviour in elections were developed for “old” media: newspapers, radio, and television. In the meanwhile new forms of media are developing at a rapid rate. Are the regulatory practices and styles of reporting that have developed over the years for conventional media equally applicable to “new” media? Many of the assumptions that underlie the regulation of conventional media simply do not apply to new media. For example, the space to publish material on the World Wide Web is literally infinite, compared with the assumption behind broadcasting regulation that the frequency spectrum is a finite resource that must be shared. The regulatory challenge posed by new media so far has been the following: old media can be regulated in a way that does not constitute censorship and enhances, rather than restricts, freedom of expression. Such regulation of new media has proven impossible. The

¹⁰⁷ OSCE-ODIHR, Election Observation Mission to 2006 Referendum in Montenegro, Final Report, available at http://www.osce.org/documents/odihr/2006/08/20077_en.pdf.

¹⁰⁸ A discussion regarding the broader regulation of the Internet during an election campaign is beyond the scope of the present paper. However, there is a general disfavour towards election campaign regulation imposed on bloggers and individuals' websites.

Internet, in particular, poses a challenge to traditional views of media conduct in elections. Election reporting blackouts, for example, have been rendered virtually obsolete by the activities of unregulated web sites. The characteristic of the Internet that places it beyond regulation is its international nature. This regulatory challenge is likely to extend beyond the written word, with the development of Internet radio and, with time, television. Other variants, such as podcasting – the transmission of audio files – RSS (Really Simple Syndication) and peer-to-peer networks, will only increase this challenge”¹⁰⁹.

Many considerations already presented in relation to digital media – namely problems of jurisdiction, conflicts of laws, justification and enforcement – are valid to the Internet too (see Section 3.4). As a matter of fact it may be neither simple nor advisable to sanction or block a website. Even enforcement against national websites and servers might prove problematic¹¹⁰. Even though technical devices may be used to prevent the dissemination of unlawful material (e.g. pornography, hate speech, dissemination of copyrighted material, etc.) in the territory of a state, the adoption of such an approach is extremely controversial opening the way to possible abuses against freedom of expression as the cases of China¹¹¹ and Tunisia demonstrate¹¹².

The regulation of online campaign activity is therefore one of the most complicated areas of regulation for election monitoring bodies. *“They often must review existing campaign regulatory laws and issue clear guidance. When possible, they should apply to Internet content those laws that currently regulate offline media. However in many areas, they should fundamentally re-evaluate laws and regulations and develop proposals that allow the Internet to contribute positively to democracy. Achieving the original goals of electoral regulations may require that those regulations be repealed in the face of the opportunity afforded by the Internet. There will be instances in which the application of existing “offline” laws may lead to civil or criminal charges for what is considered “normal” online campaign or political activity”¹¹³.*

Some areas of regulation are less controversial than others in terms of justification. For instance many countries have included specific legal provisions regarding advertising, silence period and opinion polls in their legislation. Other countries have promoted codes of self-regulation for internet providers in relation to these matters. On the contrary requirements related to the provision of free access are not usually in force. In addition, the possibility of introducing a right of reply for online media have been considered, a measure that many human rights defenders oppose.

Other areas of regulation are even more debated, particularly as far as editorial coverage is concerned. Legislations normally leave editorial coverage to the professional judgement of the

¹⁰⁹ ACE Project, Media and Elections: "New" Media, available at <http://aceproject.org/ace-en/topics/me/meb/meb03/meb03b/default/?searchterm=internet>.

¹¹⁰ The global nature of the Web makes the delocalisation of web pages rather simple an exercise. Therefore a web site registered in country A might have its server in country B with all the consequences in terms of jurisdiction and feasible enforcement. Therefore, attempts by national regulators to close down websites may be useless due to the creation of mirror sites beyond the country's borders.

¹¹¹ Human Rights Watch, How Censorship Works in China: A Brief Overview, available at <http://www.hrw.org/reports/2006/china0806/3.htm>.

¹¹² Human Rights Watch, Tunisia, in False Freedom Online Censorship in the Middle East and North Africa available at <http://www.hrw.org/reports/2005/mena1105/7.htm>.

¹¹³ S. Clift for IFES, Challenging the Norms and Standards of Election Administration: Election Management Bodies and Use of the Internet, available at <http://www.ifes.org/publication/ebcb8f6a4743357c3748b352c68abaaa/2%20IFES%20Challenging%20Election%20Norms%20and%20Standards%20WP%20EMBSINT.pdf>.

online media themselves. The journalistic ethical values are often used as a reference to inform electoral coverage rather than externally imposed regulation.

Canada

On occasion of Federal by-elections of March 2008, the Chief Electoral Office issued a reminder regarding the ban on opinion polls during the voting day. According to the note the media must be mindful not to publish election advertising or the results of election opinion surveys that have not already been transmitted to the public prior to the close of polls. This provision applies to all media, including the Internet¹¹⁴.

Hungary

On occasion of 2002 elections, a Code of Conduct for Internet Content Providers formulated by the Hungarian Association of Content Providers (MTE) in cooperation with the National Election Committee set forth the liability and duties of Content Providers, political advertisement using Internet, pre-election media blackout and opinion polls¹¹⁵.

Europe: right of reply in online media

The recommendation adopted by the European Parliament in 2006 suggests that the member states should consider "the introduction of measures into their domestic law or practice regarding the right of reply or equivalent remedies in relation to on-line media, with due regard for their domestic and constitutional legislative provisions, and without prejudice to the possibility of adapting the manner in which it is exercised to take into account the particularities of each type of medium". The right of reply in the new media is also included in the new Audiovisual Media Services Directive.

Also the Council of Europe issued a hotly debated recommendation on the right of reply in 2004¹¹⁶. "Governments of the member states should examine and, if necessary, introduce in their domestic law or practice a right of reply or any other equivalent remedy, which allows a rapid correction of incorrect information in online or off-line media." "Anybody can claim a right to react to any information in the media presenting inaccurate facts about him or her and which affect his/her personal rights." The right is only limited in length (should not exceed the original article), should only 'correct facts' and should be provided in the same language as the original article. The replies must be 'given the same prominence', both in the publication as well as in any electronic archive.

Article 19, a global organisation dedicated to freedom of expression, vehemently opposed the proposed recommendation in August 2003: "Under the proposal, websites such as those run by human rights organisations, a national health service or political parties - which are all frequently updated, edited and contain information on matters of public interest - would all be treated as mass media outlets and be obliged to grant a right of reply to those who allege that their rights have been infringed by incorrect factual statements. For example a government representative would be able to post a mandatory reply on the site of a political opposition party, to refute allegations of corruption."¹¹⁷

In sum, there is no shared approach to online media regulation for election coverage, being the practices and the underpinning principles rather new and often controversial. A source of guidance for the OSCE area may be the Recommendations of the OSCE Representative on Freedom of the Media that are briefly summarised below:

¹¹⁴ Elections Canada, Important Reminders for Media on Election Day, Monday, March 17, 2008, available at <http://www.elections.ca/content.asp?section=med&document=mar1008&dir=pre&lang=e&textonly=false>.

¹¹⁵ Hungarian Association of Content Providers, Code of Conduct for Internet Content Providers Available at <http://aceproject.org/ero-en/topics/media-and-elections/Hungarian%20Association%20of%20Content%20Providers.pdf/view>.

¹¹⁶ Council of Europe, Recommendation Rec (2004)16 of the Committee of Ministers to member states on the right of reply in the new media environment, available at <http://www.coe.int/T/E/Com/press/News/2004/rec%282004%2916.asp>.

¹¹⁷ Article 19, Submission to Council of Europe on "Right of Reply" in New Media Environment, available at <http://www.statewatch.org/news/2003/aug/14art19.htm>.

OSCE 2004 Amsterdam Internet Conference

The source for all legislation regarding the Internet should be basic constitutional values, such as freedom of expression and its interpretation in jurisprudence. These values form the foundations for tailor-made and non-restrictive regulation where necessary. New legislation should be limited to instances where it is absolutely unavoidable and then only in the least restrictive way in terms of freedom of expression and users' rights.

The Internet is not in itself a guarantor of freedom of opinion and expression. (...) There must be no prior censorship, arbitrary control or unjustified constraints on content, transmission and dissemination of information. Pluralism of sources of information and media must be safeguarded and promoted including diversity among systems for information retrieval.

All Internet content should be subject to the legislation of the country of its origin ("upload rule"). Any legislation which imposes liability on an author or publisher for content wherever it is downloaded is too restrictive for freedom of expression.

Regulation of the Internet should be limited to fields where it is unavoidable. Preferably the Internet should be seen as a space that works best autonomously and without any intervention. If regulation appears unavoidable, it should be applied according to the principle of subsidiarity, meaning that regulation should be as close to the source of trouble as possible – close both in terms of geography and competence. Within regulatory and co-regulatory bodies, transparency, accountability and the right to appeal should be observed to at least the same degree as in classic media.

Regulatory schemes must be able to command public confidence. There must be a high degree of external consultation and all relevant stakeholders should be involved in the design and operation of schemes. As far as practicable, the operation and control of schemes should be separate from the institutions of the industry.

Regulatory schemes must be based on clear and intelligible statements of principles and measurable standards – usually in the form of a code. Reasons for interventions must originate from these objectives and intended outcomes should be identified¹¹⁸.

¹¹⁸ OSCE, Recommendations of the OSCE Representative on Freedom of the Media from the 2004 Amsterdam Internet Conference in The Media Freedom Internet Cookbook, available at http://www.osce.org/publications/rfm/2004/12/12239_89_en.pdf.

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