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the legal framework in Europe

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Media coverage of elections: the legal framework in Europe

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Editorial team – Francisco Javier Cabrera Blázquez, Sophie Valais

European Audiovisual Observatory

Authors

Ernesto Apa, Marco Bassini, Anne Bruna, Francisco Javier Cabrera Blázquez, Ingrid Cunningham, Christina Etteldorf, David Goldberg, Agnes Granchet, Beata Klimkiewicz, Ronan Ó Fathaigh, Andrei Richter, Max Rozendaal

Translation

France Courrèges, Marco Polo Sarl, Nathalie Sturlèse, Stefan Pooth, Erwin Rohwer, Sonja Schmidt

Proofreading

Philippe Chesnel, Johanna Fell, James Drake

Editorial assistant – Sabine Bouajaja

Marketing – Markus Booms, markus.booms@coe.int

Press and Public Relations – Alison Hindhaugh, alison.hindhaugh@coe.int

European Audiovisual Observatory

Publisher

European Audiovisual Observatory

76, allée de la Robertsau, 67000 Strasbourg, France

Tel.: +33 (0)3 90 21 60 00

Fax: +33 (0)3 90 21 60 19

iris.obs@coe.int

www.obs.coe.int

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Media regulation in Europe during elections

Ernesto Apa, Marco Bassini, Anne Bruna, Francisco Javier Cabrera Blázquez, Ingrid Cunningham, Christina Etteldorf, David Goldberg, Agnes Granchet, Beata Klimkiewicz, Ronan Ó Fathaigh, Andrei Richter, Max Rozendaal

Foreword

“Get yourself some glass eyes, and pretend to see things you can’t, like a crooked politician.”¹ – said King Lear to the blinded Gloucester, complaining that there is no real difference between the thief and the judge who sentences him, or between the prostitute and the officer who whips a prostitute’s back for her crimes, when what he’d really like is to commit those crimes with her.

This quote is referred to in the *Encyclopaedia of Political Communication*² as an example of the negative connotation that the words “politics/politician/political/politicise” had gained in the 17th century. Interestingly, in that same period the word “candidate” was first recorded in modern dictionaries, despite the fact that its origins recalling purity (*candidus* = white; *candidatus* = white-robed) might clash with the concept of “crooked politicians”.³

Even though it is not mentioned in the title of this IRIS *Special*, these two words are of special relevance when it comes to “media regulation in Europe during elections”. As is well known, political communication in the media plays a central role in the campaigns through which candidates hope to become elected politicians, and such communication goes hand in hand with the concept of freedom of expression and information under consolidated European and national jurisprudence.

How this interplay has developed over the past years is explored in this report, produced in coordination with the Institute of Information Law (IViR) of the University of Amsterdam. It provides an overview of the most recent rules, case-law and policies across Europe with regard to the coverage of elections and referenda in the various media. Looking into broadcasting and print media, as well as the online dimension, it gives an insight into the differing degrees of regulation that political communication is experiencing within the different contexts, and shows – maybe quite surprisingly – that broadcast media remain the most regulated ones (as they remain the most influential), and that social media, despite their increased use by “crooked” politicians, remain substantially unregulated.

The structure of the report takes a bird’s-eye perspective and is divided into three main sections.

¹ Shakespeare W., *King Lear*, 1605/1606 (Act 4, Scene 6). This is a modern translation of the original Elizabethan language used by the Bard of Stratford. The original reads as follows: “Get thee glass eyes, And like a scurvy politician seem, To see the things thou dost not.” See http://nfs.sparknotes.com/lear/page_244.html.

² Kaid L.L., Holtz-Bacha C., *Encyclopedia of Political Communication*, Volume 1, SAGE, 2008.

³ The word “candidate” was first recorded in 1605-1615, Dictionary.com Unabridged, <http://www.dictionary.com/browse/candidate>.

Firstly, Part 1 contains an overview of the topic, and is divided into a number of sub-chapters. Chapter 1 briefly identifies the main issues, including what the role of the various media is during elections and what types of rules apply during elections and referenda. Furthermore, a separate section explores the question of whether major online media have self-regulatory rules on political content and election coverage and gives an indication of online media's role in elections. Chapter 2 explores Council of Europe (CoE) law in respect of these issues – in particular the European Convention of Human Rights and the jurisprudence of the European Court of Human Rights regarding elections and the broadcast, print and online media. Chapter 3 contains a brief overview of the current common European standards and policy in respect of media reporting of elections, including recommendations, opinions and reports from CoE bodies such as the Committee of Ministers, the Parliamentary Assembly, and the Venice Commission, and from other European bodies such as the European Platform of Regulatory Authorities and the Organization for Security and Co-operation in Europe.

Secondly, Part 2 contains a number of country reports whose purpose is to explore whether governments are extending laws to encompass the online environment, whether regulators are extending enforcement to the online environment, and whether the regulation of traditional media is being gradually lifted. The country reports are not exhaustive, and only represent a sample of CoE member states. Some of the largest member states, including France, Germany, Italy, Poland, Russia, Spain, and the United Kingdom, are included owing to their size, and in the light of recent and forthcoming elections and referenda. Ireland is included by way of representing small member states, and because of its considerable case-law on media, referenda and elections; the Netherlands is included because it held parliamentary elections in March 2017, and up-to-date discussion and relevant policies are easily accessible.

Lastly, Part 3 contains two chapters. The first provides an overview and objective analysis of the results from the country reports, and attempts to identify trends. The final chapter concludes with a brief overview of the entire IRIS *Special*.

All of the above issues are discussed in this IRIS *Special*, which collects contributions from different national experts. I would like to thank (in alphabetical order): Ernesto Apa, Marco Bassini, Anne Bruna, Francisco Javier Cabrera Blázquez, Ingrid Cunningham, Christina Etteldorf, David Goldberg, Agnes Granchet, Beata Klimkiewicz, Andrei Richter and Max Rozendaal.

Special recognition goes to Ronan Ó Fathaigh, from the IViR of Amsterdam, who is not only one of the authors, but, together with Tarlach McGonagle, also the coordinator behind the research.

Strasbourg, July 2017

Maja Cappello

IRIS Coordinator

Head of the Department for Legal Information

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1. Introduction

Ronan Ó Fathaigh, Institute for Information Law (IViR), University of Amsterdam

1.1. Media and elections in selected Council of Europe member states

This IRIS Special examines the regulation of media, including broadcast, print and online media, during elections and referenda in selected Council of Europe (CoE) member states. Such an examination is necessary for a number of reasons. Firstly, as the European Court of Human Rights has stated, in the period before or during an election it may be considered necessary “to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression” in order to secure the “free expression of the opinion of the people in the choice of the legislature”.⁴ In many instances, this may mean that additional regulation is imposed on the media (in particular during elections), and this IRIS Special seeks to identify this additional regulation and how it is being applied by courts and regulators in CoE member states.

Secondly, given that special rules may apply to the media during elections and referenda, it is important to note the sheer number of elections that take place in CoE member states annually. For instance, while global media coverage in 2016 may have been dominated by the presidential election in the United States, it is worth noting that in 2016 alone there were six presidential elections in CoE member states: Austria, Bulgaria, Estonia, Iceland, Moldova, and Portugal.⁵ Indeed, there were parliamentary elections in over 12 member states in 2016, including Croatia, Georgia, Ireland, Lithuania, Macedonia, Moldova, Montenegro, the Slovak Republic, Spain, Romania, the Russian Federation, and San Marino,⁶ and local elections in six member states.⁷ In addition, while 2016 may be remembered for the UK referendum on European Union membership, there were referenda in five other members states: Azerbaijan, Hungary, Italy, the Netherlands and Switzerland.⁸ Thus, an examination of media regulation during elections and referenda

⁴ *Bowman v. the United Kingdom*, App. no. 24839/94, 19 February 1998, par. 43, <http://hudoc.echr.coe.int/eng?i=001-58134>.

⁵ Council of Europe, 2016 electoral calendar of the member states of the Council of Europe, <https://www.coe.int/en/web/electoral-assistance/electoral-calendar>.

⁶ Council of Europe, 2016 electoral calendar of the member states of the Council of Europe, <https://www.coe.int/en/web/electoral-assistance/electoral-calendar>.

⁷ Armenia, Bosnia and Herzegovina, Germany, Romania, Spain, and the United Kingdom.

⁸ Council of Europe, 2016 electoral calendar of the member states of the Council of Europe,



seems particularly necessary, given that over half (27) of the CoE member states held various elections and referenda in 2016 alone.

Similarly, while many may point to the presidential and parliamentary elections in France and Germany in 2017 as the most significant, it is also worth noting that there will be parliamentary elections in eight other member states, including Albania, Armenia, Bulgaria, the Czech Republic, Liechtenstein, the Netherlands, Norway and the United Kingdom.⁹ Similarly, there will be referenda in two member states, namely Switzerland and Turkey, and local and regional elections in 15 other member states.¹⁰ Further, there will be presidential elections in three other member states, including Hungary, Serbia, and Slovenia. Thus, as in 2016, there will be elections and referenda in over half (25) of the COE members states in 2017.

A third reason for examining the regulation of media is the influence of online media during elections. For example, during the UK parliamentary elections in 2015, GBP 1.6 million was spent on political advertising through Facebook and Google.¹¹ This figure was double the amount spent on campaign broadcasts, and five times that spent on newspapers. A similar figure was spent by political parties and campaign groups on online political advertising during the UK's referendum on EU membership.¹² However, a number of European bodies, such as the CoE's Parliamentary Assembly, have noted their concern over the influence of online media on elections. Indeed, the Parliamentary Assembly adopted a Resolution in 2017 expressing its concern at many "online media campaigns", often in the political context, "with the objective of harming democratic political processes".¹³ In the light of these developments and concerns, the question arises whether regulation is being properly applied to online media during elections throughout the CoE member states, and whether online media are adopting self-regulatory measures during elections.

<https://www.coe.int/en/web/electoral-assistance/electoral-calendar>.

⁹ Council of Europe, 2017 electoral calendar of the Member states of the Council of Europe,

<https://www.coe.int/en/web/electoral-assistance/2017-electoral-calendar>.

¹⁰ Austria, Germany, Finland, Switzerland, Macedonia, United Kingdom, Armenia, Croatia, Latvia, Portugal, Georgia, Italy, Luxembourg, Estonia, and Denmark.

¹¹ The Electoral Commission, Party spending in the 2015 UK PGE,

<http://search.electoralcommission.org.uk/Search/Spending?currentPage=1&rows=20&sort=TotalExpenditure&order=desc&tab=1&et=pp&evt=ukparliament&ev=445&optCols=ExpenseCategoryName&optCols=AmountInEngland&optCols=AmountInScotland&optCols=AmountInWales&optCols=AmountInNorthernIreland&optCols=DatePaid>.

¹² The Electoral Commission, Spending in the 2016 Referendum on the UK's membership of the EU,

<http://search.electoralcommission.org.uk/Search/Spending?currentPage=1&rows=10&query=google&sort=DateIncurred&order=desc&tab=1&open=filter&et=perpar&evt=referendum&ev=2514&optCols=CampaigningName&optCols=ExpenseCategoryName&optCols=FullAddress&optCols=AmountInEngland&optCols=AmountInScotland&optCols=AmountInWales&optCols=AmountInNorthernIreland&optCols=DateOfClaimForPayment&optCols=DatePaid>.

¹³ Parliamentary Assembly of the Council of Europe, Resolution 2143 (2017) Online media and journalism: challenges and accountability, 25 January 2017, <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=23455&lang=2>.



1.2. Broadcast media and elections

Broadcast media has historically been subject to the highest level of regulation, in particular during election periods. However, before brief sample of this regulation is presented, it seems helpful to first note the continued influence of the broadcast media in general, and during elections in particular. Two important recently-published studies from Europe and the United States suggest that the broadcast media is still a main source of news for individuals, particularly during election periods. In its *Digital News Report 2016*,¹⁴ which covered 26 countries (including 20 CoE member states), the Reuters Institute for the Study of Journalism examined how news is being consumed. Similarly, in 2016 the Pew Research Center examined news practices and attitudes in its survey *The Modern News Consumer*;¹⁵ it also published a related study on news consumption during the US presidential election.¹⁶

The Reuters study suggested that "television news still remains most important for older groups but overall usage has continued to decline, particularly amongst younger groups".¹⁷ In particular, 28% of 18-24s said that social media was their main source of news, which was more than television (24%) "for the first time".¹⁸ Nevertheless, as concerns the two largest markets in Europe, namely Germany and France, the study also suggests that "television, particularly the widely watched evening bulletins from PSBs ARD and ZDF, remains the most important news source in Germany",¹⁹ while "television news remains the most important source of news in France".²⁰ Similarly, in the Pew Research Center study, television is the most widely used news platform. In the US, 57% of adults often get news from television, 38% get news online, 25% get news from radio, and 20% get news from print newspapers.²¹ Notably, during the US presidential election, television was the top source for election results, with 88% of US voters following returns on television, 48% using online platforms, and 21% using social networks.²²

As will be seen in the country chapters in Part 2, broadcast media (both commercial and public) are subject to a wide array of rules during elections. In the CoE member states, these rules include the obligation for public and private broadcasters to

¹⁴ Reuters Institute for the Study of Journalism, *Digital News Report 2016*, <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital-News-Report-2016.pdf>.

¹⁵ Pew Research Center, *The Modern News Consumer*, 7 July 2016, <http://www.journalism.org/2016/07/07/the-modern-news-consumer>.

¹⁶ Monica Anderson, *TV still the top source for election results, but digital platforms rise* (Pew Research Center), 21 November 2016, <http://www.pewresearch.org/fact-tank/2016/11/21/tv-still-the-top-source-for-election-results-but-digital-platforms-rise/>.

¹⁷ Reuters Institute for the Study of Journalism, *Digital News Report 2016*, p. 8, <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital-News-Report-2016.pdf>.

¹⁸ *Ibid.*, p. 8.

¹⁹ *Ibid.*, p. 36.

²⁰ *Ibid.*, p. 49.

²¹ Pew Research Center, *The Modern News Consumer*, 7 July 2016, p. 4, <http://www.journalism.org/2016/07/07/the-modern-news-consumer>.

²² Monica Anderson, *TV still the top source for election results, but digital platforms rise* (Pew Research Center), 21 November 2016, <http://www.pewresearch.org/fact-tank/2016/11/21/tv-still-the-top-source-for-election-results-but-digital-platforms-rise/>.

cover elections in a "fair, balanced and impartial manner". Secondly, many CoE member states have rules on the allocation of airtime to political parties and candidates. There is the potential for a considerable level of court proceedings over access to this airtime, and how broadcasters allocate this airtime.²³ Thirdly, some member states have rules on paid political advertising, while other member states prohibit paid political advertising. These prohibitions have led to a number of judgments by the European Court of Human Rights.²⁴ Fourthly, other member states have rules stipulating a "day of reflection" or "silence period", in which the broadcasting of electoral messages is prohibited. Fifthly, many member states have rules governing the conduct of opinion polls, including how much additional information must be given to the public in order to enable them to determine the value of the polls. Lastly, many member states allow candidates or political parties a right of reply, which may be particularly important during election campaigns. These issues are discussed in more depth in the country reports, but it is helpful to have a preliminary picture to provide context for the later chapters.

1.3. Print media and elections

While print media is generally not subject to same level of regulation as broadcast media, it is important to note that print media in many CoE member states are subject to additional regulation during election time. In many instances, the rules applicable to the print media are stipulated in specific electoral laws. For instance, in 2017 the European Court of Human Rights ruled on Russia's electoral law, which places a number of obligations on print media during elections, including a prohibition on "pre-election campaigning".²⁵ Similarly, other member states prohibit the publication, including in newspapers, of opinion polls and exit polls. Notably, some member states also criminalise publishing any "false statement of fact" in relation to a candidate's personal character or conduct. In addition, member states also require political advertisements in newspapers to include the identity of their sponsor. Finally, it must also be recognised, and emphasised, that print media must abide by defamation and privacy laws in their electoral coverage. These issues are discussed in more depth in later chapters.

Finally, although print media consumption has "declined significantly" in 2016, an important finding of the Reuters study was that "across all of our 26 countries over two-thirds of our sample (69%) access a newspaper brand online each week".²⁶ In many CoE member states, the most popular online news websites may be run by historically print media companies, such as in Germany, where www.spiegel.de is the most popular online

²³ See, for example, *Oran v. Turkey*, nos. 28881/07 and 37920/07, 15 April 2014, <http://hudoc.echr.coe.int/eng?i=001-142636>.

²⁴ See, for example, *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, 11 December 2008, <http://hudoc.echr.coe.int/eng?i=001-90235>; and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22 April 2013, <http://hudoc.echr.coe.int/eng?i=001-119244>.

²⁵ See *Orlovskaya Iskra v. Russia*, no. 42911/08, 21 February 2017, <http://hudoc.echr.coe.int/eng?i=001-171525>.

²⁶ Reuters Institute for the Study of Journalism, *Digital News Report 2016*, p. 26, <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital-News-Report-2016.pdf>.



news site,²⁷ or www.lemonde.fr in France.²⁸ This is an important issue, and should be borne in mind when discussing online media.

1.4. Online media and elections

It is important to first determine what is meant by “online media”. While “online” indicates internet accessed through computers, smartphones and tablets, there are a number of types of online media. First, there are online news media, and as the Reuters study indicated, many of the most influential online media in the Council of Europe member states are the online versions of a broadcaster or newspaper (such as *Spiegel*, *Le Monde*, and *BBC News*). Secondly, there are online news media which developed as an exclusive online presence, such as the *Huffington Post* and *Buzzfeed*. Thirdly, there are online social media, such as Facebook and Twitter, which are used to access and share news. Notably, in the Reuters study, 51% of respondents said that they use social media as a source of news each week, but only 12% said that it is their “main source” of news.²⁹ In addition, of those aged between 18 and 24, 28% said social media was their “main source” of news.

Given the increasing influence of various online media on news coverage, and as mentioned above, bodies such as the CoE’s Parliamentary Assembly have expressed concern over online media campaigns, often in the political context, “with the objective of harming democratic political processes”.³⁰ Indeed, a related debate is ongoing over “fake news” online, which has prompted four international expert bodies, namely the OSCE Representative on Freedom of the Media, the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, to issue a Joint Statement on “fake news”.³¹ While this issue is discussed in Chapter 3, it is helpful to note that some social networks have introduced self-regulatory tools aimed at tackling the issue of “fake news”. In late 2016, Facebook allowed users to “mark a news story as fake”;³² news stories reported as “fake” by users may then be reviewed by a fact-checker.³³

²⁷ Reuters Institute for the Study of Journalism, Digital News Report 2016, p. 36, <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital-News-Report-2016.pdf>.

²⁸ Reuters Institute for the Study of Journalism, Digital News Report 2016, p. 38, <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital-News-Report-2016.pdf>.

²⁹ Reuters Institute for the Study of Journalism, Digital News Report 2016, p.7, <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital-News-Report-2016.pdf>.

³⁰ Parliamentary Assembly of the Council of Europe, Resolution 2143 (2017) Online media and journalism: challenges and accountability, 25 January 2017, <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=23455&lang=2>.

³¹ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, “Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda”, 3 March 2017, <http://www.osce.org/fom/302796>.

³² Facebook, Frequently Asked Questions: How do I mark a news story as fake?, https://www.facebook.com/help/572838089565953?helpref=faq_content.



Furthermore, in the area of political advertising, a number of social networks have introduced self-regulatory policies on election coverage. For instance, LinkedIn's advertising policy includes a rule that "All political advertising must clearly identify the person or entity that paid for the message. Ads not financed by a candidate or campaign must indicate whether the content is authorised by a candidate and, if not, include contact information for the person or entity that paid for the message. Political ads must comply with applicable laws, including with respect to identifying the sponsors of such ads or observing "news blackouts" or "quiet periods" prior to elections. Similarly, Twitter's advertising policy includes restrictions on "political campaigning" and has country-specific rules. Twitter also provides a purple "promotion" icon indicating tweets that contain links to political campaign ads that have been paid for by candidates or political parties.³⁴ Notably, Google's "AdWords" policy has rules on "political content," and when promoting political content, advertisements run by Google must comply with applicable laws, including those governing "silence periods".³⁵

1.5. Conclusion

These brief introductory remarks serve to highlight the many issues that should be considered when examining the regulation of various media during elections and referenda. They should also serve as a helpful backdrop, as the following chapters delve more deeply into the legal and policy aspects, before moving on to the specific rules that various member states have been implementing and considering.

³³ Facebook, Frequently Asked Questions: How is news marked as disputed on Facebook?, <https://www.facebook.com/help/733019746855448>.

³⁴ Twitter, Political Campaigning, <https://support.twitter.com/articles/20170492>.

³⁵ Google, Advertising Policies Help - Political Content, https://support.google.com/adwordspolicy/answer/6014595?hl=en&ref_topic=1626336.



2. European law on media and elections

Ronan Ó Fathaigh, Institute for Information Law (IViR), University of Amsterdam

2.1. Introduction

Any national legislation in Council of Europe member states relating to media and elections usually needs to be consistent with the rights protected by the European Convention on Human Rights. For example, such legislation, and any court judgments interpreting such legislation, needs to be consistent with the media's right to freedom of expression, a candidate's right to freedom of expression, a political party's right to freedom of expression, and a voter's right to receive information. However, it is also important to note that legislation relating to media coverage of elections might also be required in order to protect other Convention rights, such as a candidate's right to private life or reputation or a candidate's right of reply.³⁶ Indeed, the Convention also places a number of obligations on Council of Europe member states, including the obligation to guarantee media pluralism³⁷ and to ensure fair elections.³⁸

The European Court of Human Rights is tasked with interpreting the European Convention, and the Court ultimately decides whether member state legislation and national court judgments are consistent with the European Convention. Therefore, any discussion of media regulation and elections must take account of the European Convention; accordingly, this chapter sets out the case law of the European Court as it relates to the media and elections. As with the country chapters which follow in Part 2 of this report, this chapter is structured along similar lines. Firstly, the Court's case law on broadcast media and elections is examined, focusing on a number of issues, including rules on televised election debates, equal media coverage of elections, access to election broadcasts, and political advertising. Secondly, the Court's case law on print media and elections is discussed, in particular where electoral law is applied to newspapers during election periods.³⁹ Finally, the Court's case law on online media and elections is analysed,

³⁶ Vitrenko and Others v. Ukraine (dec.), no. 23510/02, 16 December 2008, <http://hudoc.echr.coe.int/eng?i=001-90636>.

³⁷ Centro Europa 7 S.r.l. and Di Stefano v. Italy [GC], no. 38433/09, 7 June 2012, par. 134, <http://hudoc.echr.coe.int/eng?i=001-111399>.

³⁸ Article 3 of Protocol No. 1 to the European Convention on Human Rights.

³⁹ Orlovskaya Iskra v. Russia, no. 42911/08, 21 February 2017, <http://hudoc.echr.coe.int/eng?i=001-171525>.



with notable issues including online media's liability for reporting allegations against candidates⁴⁰ and liability for reader comments.

2.1.1. Article 3 of Protocol No. 1 of the ECHR

However, before moving to the substantive discussion, it is important to note the contents of Article 3 of Protocol No. 1 to the European Convention. Article 3 sets out the right to free elections, and states that member states “undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

The important clause in respect of the media is that which stipulates that member states are under an obligation to hold elections “under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. The Court has interpreted this clause to mean that member states have “positive obligations” within the context of media coverage of elections.⁴¹ These are discussed below; however, it is in the meantime worth mentioning that these obligations include the fact that during an election, the state is obliged to “intervene in order to open up the media to different viewpoints”.⁴² This follows from the state's duty to adopt measures “to secure pluralism of views”.⁴³ These principles are not merely rhetorical, but have concrete application: the Court has held that electoral candidates can bring an application before the European Court over unequal media coverage during elections.⁴⁴

2.2. Broadcast media and elections

As mentioned in the previous chapter, and as is evident from the country chapters, broadcast media has historically been subject to the most regulation during elections. As such, the European Court has developed extensive jurisprudence in this area. Indeed, the Court's case law has expanded in recent years to encompass many areas of regulation, including equality of media coverage and access to election debates.

⁴⁰ Olafsson v. Iceland, no. 58493/13, 16 March 2017, <http://hudoc.echr.coe.int/eng?i=001-171974>.

⁴¹ Communist Party of Russia and Others v. Russia, no. 29400/05, 19 June 2012, par. <http://hudoc.echr.coe.int/eng?i=001-111522>.

⁴² Communist Party of Russia and Others v. Russia, no. 29400/05, 19 June 2012, par. 126.

⁴³ Communist Party of Russia and Others v. Russia, no. 29400/05, 19 June 2012, par. 126.

⁴⁴ See, for example, Communist Party of Russia and Others v. Russia, App. no. 29400/05, 19 June 2012.



2.2.1. Election-time reporting restrictions

Article 10 of the European Convention guarantees the right to freedom of expression. Importantly, it has been held that Article 10 also protects a political party's freedom of expression.⁴⁵ This is because political parties have an “essential role in ensuring pluralism and the proper functioning of democracy”.⁴⁶ However, the former European Commission of Human Rights (existing alongside the Court until 1998)⁴⁷ has dealt with the difficult issue of whether restrictions may be placed on the broadcast media over its election-time reporting of certain political parties. The case in point was *Purcell v. Ireland*,⁴⁸ and its relevance for today seems not to be in doubt, given that the decision was cited by the Court as recently as 2017,⁴⁹ and the Grand Chamber in 2015.⁵⁰

In *Purcell*, a number of journalists from the Irish public broadcaster RTÉ brought an application to the European Commission of Human Rights over an order issued under Ireland's broadcasting law prohibiting party political broadcasts by the political party Sinn Féin, and the broadcasting of interviews with its members. Notably, the party was not an illegal organisation, and had been registered under electoral law. However, the European Commission of Human Rights ruled that Article 10 had not been violated, as the ban was designed to deny representatives of “terrorist organisations and their political supporters” the possibility of using the broadcast media “as a platform for advocating their cause” and “conveying the impression of their legitimacy”.⁵¹ Notably, the journalists also argued that the ban violated Article 3 of Protocol No. 1, as it had been imposed in respect of a registered political party and enforced during Irish parliamentary elections. However, the European Commission of Human Rights rejected the argument, and laid down an important principle that has been applied a number of times since: Article 3 of Protocol No. 1 guarantees the principle of “equality of treatment” of all citizens in the exercise of their right to vote. However, it does not give a citizen a right to demand that all political parties competing in an election be granted radio and television coverage or be granted the same amount of such coverage.⁵²

⁴⁵ *Refah Partisi and Others v. Turkey* [GC], App no. 41340/98, 13 February 2003, par. 89.

<http://hudoc.echr.coe.int/eng?i=001-60936>.

⁴⁶ *Refah Partisi and Others v. Turkey* [GC], App no. 41340/98, 13 February 2003, par. 88.

⁴⁷ The European Commission of Human Rights was established under Article 19 of the original version of the European Convention on Human Rights. With the coming into force of Protocol No.11 to the Convention on 1 November 1998, the Commission was abolished. The Commission's decisions are still cited by the Court today.

⁴⁸ *Purcell and Others v. Ireland* (Commission dec.), no. 15404/89, 16 April 1991, <http://hudoc.echr.coe.int/eng?i=001-893>.

⁴⁹ *Orlovskaya Iskra v. Russia*, no. 42911/08, 21 February 2017, par. 109, <http://hudoc.echr.coe.int/eng?i=001-171525>.

⁵⁰ *Delfi AS v. Estonia* [GC], no. 64569/09, 16 June 2015, par. 134, <http://hudoc.echr.coe.int/eng?i=001-155105>.

⁵¹ *Purcell and Others v. Ireland* (Commission dec.), no. 15404/89, 16 April 1991.

⁵² *Purcell and Others v. Ireland* (Commission dec.), no. 15404/89, 16 April 1991.



2.2.2. Candidate interviews

The European Commission of Human Rights has also considered the issue of a broadcaster's duties when interviewing political candidates. In *Haider v. Austria*,⁵³ a political party leader made an application to the Commission concerning the manner in which he was interviewed in an election programme broadcast by the Austrian broadcaster ORF. The interviewer suggested that the political party in question was seeking to turn "foreigners into some sort of non-persons". The candidate complained that the way in which the ORF reported on him had not met the requirements of objectivity, as required by Article 10. However, the European Commission of Human Rights rejected the application, and held that in interviews with candidates "it is in the interest of freedom of political debate that the interviewing journalist may also express critical and provocative points of view and not merely give neutral cues for the statements of the interviewed person, since the latter can reply immediately".⁵⁴

2.2.3. Televised election debates

While both the *Purcell* and *Haider* decisions were issued by the European Commission of Human Rights in the 1990s, the Court was confronted with one of its first cases involving the media and Article 3 of Protocol No. 1 in the 2007 case of *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia*.⁵⁵ In this case, two Latvian political parties made an application to the Court under Article 3 of Protocol No. 1, complaining about Latvia's public service broadcaster, Latvijas Televīzija. The parties pointed out that the broadcaster had only invited to take part in television debates those parties which were already represented in parliament or which had the support of 4% of the electorate according to the opinion polls, while other parties had only been offered free air time in off-peak viewing slots. However, the Court held that Article 3 of Protocol No. 1 did not guarantee the right of a political party to airtime on radio or television in the run-up to elections.⁵⁶ The Court did admit that "problems" could arise in "exceptional circumstances" – for example, if in an election period a political party was refused airtime when other parties were not. However, the Court held that no such special circumstances had been established.

A year later, the Court delivered a second judgment concerning televised election debates. However, in *Vitrenko and Others v. Ukraine*,⁵⁷ the question was not over access to

⁵³ *Haider v. Austria* (Commission dec.), no. 25060/94, 18 October 1995, <http://hudoc.echr.coe.int/eng?i=001-2361>.

⁵⁴ *Haider v. Austria* (Commission dec.), no. 25060/94, 18 October 1995, par. 3(b).

⁵⁵ *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia* (dec.), nos. 10547/07 and 34049/07, 29 November 2007, <http://hudoc.echr.coe.int/eng?i=001-83936>.

⁵⁶ *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia* (dec.), nos. 10547/07 and 34049/07, 29 November 2007.

⁵⁷ *Vitrenko and Others v. Ukraine* (dec.), no. 23510/02, 16 December 2008, <http://hudoc.echr.coe.int/eng?i=001-90636>.



such debates, but whether sanctioning a candidate for comments made during a debate (and affording a political opponent a right to reply) violated Article 10. The applicant in *Vitrenko* had been due to debate the leader of another political party, but the debate had been cancelled last minute. The applicant – reacting to the non-appearance of her opponent – had remarked during a live broadcast that “[s]he definitely knew that I would prove that she was a thief”. An electoral commission found that the applicant had defamed her opponent and issued a warning, and the domestic courts ordered the applicant to pay for a fifty-second broadcast that would enable her opponent to exercise her right of reply. The applicant claimed before the European Court that the electoral commission warning, and the sanction imposed, had violated her Article 10 right to freedom of expression. However, the Court ruled that notwithstanding the fact that applicant had been a candidate for election to parliament and her remarks had been made within the context of her political campaign, “her criticism of a political opponent included untrue accusations”. Furthermore, there had been no actual heated exchange of arguments during a live television broadcast, of the kind during which political leaders might be guilty of overstepping certain limits. Finally, in relation to the sanction and right of reply, the Court held that member states have a “positive obligation” to ensure that “persons subjected to defamation have a reasonable opportunity to exercise their right to reply by submitting a response to defamatory information in the same manner as that in which it was disseminated”.⁵⁸

2.2.4. Unequal media coverage of elections

Importantly, the European Court has held that under Article 3 of Protocol No. 1, political parties and candidates may bring applications alleging that elections had not been “fair”, due to “unequal” media coverage. This important principle was established in the Court’s 2012 judgment in *Communist Party of Russia and Others v. Russia*.⁵⁹ Two political parties and a number of election candidates claimed a violation of Article 3 of Protocol No. 1, alleging that media coverage of the 2003 elections in Russia had been “biased”, and “detrimental to the opposition parties and candidates”. Firstly, and quite importantly, the Court rejected the Russian Government’s argument that the Court did not have competence to examine the claim, and held that “as a matter of principle”, the Court is competent to examine complaints about alleged “unequal coverage of elections” under Article 3 of Protocol No. 1.⁶⁰

The Court then examined the complaints, but concluded there had been no violation of Article 3 of Protocol No. 1. Firstly, there was no “direct proof of abuse by the Government of their dominant position in the capital or management of the [television] companies concerned”. Secondly, the Court held that Russia “took certain steps to guarantee some visibility of opposition parties and candidates on Russian television and secure editorial independence and neutrality of the media.” However, while these

⁵⁸ *Vitrenko and Others v. Ukraine* (dec.), no. 23510/02, 16 December 2008.

⁵⁹ *Communist Party of Russia and Others v. Russia*, no. 29400/05, 19 June 2012.

⁶⁰ *Communist Party of Russia and Others v. Russia*, no. 29400/05, 19 June 2012, par. 79.



arrangements “probably” did not secure the *de facto* equality of all competing political forces in terms of their presence on television screens, the Court held that Russia had not failed to meet its “positive obligations in this area to such an extent that it amounted to a violation” of Article 3 of Protocol No. 1.⁶¹

2.2.5. Access to election broadcasts

The fifth issue of importance the Court has dealt with is access to election broadcasts. The applicant in the Court’s 2014 judgment in *Oran v. Turkey*⁶² was an independent candidate in Turkey’s parliamentary elections in 2007. Under Turkey’s electoral law at the time, only political parties participating in elections were permitted to transmit election broadcasts on national radio and television. The applicant made an application to the European Court, claiming a violation of Article 3 of Protocol No. 1 over his inability, as an independent candidate, to obtain airtime for electoral broadcasts. However, the Court found no violation of Article 3 of Protocol No. 1, drawing a distinction between political parties and independent candidates. The Court held that “political parties do not confine their electioneering to the constituency or district in which they have put up a candidate but attempt to cover all the constituencies, taken as a whole”. The Court then pointed out that “unaffiliated” independent candidates such as the applicant only address the constituency they stand in, and the role of independent candidates “prevent them from influencing the whole national regime in the same way as the political parties”.⁶³ The Court concluded that the regulation was based on “objective and reasonable justification”, and the candidate “was not prevented from using all the other available methods of electioneering”, or “conducting a campaign in the electoral district in which he was standing”.⁶⁴

2.2.6. Political advertising

The final issue relating to broadcast media considered by the European Court is the vexed issue of political advertising. As is quite well-known, the Court held in 2001 that a prohibition on political advertising in Switzerland, as applied to an animal rights group outside of an election period, violated Article 10.⁶⁵ However, it was not until 2008 that the Court considered a similar ban, as applied to a political party during an election period.

⁶¹ Communist Party of Russia and Others v. Russia, no. 29400/05, 19 June 2012, par. 128.

⁶² Oran v. Turkey, nos. 28881/07 and 37920/07, 15 April 2014, <http://hudoc.echr.coe.int/eng?i=001-142636>.

⁶³ Oran v. Turkey, nos. 28881/07 and 37920/07, par. 73, 15 April 2014, par. 73.

⁶⁴ Oran v. Turkey, nos. 28881/07 and 37920/07, par. 73, 15 April 2014, par. 76. The Court divided by four votes to three. The applicant made an application to the 17-judge Grand Chamber; however, a panel of judges rejected the application in September 2014 (Grand Chamber Panel’s decisions, ECHR 250 (2014), 9 September 2014, <http://hudoc.echr.coe.int/eng?i=003-4863175-5940349>)

⁶⁵ VgT Verein gegen Tierfabriken v. Switzerland, no. 24699/94, 28 June 2001, <http://hudoc.echr.coe.int/eng?i=001-59535>.



The case was *TV Vest As & Rogaland Pensjonistparti v. Norway*,⁶⁶ which concerned a Norwegian broadcaster and a Norwegian political party, the Pensioners' Party (*Rogaland Pensjonistparti*). Before the local and regional elections in Norway in September 2003, the broadcaster agreed to broadcast three different political advertisements for the party at a fee of 30,000 Norwegian kroner (NOK). The Norwegian Media Authority decided to impose a fine of NOK 35,000 on TV Vest under Norway's Broadcasting Act 1992, which prohibited political advertising in television broadcasts. The broadcaster and party brought an application to the European Court, arguing that the fine had violated Article 10.

As in the case of *VgT Verein gegen Tierfabriken v. Switzerland*, the Court held that the ban on political advertising, as applied to the political party in question, had violated Article 10. Notably, the Court noted that unlike most major political parties, which were given a large amount of attention in edited television coverage, the Pensioners' Party was "hardly mentioned". Therefore, according to the Court, "paid advertising on television became the only way for the Pensioners Party to put its message across to the public through that medium". The Court held that "by being denied this possibility under the law, the Pensioners Party was at a disadvantage compared with the major parties, which had obtained edited broadcasting coverage, and this could not be offset by the possibility available to it to use other, less potent, media".⁶⁷ In these circumstances, the fact that the audiovisual media had a "more immediate and powerful effect than other media" did not justify the ban and fine imposed.

However, in 2013, the seventeen-judge Grand Chamber of the European Court delivered its *Animal Defenders International v. United Kingdom* judgment,⁶⁸ and in contrast to its judgments in *VgT* and *TV Vest*, held that the UK prohibition on political advertising in broadcasting did not violate Article 10. The Grand Chamber held the ban was necessary (a) to prevent the "risk of distortion" of public debate by wealthy groups enjoying unequal access to political advertising,⁶⁹ (b) "the immediate and powerful effect of the broadcast media",⁷⁰ and (c) a relaxed ban (such as financial caps on political advertising expenditure) was not feasible, as there would be a risk of abuse or litigation.⁷¹ Notably, *Animal Defenders* concerned an animal rights group not being allowed to broadcast an advertisement, and did not concern a political party during an election period. However, the Court did note that "the risk to pluralist public debates, elections and the democratic process would evidently be more acute during an electoral period".⁷²

⁶⁶ *TV Vest As & Rogaland Pensjonistparti v. Norway*, no. 21132/05, 11 December 2008, <http://hudoc.echr.coe.int/eng?i=001-90235>.

⁶⁷ *TV Vest As & Rogaland Pensjonistparti v. Norway*, no. 21132/05, 11 December 2008, par. 73.

⁶⁸ *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22 April 2013, <http://hudoc.echr.coe.int/eng?i=001-119244>.

⁶⁹ *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22 April 2013, par. 117.

⁷⁰ *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22 April 2013, par. 119.

⁷¹ *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22 April 2013, par. 122.

⁷² *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22 April 2013, par. 111.

2.3. Print media and elections

This section sets out the applicable principles under the European Convention relating to the print media and elections. While it may be assumed that the print media is generally not subject to additional regulation during elections, in some Council of Europe member states this is indeed the case. Indeed, recently, the Court has been called upon to examine the application of electoral laws to the print media during elections and the imposition of injunctions against newspapers during an election period. Lastly, it is also proposed to set out, though not exhaustively, the general principles applicable to reporting on political candidates during elections.

2.3.1. Electoral-law restrictions on print media

In 2017, the European Court for the first time considered a national electoral law which placed a number of obligations on the print media during election periods. The case was *Orlovskaya Iskra v. Russia*,⁷³ which concerned the publisher of the *Orlovskaya Iskra* newspaper. In November 2007, the newspaper published two articles written by a staff member entitled “Hatred, Stroyev style” and “Stroyev Sues the People: The People sue Stroyev”, which criticised the then-governor of the Orel Region, who was a candidate in the forthcoming elections to the Duma. The first article suggested that the closing of a publicly-owned newspaper had been a “direct consequence” of a conflict between the governor and the newspaper’s editor, who had criticised his policies.

Under Russia’s Electoral Rights Act of 2002 and the State Duma Deputies Election Act of 2005, “mass media outlets” are prohibited from engaging in “pre-election campaigning”, which includes disseminating information about a candidate “in combination with positive or negative comment”.⁷⁴ Russia’s Electoral Committee examined both articles and concluded that the articles contained “elements of election campaigning”. The decision was upheld by the domestic courts, and the newspaper was convicted of an administrative offence, and fined RUB 35,000 (EUR 1,000).

The newspaper made an application to the European Court, claiming that the classification of the articles as “election campaigning” and the fine imposed had violated Article 10 of the European Convention. Firstly, the Court rejected the Government’s argument that the law was “related to political advertising”, and that the *Animal Defenders* principle of a “wide margin of appreciation” should apply. The Court held that the present case involved an interference with “political expression in the time of elections” and “part of the normal journalistic coverage of a political debate in the print media”.⁷⁵ Therefore, there was “little scope” for restrictions on the form of expression at issue.⁷⁶

⁷³ *Orlovskaya Iskra v. Russia*, no. 42911/08, 21 February 2017, <http://hudoc.echr.coe.int/eng?i=001-171525>.

⁷⁴ Electoral Rights Act of 2002, section 48 (cited in *Orlovskaya Iskra v. Russia*, no. 42911/08, 21 February 2017, par. 37).

⁷⁵ *Orlovskaya Iskra v. Russia*, no. 42911/08, 21 February 2017, par. 115.

⁷⁶ *Orlovskaya Iskra v. Russia*, no. 42911/08, 21 February 2017, par. 116.



The Court then sought to consider whether the regulatory framework was consistent with Article 10. Firstly, the Court noted that the justification for “restricting the activity of mass media outlets during an election campaign” was meant to take account of historical conditions that prevailed at a particular stage of the country’s development, when “the need to ensure transparent financing of elections required reinforced safeguards”, against the “realistic possibility of control over the financing of elections” in Russia. However, the Court held that the Russian Government had failed “to demonstrate how the special regulations in question related to and actually addressed the situation”.⁷⁷ The Court stated that “it may be desirable” for publications to contain a review of several candidates or parties or their programmes, but the Court held that the regulation “restricted the activity of the print media on the basis of a criterion that was vague and conferred a very wide discretion on the public authorities that were to interpret and apply it”.⁷⁸ The Court also emphasised that it had “not been convincingly established” that the “print media should be subjected to rigorous requirements of impartiality, neutrality and equality of treatment during an election period”.⁷⁹ Accordingly, the Court concluded that there had been a violation of Article 10.

2.3.2. Election-time injunctions against print media

The Court has considered the issue of political candidates seeking injunctions in respect of criticism published during an election. An important case in this regard is *Cumhuriyet Vakfı and Others v. Turkey*.⁸⁰ In late April 2007, the newspaper *Cumhuriyet* published a front-page advertisement, which consisted of a quote by a member of parliament (Abdullah Gül), printed in white letters against a red background covering approximately one quarter of the page. The quote read “It is the end of the Republic in Turkey ... We definitely want to change the secular system – Abdullah Gül.” The quote was followed by the slogan “Take care of your Republic”. In the following day’s edition, *Cumhuriyet* published a short article regarding the background to this advertisement, explaining that the quote had been taken from an interview that Gül had given to the *Guardian* newspaper in the United Kingdom. Gül was a candidate running in the presidential elections, and on 9 May 2007 the second round of the presidential elections were due to be held, along with parliamentary elections.

On 2 May 2007, Gül brought a civil action against the newspaper, and sought an injunction against further publication, arguing that the “fictitious and defamatory” statement “carried the sole aim of damaging his reputation”. The Ankara Civil Court of First Instance granted an interim injunction, prohibiting the re-publication of the statement, and this was upheld on appeal. Subsequently, the European Court examined the interim injunction and concluded that it violated Article 10. The Court held that the

⁷⁷ Orlovskaya Iskra v. Russia, no. 42911/08, 21 February 2017, par. 125.

⁷⁸ Orlovskaya Iskra v. Russia, no. 42911/08, 21 February 2017, par. 128.

⁷⁹ Orlovskaya Iskra v. Russia, no. 42911/08, 21 February 2017, par. 129.

⁸⁰ *Cumhuriyet Vakfı and Others v. Turkey*, no. 28255/07, 8 October 2013, <http://hudoc.echr.coe.int/eng?i=001-126797>.



injunction “had a general chilling effect on the reporting of these matters at a period of intense political debate regarding the presidential elections, thereby affecting not only *Cumhuriyet* as the measure’s direct addressee but all media outlets in the country.” Moreover, the Court stated that “this measure had the effect of hampering the contribution of *Cumhuriyet* to the discussions surrounding the elections and the candidature of Mr Gül at a critical time in Turkish political history. As such, it also prevented the public, which heavily relies on the press for learning about, and forming an opinion on, the ideas and attitudes of political leaders”.⁸¹

2.3.3. Defamation and privacy proceedings during elections

Lastly, it is necessary to briefly set out the principles under Article 10 and Article 8 of the European Convention when defamation or privacy proceedings are taken by candidates against the print media during elections. The Court’s judgment in *Axel Springer AG v. Germany*⁸² set out the factors to be considered when balancing a person’s right to reputation or private life under Article 8 and a newspaper’s Article 10 right to freedom of expression, namely: (a) whether there is any contribution to a debate of general interest, (b) how well known the person concerned is and what the subject of the report is, (c) the prior conduct of the person concerned, (d) the method of obtaining the information and its veracity, (e) the content, form and consequences of the publication and (f) the severity of the sanction imposed.⁸³

However, the Court has held that during an election period, the assessment of publications, including allegedly defamatory publications, should “be subject to the traditional criteria under Article 10 of the Convention”. The Court noted that “unfavourable publications before election day ... indeed, could be damaging to one’s reputation”. However, any damage caused to reputation could be addressed, possibly before election day, by way of other appropriate procedures,⁸⁴ such as the exercising of a right of reply. Notably, in *Saaristo and Others v. Finland*,⁸⁵ the Court held that a journalist’s conviction for invasion of privacy over an election-time article had violated Article 10. The Court noted that the article had been published during a presidential election campaign and was thus closely linked to it in time; the Court considered that, unlike in the *Von Hannover* case, “the article did not only satisfy the curiosity of certain readers but it also contributed to an important matter of public interest in the form of political background information”.⁸⁶

⁸¹ *Cumhuriyet Vakfı and Others v. Turkey*, no. 28255/07, 8 October 2013, par. 64.

⁸² *Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012, <http://hudoc.echr.coe.int/eng?i=001-109034>.

⁸³ *Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012, par. 90-95.

⁸⁴ *Orlovskaya Iskra v. Russia*, no. 42911/08, 21 February 2017, par. 132.

⁸⁵ *Saaristo and Others v. Finland*, no. 184/06, 12 October 2010, <http://hudoc.echr.coe.int/eng?i=001-101017>.

⁸⁶ *Saaristo and Others v. Finland*, no. 184/06, 12 October 2010.



2.4. Online media and elections

The European Court's jurisprudence on online media has been generally developing in recent years. In 2017, however, the European Court for the first time ruled on the online news media's liability for reporting serious allegations against a political candidate. The Court laid down important principles under Article 10 applicable to the online media during elections, in particular where online media outlets follow "good-faith" journalism practices. In addition, the Court has also delivered important judgments concerning the online news media's liability for reader comments, which are also discussed below.

2.4.1. Liability for reporting allegations against candidates

In *Olafsson v. Iceland*,⁸⁷ the applicant was editor of an online news website, *Pressan*. In November 2010, the website published an article concerning a candidate in upcoming elections for Iceland's Constitutional Assembly. The article concerned allegations made against the candidate by two sisters, who alleged that the candidate had "sexually abused them when they were children". The article was based on an interview with one of the women, and a letter she had published on her own website setting out the allegations. *Pressan* had also contacted the candidate before publication, and the article also included his denial of the allegations.

However, in February 2013, Iceland's Supreme Court overturned a district court's judgment, holding that the website's editor was liable for "insinuations that [the candidate] was guilty of having abused children". The editor was ordered to pay 200,000 ISK (1,600 EUR) in damages, and 800,000 ISK (6,500 EUR) in costs. The Supreme Court held that the applicant "had a supervisory obligation which entailed that he should conduct his editorial duties in such a way that the published material would not harm anyone through its being defamatory". The Supreme Court agreed that candidates "have to endure a certain amount of public discussion", but ruled that this did not include being "accused of this criminal act in the media".⁸⁸

The applicant made an application to the European Court, claiming a violation of Article 10. Firstly, the Court held that it had "no cause to question the Supreme Court's assessment that the allegations were defamatory".⁸⁹ However, the Court noted that the article concerned matters of public interest, namely a candidate running in a general election, and the "issue of sexual violence against children". Secondly, because the candidate was running in a general election, he "must be considered to have inevitably and knowingly entered the public domain and laid himself open to closer scrutiny of his acts. The limits of acceptable criticism must accordingly be wider than in the case of a private individual".⁹⁰

⁸⁷ *Olafsson v. Iceland*, no. 58493/13, 16 March 2017, <http://hudoc.echr.coe.int/eng?i=001-171974>.

⁸⁸ *Olafsson v. Iceland*, no. 58493/13, 16 March 2017, par. 22.

⁸⁹ *Olafsson v. Iceland*, no. 58493/13, 16 March 2017, par. 49.

⁹⁰ *Olafsson v. Iceland*, no. 58493/13, 16 March 2017, par. 51.



Importantly, the Court reiterated the principle that a “general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas”.⁹¹ The Court then applied these principles to the website’s editor, and held that he had “acted in good faith” and ensured that the article had been written in compliance with “ordinary journalistic obligations to verify a factual allegation”.⁹² Finally, the Court stated that the interest in protecting the candidate from the defamatory allegations was “largely preserved by the possibility open to him under Icelandic law to bring defamation proceedings against the sisters”.⁹³

2.4.2. Online news media's liability for reader comments

Most online news media provide readers with the opportunity to comment on articles; during an election these comments can facilitate a reader's freedom of expression. While the Court has not ruled on an online news media's liability for a reader's comment concerning a political candidate, the Court has delivered three important judgments on reader comments, which contain important principles that are relevant for the present discussion.

Firstly, in 2015, the Grand Chamber delivered its well-known *Delfi AS v. Estonia* judgment,⁹⁴ which concerned an online news website's liability for reader comments. The Court laid down a number of factors to be assessed when considering whether an online news site should be liable for reader comments: (a) the context of the comments, (b) the measures applied by the applicant company to prevent or remove defamatory comments, (c) the possible liability of the actual authors of the comments as an alternative to the applicant company's liability, and (d) the consequences of the domestic proceedings for the applicant company.⁹⁵ The Court held that a “commercial” news site being held liable for reader comments which were “clearly unlawful speech” and “hate speech” did not violate Article 10. The Court concluded that “where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals”, liability may be imposed on online news sites “if they fail to take measures to remove clearly unlawful comments without delay.”⁹⁶

In 2016, the Court again considered this issue in *MTE and Index.hu v. Hungary*.⁹⁷ However, unlike in the case of *Delfi*, the reader comments at issue “did not constitute clearly unlawful speech”, or hate speech. The Hungarian courts had held that a news

⁹¹ Olafsson v. Iceland, no. 58493/13, 16 March 2017, par. 56.

⁹² Olafsson v. Iceland, no. 58493/13, 16 March 2017, par. 57.

⁹³ Olafsson v. Iceland, no. 58493/13, 16 March 2017, par. 60.

⁹⁴ *Delfi v. Estonia* [GC], no. 64569/09, 16 June 2015, <http://hudoc.echr.coe.int/eng?i=001-155105>.

⁹⁵ *Delfi v. Estonia* [GC], no. 64569/09, 16 June 2015, par. 142-143.

⁹⁶ *Delfi v. Estonia* [GC], no. 64569/09, 16 June 2015, par. 159.

⁹⁷ *Magyar Tartalomsgazdálkodók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, 2 February 2016, <http://hudoc.echr.coe.int/eng?i=001-160314>.



portal was liable for defamatory reader comments, and “were liable for enabling their publication, notwithstanding the fact that they had subsequently removed them”.⁹⁸ The Court applied the *Delfi* criteria, but concluded that there had been a violation of Article 10. Firstly, the Court had regard to the fact that the “injured company never requested the applicants to remove the comments but opted to seek justice directly in court”.⁹⁹ Secondly, the Court held that “if accompanied by effective procedures allowing for rapid response, the notice-and-take-down-system could function in many cases as an appropriate tool for balancing the rights and interests of all those involved”.¹⁰⁰

Most recently in 2017, the Court again returned to this issue in *Pihl v. Sweden*.¹⁰¹ An article was published by an association on a Swedish blog alleging that the applicant had been “involved in a Nazi party”. The following day, a reader posted a comment under the article that the applicant was a “real hash-junkie”. A week later, the applicant posted a comment on the blog, stating that the information was wrong and should be removed. The following day the blog post and the comment were removed and a new post was added on the blog by the association, stating that the earlier post had been wrong and based on inaccurate information, and apologised for the mistake. The applicant instituted defamation proceedings against the association which published the blog. However, a district court rejected the applicant’s claim. The court found that the comment constituted defamation on the basis of the content and the context within which it had been made. However, it found no legal grounds on which to hold the association responsible for failing to remove the comment sooner than it had done.

The applicant made an application to the European Court, arguing that Swedish legislation prevented him from holding the association responsible for the defamatory comment that violated his Article 8 right to private life. However, the Court found that Article 8 had not been violated, holding that the applicant had obtained the IP-address of the computer used to submit the comment; however, he did not take further measures to try to obtain the identity of the author of the comment.¹⁰² Moreover, the association removed the blog post and the comment one day after being notified by the applicant that the post was incorrect and that he wanted the post and the comment removed.¹⁰³ Finally, the Court held that “expecting the association to assume that some unfiltered comments might be in breach of the law would amount to requiring excessive and impractical forethought capable of undermining the right to impart information via the Internet.”¹⁰⁴ The Court reiterated an important principle, namely that:

⁹⁸ Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, no. 22947/13, 2 February 2016, par. 17.

⁹⁹ Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, no. 22947/13, 2 February 2016, par. 83.

¹⁰⁰ Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, no. 22947/13, 2 February 2016, par. 83.

¹⁰¹ *Pihl v. Sweden* (dec.), no. 74742/14, 7 February 2017, <http://hudoc.echr.coe.int/eng?i=001-172145>.

¹⁰² *Pihl v. Sweden* (dec.), no. 74742/14, 7 February 2017, par. 34.

¹⁰³ *Pihl v. Sweden* (dec.), no. 74742/14, 7 February 2017, par. 32.

¹⁰⁴ *Pihl v. Sweden* (dec.), no. 74742/14, 7 February 2017, par. 31.



*“ ... liability for third-party comments may have negative consequences on the comment-related environment of an internet portal and thus a chilling effect on freedom of expression via [the Internet]”.*¹⁰⁵

2.5. Conclusion

This chapter has set out the general principles under the European Convention, as interpreted by the European Court. The case law reflects the various interests at play during elections, including those rights guaranteed under Articles 8 and 10 and the obligations flowing from Article 3 of Protocol No. 1. Indeed, the case law arguably demonstrates the difficulty that the Court has in reconciling two competing principles: firstly, that it is particularly important in the period preceding an election that opinions and information of all kinds be permitted to circulate freely¹⁰⁶; but secondly (and equally importantly), that during elections it may also be considered “necessary”, to place “certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the “free expression of the opinion of the people in the choice of the legislature”.¹⁰⁷

¹⁰⁵ Pihl v. Sweden (dec.), no. 74742/14, 7 February 2017, par. 35.

¹⁰⁶ Bowman v. the United Kingdom [GC], no. 24839/94, 19 February 1998, par. 42.

¹⁰⁷ Bowman v. the United Kingdom [GC], no. 24839/94, 19 February 1998, par. 43.



3. European standards and policy on media and elections

Ronan Ó Fathaigh, Institute for Information Law (IViR), University of Amsterdam

3.1. Introduction

The purpose of this Chapter is to provide a brief overview of current European common standards and policies on media and elections, as provided by a number of Council of Europe (CoE) bodies and other international organisations. These common standards are essential to informing CoE member states seeking to reform current regulations relating to media and elections. These standards are also relied upon by the European Court of Human Rights when interpreting the European Convention on Human Rights. Taking these standards into account will also assist and provide context for the reader when considering the country reports in later chapters.

This chapter begins by setting out recommendations and resolutions of the CoE's Parliamentary Assembly (PACE) and Committee of Ministers, in addition to the opinions of the European Commission for Democracy through Law ("the Venice Commission"). This overview also includes the 2017 PACE resolution on online media and journalism.¹⁰⁸ This chapter then addresses the reports of the European Platform of Regulatory Authorities (EPRA), which have been relied upon by the European Court on a number of occasions. The final section analyses the declarations and reports of the Organization for Security and Co-operation in Europe (OSCE), including its recent joint declaration on freedom of expression and "fake news".¹⁰⁹

¹⁰⁸ Parliamentary Assembly of the Council of Europe, Resolution 2143 (2017) Online media and journalism: challenges and accountability, 25 January 2017, <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=23455&lang=2>.

¹⁰⁹ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, "Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda", 3 March 2017, <http://www.osce.org/fom/302796>.



3.2. Council of Europe

A number of Council of Europe bodies have issued important European recommendations, resolutions and opinions on media and elections, including the Committee of Ministers (composed of foreign affairs ministers from all member states), the Parliamentary Assembly (comprising parliamentarians from all member states) and the Venice Commission (an independent expert body).

3.2.1. Recommendation (1999) on media coverage of election campaigns

The first recommendation to be mentioned is the Recommendation adopted by the Committee of Ministers in 1999 on measures concerning media coverage of election campaigns.¹¹⁰ The Recommendation first addresses the print media. It states that the regulation of media coverage of elections “should not interfere with the editorial independence of newspapers or magazines nor with their right to express any political preference”.¹¹¹ Notably, member states should guarantee that print media outlets owned by public authorities cover elections in a “fair, balanced and impartial manner”.¹¹² Importantly, and in relation to paid political advertising, member states should ensure that all political candidates and parties “are treated in an equal and non-discriminatory manner”.¹¹³

The Recommendation then turns to the broadcast media. It states that both public and private broadcasters should be obliged to cover elections “in a fair, balanced and impartial manner”. In addition, where member state legislation defines a “pre-election time”, the rules on fair, balanced, and impartial coverage should also apply to this period. Similarly, public and private broadcasters should be required to ensure that news and current affairs programmes, discussion programmes, interviews and debates are “fair, balanced and impartial”. In this regard, the recommendation states that member states “might examine” whether monitoring authorities should be able “to intervene in order to remedy possible shortcomings”.

In relation to free airtime for candidates and political parties, the recommendation states that member states “may examine the advisability” of regulating the provision of free airtime to candidates and political parties via public broadcast services. This should

¹¹⁰ Recommendation No. R (99) 15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns, 9 September 1999, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e3c6b.

¹¹¹ Recommendation No. R (99) 15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns, 9 September 1999, section I(1).

¹¹² Recommendation No. R (99) 15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns, 9 September 1999, section I(2).

¹¹³ Recommendation No. R (99) 15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns, 9 September 1999, section I(2).



be done in a “fair and non-discriminatory manner” and “on the basis of transparent and objective criteria”. Finally, in relation to paid political advertising, the recommendation states that where member states permit paid political advertising, the regulatory regime should ensure that parties should have the possibility of purchasing advertising “[under] equal conditions and for equal rates of payment”. Moreover, member states should ensure that the public is aware that such messages are political advertisements that have been paid for. Of particular note is the fact that member states “may consider” regulation limiting the amount of political advertisement space that parties or candidates can purchase.¹¹⁴

The recommendation also addresses regulation concerning both print and broadcast media. First, it states that member states “may consider the merits” of prohibiting the “dissemination of partisan electoral messages on the day preceding voting”. This is referred to as a “day of reflection”, and applies to both the print and broadcast media. Secondly, in relation to opinion polls, the recommendation states that regulation, or self-regulation, should ensure that when the media disseminate the results of opinion polls, the public should be provided with “sufficient information” with which to assess the value of such polls. This information could include the name of the party that commissioned the poll, the margin of error, and when the poll was conducted. Importantly, the recommendation states that “all other matters concerning the way in which the media present the results of opinion polls should be decided by the media themselves”. Notably, restrictions on the publication or broadcasting of opinion polls on voting day, or before elections, “should comply with Article 10 of the European Convention on Human Rights”. However, member states “may consider” prohibiting reporting by the media on the results of exit polls “until all polling stations in the country have closed”. Finally, in relation to the right of reply, the recommendation states that candidates or political parties who are entitled to a right of reply under national law should be able to exercise this right during the campaign period.

3.2.2. Recommendation (2007) on media coverage of election campaigns

In 2007, the Committee of Ministers adopted a new Recommendation on measures concerning media coverage of election campaigns. The revision was necessary because of the “constant development of information and communication technology and the evolving media landscape”. The 2007 Recommendation is broadly similar to the 1999 recommendation; however, there are a number of differences. Firstly, it states that member states should apply the principles concerning the broadcast media and rules on “fairness, balance and impartiality” to “non-linear audiovisual media services of public service media”. Secondly, in relation to editorial independence, the 2007

¹¹⁴ Recommendation No. R (99) 15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns, 9 September 1999, section II(5), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e3c6b.



Recommendation adds that member states should ensure that “there is an effective and manifest separation between the exercise of control of media and decision making as regards media content and the exercise of political authority or influence”. Thirdly, the 2007 Recommendation includes a new provision on professional and ethical standards of the media. It states that “all media are encouraged to develop self-regulatory frameworks and incorporate self-regulatory professional and ethical standards regarding their coverage of election campaigns, including, inter alia, respect for the principles of human dignity and non-discrimination”. Finally, in relation to the provision of free airtime by public broadcasters, the 2007 Recommendation notes that the regulatory regime may provide that a public broadcaster make available free airtime on other “linear audiovisual media services” or “an equivalent presence on their non-linear audiovisual media services”.

3.2.3. Resolution (2017) on online media and journalism

In late January 2017, the Parliamentary Assembly of the Council of Europe adopted an important Resolution on online media and journalism.¹¹⁵ While the Resolution broadly concerns online media, it does contain a number of findings relevant for the current discussion of media and elections. Firstly, the Resolution notes that the Internet has allowed “powerful commercial stakeholders and political groups” to engage in concerted action on the part of “huge numbers of user of online media”, while “facts and fair information” are not always the “backbone” of such mobilisations.¹¹⁶ Secondly – striking a warning tone over false and biased information – the Resolution notes “with concern” the number of online campaigns “designed to misguide sectors of the public through intentionally biased or false information”. The Resolution emphasises that this often occurs within a political context, “with the objective of harming the democratic political process”.¹¹⁷ In this regard, the Resolution makes a number of recommendations which are of particular relevance.

Firstly, member states should initiate norms and mechanisms to prevent the risk of “information distortion” and the “manipulation of public opinion”.¹¹⁸ Secondly, member states should recognise in law and practice a right of reply or any other equivalent remedy which allows a rapid correction of incorrect information in online and offline media. In relation to the European Internet Services Providers Association members who provide social media, search engines and news aggregators, the Resolution notes that where “political” interests might conflict with the neutrality of these media, providers

¹¹⁵ Parliamentary Assembly of the Council of Europe, Resolution 2143 (2017) Online media and journalism: challenges and accountability, 25 January 2017, <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=23455&lang=2>.

¹¹⁶ Parliamentary Assembly of the Council of Europe, Resolution 2143 (2017) Online media and journalism: challenges and accountability, 25 January 2017, par. 4.

¹¹⁷ Parliamentary Assembly of the Council of Europe, Resolution 2143 (2017) Online media and journalism: challenges and accountability, 25 January 2017, par. 6.

¹¹⁸ Parliamentary Assembly of the Council of Europe, Resolution 2143 (2017) Online media and journalism: challenges and accountability, 25 January 2017, par. 12.1.1.,



"should be transparent about such a bias". Notably, in relation to "false information", the Resolution calls on members (i) to empower users to report "false information" and make such falsity known publicly, and to voluntarily correct false content or to publish a reply (in accordance with the right of reply), or (ii) to remove such false content.¹¹⁹

3.2.4. Venice Commission

The Venice Commission was established by the Committee of Ministers in 1990 as an independent body composed of legal experts from over 60 member states.¹²⁰ The Commission provides member states with legal advice in the form of "legal opinions" on draft legislation or legislation already in force.

In 2002, the Venice Commission adopted a code of good practice in electoral matters,¹²¹ which has been cited by the European Court of Human Rights on many occasions.¹²² The code of good practice in electoral matters was approved by the Parliamentary Assembly of the Council of Europe in 2003.¹²³ The Opinion lays down five fundamental electoral principles, including "universal, equal, free, secret and direct suffrage". This means that equality of opportunity must be guaranteed for parties and candidates, which entails a neutral attitude on the part of state authorities with regard to coverage by the media, in particular by the publicly owned media. Equality of opportunity applies in particular to radio and television air-time. Moreover, the Opinion states that legal provision should be made to ensure that there is a minimum level of access to privately owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections. Notably, the "principle of equality of opportunity can, in certain cases, lead to a limitation of political party spending, especially on advertising".

In addition, the Venice Commission has also produced opinions on individual member state laws in this area, including on electoral laws applicable to the media.¹²⁴ In this regard, the Venice Commission also issues guidelines for election monitoring

¹¹⁹ Parliamentary Assembly of the Council of Europe, Resolution 2143 (2017) Online media and journalism: challenges and accountability, 25 January 2017, par. 12.3.

¹²⁰ See Committee of Ministers, Resolution(90)6 on a Partial Agreement Establishing the European Commission for Democracy through Law, 10 May 1990, http://www.venice.coe.int/WebForms/pages/?p=01_01_Statute_old, and Committee of Ministers, Resolution(2002)3 on Revised Statute of the European Commission for Democracy through Law, 21 February 2002, http://www.venice.coe.int/WebForms/pages/?p=01_01_Statute.

¹²¹ European Commission for Democracy through Law, Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e).

¹²² See, for example, *Orlovskaya Iskra v. Russia*, App. no. 42911/08, 21 February 2017, par. 54, <http://hudoc.echr.coe.int/eng?i=001-171525>.

¹²³ Parliamentary Assembly, Recommendation 1595 (2003) Code of Good Practice in Electoral Matters, 30 January 2003, <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17084&lang=en>.

¹²⁴ See, for example, European Commission for Democracy Through Law (the Venice Commission), on the Federal Law on the Election of the Deputies of the State Duma of the Russian Federation, 19 March 2012, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)002-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)002-e).



undertaken by the OSCE.¹²⁵ These guidelines also provide sets of standards for regulation of the media during of elections.

3.3. European Platform of Regulatory Authorities

A further important source is the European Platform of Regulatory Authorities (EPRA), which has also been cited on occasion by the European Court of Human Rights.¹²⁶ EPRA was established in 1995, and is an independent platform of regulatory authorities. It currently has 52 regulatory authorities from 46 countries, and the European Commission, the Council of Europe, the European Audiovisual Observatory and the Office of the OSCE Representative on Freedom of the Media are standing observers.¹²⁷

Importantly, EPRA has produced a number of important reports in the area of media and election, and in May 2013 at its 37th Meeting in Kraków, EPRA produced a comparative report on political pluralism and political communication on television,¹²⁸ and a separate presentation was made by the Italian regulator, AGCOM (*Autorità per le Garanzie nelle Comunicazioni*), on Italy.¹²⁹ In addition, EPRA produced notable surveys on political advertising in 2006¹³⁰ and 2009,¹³¹ which have been cited by the European Court.¹³²

¹²⁵ Guidelines on Media Analysis during Election Observation Missions prepared in co-operation between the OSCE's Office for Democratic Institutions and Human Rights, the Council of Europe's Venice Commission and Directorate General of Human Rights, and the European Commission adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005),

[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2005\)032-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)032-e).

¹²⁶ See *TV Vest As & Rogaland Pensjonistparti v. Norway*, no. 21132/05, 11 December 2008, par. 67, <http://hudoc.echr.coe.int/eng?i=001-90235>, and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22 April 2013, par. 97, <http://hudoc.echr.coe.int/eng?i=001-119244>.

¹²⁷ Statutes of the European Platform of Regulatory Authorities, Article 4,

<http://www.epra.org/articles/statutes-of-the-european-platform-of-regulatory-authorities-epra>.

¹²⁸ Francesca Pellicanò, 37th EPRA Meeting - Kraków, Working Group 1 - Political Communication, 8-10 May 2013,

http://epra3-production.s3.amazonaws.com/attachments/files/2177/original/WG1_politicalcommunication.pdf?1367948783.

¹²⁹ AGCOM, Pluralism and political communication in Italy, 37th EPRA meeting, WG 1 Political communication, 9 May 2013,

http://epra3-production.s3.amazonaws.com/attachments/files/2185/original/Presentation_WG1_Francesca%20Pellicano.pdf?1368452127.

¹³⁰ EPRA Secretariat, Background paper – Plenary Political advertising: case studies and monitoring, 23rd EPRA Meeting, Elsinore, Denmark, 17-19 May 2006,

http://epra3-production.s3.amazonaws.com/attachments/files/1178/original/Political_advertising_final.doc.

¹³¹ Comparative Document (EPRA/2009/10) prepared by the EPRA Secretariat for working group 1 on "Political advertising Redefining the Limits", Dresden, 14 October 2009, <http://www.epra.org/attachments/dresden-wg1-political-advertising-comparative-document-by-epra-secretariat-oct-2009>.

¹³² See, for example, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22 April 2013, <http://hudoc.echr.coe.int/eng?i=001-119244>.



3.4. Organization for Security and Co-operation in Europe

The Organization for Security and Co-Operation in Europe (OSCE) has also issued a number of important standards and policies in relation to media and elections. Firstly, during its Copenhagen Meeting in 1990, the participating member states made an important statement of principle in relation to media and elections, stating that they would ensure that "no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process".¹³³

Notably, in 2009, the OSCE Representative on Freedom of the Media, along with the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, issued a Joint Statement on the Media and Elections.¹³⁴ The Joint Statement provided a number of important principles, including the principle that the media should "be exempted from liability for disseminating unlawful statements made directly by parties or candidates – whether within the context of live broadcasting or advertising – unless the statements have been ruled unlawful by a court or the statements constitute direct incitement to violence and the media outlet had an opportunity to prevent their dissemination". Furthermore, parties and candidates which have been illegally defamed or have suffered another illegal injury through a statement in the media during an election period should be entitled to the rapid correction of that statement or should have the right to seek redress in a court of law. Lastly, in relation to political advertising, it should be illegal for the media to discriminate, on the basis of political opinion or other recognised grounds, in respect of the allocation of and charging for paid political advertisements, where these are permitted by law.

Lastly, a Joint Declaration was issued in 2017, on freedom of expression and "fake news", disinformation and propaganda.¹³⁵ This timely Joint Statement contains a number of important recommendations, which relate to online media in particular, and which are particularly important during election periods. Firstly, it states that "general prohibitions" on the dissemination of information based on "vague and ambiguous ideas", including "false news" or "non-objective information", are incompatible with international standards pertaining to restrictions on freedom of expression. Secondly, intermediaries should never be liable for any third party content relating to those services unless they specifically

¹³³ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, 29 June 1990, par. 7.8, <http://www.osce.org/odihr/elections/14304?download=true>.

¹³⁴ UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, "Joint Statement on the Media and Elections" 15 May 2009, <http://www.osce.org/fom/37188?download=true>.

¹³⁵ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, "Joint declaration on freedom of expression and "fake news", disinformation and propaganda", 3 March 2017, <http://www.osce.org/fom/302796>.



intervene in that content or refuse to obey an order adopted in accordance with due process. Finally, the Joint Statement provides that during elections, the media should consider including critical coverage of disinformation and propaganda as part of their news services, in line with their watchdog role in society.

3.5. Conclusion

This brief overview of current European standards and policies demonstrates the myriad issues which must be considered when creating frameworks for the media during elections. It also demonstrates that these interests include not only those of the media, but of voters, candidates, parties, and the broader interests of pluralism and free elections. Common standards are essential for member states when drafting or reforming regulation on media and elections.



4.DE - Germany

Christina Etteldorf, Institute of European Media Law (EMR)

4.1. Introduction

The media's considerable influence over the formation of public opinion is undisputed. This becomes particularly relevant during election periods, when the media's role as both a conveyor of information and an influencing factor in the shaping of public opinion comes to the fore. On the one hand, the media serve as a platform on which political parties are keen and able to present themselves and their election manifestos. On the other hand, they contribute to the formation of public opinion through their independent journalistic reporting of election campaigns. Meanwhile, sandwiched between the political parties' original, unedited election advertising¹³⁶ and their own independent, journalistic reporting of elections, the German media also provide space for various discussion forums, including televised debates between party leaders. Although these debates are subject to editorial influence, the parties are able to use them to raise their public profile. While independent reporting is an essential task of the media and intrinsic to the exercise of the media freedoms enshrined in Article 5(1) of the *Grundgesetz* (Basic Law – “the GG”)¹³⁷, the opportunity for political parties to present themselves to the public during election periods in the Federal Republic of Germany is central to their own freedom, which is protected under Article 21 of the GG, and enables them to assume their role as instruments of constitutional life.¹³⁸ Since these interests conflict in the area of election advertising and election reporting, there is a need for regulation which, in Germany, takes the form of legislation, case law and self-regulation. It is described below in so far as it applies to broadcasters, print media and online media.

¹³⁶ This concept refers exclusively to measures aimed at persuading voters to vote for a particular party or particular candidates in specifically mentioned forthcoming elections.

¹³⁷ Basic Law of the Federal Republic of Germany, version of 23 December 2014 (Federal Gazette I p. 2438), <http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf>. An English version is available at: http://www.gesetze-im-internet.de/englisch_gg/index.html.

¹³⁸ Regarding constitutional aspects, see Reinhart Ricker, “Wahlwerbung und Medienfreiheit”, in Andreas Heldrich (ed.), *Medien zwischen Spruch und Informationsinteresse*, Nomos Verlagsgesellschaft, Baden-Baden 1999, pp. 139 et seq, <http://www.gbv.de/dms/spk/sbb/toc/269198237.pdf>.



4.2. Current Regulation

4.2.1. Regulation of broadcast media during elections and referenda

The regulatory situation in Germany is characterised by the dual broadcasting system, as part of which the relevant regional legislators (Articles 30 and 70(1) of the GG) adopt separate provisions for public and private broadcasters. Among these provisions, a distinction should be made between the regulation of election advertising and that of election reporting, since the scale and magnitude of legislative intervention in these areas vary considerably.

4.2.1.1. Election advertising in broadcasting

Under Article 7(9)(1) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement – “the RStV”),¹³⁹ political advertising is, in principle, prohibited by broadcasters in an effort to prevent individual social groupings and forces from exerting a disproportionate influence on public opinion by purchasing advertising time.¹⁴⁰ However, exemptions apply during election campaigns. All public service broadcasters except Radio Bremen, Radio Berlin-Brandenburg and Saarländischer Rundfunk¹⁴¹ are obliged to allocate airtime for election advertising free of charge. As far as national broadcasters are concerned, for

¹³⁹ *Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV /Interstate Treaty on Broadcasting and Telemedia (Interstate Broadcasting Treaty) in the version of the 19th Amendment to the Interstate Broadcasting Treaties, entry into force: 01 October 2016, http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/19_RfAendStV_medienanstalten_Layout_final.pdf. An English version is available at: http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/RStV_19_medienanstalten_Layout_en.pdf.*

¹⁴⁰ See *Verwaltungsgericht Schwerin* (Schwerin Administrative Court), ruling of 22 June 2011, case no. 6 A 316/10, with further references, <http://www.landesrecht-mv.de/jportal/portal/page/bsmvprod.psml?doc.id=MWRE110002892&st=ent&doctyp=juris-r&showdoccase=1¶mfromHL=true#focuspoint>.

¹⁴¹ See voluntary airtime allocation provisions in Article 8(2) of the *Staatsvertrag über die Errichtung einer gemeinsamen Rundfunkanstalt der Länder Berlin und Brandenburg* (Inter-State Agreement on the creation of a joint broadcasting authority for the Berlin and Brandenburg regions), version of 11 September 2013 (Berlin Law Gazette No. 134, p. 634), https://www.rbb-online.de/unternehmen/der_rbb/struktur/grundlagen/rbb_staatsvertrag.file.html/140121-rbb_StV2013.pdf, and Article 19(2) of the *Saarländisches Mediengesetz* (Saarland Media Act - SMG), version of 10 December 2015 (Saarland Law Gazette I. 2015, p. 913), https://www.lmsaar.de/wp-content/uploads/2016/03/l_2_SMG.pdf. Although there is no such regulation in the *Radio-Bremen-Gesetz* (Radio Bremen Act), <http://www.radiobremen.de/unternehmen/organisation/gesetz108.pdf>, airtime may be allocated on a voluntary basis, see *Staatsgerichtshof Bremen* (Bremen State Court), ruling of 23 December 1996, case no. St 5/96, http://www.staatsgerichtshof.bremen.de/sixcms/media.php/13/e96_05.pdf.



Zweites Deutsches Fernsehen (ZDF) this requirement is set out in Article 11(1) of the *ZDF-Staatsvertrag* (ZDF Inter-State Agreement – “the ZDF-StV”)¹⁴², under which parties are entitled to a reasonable amount of airtime in the run-up to *Bundestag* (lower house of parliament) and European Parliament elections if they feature on at least one state list or nomination. The broadcasters that make up the ARD,¹⁴³ however, are subject to their respective regional provisions¹⁴⁴, which are essentially similar but also extend the airtime allowance to include *Landtag* (regional parliament) elections in the broadcast area concerned.¹⁴⁵ For national private broadcasters, Article 42(2) of the RStV sets out an obligation equivalent to that of Article 11 of the ZDF-StV, at the same time ensuring that broadcasters’ costs are reimbursed. However, the rules for regional private broadcasters are more diverse: while some regional media laws require broadcasters to allocate airtime,¹⁴⁶ others merely give them the option of doing so. One common feature of all the aforementioned regulations, however, is that broadcasters must respect the principle of equal opportunities for all parties when allocating airtime, as required at constitutional level by Articles 3(1) and 21(1) of the GG and in ordinary law by Article 5 of the *Parteiengesetz* (the Parties Act – Part G),¹⁴⁷ to which many regional media laws refer. This principle has been frequently reiterated by the courts in relation to airtime allocation during election campaigns ever since the *Bundesverfassungsgericht* (Federal Constitutional Court) took a landmark decision in 1957, and has become known as the principle of

¹⁴² *ZDF-Staatsvertrag*, version of 3 December 2015 (State Law Gazette 2016 p. 152), http://www.ard-werbung.de/fileadmin/user_upload/media-perspektiven/Dokumentation/20161_ZDF-Staatsvertrag.pdf.

¹⁴³ The ARD is short for the “Association of Public Broadcasting Corporations in the Federal Republic of Germany” (“Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland”). With its nine self-governed regional public broadcasting corporations, which are independent from the state or government and publicly funded, the ARD offers a diversity of programmes on television, on the radio and online for all. See http://www.ard.de/download/564240/ARD_Brochure_2011_English.pdf.

¹⁴⁴ Article 4(2)(2) of the Gesetz über die Errichtung und die Aufgaben einer Anstalt des öffentlichen Rechts “Der Bayerische Rundfunk” (Act on the establishment and tasks of a public-law institution “Bayerischer Rundfunk” - BayRG), version of 20 December 2016 – Bavarian Law Gazette 2016, No. 20 p. 427), <http://www.gesetze-bayern.de/Content/Document/BayRuFuG>true>; Article 3(6) of the Gesetz über den Hessischen Rundfunk (Hessischer Rundfunk Act - HRG), version of 13 October 2016 (Hessian Law Gazette 2016, p. 178), <http://www.hr.de/unternehmen/rechtliche-grundlagen/das-hr-gesetz,hr-gesetz-100.html>; Article 14(2) of the Staatsvertrag über den Mitteldeutschen Rundfunk (Inter-State Agreement on Mitteldeutscher Rundfunk), version of 30 May 1991 (Saxon Law Gazette 1991, p. 169), <http://www.mdr.de/presse/unternehmen/download1278-downloadFile.pdf>; Article 15(1) of the NDR-Staatsvertrag (Inter-State Agreement on NDR - NDR-StV), version of 1/2 May 2005 (Hamburg Law Gazette 2005, p. 263), https://www.ndr.de/der_ndr/unternehmen/staatsvertrag100.pdf; Article 9(2) of the Staatsvertrag über den Südwestrundfunk (Inter-State Agreement on Südwestrundfunk), version of 1/9 April 2015 (State Law Gazette 2015 p. 108), http://www.swr.de/-/id=12673462/property=download/nid=7687068/13e12x/staatsvertrag_ueber_den_suedwestrundfunk.pdf; Gesetz über den „Westdeutschen Rundfunk Köln“ (Act on Westdeutscher Rundfunk Köln), version of 6 December 2016 (North Rhine-Westphalian Law Gazette 2016, p. 79), <http://www1.wdr.de/unternehmen/der-wdr/profil/rechtsgrundlagen-100.html>.

¹⁴⁵ See Article 4(2)(2) BayRG, Article 3(6) HRG, Article 15(1) NDR-StV and Article 19(2) SMG.

¹⁴⁶ Hamburg, Schleswig-Holstein, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saxony, Saxony-Anhalt and Thuringia; see also the overview in Herrmann/Lausen, *Rundfunkrecht*, 2nd ed. 2004, Article 20 rec. 19.

¹⁴⁷ *Parteiengesetz* (Parties Act - PartG), version of 22 December 2015 (Federal Gazette I p. 2563), <http://www.gesetze-im-internet.de/partg/>.



“graded equal opportunities”.¹⁴⁸ It states that airtime should be allocated in accordance with the importance of the parties, which can be measured according to factors such as previous election results and the size of the parliamentary representation of the party in question. The parties alone are ultimately responsible for the content of their election advertisements. Broadcasters’ right to monitor and to refuse to broadcast them is therefore limited to situations in which it is obvious that their content seriously infringes general laws in the sense of Article 5(2) of the GG, which particularly include criminal laws.¹⁴⁹

4.2.1.2. Election reporting in broadcasting

In contrast to election advertising, German law contains no specific provisions concerning editorial programmes with election-related content. Article 32(2) of the *Bundeswahlgesetz* (the Federal Elections Act)¹⁵⁰ prohibits, across all sectors and in all media, the publication of results of exit polls conducted on election day before polling stations are closed. When reporting on opinion polls, broadcasters are also always obliged, under Article 11(2) of the RStV, to indicate whether they are representative. The same Article, along with corresponding provisions of regional laws, requires broadcasters, in accordance with general programming principles, to remain objective and impartial, while Article 10(1) of the RStV demands that they verify the accuracy of their own comments and label them as such. Although this is usually sufficient to protect parties’ interests in purely news-based programmes, the lack of regulation of editorial programmes covering election campaigns (television debates between party leaders, political discussion programmes, etc.) is offset by very clear case-law, since such programmes usually have a significant influence on the formation of public opinion. This is based on the assumption that, although the principles applicable to election advertising cannot be transferred directly to editorial election reporting, broadcasters must respect the “graded equal opportunities” principle. However, since programming freedom carries much greater weight in such reporting, all that is ultimately required is a coherent overall programming concept that takes sufficient account of all parties in proportion to their importance.¹⁵¹

¹⁴⁸ Bundesverfassungsgericht (Federal Constitutional Court - BVerfG), decision of 3 September 1957, case no. 2 BvR 7/57, <https://www.telemedicus.info/urteile/Rundfunkrecht/Sendezeitansprueche-der-politischen-Parteien/100-BVerfG-Az-2-BvR-757-Sendezeit-I-Bund-der-Deutschen.html>; see Beater A., *Medienrecht*, 2nd ed., rec. 646 with further references.

¹⁴⁹ BVerfG, landmark decision of 14 February 1978, case no. 2 BvR 523/75, <https://www.telemedicus.info/urteile/Rundfunkrecht/Sendezeitansprueche-der-politischen-Parteien/103-BVerfG-Az-2-BvR-52375-und-958-97776-Wahlwerbesendungen.html>; OVG Koblenz (Koblenz Higher Administrative Court), decision of 7 September 2005, case no. 2 B 11269/05 (violation of human dignity by the spot of the Anarchistic Pogo Party), <http://www.landesrecht.rlp.de/jportal/portal/t/7qe/page/bsrlpprod.psml?pid=Dokumentanzeige&showdoccase=1&doc.id=MWRE121610500&doc.part=L>.

¹⁵⁰ *Bundeswahlgesetz* (Federal Elections Act), version of 3 May 2016 (Federal Gazette I p.1062), <https://www.bundeswahlleiter.de/dam/jcr/2596ba8d-34e4-4c9b-a731-a27f8fb0618f/bundeswahlgesetz.pdf>.

¹⁵¹ See BVerfG decision of 30 August 2002, case no. 2 BvR 1332/02, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2002/08/rk20020830_2bvr133202.htm; VG Mainz (Mainz Administrative Court), decision of 7 May 2009, case no. 4 L 521/09,



4.2.2. Regulation of print media during elections and referenda

In Germany, there are no specific legislative provisions governing election advertising or election reporting in the print media. Political parties are, in principle, allowed to advertise, since the regional legislators responsible (Articles 30 and 70(1) GG) have not prohibited it in the regional press laws. If election advertising or reporting appears in the written press, the publisher – unlike broadcasters – is not required to respect the equal opportunities of the parties¹⁵² or party political neutrality. Furthermore, in accordance with the Federal Constitutional Court's landmark Montabaur ruling, the autonomy of the press means that, even if a publishing house holds a monopoly, the obligation to contract does not create an obligation to print.¹⁵³ As far as reporting is concerned, the regional press laws only contain general provisions on the public function of the press, which is primarily to gather and distribute news, and on its duty to exercise due diligence, which requires publishers to verify the origin and accuracy of content, and its relevance to criminal law.¹⁵⁴ These provisions must also be respected during election periods.

Election advertising can also appear on other printed materials, such as posters and mailshots. Election-related billposting constitutes a special use of public street space and therefore requires authorisation. When granting such permission, the authorities responsible under regional laws are obliged, under established case law, to respect the equal opportunities and freedom of political parties. Consequently, during the last six weeks or so of election campaigns, parties are entitled to display posters in accordance with the 'graded equal opportunities' principle and a balanced concept of visual election advertising.¹⁵⁵ As well as the aforementioned grounds on which broadcasters can refuse to broadcast election advertising, posters can be rejected if they endanger road safety. However, the authorities must also exercise discretion and take suitable account of the political parties' interest in election advertising.¹⁵⁶ Election canvassing by mailshot or letter is permitted in principle and is not subject to any special rules. However, recipients can refuse to accept all unwanted circulars by seeking injunctive relief, as well as reject individual letters.¹⁵⁷

<http://www.landesrecht.rlp.de/jportal/portal/t/7qe/page/bsrlpprod.psml?pid=Dokumentanzeige&showdoccase=1&doc.id=MWRE090001484&doc.part=L>.

¹⁵² Regarding this issue, see Holznagel B., "Verantwortung der Massenmedien im Wahlkampf", in JZ 2012, pp. 165, 169.

¹⁵³ BVerfG, decision of 24 March 1976, case no. 2 BvP 1/75.

¹⁵⁴ For example, Articles 3, 6 and 21 of the *Pressegesetz für das Land Nordrhein-Westfalen* (North Rhine-Westphalia Press Act), version of 12 December 2013 (NRW Law Gazette 2014 p. 248), https://recht.nrw.de/lmi/owa/br_text_anzeigen?v_id=10000000000000000330.

¹⁵⁵ *Bundesverwaltungsgericht* (Federal Administrative Court – BVerwG), decision of 13 December 1974, case no. VII C 42.72; *VG Gelsenkirchen* (Gelsenkirchen Administrative Court), decision of 9 September 2013, case no. 14 L 1127/13, <https://www.jurion.de/urteile/bverwg/1974-12-13/bverwg-vii-c-4272/>.

¹⁵⁶ *OVG des Saarlandes* (Saarland Higher Administrative Court), decision of 22 February 2017, case no. 1 D 166/17, <http://www.rechtsprechung.saarland.de/cgi-bin/rechtsprechung/document.py?Gericht=sl&nr=5581>.

¹⁵⁷ *KG Berlin* (Berlin Appeal Court), decision of 21 September 2001, case no 9 U 1066/00, <http://www.proius.de/Unterlassungsklage%20-%20KG%20Berlin%20-%209%20U%201066.00.pdf>; VGH

4.2.3. Regulation of online media during elections and referenda

The regulation of election advertising and election reporting in the online sector depends not only on the online service itself but also on its provider. German law distinguishes between broadcasting and telemedia. The transmission of a linear programme according to a schedule (especially live streaming services) via the Internet is classified as broadcasting and is therefore subject to the provisions described in section 2.1. Telemedia content, on the other hand, is governed by Articles 54 *et seq.* of the RStV. Election advertising via on-demand audiovisual media services is prohibited under Article 58(3)(1), in conjunction with Article 7(9) of the RStV and, in other telemedia, must be separated from other content, in accordance with Article 58(1) of the RStV. However, the UWG (Unfair Competition Act), which is by far the most important instrument for the regulation of Internet advertising in Germany, does not apply to political advertising.¹⁵⁸ As far as reporting during election campaigns is concerned, Article 54(3) of the RStV is particularly relevant, obliging telemedia providers – like broadcasters (Art. 10(2) of the RStV) – to indicate the representative strength of the opinion polls that they publish. For journalistic telemedia – especially on-demand online services of newspapers and broadcasters – Article 54(2) the RStV also states that recognised journalistic principles should apply, which means that the provisions for the press described in section 2.2 are also applicable here. However, this does not cover telemedia that fall beneath the journalistic threshold, which typically include social platforms such as Facebook and YouTube, as well as political parties' online offerings.

If the state provides an online service or information, it is required by Article 5, Part G – or directly by Articles 3(1) and 21(1) – of the GG, to respect equal opportunities and to remain neutral.¹⁵⁹

4.2.4. Self-regulatory codes or practices concerning elections/referenda

In broadcasting, self-regulation is achieved through the publication of guidelines for the allocation of airtime for election advertising and programming guidelines by the public broadcasting authorities.¹⁶⁰ The *Landesmedienanstalten* (regional media authorities), which are responsible for monitoring private broadcasters, have also jointly published a set of

Mannheim (Mannheim Administrative Court), decision of 24 April 1990, case no. 10 S 560/89, <https://openjur.de/u/328501.html>.

¹⁵⁸ Koch Th., in: *juris Praxiskommentar zum UWG*, Eike Ullmann (ed.), 4th ed. 2016, Art. 7 UWG, rec. 161.

¹⁵⁹ See Sophie Charlotte Lenski, “*Die abgestufte Chancengleichheit der Parteien im Internet*”, MIP 16 (2010), pp. 7 *et seq.*, and, regarding “Wahl-O-Mat”, http://www.pruf.de/fileadmin/redaktion/Oeffentliche_Medien/PRuF/MIP/MIP_2010_Heft16.pdf.

¹⁶⁰ See NDR programming guidelines 2017/2018, for example: https://www.ndr.de/der_ndr/unternehmen/leitlinien104.pdf.



guidelines on the implementation of Article 43(2) of the RStV.¹⁶¹ Although these guidelines are not legally binding, they describe the legal interpretation of the media regulators, in particular their view on what is reasonable in terms of the volume and scheduling of election advertising.

For the written press, the *Pressekodex* (Press Code)¹⁶² sets out general requirements for journalists. Although it has no direct legal binding force, it is referred to by courts verifying compliance with the due diligence obligations of the press in cease-and-desist, right-of-reply and compensation cases. With regard to election campaign reporting in particular, Guideline 1.2 of the Press Code requires the press to report opinions with which it disagrees in order to fulfil its obligation to inform the public truthfully. Guideline 7 states that (political) advertising should be separated from editorial content and labelled as such. The *Presserat* (Press Council) can punish breaches of the Press Code after conducting a complaints procedure by issuing a simple notice, a letter of disapproval, or a (public) reprimand, which is the harshest sanction available.¹⁶³

The Press Code's provisions also apply to journalistic telemedia.¹⁶⁴ Incidentally, German law only invites online service providers to adhere to a voluntary system of self-regulation.

4.3. Recent and emergent issues

4.3.1. Claims regarding reasonable coverage

Even though election advertising and election reporting are already regulated in the broadcasting sector, disputes frequently arise in the run-up to German elections, usually between broadcasters and small political parties that do not think they are receiving sufficient coverage. In such cases, it is often left to the courts¹⁶⁵ to assess the importance of the party and, on that basis, whether the broadcaster's overall programming concept is

¹⁶¹ *Rechtliche Hinweise der Landesmedienanstalten zu den Wahlsendezeiten für politische Parteien* (Legal guidelines of the regional media authorities on election airtime for political parties), 16 May 2017, http://www.die-medienanstalten.de/fileadmin/Download/Positionen/Gemeinsame_Positionen/Rechtliche_Hinweise_der_Medienanstalten_zu_den_Wahlsendezeiten_2017.pdf.

¹⁶² *Pressekodex* (Press Code) of the German Press Council, <http://www.presserat.de/pressekodex/pressekodex/>. An English version is available at http://www.presserat.de/fileadmin/user_upload/Downloads_Dateien/Pressekodex2017english.pdf.

¹⁶³ See also the Press Council overview at <http://www.presserat.de/pressekodex/uebersicht-der-ruegen/>.

¹⁶⁴ Press release of the German Press Council, 4 December 2008, <http://www.presserat.de/presserat/news/pressemitteilungen/datum/2008/>.

¹⁶⁵ See, for example, the recent decision of the *Verfassungsgerichtshof des Saarlandes* (Saarland Constitutional Court) of 16 March 2017, case no. Lv 3/17 – NPD excluded from Saarländischer Rundfunk leaders' debate, <http://www.verfassungsgerichtshof-saarland.de/verfghsaar/dboutput.php?id=331>.



compatible with the “graded equal opportunities” principle, taking programming freedom into account.

4.3.2. Impact of “fake news” and “social bots” on elections

As the date of the 2017 *Bundestag* elections approaches, media, politicians and even the general public in Germany are increasingly voicing fears that the election results could be influenced by “fake news” and social bots.¹⁶⁶ So-called “chatbots” in particular are capable of automatically disseminating information (whether true or false) to huge numbers of targeted recipients via social networks, thereby influencing the formation of political opinion. New opportunities for election advertising are also therefore being created. Since German teledmedia law does not contain any provisions that are directly applicable to social bots and that are capable of countering the resulting risks to diversity of opinion, transparency and equal opportunities, reference must be made to the aforementioned provisions (section 2.3), which do not fully address the problem outside the sphere of journalistic content.¹⁶⁷ Similarly, beyond the realms of journalistic teledmedia, “fake news”, which spreads like wildfire even without the use of bots, also remains¹⁶⁸ untouched by any legislation that takes into account the specific characteristics of the Internet. In particular, the enforcement of deletion or injunction claims, which are perfectly suited to the analogue world, is either impossible or takes too long in a digital environment.¹⁶⁹

4.3.3. Online public relations activities by the government

The Internet is also providing new ways for the Government to communicate with the general public. Since 2015, for example, the *Bundespresseamt* (Federal Press Office) has been operating the “*Bundesregierung*” (Federal Government) account on the Facebook social network, through which it distributes political information, among other things. The general competence of state authorities to carry out public relations work is based on the remit assigned to them under the Constitution, which also places limitations on such

¹⁶⁶ See, for example, the report in the *Frankfurter Allgemeine Zeitung* on 14 January 2017, <http://www.faz.net/aktuell/politik/bundeswahlleiter-will-bundestagswahl-vor-hackerangriffen-schuetzen-14651555.html>.

¹⁶⁷ For more detail, see Jörg Ukrow, “*Neue Formen politischer Kommunikation als Gegenstand einer positiven Ordnung 4.0*”, available at <http://www.medien-impulse.de/wp-content/uploads/2017/01/chat-bots-170110.pdf>.

¹⁶⁸ On 14 March 2017, Federal Justice Minister Heiko Maas tabled a bill to improve law enforcement in social networks (Network Inspection Act - NetzDG), which is designed to combat fake news and hate speech, see http://www.bmfv.de/SharedDocs/Pressemitteilungen/DE/2017/03142017_Monitoring_SozialeNetzwerke.html.

¹⁶⁹ On 22 March 2017, against the background of the draft Network Inspection Act, the *Gesamtkonferenz* (General Conference) of the regional media authorities recommended coordinated action by the Federal Government and the *Länder* with regard to hate speech and fake news. See <http://www.die-medienanstalten.de/presse/pressemitteilungen/die-medienanstalten/detailansicht/article/die-medienanstalten-pressemitteilung-052017-fake-news-debatte-medienanstalten-empfehlen-koordinie.html>.



activities.¹⁷⁰ Problems arise, however, in relation to the distribution of information about current Government activities, since this can constitute election advertising on the Government's behalf, especially during election campaigns. It is true that State authorities must respect the principle of equal opportunities for political parties, in accordance with Articles 3(1) and 21(1) GG – that is to say there must be a clear distinction between public relations work and election advertising.¹⁷¹ However, German law does not expressly define any criteria regarding the scope, format or time limits of public relations work in the media, which can cause problems when content can be so quickly and easily distributed to large numbers of people via social networks.

4.4. Conclusion

The above description of current regulation of the media during election campaigns shows that there are major disparities between the rules applicable to broadcasters, print media and online media in Germany. While the legislative authorities attach particular importance to the role of broadcasters during election campaigns (imposing strict regulations as a result), it only sets out general principles for print media, combined with a self-regulatory system based on the Press Code, and maintains a 'hands-off' approach in the online sector, where it relies entirely on voluntary self-regulation.

Conflicts between media freedom and the rights of political parties in the broadcasting and press sectors can and therefore must be resolved – albeit over and over again – on the basis of existing regulations and established case law. However, the lack of rules for the digital world creates problems that cannot be resolved (or at least can only be partly resolved) through the use of existing tools. Since the risks posed to diversity of opinion and equal opportunities for political parties by phenomena such as “fake news”, social bots and the online activities of state authorities cannot be tackled effectively, there is clearly a fundamental need for regulation in the online sector in Germany.

¹⁷⁰ For detailed discussion of this issue, see Gerhard Leibholz, Hans-Justus Rinck and Dieter Hesselberger in: *Grundgesetz*, Leibholz/Rinck (ed.), *Stand der 72. Lieferung vom 08.2016*, Art. 20 GG Rn. 401 ff; and Sebastian Müller-Franken, “Unzulässige Staatsmedien oder zulässige Informationstätigkeit? Grund und Grenzen medialer Verlautbarungen von Hoheitsträgern”, AfP 2016, pp. 301-308.

¹⁷¹ BVerfG, decision of 2 March 1977, case no. 2 BvE 1/76, <https://www.telemedicus.info/urteile/Informationsrecht/Staatliche-OEFFentlichkeitsarbeit/404-BVerfG-Az-2-BvE-176-OEFFentlichkeitsarbeit.html>.





5. ES - Spain

Francisco Javier Cabrera Blázquez¹⁷², European Audiovisual Observatory

5.1. Introduction

The Spanish system regulating media and elections is notable in at least three aspects:

- Firstly, the *Ley Orgánica del régimen electoral general* (Representation of the People Institutional Act – “the LOREG”),¹⁷³ that is to say the Spanish Elections Act, regulates the use of mass media for electoral campaigning.
- Secondly, political advertisements are forbidden on both public service media and private channels; however, parties and other entities participating in elections are entitled to free advertising slots on public service television and radio in a percentage relative to the total number of votes obtained by them in the previous round of equivalent elections.
- Thirdly, television channels’ coverage of political parties’ campaigning has to be proportional to the results obtained by each political grouping in the last equivalent elections.

5.2. The current regulations

In its Article 1(1), the Spanish Constitution¹⁷⁴ states that “political pluralism” is one of the highest values that it upholds. Article 20(3) states that the law shall guarantee that the main social and political groupings have access to social communications media under the control of the State or any public agency, while respecting the pluralism of society and of the various languages of Spain. Furthermore, Article 149(1)(27) provides that the State holds exclusive competence over basic rules relating to the organisation of the press, radio and television and, in general, all the means of social communication, without

¹⁷² The author wishes to thank Sonia Monjas González (Comisión Nacional de los Mercados y la Competencia - CNMC) for her useful comments on an earlier draft of this article.

¹⁷³ Ley Orgánica 5/1985, de 19 de Junio, del régimen electoral general (LOREG), <https://www.boe.es/buscar/act.php?id=BOE-A-1985-11672>.

¹⁷⁴ Spanish Constitution, passed by the Cortes Generales in Plenary Meetings of the Congress of Deputies and the Senate held on 31 October 1978, <https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229>. An English version is available at: www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf.

prejudice to those of the powers vested in the Autonomous Communities that relate to their development and implementation.

The LOREG sets out some general rules that apply to all media, although the regulatory bulk concerns broadcast media. Under its Article 51, the electoral campaign begins on the thirty-eighth day after the calling of elections. It lasts fifteen days and ends at midnight on the day immediately preceding the vote. From the calling of the elections to the legal start of the campaign, it is prohibited to disseminate advertising or electoral propaganda through posters, commercial media or advertisements in the press, radio or other digital media.¹⁷⁵ Furthermore, no electoral propaganda can be disseminated once the electoral campaign has legally ended.¹⁷⁶ Moreover, the publication and dissemination or reproduction of electoral polls by any means of communication is forbidden during the five days prior to Election Day.¹⁷⁷

5.2.1. Regulation of broadcast media during elections and referenda

5.2.1.1. Distribution of free advertisement slots

As a general rule, political advertisements are forbidden on both public service media and private channels. However, during the electoral campaign parties¹⁷⁸ participating in the elections are entitled to free advertising space on public service television and radio.¹⁷⁹

The LOREG contains detailed rules about the distribution of free advertising slots. In general terms, this distribution is done according to the total number of votes obtained by each party, federation or coalition in the previous equivalent elections.¹⁸⁰ If the territorial scope of the broadcaster (or its programming) is more limited than that of the election at stake, the distribution of free advertising slots is calculated according to the total number of votes obtained by each party, federation or coalition in the constituencies that fall within the corresponding broadcasting area or, where appropriate, programming. In the case of elections to the European Parliament, the allocation of advertising space is calculated taking into account the total number of votes obtained by each party,

¹⁷⁵ Article 53 LOREG. Such actions cannot be justified by the exercise of ordinary activities of the parties, coalitions or federations.

¹⁷⁶ The above limitations are established without prejudice to the activities carried out by parties, coalitions and federations in the exercise of their constitutionally recognized functions and, in particular, article 20 of the Constitution.

¹⁷⁷ Article 69 LOREG.

¹⁷⁸ The LOREG mentions “parties, federations, coalitions and groups”. For the sake of clarity “parties” will be used henceforth.

¹⁷⁹ Article 60 LOREG.

¹⁸⁰ Article 61 LOREG.



federation or coalition in the territorial scope of the corresponding broadcaster or its programming in the last such election.¹⁸¹

The distribution of free advertising slots in respect of each public service broadcaster and its different programming areas is calculated according to the following scale:

Table 1. Spain: distribution of free advertising slots

Parties	Time allotted
Did not participate or did not obtain representation in the previous equivalent elections.	Ten minutes
Won representation in the previous equivalent elections but did not secure 5% of the total valid votes cast over the national territory or, if applicable, in the constituencies referred to in Article 62.	Fifteen minutes
Won representation in previous equivalent elections and secured between 5 and 20 per 100 of the total votes cast.	Thirty minutes
Won representation in the previous equivalent elections and secured at least 20% of the total votes cast.	Forty-five minutes

Source: Article 64 LOREG

The right to free advertising slots corresponds only to those parties, federations or coalitions that field candidates in more than 75% of the constituencies included in the broadcasting area or, as the case may be, the programming area of the broadcaster in question.¹⁸²

Parties that do not meet the required number of candidates are, however, entitled to fifteen minutes of broadcast time in the general programming of national public service media if they obtained in the previous equivalent elections at least 20% of the votes cast in an Autonomous Community, under hourly conditions similar to those agreed for the broadcasts of the parties referred to above. In such case, the free advertising slots shall be confined to the territorial scope of that Community. This right is over and in addition to that noted above.

Groups of voters that join together to advertise in public service media will be entitled to ten minutes of broadcast time if they meet the required number of candidates mentioned above.

¹⁸¹ Article 62 LOREG.

¹⁸² Municipal elections are regulated by special provisions of this Act.



There are special rules for cases in which two or more elections are held simultaneously. Depending on the nature of the elections at stake, the rules governing the distribution of free advertising slots differ slightly.¹⁸³

In order to determine the timing and order of free advertising slots, the relevant Electoral Commission give preference, in order, to the parties that gained the highest numbers of votes cast in the in the previous equivalent elections.¹⁸⁴

5.2.1.2. Regulatory authority during elections

The *Junta Electoral Central* (Central Electoral Commission)¹⁸⁵ is the authority that a.o. distributes free broadcast advertising slots among public service media; it determines the proportion of slots available according to a calculation issued by the Radio and Television Commission.¹⁸⁶ This Commission is appointed by the Central Electoral Commission and is composed of a representative of each party that is both participating in the elections and is already represented in the Congress of Deputies. Such representatives will have a weighted vote in proportion to the composition of the Congress of Deputies. The Central Electoral Commission also elects the President of the Commission from among the representatives appointed.

The Central Electoral Commission may delegate to Provincial Electoral Commissions the duty of distributing free advertising slots in the regional and local windows of public service media. In such case, a territorial commission is created with the same powers as those noted in paragraph 2 of this article and with a composition that takes into account the parliamentary representation in the Congress of Deputies of the respective territorial area. This commission acts under the direction of the corresponding Provincial Electoral Commission.

In the event that only elections to a Legislative Assembly of an Autonomous Community are held, the functions noted in this article with respect to public service media shall be limited to the territorial scope of the said Autonomous Community, and shall be exercised by the Electoral Commission of that Autonomous Community or, in the event that it is not constituted, by the Electoral Commission of the province whose capital holds that of the Community. In such case the Electoral Commission of that Autonomous Community shall also have at least those powers enjoyed by the Central Electoral Commission, including that of the management of a Radio Television Commission (if so provided by the legislation of the Autonomous Community that regulates the elections to the respective Legislative Assemblies).

Furthermore, the Central Electoral Commission provides instructions to ensure that public and private media observe the principles of political and social plurality, equality and neutrality information concerning informations relating to the electoral campaign (article 66 of LOREG). The CEC is as well competent to sanction the electoral

¹⁸³ Article 63 LOREG.

¹⁸⁴ Article 67 LOREG.

¹⁸⁵ <http://www.juntaelectoralcentral.es/cs/jec/inicio>.

¹⁸⁶ Article 65 LOREG.



infringements of the LOREG that are not considered as a criminal offense (art 153.1 of LOREG).

5.2.1.3. The role of public service and private media

Under Article 66(1) of the LOREG, public service media will undertake to respect political and social pluralism, as well as equality, proportionality and “information neutrality”, in their programming during the electoral period. The decisions of their administrative bodies can be appealed against to the competent Electoral Commission, in accordance with the provisions of the LOREG, and according to the procedure that the Central Electoral Commission has put in place.

In its Instruction 4/2011 (as modified by Instruction 1/2015),¹⁸⁷ the Central Electoral Commission has further explained the obligations arising from an undertaking given by the media to respect during the election period the principles of pluralism, equality, proportionality and information neutrality.

5.2.1.3.1. Public service media

Governing bodies of public service broadcasters have to submit to the relevant Electoral Commissions their plans for covering the electoral campaign, including specific electoral debates, interviews and programmes that they intend to broadcast, as well as the criteria to be applied to specific information related to the electoral campaign. Such plans must reflect the principles of pluralism, equality, proportionality and information neutrality. The campaign coverage plans of public service media, as well as the events and programmes broadcast during the electoral period by public service media that have an impact on the elections, may be challenged before the competent Electoral Commission.

5.2.1.3.2. Private broadcasters

In its Article 66(2) the LOREG provides that private broadcasters must also respect the principles of pluralism and equality during the election period. Likewise, they must respect the principles of proportionality and information neutrality in debates and electoral interviews, as well as in respect of information that they broadcast related to the electoral campaign, in accordance with the Instructions issued by the competent Electoral Commission. The principle of proportionality is taken to mean that the degree of coverage given to each political grouping should reflect the results obtained by that political

¹⁸⁷ Instrucción 4/2011, de 24 de marzo, de la Junta Electoral Central, de interpretación del artículo 66 de la Ley Orgánica del Régimen Electoral General, en lo relativo a las garantías de respeto a los principios de pluralismo, igualdad, proporcionalidad y neutralidad informativa por los medios de comunicación en periodo electoral (BOE núm 74, de 28 de marzo de 2011). [Modificada por Instrucción de la Junta Electoral Central 1/2015, de 15 de abril],

http://www.juntaelectoralcentral.es/cs/jec/doctrina/instrucciones?packedargs=esinstruccion=true&idacueroiinstruccion=25790&sPag=1&template=Doctrina%252FJEC_Detalle&total=81.



grouping in the last equivalent elections. They can provide information on those parties that were not represented or did not obtain representation in the last elections, but these parties should not receive greater informational coverage than the political groupings that did obtain representation in the previous elections.

Management bodies of private televisions are allowed to organise or broadcast interviews or electoral debates, but in so doing they shall take particular account of the results obtained by each political grouping in the last equivalent elections. If a private television channel decides to organise a debate between the two candidates who obtained the most votes in the previous equivalent elections, it shall organise other bilateral or multilateral debates or provide sufficient compensatory information on those other candidates who also won representation in the previous equivalent elections.

Events and programmes broadcast by private television channels that have an electoral impact may also be challenged before the competent Electoral Commissions.

5.2.2. Regulation of print media during elections and referenda

During the campaign period, candidates have the right to advertise in the periodical press and on private radio stations. The cost of such advertising cannot exceed 20% of the planned expenditure limit for parties, groupings, coalitions or federations and candidates.¹⁸⁸ Rates for these electoral advertisements shall not be higher than those in force for commercial advertising, and no discrimination may occur in respect of certain candidatures as to the inclusion, rates and location of those advertising slots; the nature of such advertisements shall be clearly stated.

5.2.3. Regulation of online media during elections and referenda

As mentioned above, from the calling of the elections until the legal start of the campaign it is prohibited to disseminate advertising or electoral propaganda through posters, commercial media or advertisements in any other digital media. Also no electoral propaganda can be disseminated once the electoral campaign has legally ended. The rules on polls also apply to online media.¹⁸⁹

¹⁸⁸ Article 58 LOREG. See also articles 175.2, 193.2 and 227.2 of the LOREG.

¹⁸⁹ See Chapter 5.2.



5.2.4. Self-regulatory codes or practices concerning elections and referenda

No specific self-regulatory code or practice or "soft law" has been adopted in Spain with a view to regulating the media during elections and referenda.

5.3. Recent and emergent issues

The so-called *Jornada de reflexión* ("Day of Reflection"), that is to say the day before Election Day, during which no campaigning or electoral advertising is allowed, has given rise to some criticism. It is argued that in the era of social media and the borderless Internet, such a rule cannot be enforced properly and no longer makes any sense.¹⁹⁰ Moreover, examples such as that in which the Andorran version of a Spanish journal which published the daily prices of water and fruits (everybody in Spain understood them to represent political parties, according to their colours), in contravention of the five-day prohibition rule mentioned above, show how easily these rules can be circumvented.¹⁹¹

5.4. Conclusion

The reform of the LOREG in 2011 was heavily criticised by the media at the time that it was implemented.¹⁹² The *Unión de Televisiones Comerciales Asociadas* (UTECA), which represents Spanish private broadcasters, argued that it infringed upon freedom of expression and information. According to UTECA, the rules introduced by the reform are not comparable to those in force in other countries.¹⁹³ Indeed, a comparison¹⁹⁴ at European level shows that the Spanish system is unique among neighbouring countries, in particular due to two aspects:

1. The activities of the media during electoral periods are regulated by a political body in which neither the media nor the audiovisual regulatory bodies are represented.

¹⁹⁰ See e.g. Rubio Hancock J., "La jornada de reflexión en tiempos de Twitter: obsoleta y paternalista", Verne El País, 25 June 2016, http://verne.elpais.com/verne/2016/06/24/articulo/1466764167_730026.html.

¹⁹¹ See e.g. Matas C., "El precio de la fruta, las playas de Andorra y la campaña electoral", Cadena Ser, 22 Junio 2016, http://cadenaser.com/programa/2016/06/22/hoy_por_hoy/1466588915_189776.html.

¹⁹² The system was already criticised before the reform of 2011, see Almirón N., Capurro M., Santcovsky P., "Los bloques electorales en los medios públicos del Estado español: una excepción en Europa", *Quaderns del CAC* 34, vol. XIII (1) – June 2010 (95-102), http://www.cac.cat/pfw_files/cma/recerca/quaderns_cac/O34_Almiron_Capurro_Santcovsky_ES.pdf.

¹⁹³ Gómez R. G., "Los políticos ponen la mordaza a la televisión", El País, 4 April 2011, http://elpais.com/diario/2011/04/04/sociedad/1301868001_850215.html.

¹⁹⁴ See Chapter 13 of this publication.



2. The degree of coverage given to each political grouping in daily news programmes has to reflect the results obtained by that political grouping in the last equivalent elections.

The Spanish system has also been harshly criticised by different associations and journalistic organizations. In 2015, the College of Journalists of Catalonia brought a case before the European Court of Human Rights against Spain, although the Court declared the application inadmissible.¹⁹⁵ In the same year, Reporters Without Borders (RWB) made a public declaration against the LOREG before the beginning of the electoral campaign for the municipal and autonomic elections. According to RWB, “Spain is the only European country that restricts electoral information through a political body such as the Central Electoral Commission, which controls the information [disseminated by] public broadcasters, applying criteria that seem more like political propaganda than journalism, and has as a result ‘corseted’ information – [which is] hardly professional and lacking in interest – thereby generating mistrust among citizens.”¹⁹⁶

¹⁹⁵ Not published.

¹⁹⁶ Press release of Reporters Without Borders Spain, “Reporteros Sin Fronteras reclama la supresión de los bloques electorales en las televisiones y respeto al libre ejercicio del periodismo”, 9 May 2015, <http://www.rsf-es.org/news/espana-elecciones-municipales-20151/>.



6.FR - France

Agnès Granchet, Université Paris II Panthéon-Assas

6.1. Introduction

Integral to democracy, the media play a fundamental role in election periods, not only by informing the electorate and helping to form public opinion prior to the vote, but also by providing the candidates and parties with a platform on which to freely express themselves, publicising their manifestos and ideas, and reporting on their popularity among the voters.

In France, the number of pre-election opinion polls grows with every election. The 2012 presidential election was the subject of 409 polls, compared with 157 in 1995, 193 in 2002 and 293 in 2007.¹⁹⁷ In 2016, sixty-nine opinion polls were devoted to the centre-right primaries alone.¹⁹⁸ The Internet, which first played a role in French electoral debate in the run-up to the 2005 referendum on the proposed European constitution, is now a vital medium of political communication. All candidates and parties have their own official websites, Facebook pages and Twitter accounts. However, traditional media, especially in the audiovisual sector, continue to play an essential role. The televised debate held on 20 March 2017, involving the five main presidential candidates, was watched by 9.8 million viewers,¹⁹⁹ while the second debate, which was the first to bring together all the candidates for a presidential election, attracted an audience of 6.3 million.²⁰⁰

Media freedom is controlled by French law during election periods in order to guarantee “the pluralist expression of opinions and the fair participation of political parties and groups in the democratic life of the nation”.²⁰¹ The regulations applicable to

¹⁹⁷ “The Opinion Polls Commission and the 2012 presidential and legislative elections”, <http://www.commission-des-sondages.fr/hist/pdf/2012.pdf>.

¹⁹⁸ “The Opinion Polls Commission and the 2015 departmental and regional elections and the 2016 centre-right primaries”, <http://www.commission-des-sondages.fr/hist/pdf/rapport-2015-2016.pdf>.

¹⁹⁹ “Presidential debate a great success with nearly 10 million television viewers”, lemonde.fr, 21 March 2017, http://www.lemonde.fr/election-presidentielle-2017/article/2017/03/21/debat-presidentiel-pres-de-10-millions-de-telespectateurs_5098150_4854003.html.

²⁰⁰ Renault E., “Record audience for BFMTV and CNews thanks to 11-candidate debate”, lefigaro.fr, 5 April 2017, <http://www.lefigaro.fr/medias/2017/04/05/20004-20170405ARTFIG00104-audience-record-pour-bfmtv-et-cnews-grace-au-debat-a-11-candidats.php>.

²⁰¹ Article 4 of the Constitution of 4 October 1958,



the media at these times are enshrined in the numerous texts that govern the various elections (the Electoral Code;²⁰² the Law of 6 November 1962 on the presidential election;²⁰³; the Law of 7 July 1977 on European elections²⁰⁴) or referenda, the Law of 19 July 1977 on pre-election opinion polls,²⁰⁵ and texts concerning the different media.

6.2. Current regulations

A number of regulations that apply to all media, both traditional and online, govern the dissemination of information concerning elections or a referendum. Article L. 52-1 of the Electoral Code prohibits, during the six months prior to an election, “the use, for the purpose of election propaganda, of any commercial advertising in the press or any means of audiovisual communication”. This rule, which can also apply to referendum campaigns,²⁰⁶ additionally covers online public communication.²⁰⁷

The Law of 19 July 1977 which, under the supervision of the Opinion Polls Commission, aims to ensure “the objectivity and the quality of opinion polls” published in France and “concerning issues directly or indirectly linked to electoral debate”, requires that media publishing such polls also include various details concerning how they were conducted. Article 11 prohibits, “on the day before and the day of any vote”, the publication of or commentary on any pre-election opinion poll “by any means”. In other words, the media cannot publish the results of exit polls or forecasts based on partial results until all polling stations are closed. Under Article L. 52-2 of the Electoral Code, “no election results, either partial or final, may be communicated to the public by any means” before the last polling station is closed. In order to maintain the adversarial nature of the electoral debate, the media are also banned, under Article L. 48-2 of the Electoral Code, from publishing comments by a candidate that include “a new electoral argument to which their opponents are unable to offer a considered response before the end of the election campaign”.

Lastly, under Article L. 48 of the Electoral Code, media coverage of an election or referendum campaign is governed by the provisions of the Law of 29 July 1881 on

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006071194>.

²⁰² <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070239>.

²⁰³ Law no. 62-1292 of 6 November 1962 on the election of the President of the Republic by universal suffrage, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000684037>.

²⁰⁴ Law no. 77-729 of 7 July 1977 on the election of members of the European Parliament, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068600>.

²⁰⁵ Amended Law no. 77-808 of 19 July 1977 on the publication and distribution of certain opinion polls, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000522846>.

²⁰⁶ Council of State, Assembly, 10 September 1992, no. 140376, 140377, 140378, 140379, 140416, 140417 & 140832,

<https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007834093&fastReqlId=1567561682&fastPos=1>.

²⁰⁷ Council of State, 3rd and 8th sub-sections combined, 13 February 2009, no. 317637,

<https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000020253073&fastReqlId=1760283217&fastPos=1>.



freedom of the press²⁰⁸ concerning electoral propaganda. Candidates or parties criticised by the media in the run-up to an election or referendum can instigate legal proceedings for insult, defamation or incitement to hatred, violence or discrimination, or demand the right of reply. The 1881 Law states that, during an election period, the deadlines for publishing a reply in a daily newspaper and appearing in court in cases involving alleged defamation or insult against a candidate for elective office should be twenty-four hours, with the judgment required before election day.

6.2.1. Regulation of broadcast media during elections and referenda

During election and referendum periods, in order to guarantee “respect for the pluralist expression of schools of thought and opinion in radio and television programmes,”²⁰⁹ audiovisual media must obey strict rules laid down in the resolution of the *Conseil supérieur de l’audiovisuel* (Higher Audiovisual Council – the “CSA”) of 4 January 2011,²¹⁰ which are usually supplemented with recommendations specific to each election,²¹¹ During the six weeks leading up to an election, audiovisual media must, in their election coverage, ensure that the candidates and their supporters “are presented fairly and given fair access to airtime”. News coverage unrelated to the election remains subject to the rules that apply outside election periods.²¹² Once an election campaign is underway for presidential,²¹³ legislative²¹⁴ and European²¹⁵ elections and most referenda, stricter editorial obligations apply to all public service radio and television channels (*France Télévisions, Radio France and France Médias Monde*). Legal provisions determine the overall length of campaigns for the various elections, and how airtime should be distributed between the different candidates, parties or groups. The CSA lays down “the rules

²⁰⁸ <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722>.

²⁰⁹ Article 13 of Law no. 86-1067 of 30 September 1986 on the freedom of communication, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930>.

²¹⁰ Resolution no. 2011-1 of 4 January 2011 on the principle of political pluralism in radio and television services during election periods, amended by Resolution no. 2011-55 of 22 November 2011, <http://www.csa.fr/Espace-juridique/Deliberations-et-recommandations-du-CSA/Recommandations-du-CSA-en-vue-de-consultations-electorales-ou-referendaires/Deliberation-du-4-janvier-2011-relative-au-principe-de-pluralisme-politique-dans-les-services-de-radio-et-de-television-en-periode-electorale>.

²¹¹ See, for example, CSA Recommendation no. 2016-2 of 7 September 2016 to radio and television services concerning the election of the President of the Republic, https://www.legifrance.gouv.fr/affichTexte.do?sessionId=8737C67366669CCAB74FD42D4DEF66A2.tpdila16v_1?cidTexte=JORFTEXT000033104095&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT00033103518.

²¹² Resolution no. 2009-60 of 21 July 2009 on the principle of political pluralism in radio and television services, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020913951>.

²¹³ Article 15 of Decree no. 2001-213 of 8 March 2001 on the application of Law no. 62-1292 of 6 November 1962 on the election of the President of the Republic by universal suffrage, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000769091>.

²¹⁴ Article L. 167-1 of the Electoral Code.

²¹⁵ Article 19 of Law no. 77-729 of 7 July 1977 on the election of members of the European Parliament.



concerning conditions for the production, scheduling and broadcast of programmes”²¹⁶ during the official campaign before each election.²¹⁷

Audiovisual media must respect the so-called “quiet period” beginning at midnight on the day before the election, which is required under Article L. 49 of the Electoral Code, during which “the dissemination to the public, by electronic means, of any message that constitutes election propaganda is prohibited”. Promotional audiovisual programmes of a political nature are prohibited at all times.²¹⁸ During election periods, press advertisements must not contain “references, verbal or visual, to candidates or election-related issues”.

6.2.2. Regulation of print media during elections and referenda

During election periods, the written press enjoy greater editorial freedom than audiovisual media. Case law frequently points out that “the press are free to report on the different candidates’ campaigns and to express support for any one of them.”²¹⁹ However, this freedom is not absolute. The press must respect the quiet period required by the law with regard to opinion polls and the ban on commercial advertising for election propaganda purposes during the six months leading up to the election, with the exception set out in Article L. 52-8 of the Electoral Code allowing candidates to “advertise in the press for authorised donations” in order to finance their campaigns. Newspapers may be held liable for any infringement of the freedom of expression in their election coverage.

6.2.3. Regulation of online media during elections and referenda

With broad editorial freedom similar to that of the written press, online media are not subject to any specific regulations during election periods.

²¹⁶ Article 16 of Law no. 86-1067 of 30 September 1986; Article L. 167-1-IV of the Electoral Code.

²¹⁷ Decision no. 2017-183 of 22 March 2017 on conditions for the production, scheduling and broadcast of programmes during the campaign for the election of the President of the Republic for the first and second rounds of voting,

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034265719&fastPos=1&fastReqlid=1736238927&categorieLien=id&oldAction=rechTexte>.

²¹⁸ Article 14, para. 2 and 3, of Law no. 86-1067 of 30 September 1986 on the freedom of communication, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930>.

²¹⁹ Council of State, Assembly, 18 December 1996, no. 176283 & 176741, <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007930374&fastReqlid=577663817&fastPos=22>.



6.2.3.1. The rules on data protection applicable to online media

Online media are subject to the Law of 6 January 1978²²⁰, which governs the protection of personal data under the supervision of the *Commission nationale de l'informatique et des libertés* (National Commission on Information Technology and Freedoms – “the CNIL”).

6.2.3.2. The rules applicable to political parties that use online media

According to the CNIL’s Resolution of 26 January 2012,²²¹ candidates and political parties that use online media for political communications must respect personal data protection law. Just like commercial marketing, political canvassing by email requires the prior consent of the people concerned. If this consent is refused, the creation of electronic files containing details of the political opinions of the people concerned is prohibited, since this violates the ban on processing such sensitive data. Parties and candidates who, for political canvassing purposes, collect and use personal data available on the Internet or provided by users as part of an account or profile registration process, must obtain the user’s consent and inform them of the implications of their registration.

6.2.3.3. Other electoral laws applicable to online media

Under Article L. 48-1 of the Electoral Code, the prohibitions and restrictions on the distribution of election propaganda expressly apply to “any message with the character of election propaganda disseminated to the public by any electronic communication method”. The ban on distributing publicity for propaganda purposes prohibits the commercial referencing of a website in a search engine prior to an election, but not the creation of a website that is only accessible to voters who visit it intentionally. The quiet period required by law does not prevent either the retention, on the website of a candidate or list, of election propaganda uploaded before polling day without any amendments that could be likened to the publication of new messages,²²² or the continued publication of previously published opinion polls.

²²⁰ Law no. 78-17 of 6 January 1978 on information technology, files and freedoms, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000886460>.

²²¹ Resolution no. 2012-020 of 26 January 2012 containing a recommendation on the use, by political parties or groups, elected representatives or candidates for elective office, of electronic files as part of their political activities, <https://www.legifrance.gouv.fr/affichCnil.do?oldAction=rechExpCnil&id=CNILTEXT000025364626&fastReql=1082859898&fastPos=1>.

²²² Council of State, 8 July 2002, no. 239220, <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008024439&fastReql=388405045&fastPos=1>.

6.2.4. Self-regulatory codes or practices concerning elections and referenda

Generally speaking, journalists' codes of ethics and the editorial or programming charters adopted by the media do not set out any specific principles regarding media election coverage. The Broadcasting Charter of *France Télévisions*²²³ contains the current regulations. In 2012,²²⁴ opinion poll organisations agreed to uphold the ban on the publication of opinion polls on the day of and the day before an election. In 2017, *Le Parisien* decided to stop commissioning political opinion polls during the presidential election campaign.²²⁵

6.3. Recent and emergent issues

The regulation of airtime allocated to politicians and political parties in the audiovisual media was relaxed for the presidential election by an organic law of 25 April 2016.²²⁶ Although radio and television channels retain a degree of editorial freedom, “the application of the fairness principle remains mandatory. Assessing the amount of coverage given to candidates and measuring their respective speaking time and airtime are complex tasks. Imbalances are created by the holding of primary elections and the refusal of certain candidates to participate in political programmes in an attempt to delay their speaking time”.²²⁷ The organisation of a televised debate involving the five main candidates also raised the question of whether, in accordance with the fairness principle, all candidates should be invited.²²⁸ A debate involving all the candidates close to the election could damage the adversarial nature of the electoral debate.²²⁹

²²³ http://www.francetelevisions.fr/sites/default/files/pdf/2015/07/11/charte_des_antennes_FTV_0.pdf.

²²⁴ Press release of the Opinion Polls Commission, 20 April 2012
<http://www.commission-des-sondages.fr/hist/communiqués/communiqué-sondages-elections-presidentielles-20avril2012.htm>.

²²⁵ Albouy S., “Why our newspaper is giving opinion polls a break”, *leparisien.fr*, 4 January 2017,
<http://www.leparisien.fr/politique/pourquoi-notre-journal-fait-une-pause-avec-les-sondages-04-01-2017-6522714.php>.

²²⁶ Organic Law no. 2016-506 of 25 April 2016 updating the rules applicable to the presidential election,
<https://www.legifrance.gouv.fr/eli/loi/2016/4/25/INTX1527011L/jo/texte>.

²²⁷ “Speaking time: the CSA rejects NF request”, *lepoint.fr*, 1 February 2017,
http://www.lepoint.fr/presidentielle/temps-de-parole-le-csa-rejette-la-demande-du-fn-01-02-2017-2101748_3121.php.

²²⁸ Council of State, summary order of 16 March 2017, no. 408730,
<https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000034253745&fastReqId=2069337696&fastPos=1>.

²²⁹ “Organisation of debates: clarification by the Higher Audiovisual Council”, 29 March 2017,
<http://www.csa.fr/Espace-Presses/Communiqués-de-presses/Organisation-des-debats-mise-au-point-du-Conseil-supérieur-de-l-audiovisuel>.



The rules on opinion polls, which were completely overhauled under a law of 25 April 2016,²³⁰ still appear out of touch with the widespread use of the Internet and social networks during election periods. The new legal definition of an opinion poll does not include the numerous online surveys conducted among panels of Internet users, which do not constitute representative samples of the electorate. Often published with electoral forecasts, they do not fall within the supervisory remit of the Opinion Polls Commission.²³¹ The ban on publishing opinion polls on the day before and the day of an election day can easily be bypassed²³² by publishing, on foreign websites or social networks, the results of exit polls or forecasts based on partial results. Violations of this ban, and of the other rules applicable to the media during election periods, are rarely punished. The criminal sanctions laid down in law are never imposed. The CSA makes little use of its power to impose sanctions, often merely issuing caution.²³³ The media can justify the publication of private or defamatory information about election candidates by claiming that it is contributing to a debate of public interest. An election can be cancelled if irregularities or abuses have affected the election result.

6.4. Conclusion

During election periods, rather than simply distinguishing between traditional and online media, French regulations impose contrasting requirements on the written press and the Internet on the one hand, which enjoy fairly extensive editorial freedom, and audiovisual media on the other hand, which are subject to more stringent rules and are monitored by the CSA. In line with the CSA's recommendations,²³⁴ these regulations were significantly improved in preparation for the 2017 presidential election. After the principle of equal speaking time and airtime was replaced with that of greater fairness during the interim period between the publication of the list of presidential election candidates and the start of the official campaign, the candidates were given much more exposure in the audiovisual media, with 61.5% more speaking time than in 2012.²³⁵ The harmonisation of voting hours in the different constituencies should help to prevent breaches of the ban on the publication of opinion polls on the day of and the day before an election. As far as

²³⁰ Law no. 2016-508 of 25 April 2016 updating various rules applicable to elections, <https://www.legifrance.gouv.fr/eli/loi/2016/4/25/INTX1527491L/jo/texte>.

²³¹ See, for example, the Opinion Polls Commission press release of 31 March 2017, <http://www.commission-des-sondages.fr/hist/communiqués/communiqué-enquête-opinions-reseaux-sociaux-31-mars-2017.htm>.

²³² Opinion Polls Commission press release of 27 April 2012, <http://www.commission-des-sondages.fr/hist/communiqués/communiqué-sondages-elections-presidentielles-27-avril-2012.htm>.

²³³ CSA, "Obligations for the declaration of speaking time and airtime: Radio Classique cautioned", 15 March 2017, <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Obligations-de-declaration-des-temps-de-parole-et-d-antenne-Radio-Classique-mise-en-garde>.

²³⁴ <http://www.csa.fr/Espace-Presse/Communiqués-de-presse/Propositions-du-Conseil-supérieur-de-l-audiovisuel-relatives-au-principe-de-pluralisme-politique-dans-les-medias-audiovisuels-en-période-electorale>.

²³⁵ CSA, "2012/2017 presidential elections: political expression increased by more than 60%", 12 April 2017, <http://www.csa.fr/Espace-Presse/Communiqués-de-presse/Presidentielle-2012-2017-l-expression-politique-s-est-accrue-de-plus-de-60>.



election propaganda is concerned, the fact that the quiet period (which the CSA had said should be shortened) remains in place means that there are serious imbalances between the written press (to which it does not apply), audiovisual media (which are monitored by the CSA), and online media (which, apart from the websites of media supervised by the CSA, are not regulated at all).

Although they are still often perceived as excessively interfering in the freedom of information of the media and the freedom of political expression, the regulations applicable during election periods nevertheless appear to “reconcile the constitutional requirements of the pluralist expression of schools of thought and opinions with the freedom of communication in a way that is not manifestly imbalanced”.²³⁶

²³⁶ Constitutional Council, decision no. 2016-731 DC of 21 April 2016, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-731-dc/decision-n-2016-731-dc-du-21-avril-2016.147257.html>.



7.GB - United Kingdom

David Goldberg, deeJgee Research/Consultancy

7.1. Introduction

The role of the media during elections and referenda is a complicated and complex topic. It is important to distinguish the media's short-term impact during a campaign and its long-term cumulative impact.²³⁷ Also, it must be asked which media is being referred to? Thus, it is all too easy to ignore other media, including non-mainstream and community journalism.²³⁸ An authoritative source examining the issue is *Media in Context and The 2015 General Election: How Traditional and Social Media Shape Elections and Governing*,²³⁹ a study funded by the Economic and Social Research Council. Moreover, a snapshot after the 2015 General Election is offered by the Political Studies Association;²⁴⁰ and according to a survey conducted by the Panelbase research group of 3,019 people, 38% were influenced by the leaders debates, 23% by television news coverage, and 10% by party political broadcasts – according to the survey's conclusions, television was "by far the most influential media source", outscoring newspapers and social media.²⁴¹ The Reuters Institute for the Study of Journalism specifically addressed the topic of social media during the 2015 general election, concluding that "the evidence points to traditional media, particularly broadcast media, remaining more influential than new digital platforms this time around".²⁴² Of course, while the next general election had been

²³⁷ See Jackson, Thorsen and Wring (eds.), "EU Referendum Analysis 2016: Media, Voters and the Campaign", The Centre for the Study of Journalism, Culture and Community, Bournemouth University June 2016, <http://www.referendumanalysis.eu>.

²³⁸ See Hannah Scarbrough, "Eight ways community journalists have covered elections in 2016", Centre for Community Journalism, Cardiff University, 6 May 2016, <https://www.communityjournalism.co.uk/blog/2016/05/06/eight-ways-community-journalists-have-covered-elections-in-2016/>.

²³⁹ See University of Exeter, "Media in Context and The 2015 General Election: How Traditional and Social Media Shape Elections and Governing", <http://gtr.rcuk.ac.uk/projects?ref=ES/M010775/1>.

²⁴⁰ See Jackson, Thorsen and Wring (note 1 above). <http://www.referendumanalysis.eu>.

²⁴¹ See Emma Thelwell, "Election 2015: TV debates 'most influential' for voters", BBC News, 9 May 2015, <http://www.bbc.co.uk/news/election-2015-32673439>.

²⁴² See Colin Byrne, *Getting Engaged? The Relationship between Traditional, New Media, and the Electorate during the 2015 UK General Election*, (Reuters Institute for the Study of Journalism, 2015), <http://reutersinstitute.politics.ox.ac.uk/publication/getting-engaged-relationship-between-traditional-new-media-and-electorate-during-2015-uk>; see Tom Felle, "Did newspapers ever really influence elections?", City University London, 27 April 2015, <http://www.city.ac.uk/news/2015/april/newspapers-influence-election>.

scheduled for 2020, the UK Parliament voted in April 2017 to have an early election on 8 June 2017.²⁴³

7.2. Current regulation

7.2.1. Regulation of broadcast media during elections and referenda²⁴⁴

The UK communications regulator, Ofcom, is tasked with ensuring that the special impartiality requirements in the Communications Act 2003 and other legislation relating to broadcasting on elections and referenda are applied at the time of elections and referenda.²⁴⁵ Rules are included in the Communications Act 2003 and the BBC Charter and Agreement (2017).²⁴⁶ Broadcasters should also have regard to relevant sections of the Representation of the People Act 1983 (as amended – in particular sections 66A, 92 and 93 – and the Political Parties, Elections and Referendums Act 2000. In March 2017, Ofcom published a statement regarding changes regarding section 5 (due impartiality and due accuracy) and section 6 (Elections and referendums) of the Broadcasting Code,²⁴⁷ supplemented by guidance notes.²⁴⁸

Rules stipulated by section 333 of the Communications Act 2003 – regarding party election broadcasts, party political broadcasts and referendum campaign broadcasts – and the BBC Agreement are contained in *Ofcom Rules on Party Political and Referendum*

²⁴³ UK Parliament, "MPs approve an early general election", 19 April 2017, <https://www.parliament.uk/business/news/2017/april/mps-to-vote-on-an-early-general-election/>.

²⁴⁴ "Broadcast media" is a broad term and includes, e.g., community media, which are also caught by elections/referenda legal obligations. See Community Radio Toolkit, Law, Regulation & Policies, <http://www.communityradiotoolkit.net/on-air/regulation/>. From 3 April 2017, Ofcom (the UK communications regulator) assumes responsibility as the first external regulator for the BBC, see Ofcom, "BBC regulation", 29 March 2017, <https://www.ofcom.org.uk/consultations-and-statements/ofcom-and-the-bbc>.

²⁴⁵ See Ofcom, "Section six: Elections and referendums, 3 April 2017, <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-six-elections-referendums>. For the BBC's Editorial Guidelines, see Section 10: Politics, Public Policy and Polls, <http://www.bbc.co.uk/editorialguidelines/guidelines/politics/elections>.

²⁴⁶ See BBC Charter and BBC Framework Agreement (commenced, 1 January 2017), <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>.

²⁴⁷ Ofcom, Broadcasting Code Review, 29 March 2017, https://www.ofcom.org.uk/_data/assets/pdf_file/0032/99518/BroadcastingCodeReview.pdf; The new BBC Charter and BBC Framework Agreement require that the BBC's UK Broadcasting and On Demand Programme Services comply with the Code.

²⁴⁸ See Ofcom, Guidance Notes - Section 5, 21 March 2013, https://www.ofcom.org.uk/_data/assets/pdf_file/0018/24534/section5.pdf, and Ofcom, Guidance Notes - Section 6, 11 March 2016, https://www.ofcom.org.uk/_data/assets/pdf_file/0020/25643/section6.pdf?lang=cym.



*Broadcasts.*²⁴⁹ However, such broadcasts are also required to comply with the relevant provisions of the Broadcasting Code – for example the provisions regarding “harm and offence” – notwithstanding the fact that broadcast content is normally the responsibility of the political parties concerned. In March 2017, Ofcom published its decision to remove the concept of the list of “larger parties” from the rules on party political and referendum broadcasts (“PPRB Rules”). The previous PPRB Rules required broadcasters to offer a minimum of two party election broadcasts (“PEBs”) to each of the defined “larger parties”; in relation to broadcasters’ own election programming, broadcasters were required to give “due weight” to the “larger parties”. However, under the new PPRB Rules, broadcasters “use their own judgement, based on the criteria of past electoral support and/or current support”²⁵⁰

The Election Committee²⁵¹ is a delegated authority from the Ofcom Board to determine disputes between broadcasters and political parties regarding the allocation/scheduling of party election broadcasts and referendum campaign broadcasts under PPRB Rules. The Committee also make decisions on complaints received in relation to standards set by Ofcom on due impartiality in respect of programmes during an election or referendum period.

7.2.1.1. Local items during elections and prohibition on exit polls

In relation to local items broadcast during election periods, Ofcom is required to adopt a code of practice with respect to the participation of candidates at a parliamentary or local government election in items about the constituency or electoral area during the election period.²⁵² Moreover, under the Representation of the People Act 1983, there is a prohibition on publication of the results of exit polls “before the poll is closed”.²⁵³

7.2.1.2. Party political and referendum campaign broadcasts

Broadcasters are to have regard to the Electoral Commission’s views on party political broadcasts.²⁵⁴ The Electoral Commission is an independent statutory body that regulates elections. Moreover, Section 37 of the Political Parties, Elections and Referendums Act

²⁴⁹ See Ofcom, Ofcom rules on Party Political and Referendum Broadcasts, 22 March 2017, https://www.ofcom.org.uk/_data/assets/pdf_file/0035/99188/pprb-rules-march-2017.pdf.

²⁵⁰ See Ofcom, Ofcom’s rules on due impartiality, due accuracy, elections and referendums, 9 March 2017, https://www.ofcom.org.uk/_data/assets/pdf_file/0030/98148/Due-impartiality-and-elections-statement.pdf.

²⁵¹ See Ofcom, Election Committee, <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/committees/election-committee>; its decisions are at the same page; a representative recent decision is the 10 June 2016 Decision, https://www.ofcom.org.uk/_data/assets/pdf_file/0022/64840/decision-election-eu-referendum.pdf (The Complaint concerned whether ITV has preserved, in its coverage of the EU Referendum, due impartiality in relation to the “Leave” outcome and given due weight to Vote Leave).

²⁵² See Political Parties, Elections and Referendums Act 2000, section 144, <http://www.legislation.gov.uk/ukpga/2000/41/part/X/crossheading/broadcasting-during-election-period>.

²⁵³ See Representation of the People Act 1983, section 66A, <http://www.legislation.gov.uk/ukpga/1983/2/section/66A>.

²⁵⁴ See Political Parties, Elections and Referendums Act 2000, section 11.



2000 provides that²⁵⁵ a broadcaster shall not include in its broadcasting services any party political broadcast made on behalf of a party which is not a registered party". In addition, paid political advertising is prohibited under the Communications Act 2003.²⁵⁶

Further, and in relation to referendum campaign broadcasts,²⁵⁷ section 127 of the Political Parties, Elections and Referendums Act 2000 provides that broadcasters only include referendum campaign broadcasts by organisations designated by the Electoral Commission.

7.2.1.3. Adjudications and cases

Ofcom has adjudicated many complaints concerning elections and referendums over the years.²⁵⁸ A representative recent case is "Your World with Neil Cavuto" on Fox News in June 2016, where a complainant who objected to this programme discussing the referendum on the UK's membership of the EU on the day of the vote while the polls were still open.²⁵⁹

There have been a number of court cases concerning broadcasting in the run-up to, or during, elections. For example, in *R. v BBC and Independent Television Commission, ex parte the Referendum Party* it was held that the former Independent Television Commission had decided irrationally in allocating the party in question a one five-minute party election broadcast during the 1997 general election campaign.²⁶⁰ A further case of note is *R. v BBC, ex parte ProLife Alliance*, where the House of Lords was asked to review the BBC's decision not to air a party election broadcast prepared by the Pro Life Alliance.²⁶¹ More recently, in *R. (Craig) v BBC*,²⁶² it was held that the BBC, as publisher, was entitled to change words contained in a party election broadcast in order to comply with the balance between allowing election broadcasts to be transmitted unfettered in their content (text or images) and the right/duty of the broadcaster to ensure that content does not breach general obligations that are applicable to PEBs as well. Finally, in *Petition of Scottish National Party and Others*, the Scottish National Party attempted to use the courts

²⁵⁵ Ibid, section 37.

²⁵⁶ Communications Act 2003, sections 319(2)(g) and 321(2), <http://www.legislation.gov.uk/ukpga/2003/21/section/321>.

²⁵⁷ Ibid, section 127.

²⁵⁸ See Ofcom, Guidance Notes, Section Six, 22 March 2017, https://www.ofcom.org.uk/_data/assets/pdf_file/0034/99178/broadcast-code-guidance-section-6-march-2017.pdf.

²⁵⁹ See Ofcom Broadcast and On Demand Bulletin, Issue number 311, 22 August 2016, p. 8, https://www.ofcom.org.uk/_data/assets/pdf_file/0028/88750/Issue_311_of_Ofcoms_Broadcast_and_On_Demand_Bulletin.pdf.

²⁶⁰ *R. v BBC and Another* [1997] E.M.L.R. 605 (Queen's Bench Division, 24 April 1997).

²⁶¹ *R. v. British Broadcasting Corporation ex parte ProLife Alliance* [2003] UKHL 23, <http://www.bailii.org/uk/cases/UKHL/2003/23.html>.

²⁶² *R (on the application of Alan Craig) v BBC* (Case no CO/4088/2008 on 30 April 2008 before Mr Justice Collins) (Unreported) - copy of judgement on file with author (Also available on the subscription legal database Westlaw UK).



to ban the broadcast in Scotland of a BBC TV prime ministerial debate because the corporation had allegedly breached its rules on impartiality by excluding the SNP.²⁶³

7.2.2. Regulation of print media during elections and referenda

In their coverage of election- and, by extension, referenda-related material, print media are permitted to be partisan. Perhaps the reason is that 'Newspaper readers tend to vote for parties that broadly represent their interests, in the same way they buy newspapers that broadly speak to their interests.'²⁶⁴ There is a non-legally binding Editors' Code of Practice for such media; the Editors' Code of Practice FAQ states that the Editors' Code "allows newspapers and magazines to be partisan generally, including in their coverage of election-related material".²⁶⁵ In *Bex v Oxford Times* and *Bex v Witney Gazette*,²⁶⁶ the complainant raised concerns about his candidacy receiving less coverage than others, and the fact that he had provided the newspaper with press releases relating to his campaign activities, which were not then reported. Dismissing the complaint, the Independent Press Standards Organisation held that "newspapers are not required to provide equal coverage to all political parties".

Regarding publication of material derived from exit polls, Section 66A of the Representation of the Peoples Act 1983 makes it a criminal offence to publish, before polls have closed, any statement about how people have voted or forecast, if based on exit poll information.²⁶⁷ *The Times*, in 2004, published a piece based on an election which was conducted entirely through postal ballots. The Electoral Commission referred the matter to the Crown Prosecution Service, deeming it to be an exit poll; however, no further action ensued.

As regards the actual count after an election, there is no right for the media to be in the space where the votes are counted. Journalists have to be accredited by the returning officer, who has full discretion.²⁶⁸ In 2010 and 2011, there were complaints

²⁶³ Scottish National Party and Others [2010] CSOH 56, <http://www.bailii.org/scot/cases/ScotCS/2010/2010CSOH56.html>.

²⁶⁴ See Tom Felle, "Did newspapers ever really influence elections?", City University London, 27 April 2015, <http://www.city.ac.uk/news/2015/april/newspapers-influence-election>.

²⁶⁵ Independent Press Standards Organisation, Editors' Code FAQ, <https://www.ipso.co.uk/faqs/editors-code/#can-a-newspaper-publish-articles-which-are-biased-in-favour-of-one-political-party>.

²⁶⁶ IPSO, Decision 04048-15, *Bex v Oxford Times*, 12 August 2015, <https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=04048-15>. IPSO, Decision 03469-15 *Bex v Witney Gazette*, 12 August 2015, <https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=03469-15>.

²⁶⁷ Representation of the People Act 1983, section 66A, <http://www.legislation.gov.uk/ukpga/1983/2/section/66A>; for European elections, polls must be closed across the whole of the European Union.

²⁶⁸ The Electoral Commission, Part E Returning Officer guidance - UK Parliamentary elections, 19 September 2014, <http://www.electoralcommission.org.uk/search?query=media+attendance+at+count&daat=on&collection=electoral-commission&form=simple-redesign&isadvanced=false&context=en>.



concerning bans on journalists at counts. In the former, the initial decision was, after legal representations, overturned;²⁶⁹ in the latter, the press was only afforded facilities to view the count from a balcony.²⁷⁰

Moreover, section 106 of the Representation of the Peoples Act 1983 makes it a criminal offence to publish a false statement about the character or conduct of an election candidate in order to (negatively) affect how many votes that person will/might get.²⁷¹ However, the law is not specifically or solely aimed at the press/media. Note also there is no statutory privilege for the media to republish election material which may be defamatory or hateful; however, qualified privilege attaches to fair and accurate reports of public meetings and press conferences.²⁷²

It is an offence not to include an “imprint” (identification) on election material printed in a newspaper or periodical.²⁷³ The Electoral Commission fined Mr Laurence Taylor GBP 4,000 for failing to include the proper identification details on a newspaper advertisement he placed during the regulated period (15 April to 23 June) for the EU referendum.²⁷⁴

7.2.3. Regulation of online media during elections and referenda

Notwithstanding the opinion that social media were “at the heart of 2015 general election campaign”,²⁷⁵ Ofcom and the Advertising Standards Authority both cannot stop online advertising during campaigns because they do not have the power to control what happens online.²⁷⁶ Accordingly, it has recently been asked: has campaign regulation kept

²⁶⁹ See “Sentinel wins fight to report from key count”, The Sentinel, 5 May 2010,

<http://www.stokesentinel.co.uk/sentinel-wins-fight-report-key-count/story-12520717-detail/story.html>.

²⁷⁰ See “Oldham council places ‘draconian’ ban on journalists in by-election”, The Telegraph, 13 January 2011, <http://www.telegraph.co.uk/news/politics/byelection/8258510/Oldham-council-places-draconian-ban-on-journalists-in-by-election.html>.

²⁷¹ Representation of the People Act 1983, section 106, <http://www.legislation.gov.uk/ukpga/1983/2/section/106>.

²⁷² See Mark Hanna and Mike Dodd, McNae’s Essential Law for Journalists, 23rd edn. (Oxford University Press, 2016), Chapter 32.

²⁷³ See Political Parties, Elections and Referendums Act 2000, section 143 (5), <http://www.legislation.gov.uk/ukpga/2000/41/section/143>.

²⁷⁴ See The Electoral Commission, “Campaigner who broke EU referendum rules fined £4,000 by Electoral Commission”, 20 December 2016, <http://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/news-releases-donations/campaigner-who-broke-eu-referendum-rules-fined-4,000-by-electoral-commission>.

²⁷⁵ See “Social media ‘at heart’ of 2015 general election campaign”, BBC News, 11 March 2015, <http://www.bbc.co.uk/news/uk-politics-31798184>.

²⁷⁶ See Advertising Standards Authority, “Political advertising complaints”, 26 May 2016, <https://www.asa.org.uk/news/political-advertising-complaints.html#.V3JEpzYrKCe>; see also, Mark Sweney and John Plunkett, “Ad watchdog powerless to act on controversial Brexit campaigns”, The Guardian, 28 June 2016, <https://www.theguardian.com/media/2016/jun/28/ad-watchdog-powerless-to-act-on-controversial-brexit-campaigns>.



up with the increasing use of digital platforms and social networks?²⁷⁷ One has to distinguish between regulation of content and spending limits. Thus, the Electoral Commission states that spending limits apply to "advertising of any kind ... [f]or example, street banners, websites or YouTube videos".²⁷⁸

Section 143 of the Political Parties Elections and Referendums Act 2000 requires certain details to appear on printed election material.²⁷⁹ However, the Electoral Commission, as good practice, stated that²⁸⁰ – as regards websites and other electronic election material (intended for the public or part thereof and aimed at influencing voters) published by "non-party campaigners" – it is recommended that an imprint be put on electronic material, such as websites and emails. The imprint should include the name and address of the promoter and the organisation on whose behalf it has been produced. It adds, with respect to tweeting and posting on social media sites: "You should display your full imprint details prominently on your profile. You can include a shortened link to your imprint in your tweet or post." The Electoral Commission does, however, acknowledge that compliance cannot be absolute: "... it is [might be] impracticable to do so".

7.2.4. Self-regulatory codes concerning elections and referenda

Firstly, the Code of Advertising Practice applies to advertisements in newspapers. However, under section 7, "claims made in marketing communications, whenever published or distributed, whose principal function is to influence voters in a local, regional, national or international election or referendum are exempt from the Code". Further, marketing communications by central or local government, as distinct from those concerning party policy, are subject to the Code.²⁸¹

Secondly, the Editors' Code of Practice is applied by the two press regulators (although it is under review by both IMPRESS²⁸² and the Editors Code Committee²⁸³). The

²⁷⁷ See Emma Goodman, Sharif Labo, Damian Tambini, and Martin Moore, *The new political Campaigning* (LSE Media Policy Project Series, 2017), <http://eprints.lse.ac.uk/71945/>.

²⁷⁸ See The Electoral Commission, *Media Handbook, Referendum on the United Kingdom's membership of the European Union*, 23 June 2016, Section 4.2, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/199357/Media-Handbook-EU-Referendum.pdf.

²⁷⁹ See *Political Parties, Elections and Referendums Act 2000*, section 143.

²⁸⁰ See The Electoral Commission, *Factsheet for non-party campaigners: Election material and imprints – Great Britain*, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/166225/fs-imprints-npc.pdf; see also, The Electoral Commission, *Law Commission Review of Electoral Law - Electoral Commission Response*, March 2015, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/183833/Electoral-Commission-response-to-Law-Commission-consultation-paper.pdf.

²⁸¹ See *Code of Non-broadcast Advertising and Direct & Promotional Marketing, Political Advertisements*, https://www.asa.org.uk/type/non_broadcast/code_section/07.html.

²⁸² The Independent Monitor for the Press is an independent press regulator.



Code, as noted, does not have a section specifically about elections and referenda coverage. Given that the Code applies to both offline and online versions of printed media, *a fortiori*, the permission to be partisan covers both platforms. Finally, the Broadcasters' Liaison Group²⁸⁴ comprises broadcasters who make airtime available to registered political parties to help them promote their manifestos to the electorate and to designated organisations in referendum campaigns. Meetings of the BLG are chaired by the BBC's Chief Adviser, Politics. The BLG has a remit for party political/election broadcasts and referendum campaign broadcasts, including production guidelines. The BLG has no remit for editorial coverage of elections or referendums. It has no decision-making powers, so the key elements are decided by the individual broadcasters.

7.3. Recent and emergent issues²⁸⁵

The first issue worth mentioning relates to the content of campaign literature. Currently, the general position is that "there is very little regulation of election or referendum campaign literature", with political parties, candidates and referendum campaigners being responsible for the content of their own campaigns and "subject to the general restrictions of criminal and civil law".²⁸⁶ Increasingly, and in particular regarding the recent EU referendum, the accuracy of campaign arguments and the correlated control over political advertisements is an issue. However, the Electoral Commission has stated that "we do not believe that a role as a "truth commission" would be appropriate for us given the breadth of our other functions".²⁸⁷

The second issue is the increasingly prominent and influential aspect of elections is the so-called "leaders debates".²⁸⁸ There is no statutory footing for such debates – which are, in essence, simply a genre of broadcast programming. Ofcom has stated: "The decision on which leaders are represented in any broadcast debates is an editorial matter for broadcasters in agreement with the political parties taking part."²⁸⁹ The Scottish

²⁸³ IMPRESS, IMPRESS Code Consultation, <http://impress.press/standards/impress-standards-code-consultation.html>; and Editors' Code of Practice Committee, Code Review, <http://www.editorcode.org.uk/interact/index.php>. A new Codebook was published at the end of 2016: Editors' Code of Practice Committee, The Editors' Codebook, 2016, http://www.editorcode.org.uk/the_code_book.php.

²⁸⁴ Broadcasters' Liaison Group, <http://www.broadcastersliaisongroup.org.uk/>.

²⁸⁵ The Law Commissions of England and Wales, Scotland, and Northern Ireland have recently issued an interim report concerning the whole panoply of electoral law: Law Commission, Scottish Law Commission, and Northern Ireland Law Commission, Electoral Law - An Interim Report, 4 February 2016, <http://www.lawcom.gov.uk/project/electoral-law/>.

²⁸⁶ See Isobel White, Neil Johnston, and Elise Uberoi, Referendum campaign literature, Commons Briefing papers CBP-7678, 15 February 2017, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7678>.

²⁸⁷ See The Electoral Commission, The 2016 EU Referendum, September 2016, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/215279/2016-EU-referendum-report.pdf.

²⁸⁸ See Isobel White, "Televised debates between party leaders", House of Commons Library Standard Note, 30 March 2015, <http://researchbriefings.files.parliament.uk/documents/SN05241/SN05241.pdf>.

²⁸⁹ See Ofcom, Review of Ofcom list of major political parties for elections taking place on 7 May 2015, Para 2.6, https://www.ofcom.org.uk/_data/assets/pdf_file/0030/59169/major_parties.pdf#page=28.



National Party and Plaid Cymru have both complained about issues of (non) allocation, the former going to court to seek an interim interdict in respect of a debate's publication in Scotland (the attempt failed).²⁹⁰ An academic paper has noted how "striking" the relatively ad hoc way the occurrence of debates and the rules that govern them are negotiated, with the process essentially being understood as a private enterprise between political parties and broadcasters.²⁹¹ Notably, the current Prime Minister, Theresa May, has ruled out participating in a televised election debate with other party leaders in the June 2017 snap election.²⁹²

7.4. Conclusion

With the holding of local elections in May 2017, and an early general election in June 2017, the rules applicable to media coverage of elections will again fall into focus in the UK. As noted above, Ofcom has been adopting some new rules relating to electoral coverage,²⁹³ and the Electoral Commission has been providing helpful guidance on the rules applicable to online media. The 2017 elections will provide a good test for these new rules, and whether further reform is needed.

²⁹⁰ Scottish National Party and Others [2010] CSOH 56, <http://www.bailii.org/scot/cases/ScotCS/2010/2010CSOH56.html>; and BBC Trust, Ad Hoc Appeal Committee – BBC Prime Ministerial Debate Joint appeal from the Scottish National Party and Plaid Cymru, 21 April 2010, http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/appeals/ad_hoc/snp_pl_cymru/snp_pl_cymru.pdf.

²⁹¹ See Nick Anstead, "Televised Debates in Parliamentary Democracies", LSE Media Policy Brief 13, January 2015, <http://www.lse.ac.uk/media@lse/documents/MPP/LSE-MPP-Policy-Brief-13-Televised-Election-Debates-in-the-UK.pdf>.

²⁹² Jessica Elgot and Jane Martinson, "Theresa May rules out participating in TV debates before election", The Guardian, 18 April 2017, <https://www.theguardian.com/politics/2017/apr/18/theresa-may-rules-out-participating-in-tv-debates-before-election>.

²⁹³ See, most recently, Ofcom, Ofcom Broadcast and On Demand Bulletin, Issue number 327, 24 April, p. 5 (Election programming), https://www.ofcom.org.uk/_data/assets/pdf_file/0013/101227/Issue-327-of-Ofcoms-Broadcast-and-On-Demand-Bulletin.pdf.





8.IE - Ireland

Ingrid Cunningham, National University of Ireland

8.1. Introduction

The media play a vital role in the proper functioning of a democracy. Generally speaking, the role of the Irish media (both traditional and online) in elections and referenda has been consistent with the principle of the right to freedom of expression, as enshrined in Article 40.6.1 i of the Irish Constitution and Article 10 of the European Convention on Human Rights. In this regard, the media act as a conduit through which the public are informed on and can interact to the issues put forward, thus enabling full public participation and the education of voters in the exercising of their democratic rights. Another function of the Irish media within the context of elections and referenda is that one of "watchdog", which is exercised through analysis and discussion of the policies proposed and reporting on the development of campaigns. In terms of elections, the media can inform the public of the achievements and failures of candidates and the Government and how effectively they have performed, and thus facilitating the process of their being held to account. The Irish media also serve another purpose by providing a platform for the Government, political parties and candidates to communicate their policies and messages to the electorate, by allowing the parties and candidates to debate with each other, and by reporting and scrutinising voting and monitoring the electoral process itself.

8.2. Current regulation

8.2.1. Regulation of broadcast media during elections and referenda

The Broadcasting Act of 2009 details the legal requirements placed on broadcasters in respect of their coverage of news and current affairs issues, including their coverage of elections and referenda, even though not explicitly mentioned. General requirements for broadcasters in terms of news and current affairs coverage are set out in section 39(1) of the Broadcasting Act 2009, which states that every broadcaster "shall ensure that all news



broadcast is reported in an objective and impartial manner without any expression of the broadcaster's own views." Section 39(1)(b) also provides that every broadcaster "shall ensure that the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of public debate, is fair to all interests concerned and that the broadcast matter is presented in an objective and impartial manner and without any expression of his or her own views." Section 39(2) further states that a broadcaster "shall not be prevented from transmitting party political broadcasts, provided that a broadcaster does not, in the allocation of time for such broadcasts, give an unfair preference to any political party".²⁹⁴

The Broadcasting Authority of Ireland (BAI) regulates all content broadcast on all Irish licensed broadcasters – both programming and commercial content. Section 42 of the Broadcasting Act of 2009 places a legal obligation on the BAI to prepare, and from time to time revise, Broadcasting Code(s) governing standards and practice to be observed by broadcasters. In 2013, the BAI published its Code of Fairness, Objectivity and Impartiality in News and Current Affairs, which deals with matters of fairness, objectivity and impartiality in news and current affairs content.²⁹⁵ Rule 27 of the Code of Fairness, Objectivity and Impartiality in News and Current Affairs deals specifically with "Election and Referendum Coverage" and provides that: "Coverage of an election or a referendum shall comply with guidelines and codes of practice issued from time to time by the BAI." In 2015, the BAI issued guidelines with respect to the then upcoming referendum on same-sex marriage and the minimum age for candidates for the presidency of Ireland,²⁹⁶ and later issued guidelines for the 2016 general election.²⁹⁷

8.2.1.1. Opinion polls and exit polls

The BAI's recent guidelines on both coverage of referenda and general elections contain identical provisions with regard to opinion polls.²⁹⁸ The guidelines acknowledge that "opinion polls are a useful tool to inform the audience of voting intentions", and where such polls are being used as part of coverage of a referendum or general election, coverage should be accompanied by information to assist viewers or listeners to understand the significance of the opinion poll in question. The guidelines further state that information on the details of the date of the poll, the name of organisations that have commissioned and paid for it, the organisation that conducted the poll and the number of people polled must be provided on-air. Additionally, in representing the

²⁹⁴ Broadcasting Act 2009, section. 39 (2), <http://www.irishstatutebook.ie/eli/2009/act/18/section/39/enacted/en/html>.

²⁹⁵ The Code was prepared by the BAI in accordance with section 42(1) and 42(2)(a), (b) and (e) of the Broadcasting Act 2009, <http://www.irishstatutebook.ie/eli/2009/act/18/section/39/enacted/en/html>.

²⁹⁶ BAI, "Guidelines in Respect of Coverage of Referenda", March 2015, <http://www.bai.ie/?ddownload=113476>. (The referendum was held in May 2015.)

²⁹⁷ BAI, "Rule 27 Guidelines General Election Coverage", November 2015, <http://www.bai.ie/en/guidelines-on-coverage-of-the-general-election-issued>. The General Election was held in February 2016.

²⁹⁸ BAI, "Rule 7 Guidelines in Respect of Coverage of Referenda", March 2015 p.8, <http://www.bai.ie/?ddownload=113476>. BAI, "Rule 27 Guidelines General Election Coverage", November 2015, p. 7, <http://www.bai.ie/en/download/128775>.



findings of opinion polls to audiences, “broadcasters are advised to take into account not only the interpretation of the findings provided by those who have undertaken the opinion poll but to also have regard to their own analysis of the results”. According to the BAI’s guidelines on the coverage of referenda and the general election, “[the results of] exit polls, which are conducted outside polling stations on voting day, are to be broadcast only after the closure of polling booths.”²⁹⁹

8.2.1.2. Silence period

Radio and television broadcasters in Ireland must observe a moratorium on coverage of referenda and elections. The moratorium usually operates from 2 p.m. on the day before the poll takes place, and throughout the day of the poll itself until polling stations close. The moratorium extends to all areas of programming, including newspaper reviews, coverage of opinion polls, and information announcements. The BAI’s “Guidelines on General Election Coverage” state that: “Electioneering, and/or references to issues linked to the General Election and/or references [thereto] shall not be broadcast while the moratorium is in operation.”³⁰⁰ A similar provision is included in the BAI’s Guidelines on Referenda Coverage. The moratorium on referenda coverage applies “to all on-air personnel, including but not limited to, presenters and representatives of referenda interests and groups, including political parties”.³⁰¹ The BAI provides further instruction to broadcasters when considering the manner in which to apply the moratorium during election and referenda coverage and to note, *inter alia*, that “the moratorium is not intended to preclude coverage during this period of legitimate news and current affairs stories that are unrelated to the General Election/Referenda”. However, broadcasters “should avoid airing content (including breaking news stories) that the broadcaster believes is intended and/or likely to influence or manipulate voters’ decisions during the moratorium periods”.

8.2.1.3. Political advertising

Requirements in respect of advertising are set out in section 41(3) of the Broadcasting Act of 2009, which provides a statutory prohibition on advertising “directed towards a political end”. This prohibition applies to advertising contained in coverage of both referenda and elections. According to the BAI’s “Guidelines on General Election Coverage”, in this context, “broadcasters shall ensure that advertising is free of material that promotes candidates, political parties or election interests”.³⁰² A similar provision is

²⁹⁹ BAI “Rule 27 Guidelines General Election Coverage”, November 2015, p. 9; BAI, “Guidelines in Respect of Coverage of Referenda”, March 2015, p.11, <http://www.bai.ie/en/download/128775/>.

³⁰⁰ BAI, “Rule 27 Guidelines General Election Coverage”, November 2015, p.8, <http://www.bai.ie/en/guidelines-on-coverage-of-the-general-election-issued>.

³⁰¹ Ibid.

³⁰² Ibid., p.7.



contained in the BAI's "Guidelines in Respect of Coverage of Referenda".³⁰³ The prohibition also applies to advertising "for events, notices regarding meetings or other events" being organised by "election interests as part of their activities" or "by referenda interests as part of their campaign". Both sets of guidelines provide that in determining whether an advertisement is in contravention of section 41(3) of the Broadcasting Act 2009, "it is reasonable for broadcasters to take into account the following three factors: the content of the advertisement; the context in which the ad is broadcast; and the aims of objectives of the advertiser and of the advertising campaign".³⁰⁴ In 2016, the BAI upheld a complaint regarding a television advert coordinated by the Irish Wind Energy Association (IWEA) as being in breach of section 41(3) of the Broadcasting Act of 2009. The advert had been broadcast in the run up to the 2016 General Election.³⁰⁵

One important distinction between the broadcasting of political advertising during coverage of elections and referenda is stipulated in section 41(6) of the Broadcasting Act of 2009, which states that advertisements broadcast at the request of the Referendum Commission are not covered by the prohibition contained in section 41(3) of the Broadcasting Act of 2009. The Irish Government appoints a Referendum Commission under the Referendum Acts; its functions are varied, and include the promotion of public awareness of a referendum and encouraging the electorate to vote. Subject to the 1998 Referendum Acts 1998 and the 2009 Broadcasting Act, the Minister for Communications, Energy and Natural Resources may direct RTÉ (the national television and radio broadcaster), TG4 (the public broadcaster serving Irish-speakers) and the BAI to arrange for the allocation of broadcasting time to facilitate the Referendum Commission in its role.³⁰⁶

8.2.1.4. Party-political broadcasts

Section 39(2) of the 2009 Act states that nothing in section 39(1)(a) or (b) of the Act "shall prevent a broadcaster from transmitting political party broadcasts, provided that a broadcaster does not, in the allocation of time for such broadcasts, give an unfair preference to any political party". Under the BAI's "Guidelines on General Election Coverage", party political broadcasts are permitted during election campaigns, although there is no obligation on broadcasters to transmit party political broadcasts³⁰⁷ Likewise, party political broadcasts are also permitted during referenda campaigns further to section 39(2) of the Broadcasting Act of 2009, so long as broadcasters ensure that the total time allocated to such broadcasts amounts to equal airtime being afforded to

³⁰³ BAI, "Guidelines in Respect of Coverage of Referenda", March 2015 p.9, <http://www.bai.ie/?ddownload=113476>.

³⁰⁴ Ibid., p. 7; BAI, "Rule 7 Guidelines in Respect of Coverage of Referenda", March 2015 p.9, <http://www.bai.ie/?ddownload=113476>.

³⁰⁵ Ingrid Cunningham, "BAI decision on political advertisement by wind-energy association", IRIS 2016-10/18, <http://merlin.obs.coe.int/article.php?id=15699>.

³⁰⁶ Broadcasting Act 2009, Section 106 (4), <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/html>. See also Broadcasting Act 2009, section 185(1), (2) and (3).

³⁰⁷ BAI, "Rule 27 Guidelines General Election Coverage", November 2015, p.8, <http://www.bai.ie/en/guidelines-on-coverage-of-the-general-election-issued>.



advocates and opponents of the proposed constitutional changes. In *Coughlan v The Broadcasting Complaints Commission and RTÉ*³⁰⁸ the question arose as to whether unequal broadcasting time allocated by RTÉ for the promotion of a particular side of the divorce referendum in 1995 constituted an interference with the democratic process. In the run-up to the Divorce Referendum, RTÉ permitted the five largest political parties – all of which supported a “Yes” vote – to make party political broadcasts, and allocated 40 minutes of broadcasting time to them. However only ten minutes of broadcasting time was allocated to the “No” side. The High Court pointed to the unique position of RTÉ, and took the view that “a package of uncontested or partisan broadcast by the national broadcasting service weighed on one side of the argument was an interference with the referendum process”, and the Supreme Court agreed that RTÉ had acted unfairly in the allocation of free and unchallenged airtime to the “Yes” side.

Both the BAI’s sets of guidelines on election and referenda coverage state that similar broadcast treatment shall be accorded to all party political broadcasts, both at their introduction and conclusion. The “Guidelines on Election Coverage” add that “such broadcasts may only be availed of by political parties included on the Register of Political Parties.”³⁰⁹ The Supreme Court in *McKenna v. An Taoiseach (No. 2)*,³¹⁰ found it illegal for the Government or the Parliament to spend public monies with a view to promoting the Government’s official view on a referendum. In *McKenna* the court ruled that the allocation by the State of nearly EUR 650,000 to promote a “Yes” vote in the divorce referendum of 1995 had been in breach of the constitutional right to equality, freedom of expression and the right to a democratic process. The principles in *McKenna* were recently applied in *McCrystal v Minister for Children and Youth Affairs & Ors*,³¹¹ which concerned the expenditure of public monies on a referendum campaign in 2012 by the then Minister for Children and Youth Affairs. The plaintiff brought proceedings claiming that certain information disseminated by the Minister during the period the prior to the referendum had breached the Constitution and the principles laid down in the decision of *McKenna*. Of the EUR 3 million funding for the referendum, EUR 1.9 million had been allocated to the Referendum Commission and the remainder, EUR 1.1 million, had been furnished to the Minister to provide information on the referendum and to encourage people to vote. The Supreme Court found that some of the material published by the Minister was “not fair, equal, impartial or neutral” and showed a clear disregard for the principles laid down by *McKenna*.

³⁰⁸ *Coughlan v The Broadcasting Complaints Commission and RTÉ* [2000] 3 I.R.1, <http://www.bailii.org/ie/cases/IESC/2000/44.html>.

³⁰⁹ *Ibid.* See also Section 25 of the Electoral Act, 1992, as substituted by Section 11 of the Electoral (Amendment) Act, 2001 as amended by the Electoral (Amendment) Political Funding Act, 2012, <http://www.irishstatutebook.ie/eli/1992/act/23/enacted/en/html>.

³¹⁰ *McKenna v. An Taoiseach (No. 2)* [1995] 2 IR 10, <http://www.supremecourt.ie/>.

³¹¹ *McCrystal v Minister for Children and Youth Affairs & Ors* [2012] IESC 53, <http://www.bailii.org/ie/cases/IEHC/2012/H419.html>



8.2.1.5. Fairness, objectivity and impartiality

The “BAI Guidelines on Election Coverage” explicitly refer to the “important and valuable role” that broadcasters play in the “manner in which information about an election is communicated to, and discussed by, the Irish public.”³¹² The guidelines for the 2016 General Election encouraged broadcasters to cover that election “in as comprehensive a manner as possible” and to have regard to the following in their approach to coverage: “Fairness, objectivity and impartiality, which can be achieved by a variety of means, for example, through the selection of contributors, the airtime afforded, the scope of the debate, the structure of the programme and the presenter’s handling of the topic, the make-up of audiences or through other suitable means.” “Guidelines on Referenda”, which contain similar provisions regarding objectivity, etc., state that broadcasters should approach coverage with an emphasis on the issues upon which the public must decide, rather than simply that ensuring referenda interests receive equitable airtime.

8.2.1.6. Televised debates

In the run-up to the 2016 General Election, public service broadcaster RTÉ set the criteria that a party must have a minimum of three MPs in the dissolved lower house of parliament *Dáil Éireann* in order to qualify for an invitation to take part in its 15 February 2016 debate. The Green Party, which had no MPs (having lost them all in 2011), brought an unsuccessful High Court case challenging the exclusion of its leader, Eamon Ryan, from the debate.³¹³ In *Kivlehan v Radio Telefís Éireann*,³¹⁴ the High Court considered that although the cases of *McKenna v An Taoiseach (No.2)* and *Coughlan v Broadcasting Complaints Commission* were “authoritative” in respect of the issue at hand they were not “dispositive”, “primarily because it cannot be said that any individual party has a constitutional right to participate in the TV debate”.³¹⁵ Justice Baker in the High Court was of the opinion that in this case, it fell on the broadcaster to exercise its editorial judgment in structuring programmes and coverage relating to the election.

8.2.1.7. Use of social media by broadcasters

The BAI guidelines on both election and referenda coverage contain a specific section dealing with social media.³¹⁶ The guidelines state that broadcasters are reminded that they are required to have in place appropriate policies and procedures for handling on-air contributions via social media”. Such “policies and practices must be applied where social media is referenced on-air in the context of” coverage of general elections and

³¹² BAI, “Rule 27 Guidelines General Election Coverage”, November 2015, p.5, <http://www.bai.ie/en/guidelines-on-coverage-of-the-general-election-issued/>.

³¹³ Ingrid Cunningham, “Political party loses legal challenge over televised leaders’ debate prior to election”, IRIS 2016-419, <http://merlin.obs.coe.int/iris/2016/4/article19.en.html>.

³¹⁴ *Kivlehan v Radio Telefís Éireann* [2016] IEHC 88, <http://www.bailii.org/ie/cases/IEHC/2016/H88.html>.

³¹⁵ *Kivlehan v Radio Telefís Éireann* [2016] IEHC 88, para 44.

³¹⁶ BAI, “Rule 27 Guidelines General Election Coverage” November 2015, p.7.; BAI, “Guidelines in Respect of Coverage of Referenda”, March 2015, p 8, <http://www.bai.ie/?ddownload=113476>.



referenda.³¹⁷ The BAI “Guidelines on Election Coverage” prohibit “endorsements by broadcasters of election candidates, participating political parties or election interests”. These guidelines also prohibit on-air endorsements by staff of election candidates, participating political parties or election interests.³¹⁸ A similar provision regarding endorsements by broadcasters and staff is contained in the “Guidelines on Referenda”.³¹⁹ Some weeks prior to the marriage referendum in 2015, *RTE* banned its personnel expressing their views on social media prior to the marriage referendum in a bid to remain impartial. One presenter stepped down as presenter of *RTE*’s only LGBT show over the restrictions. *RTE* also cautioned a comedian who breached the ban by calling for a “Yes” vote in the referendum.

8.2.2. Regulation of print media during elections and referenda

The Defamation Act 2009 formally recognises the Press Council of Ireland, an independent non-statutory body tasked with maintaining minimum ethical and professional standards among the press; these are set out in a schedule to the Act. The Act also provides that the Press Council shall have authority to receive, hear and determine complaints concerning the conduct of its members and also to appoint a Press Ombudsman to investigate, hear and rule on complaints made to the Press Council concerning the conduct of its members.³²⁰ The Defamation Act also provides that the Press Council shall adopt a code of standards.³²¹

Although the Press Council’s Code does not contain any specific mention of press coverage of elections or referenda, the principles that it sets out do have an indirect bearing on the reporting of these events. For instance, in reporting news and information, the Code provides that “the press shall strive at all times for truth and accuracy”. The Code also states that “the press is entitled to advocate strongly its own views on topics and that comment, conjecture, rumour and unconfirmed reports shall not be reported as if they are fact”. Principle 5 also recognises that: “Public persons are entitled to privacy.” However, publication of relevant details of public persons’ private life and circumstances may be justifiable where the information revealed relates to the validity of their conduct, the credibility of their public statements, the value of their publicly expressed views or is otherwise in the public interest.” Finally, whereas political advertising is banned in the broadcast media, there are no similar restrictions upon the press.

³¹⁷ Ibid.

³¹⁸ BAI, “Rule 27 Guidelines General Election Coverage”, November 2015, p.6, <http://www.bai.ie/en/guidelines-on-coverage-of-the-general-election-issued/>.

³¹⁹ BAI, “Guidelines in Respect of Coverage of Referenda”, March 2015, p.8, <http://www.bai.ie/?download=113476>.

³²⁰ Defamation Act 2009, Schedule 2, section 8(1) and (2), <http://www.irishstatutebook.ie/eli/2009/act/31>.

³²¹ Defamation Act 2009, Schedule 2, section 10.

8.2.3. Regulation of online media during elections and referenda

8.2.3.1. Data protection and privacy

In 2016 the Data Protection Commissioner issued [guidelines](#) to candidates for election, and their representatives, on canvassing, data protection and electronic marketing for the 2016 General Election 2016.³²² The guidelines deal with websites (including party websites) and “cookies”, and state that if a website uses cookies to collect information from individuals, it should “communicate [this fact] clearly to the user, detailing the terms of cookies’ usage and a means of giving or refusing consent”. The guidelines also provide that candidates should “[e]nsure [that] websites include clear and prominent privacy statements, telling users who you are, what personal data you are collecting, and what you are going to do with their data”.

8.2.3.2. Electronic political communication

The Data Protection Commissioner (DPC)³²³ sent a guidance letter to all political parties regarding the European and Local Elections in May 2014 entitled “Restrictions on Electronic Direct Marketing/Canvassing”. The Letter stated that: “The Data Protection Acts cater for written communications with the electorate by providing that the restrictions on direct marketing do not apply to direct mailing/post carried out in the course of political activities by a political party or its members, or a candidate for elective political office.” The letter indicated that in previous election campaigns, the DPC had received a substantial number of complaints from individuals in receipt of unsolicited messages, emails and phone calls from political parties and candidates for election. In many cases, the individual had had no previous contact with the political party or candidate and was concerned at how their details had been sourced. Subsequent investigations by the DPC revealed that contact details had been obtained from sources such as sports clubs, friends, colleagues and schools. The letter highlighted that “the obtaining of personal data in all of these circumstances would constitute a breach of the Data Protection Acts, as there would be no consent from the individual for their details to be obtained and used in this way”. The letter underlined that Ireland had signed into effect of the 2011 European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations,³²⁴ and that accordingly, both candidates and political parties must abide by the statutory guidelines relating to the use of electronic means to send electoral messages. The key points of the Regulations were: Avoid sending electoral messages by electronic means to persons other than those (such as party

³²² Data Protection Commissioner, “Canvassing, Data Protection and Electronic Marketing”, 1 February 2016, <https://www.dataprotection.ie/docimages/documents/DPCanvasGuide.pdf>.

³²³ The role and functions of the Data Protection Commissioner are as set out in the Data Protection Acts 1988 and 2003, <http://www.irishstatutebook.ie/eli/2003/act/6/enacted/en/html>.

³²⁴ S.I. No. 336/2011, <http://www.irishstatutebook.ie/eli/2011/si/336/made/en/print>.



members) who have consented to receiving such messages; ensure that those persons who have given prior consent to be contacted or have “opted in” have done so within the last twelve months or have renewed this consent; do not attempt to obtain or use contact information from third parties. The Regulations further provide that where the DPC’s investigations of any complaints received establish that offences have been committed, the offender may be prosecuted and, if convicted in a district court, may face penalties of up to EUR 5,000 in respect of each separate offence.

8.3. Recent and emergent issues

In 2012 the BAI upheld a complaint made by former presidential candidate Seán Gallagher relating to the Frontline Presidential Debate Broadcast on *RTÉ One* television, and a radio programme broadcast the following day. Mr Gallagher contended that the broadcast of a tweet from what had been erroneously described as the “Martin McGuinness for President Campaign” had been unfair, and “indicative of a lack of objectivity and of partiality towards the candidate”; the BAI agreed.³²⁵

Social media platforms have broadened the scope of what it is possible to talk about during a campaign. According to academic Derek Greene, social media in the 2016 general election in Ireland was more important than ever before, with more than 70% of candidates having a Twitter account, up from 57% during the 2011 election. However, it is questionable whether this fact influenced the result. His research states that none of the parties in General Election 2016 managed to capture online attention in the way that occurred during the marriage referendum, when online engagement played a significant role in the result.³²⁶

8.4. Conclusion

In considering media regulation in Ireland during elections and referenda it is clear that the most extensive and detailed regulation applies to the broadcast media, particularly television, probably on account of the pervasiveness of the medium. Notably, courts are careful not to overstep the media’s right to freedom of expression, particularly where editorial decisions are to be made by broadcasters with regard to election content. Finally, in relation to online media, the increased role of the Data Protection Commissioner in relation to elections is quite notable.

³²⁵ Damien McCallig, “Broadcast of Unverified “Tweet” Unfair to Presidential Candidate”, IRIS 2012-5/27, <http://merlin.obs.coe.int/iris/2012/5/article27.en.html>.

³²⁶ Derek Greene, “Most candidates used Twitter but its influence unknown”, *The Irish Times*, 29 February 2016, <http://www.irishtimes.com/news/ireland/irish-news/most-candidates-used-twitter-but-its-influence-unknown-1.2553043>. See <http://insights4news.ucd.ie/> (University College Dublin).





9.IT - Italy

Ernesto Apa, Portolano Cavallo Studio Legale

Marco Bassini, Bocconi University

9.1. Introduction

The Italian legislation governing political communication during elections and referenda is based on the principle of "information pluralism" and the right to free information, which make up the constitutional cornerstone of media regulation in Italy. These fundamental principles require that citizens be granted access to a plurality of cultural and political views. Accordingly, Italian law aims at providing representatives of the various political groups with equal access to the media.

The Italian legislation regulating political communication via the media during elections and referenda is relatively recent compared to that of other European countries. Indeed, the first piece of legislation to address political communication was only introduced in 2000, when Law no. 28 of 22 February 2000 (General provisions on equal access to media during elections and referenda and political communication – commonly known as the "Par Condicio Law") entered into force.³²⁷

9.2. Current regulation

The Par Condicio Law sets forth a detailed and comprehensive set of rules governing the media presence and the media coverage of candidates, politicians and political parties. With specific regard to the provisions applicable during elections and referenda, the Par Condicio Law contains "equal air time" rules that are applicable to broadcast media, and procedural rules that are applicable to both broadcast and print media. In addition, some specific provisions regulate the publication of polls by broadcast and non-broadcast media. Moreover, when elections and referenda take place, the Italian Communication Authority (*Autorità per le garanzie nelle comunicazioni* – "AGCOM") and the Parliamentary Commission for Public Service Broadcasting (the "PSB Commission") issue *ad hoc*

³²⁷ Disposizioni per la parità di accesso ai mezzi di informazione durante le campagne elettorali e referendarie e per la comunicazione politica, Legge 22 Febbraio 2000, n. 28, in Gazzetta Ufficiale 2000, 43 (Law of 22 February 2000, no. 28, Gazzetta Ufficiale 2000, 43), <http://www.camera.it/parlam/leggi/00028L.htm>.



regulations specifying the provisions of the Par Condicio Law³²⁸ that are applicable, respectively, to private broadcasters and to the public service broadcaster (Radio Televisione Italiana – "RAI").

As to "silence periods", under Italian law political "propaganda" may not be conducted the day before the date of an election or referendum. Within this context, private television and radio broadcasters are forbidden to broadcast electoral campaign material.³²⁹

Although the Par Condicio Law lacks a similar provision, AGCOM and the PSB Commission apply a "non-campaigning rule" to broadcast media when adopting their respective regulations.³³⁰ In particular, AGCOM and the PSB Commission usually extend the statutory ban governing electoral campaigning to political programmes, stipulating that political programmes cannot be broadcast the day before the vote and on the voting day.

9.2.1. Regulation of broadcast media during elections and referenda

9.2.1.1. Information programmes and political programmes

The Par Condicio Law sets out different rules in respect of informational programmes and political programmes. These provisions apply from the official announcement of an election or referendum until the end of voting.

"Political programmes"³³¹ include political programming, debates, roundtables, presentation of candidates and election programmes, interviews and any other programmes presenting any kind of confrontation between political opinions and candidates.³³²

Strict equal air time rules apply to political programmes in which candidates and political parties present their electoral programmes. Broadcasters that wish to offer political programmes (for example, debates or roundtables) shall notify AGCOM within five days of the date of the official announcement of an election or referendum. Furthermore, private radio and television broadcasters are allowed to offer party political

³²⁸ Article 2, paragraph 5, of the Par Condicio Law.

³²⁹ Article 9-bis of Law Decree no. 807 of December 6, 1984 as converted into law by Law no. 10 of February 4, 1985.

³³⁰ For the latest resolution, see AGCOM Resolution no. 448/16/CONS and the PSB Commission Resolution of 11 October 2016 issued in relation to the constitutional referendum which took place on December 2016, https://www.AGCOM.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlo&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=5961306&_101_INSTANCE_kidx9GUnlodu_type=document.

³³¹ Article 4 of the Par Condicio Law.

³³² Article 2, paragraph 2, of the Par Condicio Law.



broadcasts. However, only the public service broadcaster is *obliged* to provide party political broadcasts. Radio or television broadcasters that wish to offer party political broadcasts shall notify the PSB Commission and AGCOM that their respective broadcasting schedules shall include this type of content 15 days in advance of such broadcasts being aired. The broadcasting of political programmes and party political broadcasts is made available free of charge and is not considered to constitute advertising for the purposes of the relevant advertising limits. Private broadcasters are not obliged to provide party political broadcasts, but if they elect to broadcast such kind of programmes, they are required to make them available free of charge to all political parties. This option aims at making effective the equality of chances of political parties to compete each other: since the amounts of funds available to each political party may be significantly different, requiring them to pay for political broadcasts may actually undermine the goal of a level playing field among political parties regardless of their respective funds and financial resources.³³³

Less arduous obligations are stipulated in respect of information programmes (for example, news programmes and newscasts). Indeed, they are not subject to any equal air time rule. However, they are required to provide balanced information to the public and to comply with the duty of impartiality, equality and completeness of information.

Finally, non-informational programmes (such as entertainment programmes) must avoid expressing any voting suggestions or preferences with regard to elections and referenda until the end of the voting period. More generally, non-informational programmes are required not to influence voters in any way.³³⁴

It is worth noting that, as far as parliamentary elections are concerned, Law no. 515 of 10 December 1993 (Regulation of electoral campaigns for the election of the Parliament) also applies.³³⁵ Article 1, paragraph 5 of this law provides that from the official announcement of an election until the end of voting, the participation of the following parties in informational programmes that are under the responsibility of a media provider must be limited, to the extent necessary, in order to meet the requirements of impartiality and completeness of information: election candidates; members of political parties; and members of the government, regional councils and regional governments. Also prohibited is the coverage of such parties and their participation in any other programmes. Additionally, specific rules are established in respect of local broadcasters.

³³³ See in this respect Gardini G., *Le regole dell'informazione: principi giuridici, strumenti, casi*, Milan, 2005, p. 261.

³³⁴ Article 5 of the Par Condicio Law.

³³⁵ *Disciplina delle campagne elettorali per l'elezione alla Camera dei deputati e al Senato della Repubblica*, Legge of 10 December 1993 no. 515, in *Gazzetta Ufficiale* 1993, 292 (Regulation of electoral campaigns for the election of the Parliament, Law No. 515, 10 December 1993), <http://www.gazzettaufficiale.it/eli/id/1993/12/14/093G0598/sq>.

9.2.1.2. Opinion polls

Article 8 of the Par Condicio Law stipulates several restrictions on polls, which are further specified by the Regulation on the publication and the diffusion of polls on mass media (the "Polls Regulation") adopted by AGCOM by Resolution no. 256/10/CSP of 9 December 2010.³³⁶ In particular, the Polls Regulation prohibits (until the end of voting) reporting on polls that start 15 days before the date of an election, even if other polls have been undertaken before this date. The ban encompasses voting polls, polls regarding political preferences, and any questions posed to the public that, even if not based on scientific criteria, may nevertheless influence public opinion and, accordingly, the results of elections and referenda³³⁷. During the same period, reporting third parties' statements regarding polls is also forbidden, unless the results of such polls were already public before the 15-day period³³⁸. In any case, the publication of poll results must comply with the procedural rules stipulated by the Polls Regulation. In the case of the publication of poll results, an information notice, inter alia, containing specific details must be provided.

9.2.1.3. Enforcement and penalties

When an election or a referendum is to be held, AGCOM is in charge of the enforcement of the rules set forth in the Par Condicio Law and by the regulations issued by AGCOM and the PSB Commission. AGCOM may act *ex officio* or upon complaint. In the event that a violation is found, AGCOM may order the non-compliant broadcaster to suspend those programmes being broadcast in violation of the law. If necessary, AGCOM may also order the adoption of remedy measures, including making available a specific slot in the broadcasting schedule to the relevant parties. Fines shall apply only in the event of repeated non-compliance with the orders issued by AGCOM.

9.2.2. Regulation of print media during elections and referenda

Article 7 of the Par Condicio Law stipulates the rules that apply to print media from the date of an election or referendum being called through to the second-to-last day before

³³⁶ Annex A to AGCOM Resolution no. 256/10/CSP setting forth the Regulation on the publication and the diffusion of polls on mass media,

https://www.AGCOM.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlo du&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=657860&_101_INSTANCE_kidx9GUnlodu_type=document.

³³⁷ Article 2 of Polls Regulation.

³³⁸ Article 7 of Polls Regulation. See, for instance, AGCOM Resolution no. 161/09/CSP,

https://www.AGCOM.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlo du&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=846697&_101_INSTANCE_kidx9GUnlodu_type=document.



the date of the election or referendum. In particular, during this time frame, print media shall give timely notice if they wish to publish political advertisements in order to give candidates and political parties equal opportunity to request the publication of their own political advertisements. In this case, the Par Condicio Law allows the publication of the following types of advertisements only: (i) announcements relating to debates, roundtables, conferences, or speeches; (ii) advertisements aimed at illustrating the electoral programmes of political parties/groups and candidates or groups of candidates; and (iii) comparisons between different candidates.

In contrast to broadcast media, there is no provision corresponding to an “equal time” rule applicable to print media. Furthermore, the rules on the publication of polls analysed under paragraph 9.2.1.2 shall apply to print media as well.

9.2.3. Regulation of online media during elections and referenda

Although the Par Condicio Law ranks among the most recent pieces of legislation in Europe regulating the participation in TV programmes and the coverage by media of politicians and political parties, it lacks specific provisions that relate to online media. Nevertheless, the rules on the publication of polls are also applicable to online media.

In addition, the Polls Regulation expressly provides that its scope of application includes the online versions of broadcast and print media. On this basis, in 2013 AGCOM banned a mobile app that published polls,³³⁹ arguing that the potential for circulating information related to the election in question was so high that the relevant acts of communication amounted to a publication under Article 8. Therefore, in the light of this decision, there are grounds for arguing that the ban on the coverage of polls encompasses all means of communication based on the use of the Internet.

The asymmetry between online media and other media raises several issues from a legal standpoint. Through the use of the Internet, it has proved possible to introduce new formats which fall outside the scope of existing provisions which govern print or broadcast media only. An interesting case occurred in 2010, when a leading Italian television, Enrico Mentana, in reaction to particularly strict rules adopted by AGCOM on broadcast and print media with respect to regional elections³⁴⁰, launched a streamed talk show named *Mentana Condicio*, which was hosted by the website of the leading Italian newspaper *Corriere della Sera*.³⁴¹

³³⁹ See AGCOM press release of 6 February 2013 in relation to the mobile application 'PoliticApp', <https://www.agcom.it/documents/10179/539985/Comunicato+stampa+06-02-2013/392388be-19eb-45c0-9329-1fb97c73abb6?version=1.0>.

³⁴⁰ AGCOM Resolution no. 25/10/CSP.

³⁴¹ See *Corriere della Sera*, «*Mentana condicio*», *il dibattito è sul web* «*Mentana condicio*», *il dibattito è sul web*, 10 March 2010, http://www.corriere.it/politica/10_marzo_10/mentana-condicio-dibattiti-corriere-it_d00f847e-2c6f-11df-b239-00144f02aabe.shtml.



9.2.4. Self-regulatory codes or practices concerning elections and referenda

No specific self-regulatory code or practice or "soft law" has been adopted in Italy with a view to ensuring equal access to media during elections and referenda.

9.3. Recent and emergent issues

9.3.1. The overlapping roles of AGCOM and the PSB Commission

When an election or a referendum is called, AGCOM and the PSB Commission implement the provisions of the Par Condicio Law by means of *ad hoc* regulations that apply, respectively, to private broadcasters and to the public service broadcaster (RAI). However, the Par Condicio Law does not provide for any form of coordination of the respective courses of action. This may lead to practical problems, since AGCOM and the PSB Commission might issue different regulations in respect of media players that act in the same market as competitors. In fact, just such a situation arose in 2010 in relation to the *ad hoc* rules issued by AGCOM and the PSB Commission in respect of informational programmes.

On that occasion, AGCOM and the PSB Commission adopted the relevant regulations governing the media presence of politicians and political parties during local elections. The PSB Commission published the regulation applying to the public service broadcaster (RAI)³⁴² before AGCOM. This regulation, however, contained an unusual rule governing informational programmes, which read as follows:

Informational programmes, with the exception of newscasts, are subject to the rules governing political programmes.

This provision was also in breach of the Par Condicio Law. Indeed, Article 2, paragraph 2 actually stipulates that the provisions on political programmes do not apply to informational programmes. Therefore, AGCOM had to consider two alternative options: (i) it could extend the same rule to private broadcasters, but by doing so it would violate a statutory provision; or (ii) it could regulate informational programmes by setting different rules than those governing political programmes, but in this case competing broadcasters would have to comply with different rules.

³⁴² Regulation adopted on 9 February 2010.



Ultimately, AGCOM introduced, by means of Resolution of 24 February 2010,³⁴³ a provision that, similarly to that established by the PSB Commission, extended the rules governing political programmes to encompass information programmes.

However, the Regional Administrative Court of Lazio (*Tribunale Amministrativo Regionale*) found this provision to be illegal, as it was in breach of Article 2 of the Par Condicio Law.³⁴⁴ As a consequence, AGCOM annulled the provision and informational programmes broadcast by private broadcasters were eventually subject to different rules than those applying to political programmes.

9.3.2. Other issues

False statements about candidates (that may be spread through broadcast, print and online media) are a hotly debated social and legal issue in Italy. Some controversial episodes have occurred quite recently where, during the course of electoral campaigns, allegedly “false information” has been spread concerning the reputation of candidates: for example in 2010, when the candidate who was eventually elected mayor of Milan (Giuliano Pisapia) was falsely accused of having a criminal record during a debate with the other candidate running for mayor.

There is no specific legislation governing such cases; thus, the general provisions on defamation apply. However, the spread of “false information” has increased dramatically³⁴⁵ because of the rise of populism and the growing use of the Internet and social media for political purposes. After the constitutional referendum held in December 2016, a huge debate began, resulting in some proposals aimed at preventing “fake news” that may lead to the imposition of strict liability on media platforms. Inter alia, a very controversial proposal was presented recently by Senator Adele Gamaro (“DDL Gamaro”).³⁴⁶ This proposal aims at criminalising the circulation of “fake news”, as well as biased or exaggerated information.

9.4. Conclusion

Although the Par Condicio Law and the relevant resolutions of AGCOM and the PSB Commission provide a detailed set of rules for broadcast and print media during elections

³⁴³ AGCOM Resolution no. 25/10/CSP.

³⁴⁴ TAR Lazio, orders nos. 1179/2010 and 1180/2010, <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=L5RZ3KIWOXDBAMR4XEONCKWRR4&q> and 1180/2010, <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=OVT5OFK6SCVKF53IFADTUR4O6U&q>.

³⁴⁵ See, among others, H. Allcott, M. Gentzkow, ‘Social Media and Fake News in the 2016 Election’, March 2017, <https://web.stanford.edu/~gentzkow/research/fakenews.pdf>.

³⁴⁶ Senate of the Republic, Bill no. 2688 of 7 February 2017, <http://www.senato.it/service/PDF/PDFServer/BGT/01006504.pdf>.



and referenda, some loopholes remain open as far as online media are concerned. In the absence of any appropriate corrective actions, the situation that arose in 2010 could easily arise again in the future, with potential damage to pluralism and competition in the broadcasting market.

The framework that is currently in force seems to be much too specific to traditional broadcasters and less detailed as far as print media are concerned, while no regard is paid to specific characteristics of online media that may be difficult to reconcile with this legal background. Even though AGCOM and the PSB Commission have the power to issue specific regulations, the Par Condicio Law could probably be improved by taking into account the different nature of the Internet compared to other forms of media and that the same content provided by broadcast media and print media can now be delivered through the Internet, including social networks. A more "holistic" approach, then, would be helpful in this respect.

With this in mind, in 2012 the outgoing President of AGCOM called for the implementation of certain legislative steps aimed at ensuring equal access to the media, affirming that it was necessary to reconsider the existing legal framework in the light of the new role of the Internet within the media context³⁴⁷.

³⁴⁷ AGCOM End-of-term report for the years 2005-2012, <https://www.AGCOM.it/documents/10179/539825/Pubblicazione+02-05-2012/5c288e0d-9e62-44e4-959c-da948bc31ffb?version=1.0>



10. NL - Netherlands

Anne Bruna and Max Rozendaal, Institute for Information Law (IViR), University of Amsterdam

10.1. Introduction

As has been the case in other countries, there has been a clear shift in the Dutch media landscape from traditional media to online media. Digital innovation and new models of journalism are playing an important role. The importance of print media is declining and only two national quality papers, *de Volkskrant* and *Trouw*, are still managing to expand their readerships. In the field of public broadcasting, NOS (*Nederlandse Omroep Stichting*) is the main general broadcasting organisation and the most important offline news brand in the Netherlands. While time spent watching television has declined, on-demand or online broadcasts are increasing in popularity. Amongst online media, www.nu.nl (owned by Sanoma) is the most popular Dutch news website, followed by www.nos.nl³⁴⁸

At the beginning of the twenty-first century, political parties had their own specific media through which to spread their beliefs and policies. For instance, Catholics would spread their message through the *de Volkskrant* newspaper and the de KRO (*Katholieke Radio Omroep*) radio station; Protestants had the *Trouw* newspaper and the NCRV (*Nederlandse Christelijke Radio Vereniging*) radio station; and the socialists spoke out through *Het Vrije Volk* and the de VARA (*Vereniging Arbeiders Radio Amateurs*) radio station. However, the current media landscape looks quite different: no broadcast organisation represents a specific political party. On the other hand, with the rise of social media, selective exposure seems to have become more common again.³⁴⁹

In the Netherlands, the media system largely relies upon self-regulation. However, some constitutional guarantees are of importance for the media system, including the guarantee of freedom of expression. As a basic principle, journalists and programme-makers are free to write, publish and broadcast what they wish – the government cannot vet their output in advance.³⁵⁰

³⁴⁸ N. Newman, *Reuters Institute Digital News Report 2016*, Reuters Institute for the Study of Journalism, Oxford 2016, p. 57 <http://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital-News-Report-2016.pdf>.

³⁴⁹ F. J. Zuiderveen Borgesius e.a., 'Algoritmische verzuiling en filter bubbles: een bedreiging voor de democratie?', *Computerrecht* 2016/173, p. 4.

³⁵⁰ Article 7, Dutch Constitution, <http://wetten.overheid.nl/BWBR0001840/2008-07-15>.



10.2. Current regulation

10.2.1. Regulation of broadcast media during elections and referenda

The Dutch Media Act (*Mediawet*) contains specific rules concerning broadcasting during elections; supplemented by general media rules which may have some influence in a political context.³⁵¹

As a general rule, the Media Act prescribes that public service broadcasting media have the "public task" of informing the public on matters of "information, culture [and] education".³⁵² NOS, which is the main general broadcasting organisation, has a duty to offer media content to national public broadcasters in the field of news, sports and events.³⁵³ Moreover, the rules governing coverage of events of major importance for society are important within a political context. These rules prescribe that events with importance for Dutch society or with special cultural meaning need to be broadcast on "free-to-air" broadcasting channels.³⁵⁴

Under Article 6.1 of the Media Act, political parties which have acquired one or more seats in the most recent House of Representatives or Senate elections are allocated a set amount of broadcasting time on generalist national channels. The amount of time allocated to them is determined by the Media Authority (*Commissariaat voor de Media*). Moreover, parties that participate in elections for the House of Representatives in all polling districts or that take part in the European Parliament elections are also allocated airtime by the Media Authority. For the most recent elections in March 2017, these parties were allocated 18 minutes of television airtime and 20 minutes of radio airtime.³⁵⁵ This airtime may only be used for the broadcasting of political content and cannot be allocated to political parties that have been convicted of discrimination or hate speech.³⁵⁶

Regarding commercial broadcasting time for political parties on commercial channels, the general rules set out in the third chapter of the Media Act apply. The Media Act contains specific rules on political advertisements. These provide that neither public nor commercial broadcasters are allowed to acquire sponsorship for the broadcasting of political information.³⁵⁷

³⁵¹ Mediawet 2008 (Media Act 2008), <http://wetten.overheid.nl/BWBR0025028/2017-02-01>.

³⁵² Article 2.1, Media Act.

³⁵³ Article 2.34a, Media Act.

³⁵⁴ Article 5.1, Media Act.

³⁵⁵ Commissariaat voor de Media, Politieke partijen geïnformeerd over zendtijd voor verkiezingen , 14 February 2017, <https://www.cvdm.nl/nieuws/politieke-partijen-geinformeerd-over-zendtijd-voor-verkiezingen/>.

³⁵⁶ Article 6.4 and 6.2(1) Media Act.

³⁵⁷ Article 2.106(3)(a) and Article 3.15 (2) Media Act.



There are no specific restrictions concerning the type of political content that can be broadcast during elections. However, the general rules of the Media Act can lead to restrictions on the content broadcast by political parties in certain circumstances. The NOS is granted considerable freedom in its assessment of the topics to be covered. However, it is obliged to guarantee pluralism.³⁵⁸ This was the subject of scrutiny in a February 2017 case by the District Court of Amsterdam. The question was whether the decision of NOS not to invite a certain smaller political party to participate in an electoral debate was lawful. The District Court cited several grounds on which it might be decided that NOS had acted unlawfully, the most important ones being a limitation on the freedom of speech or misuse of journalistic freedom. According to the Court, none of these grounds applied. The misuse of journalistic freedom would only apply if NOS had tried to influence the results of the elections by its decision not to invite the party in question to participate without good reason. This was not the case, as the choice of NOS had been transparent and sufficiently neutral.³⁵⁹

10.2.2. Regulation of print media during elections and referenda

Dutch law does not contain any specific rules regarding the role of print media during election campaigns. However, general rules of civil and tort law, which are based on the European Convention on Human Rights, prescribe that a balance must be reached between different fundamental rights, such as freedom of expression and privacy. At the same time, importance is given to the role of the press in a democratic society and the freedom of the press to cover political affairs. Moreover, several Dutch codes of conduct impose an independent position on journalists in relation to political parties. For instance, the "Code for Journalism" (*Code voor de Journalistiek*) states that "The journalist will, if he is connected to any political party ... mention this connection in his article when relevant in the light of the article."³⁶⁰

Political parties are free to purchase advertising space in newspapers and other print media. This was for example done by the leader of the VVD party during the 2017 elections, when he published an open letter in major newspapers.³⁶¹

Articles 6:194 and 6:194a of the Dutch Civil Code on misleading and comparative advertisement do not apply to paid advertisements by political parties, as these articles

³⁵⁸ Article. 2.34a Media Act, and Memorie van Toelichting bij de Mediawet (Explanatory Memorandum, Media Act),

<https://zoek.officielebekendmakingen.nl/dossier/30571/kst-30571-3?resultIndex=3&sorttype=1&sortorder=4>.

³⁵⁹ V.zr. Rechtbank Amsterdam 28 februari 2017, IEF 16620; ECLI:NL:RBAMS:2017:1151 (Forum voor Democratie tegen NOS).

³⁶⁰ Vereniging van Journalisten, Code voor de Journalistiek, par. 11, <https://www.nvj.nl/ethiek/ethiek/code-journalistiek>.

³⁶¹ Raoul du Pré, "Rutte promoveert 'pleur op' tot campagnethema", de Volkskrant, 23 January 2017, <http://www.volkskrant.nl/politiek/rutte-promoveert-pleur-op-tot-campagnethema~a4452158/>.



only cover the offering of goods or services – they do not apply to “ideological advertisements”.

The Dutch Advertising Code (*Stichting Reclame Code*), a self-regulatory code governing advertisements, is applicable to commercial advertisements published in print media.³⁶² One of the core principles of the Dutch Advertising Code is that commercial advertisements should be recognisable as such and that commercial advertisements should not be misleading.

In the past, several cases regarding political advertisements have been brought before the Advertisement Code Commission (*Reclame Code Commissie*). In 2012 a complaint against the VVD party concerning a television commercial devoted to the issue of tax cuts for employees was dismissed by the Advertisement Code Commission.³⁶³ It considered that caution should be taken when dealing with political advertisements.

In another case the Advertisement Code Commission considered a complaint against the *Jonge Socialisten* party, whose advertisements had imitated the style adopted by the VVD party in its own advertisement posters. The logo and slogan of the VVD had also been copied. The Advertisement Code Commission considered that the posters were parodies and had not been posted in places reserved for political posters and deemed that it was clear that the posters had not really been produced by the VVD. The Advertisement Code Commission dismissed the complaint.³⁶⁴

10.2.3. Regulation of online media during elections and referenda

Dutch law does not specifically regulate online media during elections and referenda. However, under the general rule stipulated by Article 11.7 of the Dutch Telecommunication Act (*Telecommunicatiewet*), political messages cannot be transmitted by automated means (that is to say, without human intervention) without prior consent from the subscriber or user concerned.³⁶⁵ Also, the self-regulatory “Social Media Advertising Code” (*Reclamecode Social Media*)³⁶⁶ imposes restrictions on the possibility of surreptitious political advertising through social media. The key element of the Social Media Advertising Code is that any payment, whether in money or in kind, a social media user receives for spreading a commercial message should be disclosed. The aim of this code is to realise more transparency in the use of advertising on social media. This is

³⁶² <https://www.reclamecode.nl/nrc/pagina.asp?paginalD=0&deel=2>.

³⁶³ Stichting Reclame Code, 2012/00789B, 30 October 2012, <https://www.reclamecode.nl/webuitspraak.asp?ID=86436&acCode>.

³⁶⁴ Stichting Reclame Code, 2012/00832, 8 October 2012, <https://www.reclamecode.nl/webuitspraak.asp?ID=85113&acCode>.

³⁶⁵ Wet van 19 oktober 1998, houdende regels inzake de telecommunicatie (Telecommunication Act), <http://wetten.overheid.nl/BWBR0009950/2017-03-10>.

³⁶⁶ Stichting Reclame Code, Reclamecode Social Media (RSM) <https://www.reclamecode.nl/nrc/pagina.asp?paginalD=289%20&deel=2>.



done by regulating the disclosure of financial ties between a social media user³⁶⁷ and an advertiser and imposing a ban on targetting and encouraging children under the age of 12 to promote products and services on social media.³⁶⁸ Furthermore a ban is imposed on misleading consumers via social media, for example by creating fake online identities to post reviews of products.³⁶⁹ The use of fake online identities by political parties was a topic during the 2017 elections. A newspaper reported that the Denk party used fake online identities to partake in online discussions on Facebook and Twitter.³⁷⁰

10.2.4. Self-regulatory codes or practices concerning elections and referenda

While the media system in the Netherlands is strongly influenced by several self- and co-regulatory instruments, none of these instruments has a specific focus on the role of the media during election campaigns. The general codes governing the media are the Code for Journalism (of the Netherlands Union of Journalists), the Code for Dutch Journalists (of the Netherlands Society of Editors), and the Guidelines of Netherlands Press Council.³⁷¹ Advertising is also strongly influenced by self-regulation. The “Advertising Code Commission” has also issued several decisions on political advertising (as discussed above).

10.3. Recent and emergent issues

Recently, in the run-up to elections in March 2017, the NOS announced that it had decided to show more restraint in publishing the results of opinion polls on the allocation of seats in the House of Representatives, as they found that certain polls are unreliable.³⁷²

Moreover, there has been a lot of discussion on “fake news”, and especially on its ability to influence election results. The site www.Peiling2017.nl posted several polls on Twitter and its website. These polls were retweeted by a politician from the *Forum voor Democratie* party, a new political party which took part in the 2017 elections for the first time. Journalists found out that the polls by www.Peiling2017.nl had no basis in actual

³⁶⁷ Art. 3 Reclamecode Social Media.

³⁶⁸ Art. 5 Reclamecode Social Media.

³⁶⁹ Art. 4 Reclamecode Social Media.

³⁷⁰ Andreas Kouwenhoven and Hugo Logtenberg, “Nep-aanhang is online actief voor politieke partij Denk”, NRC, 10 February 2017, <https://www.nrc.nl/nieuws/2017/02/10/nep-aanhang-online-actief-voor-denk-6642349-a1545568>.

³⁷¹ Vereniging van Journalisten, Code voor de Journalistiek, <https://www.nvj.nl/ethiek/ethiek/code-journalistiek>. Genootschap van Hoofdredacteuren, Code voor de Journalistiek, <http://genootschapvanhoofdredacteuren.nl/code-voor-de-journalistiek/>. Raad voor de Journalistiek, Leidraad van de Raad voor de Journalistiek, <https://www.rvdj.nl/leidraad>.

³⁷² Marcel Gelauff, “NOS nog terughoudender over peilingen Tweede Kamer”, NOS Nieuws, 16 December 2016, <http://nos.nl/artikel/2148608-nos-nog-terughoudender-over-peilingen-tweede-kamer.html>.



research, and were merely based on the opinion of the entrepreneur responsible for the website.³⁷³

Further concern was caused when PVV politician Geert Wilders tweeted a photoshopped image of D66 politician Alexander Pechtold. The original image³⁷⁴ depicted a demonstration in the UK that took place as Wilders held a press conference for his newly released political film, *Fitna*. The image tweeted by Wilders replaced one of the protestors in the foreground with an image of Pechtold.³⁷⁵

Although Dutch law imposes no specific restrictions on the material produced by the media during elections, the admissibility of certain specific statements has been the focus of recent case law. The most famous case concerned the statement of PVV's leader Geert Wilders, "Do you want more or fewer Moroccans?", during a televised speech. This statement was held by the District Court of The Hague in December 2016 to constitute an incitement to discrimination and was therefore declared unlawful as it amounted to hate speech. This shows that the lack of specific regulation on media content in the Netherlands does not prevent the imposition of certain restrictions on politicians on the basis of more general rules.³⁷⁶

10.4. Conclusion

As set out above, the regulation of the use of the media by political parties during election time is sparse. Each party with a seat in the House of Representatives receives an allotment of advertising time on national television and radio. The Dutch Advertisement Code plays a role in the regulation of commercial advertisements. This Code has the status of a self-regulatory code. Enforcement by the Advertising Code Commission is exercised with restraint, especially where political advertisements are concerned. During the 2017 elections social media played a more important role than ever, which also gave rise to several issues, including "fake news" and fake polls with a possible influence on election results. It will remain to be seen how, and if, this will be addressed by fresh regulatory measures in the coming years.

³⁷³ Mark Misérus and Robert van der Noordaa, "Nu duikt ook de neppeiling op: politici trappen in 'knutselwerkjes'", 7 March 2017, <http://www.volkskrant.nl/politiek/nu-duikt-ook-de-neppeiling-op-politici-trappen-in-knutselwerkjes-a4470825/>.

³⁷⁴ Gettyimages, "Controversial Dutch Politician Geert Wilders Arrives In The UK", 16 October 2009, <http://www.gettyimages.nl/license/91933602>.

³⁷⁵ Geert Wilders, "D66 wil Amsterdam afsplitsen als de verkiezingsuitslag tegenvalt", Twitter, 5 February 2017, <https://twitter.com/geertwilderspvv/status/828502461421850624>.

³⁷⁶ Rechtbank Den Haag, 9 december 2016, ECLI:NL:RBDHA:2016:15014, <http://merlin.obs.coe.int/redirect.php?id=18353>. See Leon Trapman, "Dutch politician Wilders convicted for group insult and incitement to discrimination", IRIS 2017-2/25, <http://merlin.obs.coe.int/iris/2017/2/article25.en.html>.



11. PL - Poland

Beata Klimkiewicz, Jagiellonian University

11.1. Introduction

Media coverage during election campaigns in Poland is principally regulated by (i) the 1997 Constitution of the Republic of Poland³⁷⁷, which guarantees freedom of expression and the media;³⁷⁸ (ii) the 1984 Press Law Act, which defines press and journalistic conduct;³⁷⁹ (iii) the 1992 Broadcasting Act, which sets conditions for radio and television broadcasters and providers of audiovisual media services;³⁸⁰ and (iv) the 2011 Election Code Act³⁸¹ and the 2003 Act on Nationwide Referenda,³⁸² which set out general rules covering elections and referenda, in particular election and referendum campaigns. In addition, defamation and insulting behaviour are covered by the 1997 Criminal Code,³⁸³ which provides for the possibility of punishment under the criminal prosecution procedure.

³⁷⁷ The Constitution of the Republic of Poland (Konstytucja RP), adopted on 2 April 1997, Official Journal 1997, No 78, item 483, <http://www.sejm.gov.pl/prawo/konst/polski/kon1.htm>. English translation available under <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

³⁷⁸ Articles 14 (Freedom of the press and media) and 54 (Freedom of expression, ban on censorship).

³⁷⁹ The Press Law Act (Ustawa Prawo Prasowe) adopted on 26 January 1984, Official Journal 1984 No 5, item 24, as amended. <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19840050024>.

³⁸⁰ The 1992 Broadcasting Act (Ustawa o Radiofonii i Telewizji) adopted on 29 December 1992, as amended, Official Journal 1993, No 7, item 34, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19930070034>.

³⁸¹ The 2011 Election Code (Ustawa Kodeks Wyborczy) adopted on 5 January 2011, Official Journal 2011, No 21 item 112, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20110210112>.

³⁸² 2003 Act on Nationwide Referendum (Ustawa o Referendum Ogólnokrajowym) adopted on 14 March 2003, Official Journal 2003, No 57, item 507, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20030570507>.

³⁸³ The 1997 Criminal Code of 6 June 1997, Official Journal, 1997, No 88, item 553, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553>.



11.2. Current regulation

11.2.1. Regulation of broadcast media during elections and referenda

The broadcasting sector in Poland is regulated by the 1992 Broadcasting Act³⁸⁴, which applies to radio and TV broadcasters (private, public service and social), as well as to providers of audiovisual media services. The regulatory authority responsible for supervising and monitoring the operations of broadcasters and providers of audiovisual media services is the National Broadcasting Council (*Krajowa Rada Radiofonii i Telewizji* – “KRRiT”), which was established in 1993. Article 213 of the 1997 Polish Constitution stipulates that KRRiT’s role is to safeguard freedom of speech, the right to information, and the public interest regarding radio and television broadcasting.

With reference to elections and referenda, the regulation of the broadcast media comprises: (i) general rules covering election campaigns set by the 2011 Election Code Act, as amended;³⁸⁵ (ii) general rules covering referendum campaigns set by the 2003 Act on Nationwide Referenda;³⁸⁶ (iii) rules set by the 1992 Broadcasting Act obliging the public service media to broadcast election-related programmes; and (iv) several regulations issued by KRRiT which mainly regulate procedures related to the presentation by the public service media during elections of viewpoints concerning crucial public issues. Relevant measures can be divided into the following thematic areas: “silence periods” and opinion polls; political advertising; party political broadcasts; and televised debates.

11.2.1.1. “Silence periods” and opinion polls

Silence periods and the dissemination of the results of opinion polls by the broadcast media are regulated by the 2011 Election Code Act, as amended. Article 107(1) of the Code states that “it is prohibited to campaign on voting day and less than twenty-four hours before voting day, including convening meetings, organising marches and demonstrations, giving speeches, and distributing materials.” In a similar vein, Article 39(1) of the 2003 Act on Nationwide Referenda prohibits any form of referendum campaigning, including the broadcasting of such campaigning, less than twenty-four hours before voting day and for the whole of voting day until voting is closed.

³⁸⁴ The 1992 Broadcasting Act (*Ustawa o Radiofonii i Telewizji*) adopted on 29 December 1992, as amended, Official Journal 1993, No 7, item 34, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19930070034>.

³⁸⁵ The 2011 Election Code (*Ustawa Kodeks Wyborczy*) adopted on 5 January 2011, Official Journal 2011, No 21 item 112, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20110210112>.

³⁸⁶ 2003 Act on Nationwide Referendum (*Ustawa o Referendum Ogólnokrajowym*) adopted on 14 March 2003, Official Journal 2003, No 57, item 507, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20030570507>.



As regards opinion and exit polls, Article 115 of the 2011 Election Code Act prohibits the dissemination to the public of the results of pre-election surveys, opinion polls concerning expected voting behaviour and election results, and polling conducted on election day from twenty-four hours before the vote until the end of voting. Thus, once voting has finished, the preliminary results may be disseminated. Similarly, Article 41(1) of the 2003 Act on Nationwide Referenda prohibits the publishing of the results of all relevant opinion polls twenty-four hours before voting day and during voting day until voting is concluded.

11.2.1.2. Political advertising

Political advertising is not prohibited or limited in the broadcast media during electoral campaigns, although it should – as with any other broadcast or advertising content – comply with the general rules set by the 1992 Broadcasting Act. The buying and use of political advertising is allowed both in the public service media and private commercial media. Yet the “price issues” of paid political electoral advertising are regulated under Article 119 of the 2011 Election Code Act. Article 119 stipulates that paid-for electoral broadcasts will be disseminated under the same conditions as those that apply to all electoral committees in both the public service media (Article 119(2)) and the non-public broadcasters (Article 119(3)). In addition, Article 119(4) stipulates that:

The prices for disseminating paid electoral broadcasts cannot exceed the prices for regular advertising and should be established according to the price list adopted on the day of the election announcement.

Election committees are entities which are registered with the relevant electoral authority and which have the right to nominate candidates for elections. The election committees may each be formed by at least fifteen citizens who have the right to vote, or by an organisation, a political party or a coalition of political parties.³⁸⁷

11.2.1.3. Party-political broadcasts

The “content obligation” in respect of party political broadcasts – that is to say the obligation to broadcast political-party programming during an election period – in the case of Poland applies only to public service media. In this respect, public service media have the task under the 1992 Broadcasting Act of enabling entities participating in elections for the Sejm, the Senate, local government and the European Parliament (Article 24(1)), and the presidency of the Republic of Poland (Article 24(2)) to transmit election programmes on public radio and television under terms determined in separate provisions. Likewise, entities taking part in a nationwide referendum campaign are entitled to transmit referendum programmes on public radio and television under terms laid down in separate provisions (Article 24(3)).

³⁸⁷ The 2011 Election Code Act (The definition and rules concerning setting the election committees are covered by the Chapter 11 of the Act).



It should be recognised however, that the entities that Article 24 refers to are required to be registered as “electoral committees”, as defined by Article 117(1) of the 2011 Election Code Act, in order for their election programmes to qualify for transmission free of charge. General provisions referring to the obligation of the public service media to broadcast election programmes for all such officially-registered electoral committees for free are covered by Articles 116-122 of the 2011 Election Code Act. These provisions (i) specify, *inter alia*, the definition of “electoral broadcasts” and how electoral broadcasts shall be allocated among the public service media (Article 116a), (ii) guarantee the dissemination of electoral broadcasts free of charge (Article 117(1)), (iii) list the issues to be specified by a KRRiT Regulation (adopted on 12 July, 2011), such as the time of day at which election programmes shall be broadcast free of charge and the time-sharing framework (the distribution of broadcast time for programming made by political parties) (Article 117(6)), and (iv) the rules governing the distribution of paid-for election broadcasts and political advertising (Article 119). Public service broadcasters should also enable the State Election Commission and election commissioners to present (free of charge) information, clarifications and related messages regarding elections (Article 122(1)). The 2011 Election Code Act further specifies rules governing coverage by public service broadcasters of campaigns for elections to the Sejm³⁸⁸ (Articles 252-254), the Senate³⁸⁹ (Articles 284-285), the presidency (Articles 326-327), the European Parliament (Articles 347-348), county councils (Articles 411-412), and mayoral posts (Articles 491-491a). These rules refer mainly to the distribution of air time among the election committees for their respective broadcasts.

As mentioned above, a KRRiT Regulation, adopted on 12 July 2011,³⁹⁰ addresses several issues. For example, it stipulates that election broadcasts may be transmitted for free during the period from the fifteenth day before voting day until the last day of the election campaign (§ 1(2)). The regulation further specifies the amounts of time in hours and minutes to be reserved for such election broadcasts on nationwide and regional television and radio stations – as well as the regional branches of Polish Television (Telewizja Polska) and public service regional radio companies – in the case of elections to the Sejm (§§ 4-8), to the Senate (§ 916), for the presidency of the Republic of Poland (§§ 17–22), to the European Parliament (§§ 22-27), and to commune and county councils and regional parliaments (§§ 28-33), and for commune mayors (§§ 34-39). Section III of the Regulation describes in detail the procedure governing the allocation of time for and the length of the transmission of election broadcasts, which is mainly based on the rule of equality (in the case of national elections) and proportionality (in the case of regional and local elections). Section IV of the Regulation prescribes the method of preparation, registration and broadcasting of election broadcasts, and defines the respective roles of political parties and their electoral committees and the public service media.

³⁸⁸ The Lower Chamber of the Polish Parliament.

³⁸⁹ The Higher Chamber of the Polish Parliament.

³⁹⁰ The Regulation of the National Broadcasting Council, adopted on 12 July, 2011, concerning time and framework allocation of time for transmission of free election programmes, procedure of action concerning allocation of time, scope of registration and method of preparation and broadcasts of election programmes in public radio and television programme services, <http://www.krrit.gov.pl/en/for-broadcasters-and-operators/legal-regulations>.



In addition to this regulation, a KRRiT Regulation adopted on 24 April 2003 regarding procedures related to the presentation of viewpoints concerning crucial public issues by political parties, trade unions and employers' organisations on public radio and television³⁹¹ regulates the coverage of viewpoints, discussions, analyses, statements and addresses, and events related to the activity of political parties, trade unions and employers' organisations.

11.2.1.4. Televised debates

Debates are recognised as constituting a specific type of content that Polish Television has a duty to broadcast (in addition to the election broadcasts described above) under the 2011 Election Code Act and a KRRiT Regulation adopted on 6 July 2011 concerning detailed principles and procedures for the organisation of debates by Polish Television. Article 120(1) of the 2011 Election Code Act stipulates that Polish Television has a duty to televise debates between (i) representatives of the electoral committees which have registered their lists of candidates in all constituencies in parliamentary elections or elections to the European Parliament in the Republic of Poland, and (ii) between candidates in presidential elections. Article 120(2), which refers to the KRRiT Regulation that addresses this matter, recognises that Polish Television should ensure respect for the principle of equality in presenting positions and opinions during debate. The KRRiT Regulation adopted on 6 July 2011 stipulating detailed principles and procedures in respect of the organisation of debates by Polish Television sets out in detail the relevant conditions, including the conditions which govern nationwide programmes (§ 1(1)) and which ensure that each and every representative or candidate participates in such debates under equal terms and conditions (§ 5).

11.2.2. Regulation of print media during elections and referenda

11.2.2.1. Silence periods and opinion polls

“Silence periods” and the dissemination of the results of opinion polls by the print media are regulated in a similar manner to that which applies in the case of broadcast media – that is to say by the 2011 Election Code Act (Article 107(1)) and the 2003 Act on Nationwide Referendum (Article 39(1)). Both prohibit campaigning on voting day and 24 hours before voting day. As regards opinion and exit polls, Article 115 of the 2011 Election Code Act and Article 41(1) of the 2003 Act on Nationwide Referenda prohibit, as

³⁹¹ The Regulation of the National Broadcasting Council adopted on 24 April 2003 concerning procedures related to the presentation of standpoints with regard to crucial public issues by political parties, trade unions and of employers' organizations in public radio and television, <http://www.krrit.gov.pl/en/for-broadcasters-and-operators/legal-regulations>.



in the case of the broadcast media, the dissemination to the public on voting day and 24 hours before voting day of the results of pre-election surveys and opinion polls concerning expected voting behaviour.

11.2.2.2. False statements

Press content, which is defined by Article 111(1) of the 2011 Election Code Act as “election material disseminated in the press”,³⁹² falls under specific (fast-tracked) court procedures in cases regarding the dissemination of untrue information. Article 111(1) specifically deems to be election material “posters, leaflets and slogans, as well as speeches or other forms of election propaganda”. In the event that election material contains untrue information, the relevant district court shall rule within twenty-four hours on a request for untrue information to be corrected, and its judgment shall be executed immediately (Article 111(2)). Any appeal against the decision of the district court must be lodged within twenty-four hours, and the appellate court must review the case within a further twenty-four hours – its judgment must then be executed immediately (Article 111(3)). The publication of a correction, reply or an apology must take place at the latest within forty-eight hours of the issuance of such a judgment; the court ruling must specify the media in which such a correction, reply or apology is to be published (Article 111(4)).

11.2.2.3. Defamation

In Poland defamation is punishable under Article 212 of the 1997 Criminal Code by up to one year’s deprivation of liberty.³⁹³ However, some other provisions of the Criminal Code might be interpreted as offering greater protection to public officials than to the general public.³⁹⁴ The legal use and interpretation of Article 212 has raised and continues to raise objections from journalists, journalistic organisations, some NGOs, the Council of Europe’s Commissioner for Human Rights and KRRiT. In 2011 – in sentencing two journalists under Article 212 – KRRiT stated that “it is worrying that politicians try to conduct disputes with the press through the medium of criminal law”.³⁹⁵ Polish libel and defamation cases have been repeatedly brought before the European Court of Human Rights, and violations of Article 10 have been found in a number of cases.³⁹⁶ The repeal of Article 212 was

³⁹² “Press” is defined in the Article 7(2) of the 1984 Press Law Act (Ustawa Prawo Prasowe) adopted on 26 January 1984, Official Journal 1984 No 5, item 24, as amended, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19840050024>.

³⁹³ The 1997 Criminal Code of 6 June 1997, Official Journal, 1997, No 88, item 553, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553>.

³⁹⁴ E.g. Article 135.2; 226.1; 226.3. The 1997 Criminal Code of 6 June 1997.

³⁹⁵ PAP (2016) KRRiT odpowiada na oświadczenie TVP (komunikat) (KRRiT responds to the statement of the TVP (communication), <http://centrumprasowe.pap.pl/cp/pl/news/exportToPdf/52208;jsessionid...undefined>.

³⁹⁶ See e.g.: ECHR (2015) Case of Marian Maciejewski v. Poland on 13 January 2015 (Application no. 34447/05), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-150228>; ECHR (2014) Case of Stankiewicz and others v. Poland on 14 October 2014 (Application no. 48723/07), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-147014>; ECHR (2012) Jucha and Żak against



requested by various organisations (foremost among them the Commissioner for Human Rights) representing journalists, media and civil society in 2011,³⁹⁷ again in 2014, and most recently in September 2016. The calls for its repeal were rejected in March 2017 by the Senate Committee for Human Rights, Rule of Law and Petitions. The number of cases of defamation and insulting public behaviour via the mass media decreased over the two years preceding the last elections in 2015;³⁹⁸ however, in the first half of 2016 this number then rose again, reaching around fifty such cases by the end of June of that year.³⁹⁹ The OSCE in its final report summarising observations on parliamentary elections in 2015 recommends that “consideration ... be given to removing provisions that foresee criminal liability for defamation and public insulting behaviour” in order to effectively ensure media freedom and protect freedom of speech, especially during an election period.⁴⁰⁰

11.2.3. Regulation of online media during elections and referenda

The legal framework in Poland does not contain special regulations that are specific to online media. Thus, online press, news and other types of portals that fall under the definition of “the press” under Article 7(2) of the 1984 Press Law Act are basically regulated in the same manner as are the print media (see part 11.2.2.). This includes, in particular, a ban on campaigning on voting day and twenty-four hours before voting day and a ban on opinion and exit polls on voting day and twenty-four hours before voting day. Even so, there seems to be legal uncertainty regarding which online media fall under the definition of “press” specified by the Act. This is mainly due to the fact that the distinguishing criteria in respect of the press – as stipulated by the 1984 Press Law Act – do not match many forms of online media, such as blogs and news portals.⁴⁰¹ Article 7(2) 1 defines the press as “periodical publications that do not form a single and complete entity, are published at least once a year and bear a constant title or name, and a number and a date.” The Article includes, in particular, the following types of media in that category: “daily newspapers and magazines, news agency dispatches, repeated telex

Poland on 23 October 2012 (Application no. 19127/06), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113919>.

³⁹⁷ Under the campaign “Withdraw the Article 212”, <https://pl-pl.facebook.com/wykresl212>.

³⁹⁸ OSCE (2016) Republic of Poland: Parliamentary Elections, 25 October 2016, OSCE/ODHIR Election Assessment Mission Report, <http://www.osce.org/odihr/elections/poland/191566>, p. 13.

³⁹⁹ Wirtualnemedi.pl (2017) Nie będzie zmian w art. 212 Kodeksu karnego – Senatorzy odrzucili apel Rzecznika Praw Obywatelskich (There will be no changes in Article 212 of the Criminal Code – the Senators rejected an appeal of the Commissioner for Human Rights), <http://www.wirtualnemedi.pl/arttykul/art-212-kodeksu-karnego-senatorzy-odrzucili-apel-rzecznik-praw-obywatelskich>.

⁴⁰⁰ OSCE (2016) Republic of Poland: Parliamentary Elections, 25 October 2016, OSCE/ODHIR Election Assessment Mission Report, <http://www.osce.org/odihr/elections/poland/191566>, p. 19.

⁴⁰¹ Parnes Jakub (2016) The Definition of the Press in the Polish Press Law and its Impact on the Functioning of Local Online Media [in] Communication Today: An Overview from Online Journalism to Applied Philosophy, Trivent Publishing, <http://trivent-publishing.eu/books/philosophy/communicationtoday/4.%20Jakub%20Parnes.pdf>.



messages, bulletins, radio and television broadcasts, film chronicles" and "all existing and emerging (in the course of technological advancement) means of mass media ... that distribute periodical publications via print, image, sound or any other means." On the other hand, providers that fall under the category of "providers of audiovisual media services" are covered by the 1992 Broadcasting Act (see part 11.1.).

11.3. Recent and emergent issues

As can be seen from the above analysis, the more detailed regulatory rules – in particular, content obligations during electoral campaigns (such as in respect of party political broadcasts or televised debates) – apply to public service media only. Recently, the corporate governance of the public service media in Poland underwent changes that sparked international criticism. These included in particular the coming into effect of the so-called "Small Media Act" (*Mała Ustawa Medialna*), which amended the 1992 Broadcasting Act.⁴⁰² The Small Media Act was adopted at the end of 2015 and expired on 30 June 2016. Nevertheless, the changes introduced by the Act contributed to a direct dependent relationship between the Government (that is to say, the Finance Minister) and the public service media. In 2016, Polish Television and Polish Radio (*Polskie Radio*) witnessed massive layoffs of not only members of their respective management boards and supervisory boards, but also large numbers of journalists – some of whom had worked for twenty years in the public service. On 22 June 2016 a new Act on the National Media Council⁴⁰³ was passed by the Sejm. Under the Act a new regulatory body – the National Media Council (*Rada Mediów Narodowych* – the "RMN") was created; it took over some responsibilities from KRRiT, such as the appointment of the executive directors and boards of the public service media, and the supervision of the public service media (Articles 17 and 18). Although the 2016 Act ensures that the exercising of powers⁴⁰⁴ within the RMN is more balanced than would be the case if a single member of the Government had sole responsibility (three RMN members are appointed by the Sejm and two by the President), it still does not prevent governing parties from exerting undue influence, and allows active politicians, members of political parties and members of parliament to sit on the RMN.

⁴⁰² The 2015 Act Changing the Broadcasting Act, so called "Small Media Act" (*Ustawa o zmianie ustawy o radiofonii i telewizji*, tzw. "Mała Ustawa Medialna") adopted on 30 December 2015 and expired on 30 June 2016, Official Journal 2016, item 25. <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20160000025>. See the English translation of the document: <http://www.krrit.gov.pl/en/for-broadcasters-and-operators/legal-regulations/>.

⁴⁰³ Act on the National Media Council (*Ustawa o Radzie Mediów Narodowych*) adopted on 22 June 2016, Official Journal 29 June 2016, item 929, <http://dziennikustaw.gov.pl/du/2016/929/1>.

⁴⁰⁴ In terms that no a single minister in the Government decides about the appointment, but the decision involves representatives of the Parliament and President.



11.4. Conclusion

To summarise, in Poland public service media and broadcast, print and online media are subject to different degrees of regulation. The most detailed and arduous regulation (including content obligations) applies to the public service media, while print and online media are subject to the least onerous degree of regulation. Public debate on the regulatory framework has seen calls for reform in three areas – namely, the need for:

- a better mechanism of public service media corporate governance that would ensure institutional autonomy and editorial independence, having regard to the public service media's commitments and duties during electoral campaigns,
- functional independence of KRRiT and the RMN, bearing in mind the fact that these institutions are responsible for the supervision and monitoring of the performance of the public service media, including during electoral campaigns,
- reforming the provisions that provide for criminal liability for defamation and public insulting behaviour, possibly leading to a chilling effect on journalists or the performance of the media in general during the coverage of electoral campaigns and elections.





12. RU - Russia

Andrei Richter, Media Academy Bratislava

12.1. Introduction

Freedom of the media and the right to elect and be elected (and to participate in referenda) are both constitutional rights in the Russian Federation.⁴⁰⁵ As such they are equal values of a democracy and are closely interconnected. In the words of the European Court of Human Rights: “Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system ... The two rights are inter-related and operate to reinforce each other ... For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.”⁴⁰⁶

The ideas expressed in this judgement were confirmed by the Constitutional Court of the Russian Federation, which in particular pointed out:

*If freedom of political discussion is not assured during elections, nor proper conditions for a free exchange of views created – under which not only candidates, their representatives and representatives of electoral associations participate, but also citizens – then such elections may not be considered to be free, and the bodies formed as a result of them [may not be considered to be] legitimate.*⁴⁰⁷

A brochure published and endorsed by the Central Election Commission of the Russian Federation (hereinafter “The CEC”) notes: “The impact of the media on voters, on the formation of their electoral preferences, and on their ... attitudes to the institution of

⁴⁰⁵ Constitution of the Russian Federation. Art. 29 and 32. Official English translation at <http://www.constitution.ru/en/10003000-01.htm>.

⁴⁰⁶ Judgment in the case of *Bowman v. the United Kingdom* (141/1996/760/961), 19 February 1998, para 42, <http://www.bailii.org/eu/cases/ECHR/1998/4.html>.

⁴⁰⁷ Resolution of the Constitutional Court of the Russian Federation of 16 June 2006 N 7-P “On the case of verification of the constitutionality of a number of provisions of articles 48, 51, 52, 54, 58 and 59 of the Federal Statute ‘On basic guarantees of electoral rights and the right to participate in a referendum of citizens of the Russian Federation’ at the request of the State Duma of the Astrakhan Region.” Para 2.2. <https://rg.ru/2006/06/21/ks.html>.



elections as such is difficult to overestimate.”⁴⁰⁸ Indeed, academic research proves that the Russian media may and do affect election results both inside and outside the country to a very high degree.

European election observers recently came to the conclusion that in Russia, “despite the multifarious nature of a media scene comprising several thousand television and radio stations registered in the country, the diversity of views is limited. Television is the main source of information, including in respect of elections. It is followed by online sources – in particular social media.”⁴⁰⁹

12.2. Current regulatory framework

12.2.1. Regulation of broadcast media during elections and referenda

The main *de facto* election law in the Russian Federation is the Federal Statute “On basic guarantees regarding the electoral rights and the right to participate in a referendum of citizens of the Russian Federation”⁴¹⁰ (hereinafter “the Elections Statute”).⁴¹¹ In addition, there is the Federal Constitutional Statute “On Referenda of the Russian Federation”,⁴¹² as well as federal statutes on elections of the President and on elections of deputies of the State Duma.⁴¹³ In addition, each constituent region of the Federation has a set of local laws on elections to regional authorities, which are not dissimilar to the Elections Statute.

All of these laws regulate campaigning in the media, which starts twenty-eight days before voting day and ends at midnight the day before it. They regulate the provision

⁴⁰⁸ Средства массовой информации и выборы: вопросы и ответы / М.В. Гришина, Е.С. Данилова, В.И.Луценко, Ю.Н. Пугачева, М.В. Цветкова, П.П.Шеншин. – М.: РЦОИТ, 2016. – 80 с. – Р. 3. http://www.cikrf.ru/analog/vib_d16/2016/SMI_2016_11-06.pdf.

⁴⁰⁹ OSCE Office for Democratic Institutions and Human Rights (ODIHR). Russian Federation State Duma Elections, 18 September 2016, OSCE/ODIHR Election Observation Mission. Final Report. Warsaw, 23 December 2016. – P. 15. <http://www.osce.org/odihr/elections/russia/290861?download=true>.

⁴¹⁰ See Boudarina N., “Changes in Election Law Concern Broadcast Media”, IRIS 2002-8:10/20, <http://merlin.obs.coe.int/iris/2002/8/article20.en.html>.

⁴¹¹ Federal Statute “On basic guaranties of the electoral rights and the right to participate in a referendum of citizens of the Russian Federation” (Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации) of 12 June 2002, N 67-FZ, see IRIS 2007-1:16/30. http://www.consultant.ru/document/cons_doc_LAW_37119/.

⁴¹² See Golovanov D., “New Statute on Referenda Adopted”, IRIS 2004-8:13/26, <http://merlin.obs.coe.int/iris/2004/8/article26.en.html>.

⁴¹³ Federal Statute “On elections of the President of the Russian Federation” (О выборах Президента Российской Федерации) of 10 January 2003 N 19-FZ; Federal Statute “On elections of the deputies of the State Duma of the Federal Assembly of the Russian Federation” (О выборах депутатов Государственной Думы Федерального Собрания Российской Федерации) of 22 February 2014 N 20-FZ. http://www.consultant.ru/document/cons_doc_LAW_159349/.



of free broadcasting time and editorial space to the candidates (political parties and groups) by the media outlets, which are divided into three groups for this purpose: state-funded media, municipal-funded media, and other media. These laws establish the amount of free airtime to be allotted for different types of elections; time slots are determined by lot. The amount of paid time provided to candidates for campaigning shall not be less than the amount of free time.

The Elections Statute (section 2(56)) also bans campaigning on television by one candidate against other candidate(-s); this includes a prohibition on any description of possible negative consequences in the event of an opponents' electoral victory in the elections, as well as a prohibition on the dissemination of stories in which information about one candidate clearly dominates and is accompanied by negative comments (and any other information conducive to the creation of a negative attitude) in respect of the opponent(s).

There is a set of restrictions on the content of campaigning and provisions that prescribe the liability of editors (of media outlets), mostly for violations of campaigning procedure. Their liability regarding the content of campaigning was significantly limited by the Supreme Court of the Russian Federation in 2010.⁴¹⁴

The Code on Administrative Offences⁴¹⁵ sets out the relevant penalties. For example, its Article 5.13, establishes that a denial by a media outlet of a candidate's right to publish a refutation or any other statement defending his/her reputation before the end of the campaigning period – if the reputation was damaged earlier during the campaign in the outlet in question – is subject to a fine of between RUB 10,000 and RUB 20,000 (between EUR 66 and EUR 132). A candidate is not obliged to first demand that the media outlet in question or the election commission immediately publish his refutation; he/she may go straight to court and the court will review his complaint immediately.

For example, when on 1 March 2012 a newscast of *Khakassia*, the television channel of a municipal enterprise in Sayanogorsk, defamed a candidate in the municipal elections to be held on 4 March 2012, he appealed to the city court. The next day the court found that the information disseminated in the newscast had indicated that the candidate had engaged in certain unethical actions; the court therefore obliged the television company to provide the candidate with free airtime (in which to refute the accusation) during the edition of the same news programme to be broadcast on the day that the court's judgment was issued (2 March 2012).⁴¹⁶

The latest election campaigning in the media by candidates for the position of President of the Russian Federation (voting took place on 4 March 2012) led to the

⁴¹⁴ See Richter A., A Landmark for Mass Media in Russia, IRIS *Plus* 2011-1, http://www.obs.coe.int/documents/205595/264635/Iris_plus_2011-1_EN_FullText.pdf/87729c4d-2bc1-4da1-815c-1b4dedcbb779.

⁴¹⁵ See Boudarina N., "Code on Administrative Offences Adopted", IRIS 2002-6:15/34, <http://merlin.obs.coe.int/iris/2002/6/article34.en.html>.

⁴¹⁶ Sayanogorsk City Court of the Republic of Khakassia. Decision in the case N 2-379/2012, 2 March 2012, <https://rospravosudie.com/court-sayanogorskij-gorodskoj-sud-respublika-xakasiya-s/act-104099134/>.



registration by the district election commissions of forty-five administrative cases of violation in and by the media of the election law. Overall the courts ordered administrative fines in twenty-six cases, most of which related to campaigning beyond the time-limits established by law.⁴¹⁷

12.2.2. Regulation of the print media during elections and referenda

The regulation of print media during elections and referenda is similar to that of broadcast media. In particular, the Elections Statute prohibits extremist speech.⁴¹⁸

The case-law shows that the discretion of editors in respect of this issue can be quite broad. In Khabarovsk Region, a registered candidate for the regional Duma, in accordance with the regional election legislation, concluded an agreement with the newspaper *Priamurskie Vedomosti* on the publication of a pre-election article written by him. The editor decided to refuse to publish the article on the grounds that it contained extremist statements. As an example, he pointed to the candidate's words that each year under the-then Governor "important social objects were put into operation [in the region], the largest of which being Orthodox churches." He stated:

[These words] were aimed at inciting religious hatred and propagating [a sense of the] exclusivity, superiority or inferiority of citizens on the basis of their attitude towards religion – that is, the superiority of citizens professing Orthodoxy in relation to all the others – which leads to the violation of the integrity of the Russian Federation, the undermining of State security, the inciting of social, racial and religious hatred, hostility towards the lifestyle and culture of ethnic Russians, and undermines the national security of the Russian Federation and violates the constitutional rights of an indefinite number of people which they [should be able to] use and defend, regardless of their ethnicity, religion or race.

In court the candidate demanded that his article be published in the next issue of the newspaper, before the end of the campaign period. However, the district court in Khabarovsk agreed with the editor's position on the nature of the disputed phrase, also noting that the media were not to take out the phrase from the article, as "the current legislation does not allow for the editor to edit the text of campaign materials, or to publish them only partially."⁴¹⁹

⁴¹⁷ According to Roskomnadzor, the governmental supervisory authority (see Richter A., "Decree on Public Broadcasting Signed", IRIS 2012-8/36, <http://merlin.obs.coe.int/iris/2012/5/article36.en.html>). See: Public Report of Roskomnadzor for 2012, p. 81-82, http://rkn.gov.ru/docs/docP_962.pdf.

⁴¹⁸ See Deeva N., "Anti-extremism Amendments", IRIS 2007-9:19/27, <http://merlin.obs.coe.int/iris/2007/9/article27.en.html>.

⁴¹⁹ Decision of the Central District Court of the city of Khabarovsk. Decision in the case N 2-6843\2012 of 12 October 2012, <http://sudact.ru/regular/doc/tKw1o3qCSlbl/>.



The Elections Statute prohibits the content of campaigning if it violates intellectual property law or contains commercial advertising. According to the Supreme Court of the Russian Federation that includes the use of works without the permission of their authors or other rights holders and violations of the rules of fair use, in particular the absence of any reference to the author in question.⁴²⁰ There is case-law that brought in an annulment of candidates' registration at the elections for the use of an image of a kindergarten taken from the website of a construction company and the use therein of a logo of a social media,⁴²¹ For example, candidates' registration has been annulled in the past for their illegal use of the image of Che Guevara and the slogan of Dolores Ibárruri, "Better to die on your feet than live forever on your knees".⁴²²

12.2.3. Regulation of online media during elections and referenda

In relation to the content of campaigning materials in online media the Elections Statute has just two specific restrictions:

Section 45(7) specifies that on voting day until the end of voting in the territory of the relevant constituency the publication of data on the results of voting, including the placement of such data in information and telecommunications networks (such as the Internet) for people to access freely shall be prohibited.

Section 46(3) prohibits the publication of the results of opinion polls, forecasts of the results of elections and referenda, and other studies related to elections and referenda held (including the placement of such data in information and telecommunications networks (such as the Internet) for five days prior to voting day, as well as on voting day itself.

The Elections Statute also establishes a particular set of data on the polls (such as the method, organizer, funder, dates of opinion poll) that must accompany the publication of such results within the allowed period. A court case specific to online media illustrates the application of the norm in practice. The judge in the case decided to recognise as a violation the availability on the website of the media outlet in question of the opportunity to "vote" for real-life candidates. During the campaign, the municipal online media outlet *Studio "Fact"* put a question to its readers: "Who would you vote for from the candidates for the post of the Head of the Tazovsky District if the elections were

⁴²⁰ Resolution of the Plenary Meeting of the Supreme Court of the Russian Federation "On the case-law on protection of election rights and the right to participate in a referendum of the citizens of the Russian Federation (О практике рассмотрения судами дел о защите избирательных прав и права на участие в референдуме граждан Российской Федерации) of 31 March 2011 (as amended on 9 February 2012) N 5. Para 35. <https://rg.ru/2011/04/08/verhovn-sud-dok.html>.

⁴²¹ See Pakulina, Elena Rules to remove candidates (Правила кандидатского съёма). / *Kommersant* . 29 November 2015. <http://www.kommersant.ru/doc/2865573>.

⁴²² Коммунистов России сняли с выборов из-за Че Гевары. / *Известия*. 9 сент. 2014. <http://izvestia.ru/news/576425#ixzz40Lb7HoRd>.



held today?” The readers could mark the candidate they liked and click on the link provided to see the current results of the electronic voting. At the same time, the website did not provide the information required by the Elections Statute – specifically, information on the method of gathering data, information on the region in which the survey was conducted, and a statistical assessment of possibility of error. The chair of the local election commission complained to the district prosecutor, who in turn lodged an appeal with the judge. By a decision of the magistrate, the owner of the media outlet was found guilty of committing an administrative offence and fined RUB 30,000. The attorney for the respondent in the case argued that the website itself had not published the poll results, since users could only “observe” its progress without knowing the final figures. The judge disagreed and found that the figures could be deemed to constitute “current results”. The judgment was appealed against, but both the district court and the regional court upheld it.⁴²³

12.3. Self-regulatory codes or practices concerning elections and referenda

Researchers of self-regulatory codes and practices in Russia⁴²⁴ found just a few examples of such activity: A Declaration of Russian Journalists in Support of Free and Fair Elections, a Declaration of Kuban Journalists in Support of Free and Fair Elections, a Charter of Altai Journalists to Refute the Manipulation of the Minds and Behavior of Voters, and a Memorandum for the Journalists of the NTV Television Company.⁴²⁵

There are several obstacles to the practice of media self-regulation. The main one is the pernicious nature of the existing market for mass information. In Russia, there is a tradition of unfair competition between omnipresent state media (which enjoy public money and official favour in the gathering and dissemination of information) and private media (which are denied such advantages). Many media outlets do not depend on audience loyalty; more important for them are ongoing cash injections from proprietors

⁴²³ Decision of the Court of Yamalo-Nenetsk Autonomous District in the case N 4-a-8/12, 30 January 2012, <http://rospravosudie.com/court-sud-yamalo-neneckogo-avtonomnogo-okruga-yamalo-neneckij-avtonomnyj-okrug-s/act-103830558/>.

⁴²⁴ Such as Smirnova E., see История кодексов профессиональной этики в отечественной журналистике // Вестник Московского университета. Серия 10, Журналистика. – 2014. – №6. p. 150–164.

⁴²⁵ Декларация российских журналистов в поддержку свободных и честных выборов (Declaration of Russian Journalists in Support of Free and Fair Elections) 8 September 1999, http://www.democracy.ru/library/publications/media/jour_inv/page36.html; Декларация кубанских журналистов в поддержку свободных и честных выборов (Declaration of Kuban Journalists in Support of Free and Fair Elections). *Volnaya Kuban* newspaper, 20 September 2003, <http://www.kavkaz-uzel.eu/articles/43605/>; Хартия журналистов Алтая об отказе участвовать в манипулировании сознанием и поведением избирателей (Charter of the Altai Journalists to Refute Manipulation of the Minds and Behavior of the Voters) 18 February 2004, http://barnaul.org/board/vybory2004_hartija_gurnalistov_altaja_ob_otkaze_uch104.html; Памятка журналиста телекомпании НТВ (Memo for the Journalists of NTV Television Company), 1995, http://www.democracy.ru/library/publications/media/jour_inv/page40.html.



and the ability to influence their perceived key audience/readership. In this environment, ethical conduct can be detrimental and even dangerous for a journalist.⁴²⁶

In this context the self-regulatory codes have been forgotten soon after being adopted, while the only national functioning self-regulation body, the Public Chamber on Press Complaints (hereinafter “the PCPC”)⁴²⁷, established in 2005, has yet to address the relevant complaints despite its direct appeal in 2016 to the CEC inviting it to cooperate in monitoring media ethics in the election period.⁴²⁸ The only relevant complaint was filed in 2012 by the CEC; however, this was never addressed as the CEC had failed to sign the relevant procedural statement.⁴²⁹

Thus, the latest decisions of the national media self-regulation body turn out to be those taken by the Grand Jury of the Russian Union of Journalists in 2003.⁴³⁰

12.4. Recent and emergent issues

In 2016 monitoring by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) showed that media failed to grant electoral contestants equitable coverage, with the ruling party receiving more editorial coverage than other contestants. The vast majority of editorial coverage on national channels – 63% to 91% – was dedicated to government officials. Coupled with legal restrictions on campaigning in the media and the self-censorship encouraged by the restrictive legal and regulatory framework, this gave an undue advantage to the ruling party and limited voters’ ability to make a fully informed choice.⁴³¹

⁴²⁶ There are testimonies that media owners consider journalism ethics as something that hampers their business. See: Вначале было слово. Свободное // Телефорум (Москва). 2005, №2. P. 18; Media Sustainability Index 2004. The Development of Sustainable Independent Media in Europe and Eurasia. – Washington, 2005. P. 228. <https://www.irex.org/resource/media-sustainability-index-msi> See more in Richter A. Post-Soviet Perspective on Censorship and Freedom of the Media. Moscow: UNESCO, 2007. – P. 285-309. <http://unesdoc.unesco.org/images/0015/001537/153744e.pdf>.

⁴²⁷ See <http://presscouncil.ru/>. The PCPC has so far made decisions in some 160 cases.

⁴²⁸ See <http://presscouncil.ru/index.php/novosti/5431-kollegiya-izmenila-ustav-dlya-rassmotreniya-zhalob-na-osveshchenie-vyborov>.

⁴²⁹ See decision of the Presidium of the PCPC at <http://presscouncil.ru/index.php/praktika/snyatye-s-rassmotreniya-zhaloby/705-zhaloba-tsik-rf-na-zhurnal-russkij-reporter?showall=&start=6>.

⁴³⁰ See all decisions of the Grand Jury of the Russian Union of Journalists at:

<http://www.presscouncil.ru/index.php/teoriya-i-praktika/resheniya-bolshogo-zhyuri-soyuza-zhurnalistov-rossii>.

⁴³¹ OSCE Office for Democratic Institutions and Human Rights. Russian Federation State Duma Elections 18 September 2016 OSCE/ODIHR Election Observation Mission. Final Report. Warsaw, 23 December 2016. – P. 2. <http://www.osce.org/odihr/elections/russia/290861?download=true>.



12.5. Conclusion

Regulation of the media in Russia has certain traditions, which are supported by extensive legislation and solid case-law (including decisions taken by the highest national courts). Of all types of media today, Russian law regulates in some detail the conduct of pre-election campaigning and campaigning on referendum issues only in the broadcast and print media. There is no systematic regulation of campaigning online. At the same time, the question is rather not if such regulation will be introduced but rather when it will be done and how strict it will be.

Violations of the Elections Statute are limited in number and the rules of campaigning do not present a problem for the media. At the same time making them more liberal is something that has been recommended by international observers.

In 2016 the OSCE/ODIHR election monitoring mission suggested to the Russian Federation that consideration could be given:

- to the establishment of an independent oversight body, mandated to oversee free, equal and fair access to state-controlled broadcasters;
- to liberalising contestants' campaigning in the media, with a view to requiring equitable rather than equal media coverage, and reassessing the relevance of the legal obligations for state media to cover the activities of state officials;
- to obliging the media to identify party-sponsored airtime/space in the media in a clear manner that would ensure that voters were aware of the paid nature of such programmes.⁴³²

⁴³² Ibid. – P. 25.



13. Country report summary

Ronan Ó Fathaigh, Institute for Information Law (IViR), University of Amsterdam

13.1. Introduction

This chapter provides a brief summary of the these reports contained in Part 2 and attempts to group some of the common issues. Nine Council of Europe member states are examined in these country reports, and this chapter is structured along similar lines: it begins with the regulation of broadcast media, followed by that of print media, and concludes with the regulation of online media. Of course, an important caveat applies when discussing laws and regulations across a number of different jurisdictions: many of the terms used in this summary chapter – such as “electoral propaganda”, “silence periods”, and “political advertising” – do not have a uniform meaning across all the member states examined and are only used in this chapter to give a general overview of common regulatory principles.

13.2. Regulation of broadcast media during elections and referenda

As is evident when reading the country reports, a preliminary observation is that the rules on broadcast media are not just contained in broadcast and media legislation, but are also set out in detailed election and referendum legislation. Indeed, in Italy, a piece of legislation – known as the “*Par Condicio* law” – was drafted to specifically regulate the media during elections.⁴³³ Further, it is evident that broadcasters must not only have regard to rules and recommendations issued by broadcast regulators (such as Agcom in Italy and Ofcom in the UK),⁴³⁴ but also rules issued by other regulators, such as election commissions (for example, the Central Election Commission in Russia and the Central Electoral Commission in Spain)⁴³⁵ and opinion poll commissions (for example, the Polling

⁴³³ *Legge 22 Febbraio 2000, n. 28* (Law of 22 February 2000, no. 28), <http://www.camera.it/parlam/leggi/00028l.htm>.

⁴³⁴ *Autorità per le Garanzie nelle Comunicazioni*, <https://www.agcom.it>; and Office of Communications, <https://www.ofcom.org.uk>.

⁴³⁵ Central Election Commission of the Russian Federation, <http://www.cikrf.ru/eng>; and *Junta Electoral Central*, <http://www.juntaelectoralcentral.es>.



Commission in France).⁴³⁶ Some of the common issues addressed in the country reports relating to broadcast media during elections and referenda are discussed below.

13.2.1. General rules on electoral coverage

The overriding issue common to all member states discussed in the country reports is that broadcasters are usually required to cover election and referenda campaigns in a fair, balanced and impartial manner, as urged in the CoE Committee of Ministers recommendations on media coverage of election campaigns.⁴³⁷ In addition to such principles, many member states impose further obligations relating to pluralism and equality. For example, Spain's Elections Law provides that private broadcasters must respect the principles of pluralism and equality during election periods.⁴³⁸ Similarly, the Netherlands' Media Act provides that public broadcasters must generally guarantee pluralism.⁴³⁹

13.2.1.1. Allocation of airtime

Most national broadcasting regulators issue specific guidelines and recommendations for each election and referendum in respect of how broadcasters should cover candidates, political parties, political organisations, campaign organisations, and electoral or referendum issues. For example, in the Netherlands, the media regulator (*Commissariaat voor de Media*) determines the allocation of airtime for political parties.⁴⁴⁰ Notably, in some member states such as France, there have been some regulatory shifts towards more discretion for broadcasters. For example, in 2016 the law was reformed to replace the previous principle of equal speaking time for candidates during election campaigns.⁴⁴¹ For the 2017 elections, broadcasters were required to allocate candidates or political parties speaking or broadcasting time according to their level of representation in the French parliament and their actual involvement in the campaign. Finally, in other member states, there is an obligation on broadcasters to pre-notify broadcasting regulators of their electoral-coverage scheduling. For example, under Italy's *Par Condicio* law, broadcasters intending to broadcast political programming during the election must notify the

⁴³⁶ *La commission des sondages*, <http://www.commission-des-sondages.fr>.

⁴³⁷ See, e.g., Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns, 7 November 2007, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d4a3d.

⁴³⁸ *Ley Orgánica 5/1985, de 19 de Junio, del régimen electoral general* (Elections Act), Article 66(2), <https://www.boe.es/buscar/act.php?id=BOE-A-1985-11672>.

⁴³⁹ Media Act, Article. 2.34a, <https://zoek.officielebekendmakingen.nl/dossier/30571/kst-30571-3?resultIndex=3&sorttype=1&sortorder=4>.

⁴⁴⁰ Media Act 2008, Article 6.1, <http://wetten.overheid.nl/BWBR0025028/2017-02-01>.

⁴⁴¹ Amélie Blocman, "Change in rules on politicians' speaking time in the media", IRIS 2016-6/13, <http://merlin.obs.coe.int/iris/2016/6/article13.en.html>.



communications regulator Agcom within five days of an election's official announcement.⁴⁴²

13.2.1.2. Party-political and referendum broadcasts

Several member states, such as Poland,⁴⁴³ impose an obligation on public service broadcasters to broadcast party-political programmes during election periods. Notably, similar to reforms in France, the communications regulator in the UK, Ofcom, introduced reforms in 2017 giving broadcasters more discretion when deciding on the number of party political broadcasts.⁴⁴⁴

Lastly, some member states impose an obligation on broadcasters to notify broadcasting regulators in advance about their scheduling of party-political broadcasts. For example, in Italy, where broadcasters intend to offer party political broadcasts, they must notify Agcom content fifteen days in advance that their broadcasting schedules include this type of content.⁴⁴⁵

13.2.1.3. Election debates

Televised election debates still maintain central roles in many member states, with 16.5 million people watching the French presidential debate on 3 May 2017.⁴⁴⁶ The country reports demonstrate that in some member states, such as Ireland, the UK and the Netherlands, there are no specific rules on elections debates. However, there are usually court proceedings whenever a broadcaster decides to exclude certain parties or candidates.⁴⁴⁷ Notably, in some member states, there are specific legislative rules governing election debates. For example, in Poland, the public broadcaster *Telewizja Polska* has a duty under the Election Act to televise election debates,⁴⁴⁸ and the broadcast regulator KRRiT (*Krajowa Rada Radiofonii i Telewizji*) also issues detailed regulations on the organisation of these debates.⁴⁴⁹

⁴⁴² See above, Chapter - Italy, section 6.2.1.1.

⁴⁴³ 1992 Broadcasting Act (*Ustawa o Radiofonii i Telewizji*), Article 24, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19930070034>.

⁴⁴⁴ Ofcom, Ofcom's rules on due impartiality, due accuracy, elections and referendums, 9 March 2017, https://www.ofcom.org.uk/_data/assets/pdf_file/0030/98148/Due-impartiality-and-elections-statement.pdf.

⁴⁴⁵ See above, Chapter - Italy, section 1.2.1.1.

⁴⁴⁶ Angelique Chrisafis, "French election: Macron hailed as winner of bruising Le Pen TV debate", *The Guardian*, 4 May 2017, <https://www.theguardian.com/world/2017/may/04/french-election-marine-le-pen-and-emmanuel-macron-trade-insults-in-tv-debate>.

⁴⁴⁷ For a case during the 2017 Dutch parliamentary elections, see District Court of Amsterdam, 28 February 2017, ECLI:NL:RBAMS:2017:1151, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2017:1151>.

⁴⁴⁸ 2011 Election Code Act, Article 120(1), <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20110210112>.

⁴⁴⁹ The Regulation of the National Broadcasting Council adopted on 6 July 2011 concerning detailed principles and procedures of organizing debates by *Telewizja Polska*, <http://www.krrit.gov.pl/en/for-broadcasters-and-operators/legal-regulations>.

13.2.2. Political advertising

The rules on paid political advertising are quite diverse across the nine member states discussed, and should be read in the light of the above-mentioned rules on allocation of airtime and party-political broadcasts. In France, Germany, Ireland, Spain, and the UK, paid-for political advertising by broadcasters is generally prohibited. In contrast, in Poland, paid political advertising is permitted by both public service broadcasters and private commercial broadcasters. However, the 2011 Electoral Code Act regulates the price of political advertising.⁴⁵⁰ Finally, in the Netherlands, paid political advertising is permitted by broadcasters. However, the Media Act provides that public and commercial broadcasters may not acquire sponsorship for the broadcasting of political information.

13.2.3. Silence periods

Similar to political advertising, there is a wide divergence of rules on silence periods in the country reports. In Poland, the Election Code imposes a silence period twenty-four hours before voting day, and during voting day until voting closes;⁴⁵¹ in Ireland, under broadcasting regulator BAI's rules, the silence period begins at 2 p.m. on the day before an election, and during voting day until voting closes;⁴⁵² and in the UK, the silence period begins when polls open.⁴⁵³ Similarly, in Russia, the silence period begins at midnight the day before voting day;⁴⁵⁴ in Italy, the silence period begins the day before voting day and lasts throughout voting day;⁴⁵⁵ in France, the broadcasting of electoral propaganda is prohibited the day before an election from midnight;⁴⁵⁶ and in Spain, the silence period begins on midnight on the day before voting.⁴⁵⁷ On the other hand, there is no silence period imposed on broadcasters in the Netherlands; however, some broadcasters introduced policies regarding opinion polls during the 2017 parliamentary elections.⁴⁵⁸

13.2.4. Opinion polls and exit polls

A majority of the member states discussed in the country reports have specific rules on the broadcasting of opinion polls and exit polls. Indeed, in France, a special commission,

⁴⁵⁰ 2011 Election Code Act, Article 119, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20110210112>.

⁴⁵¹ 2011 Election Code (*Ustawa Kodeks Wyborczy*), Article 107(1).

⁴⁵² Broadcasting Authority of Ireland, Rule 27 Guidelines - General Election Coverage, November 2015, p.8, <http://www.bai.ie/en/download/128775>.

⁴⁵³ Ofcom, Ofcom Broadcasting Code, April 2017, Rule 6.4, https://www.ofcom.org.uk/_data/assets/pdf_file/0005/100103/broadcast-code-april-2017.pdf.

⁴⁵⁴ See above, Chapter - Russia, section 10.2.1.

⁴⁵⁵ See above, Chapter - Italy, section 6.2.1.

⁴⁵⁶ *L'article L. 49 du Code électoral*.

⁴⁵⁷ Elections Act (*LOREG*), Article 53.

⁴⁵⁸ Marcel Gelauff, "NOS nog terughoudender over peilingen Tweede Kamer", NOS Nieuws, 16 December 2016, <http://nos.nl/artikel/2148608-nos-nog-terughoudender-over-peilingen-tweede-kamer.html>.



the Polling Commission (*Commission des sondages*), supervises the objectivity and quality of opinion polls relating to elections.⁴⁵⁹ Notably, in Italy, there is a prohibition on reporting opinion polls fifteen days before an election, while both legislation and Agcom's Polling Regulation contain detailed rules stipulating that certain information must accompany the publication of polls.⁴⁶⁰ Similarly, in Germany, broadcasters are obliged when reporting on opinion polls to indicate whether they are representative.⁴⁶¹ At the other end of the spectrum, in some member states, such as Ireland and the Netherlands, there are no specific legislative rules on the broadcasting of opinion polls, although broadcasting regulators may issue guidelines.⁴⁶²

A final issue concerns exit polls, where the reporting of voting results or opinion polls is prohibited on voting day. Exit polls are generally prohibited on voting day until polls close in many member states, including France, Germany, the UK, and Poland.

13.3. Regulation of print media during elections and referenda

Similarly to broadcast media, the rules on print media during elections and referenda are not just contained in press and media legislation, but are also contained in detailed election and referendum legislation. In addition, some national press codes also contain specific provisions on election coverage (for example, the Press Code in Germany).⁴⁶³ Further, print media in some member states may also need to have regard to election commissions (such as the Electoral Commission in the UK)⁴⁶⁴ and advertising commissions (e.g. Advertisement Code Commission in the Netherlands) concerning their election coverage.⁴⁶⁵

⁴⁵⁹ *Loi n° 77-808 du 19 juillet 1977 modifiée relative à la publication et à la diffusion de certains sondages d'opinion*, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000522846>.

⁴⁶⁰ *Par Condicio* Law, Article 8; and Annex A to AGCOM Resolution no. 256/10/CSP setting forth the Regulation on the publication and the diffusion of polls on mass media.

⁴⁶¹ Article 10(2) RStV, http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/19_RfAendStV_medienanstalten_Layout_final.pdf.

⁴⁶² See, e.g., Broadcasting Authority of Ireland, Guidelines in Respect of Coverage of Referenda, March 2015, Rule 7, p.8, <http://www.bai.ie/?ddownload=113476>.

⁴⁶³ German Press Council, German Press Code, Guideline 1.2 - Election Campaign Reporting, https://www.presserat.de/fileadmin/user_upload/Downloads_Dateien/Pressekodex13english_web.pdf.

⁴⁶⁴ Electoral Commission, <http://www.electoralcommission.org.uk>. See, e.g., Electoral Commission, "Campaigner who broke EU referendum rules fined £4,000 by Electoral Commission", 20 December 2016, <http://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/news-releases-donations/campaigner-who-broke-eu-referendum-rules-fined-4,000-by-electoral-commission>.

⁴⁶⁵ *Reclame Code Commissie*, <https://www.reclamecode.nl> (the Commission may consider complaints concerning political advertisements in print media).

13.3.1. Silence periods

Although the vast majority of member states discussed in the country reports do not impose a legislative silence period on print media, this is not universal. For example, in Poland, silence periods in print media are regulated similarly to broadcast media under the 2011 Election Code Act⁴⁶⁶ and the 2003 Act on Nationwide Referendum,⁴⁶⁷ which prohibits campaigning twenty-four hours before voting day and on voting day itself.

13.3.2. Opinion polls and exit polls

The publication of opinion polls close to voting day and on voting day is prohibited in print media in some member states. For example, in Italy print media are subject to the *Par Condicio* law which prohibits (until the end of voting) reporting on opinion polls fifteen days before the date of an election.⁴⁶⁸ Similarly, in Poland, print media are prohibited from publishing twenty-four hours before voting day the results of pre-election surveys and opinion polls concerning expected voting behaviour.⁴⁶⁹ As regards exit polls, a number of member states impose general prohibitions that are applicable to print media. For example, in the UK, it is a criminal offence to publish exit polls before voting ends.

13.3.3. Political advertising

Some member states have prohibitions on political advertising in print media. For example, in France, under the Electoral Code, it is prohibited to disseminate commercial advertising for election propaganda purposes during the six months prior to an election.⁴⁷⁰ However, candidates are permitted to use advertising in the press to solicit donations for financing their campaign.⁴⁷¹ Other member states, while not prohibiting political advertising, have rules on price and non-discrimination. For example, Spain's Elections Law provides that rates for electoral advertisements shall not be higher than commercial

⁴⁶⁶ 2011 Election Code Act, Article 107(1), <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19840050024>.

⁴⁶⁷ 2003 Act on Nationwide Referendum, Article 39(1), <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20030570507>.

⁴⁶⁸ Annex A to AGCOM Resolution no. 256/10/CSP setting forth the Regulation on the publication and the diffusion of polls on mass media, https://www.AGCOM.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlo&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=657860&_101_INSTANCE_kidx9GUnlodu_type=document.

⁴⁶⁹ 2011 Election Code Act, Article 115; and 2003 Act on Nationwide Referendum, Article 41(1).

⁴⁷⁰ *L'article L. 52-1 du Code électoral*, <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070239>.

⁴⁷¹ *L'article L. 52-8 du Code électoral*, <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070239>.



advertisements, and no discrimination may occur in respect of candidates, rates and the location of advertising slots.⁴⁷² Notably, in Italy, under the *Par Condicio* law, print media are required to give timely notice if they wish to publish political advertisements in order to give candidates and political parties equal opportunity to request the publication of their own political advertisements.⁴⁷³ Finally, in the UK, proper identification must be included on election material printed in a newspaper.⁴⁷⁴

13.3.4. “False information”

All member states in the country reports have defamation laws (including criminal defamation laws) which generally prohibit false statements that damage a person's reputation. However, a number of member states also have specific rules which apply to elections concerning other false statements, and which apply equally to the print media.

For example, in Poland, under the 2011 Election Code Act, election material disseminated in the press falls under specific fast-tracked court procedures in cases regarding the “dissemination of untrue information”.⁴⁷⁵ Where election material contains untrue information, the relevant district court recognises within twenty-four hours a request for untrue information to be corrected and the final court order in respect of the case in question shall be served immediately. The publication of a correction, reply or apology must take place at the latest within forty-eight hours of such a judgment. Finally, in the UK, the Representation of the Peoples Act 1983 makes it is an offence to publish any false statement of fact in relation to a candidate's personal character or conduct during an election.⁴⁷⁶

13.4. Regulation of online media during elections and referenda

From reading the country reports, there is a considerable amount of regulation applicable to online media. Indeed, many rules applicable to online media are contained in election and referendum legislation. However, it is important to note that further rules are contained in data protection legislation and electronic communications legislation. In this

⁴⁷² See above, Chapter - Spain, section 1.2.2.

⁴⁷³ *Par Condicio* Law, Article 7.

⁴⁷⁴ Political Parties, Elections and Referendums Act 2000, section 143 (5). See Electoral Commission, “Campaigner who broke EU referendum rules fined £4,000 by Electoral Commission”, 20 December 2016, <http://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/news-releases-donations/campaigner-who-broke-eu-referendum-rules-fined-4,000-by-electoral-commission>.

⁴⁷⁵ “Press” is defined in the Article 7(2) of the 1984 Press Law Act (*Ustawa Prawo Prasowe*) adopted on 26 January 1984, Official Journal 1984 No 5, item 24, as amended, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19840050024>.

⁴⁷⁶ Representation of the People Act 1983, section 106, <http://www.legislation.gov.uk/ukpga/1983/2/section/106>.



regard, online media and users of online media must have regard to not only election commissions (for example, the Presidential Election Commission in France),⁴⁷⁷ but also data protection regulators.⁴⁷⁸

13.4.1. Silence periods

In some member states, silence periods have been extended to online media. For example, in Spain, no electoral propaganda may be disseminated once the electoral campaign has ended (from midnight on the day immediately preceding the vote), including online.⁴⁷⁹ Similarly, in France, under the Electoral Code, the prohibition on disseminating electoral propaganda during the silence period (which starts at midnight the day before the election) has also been extended to any means of public communication by electronic means.⁴⁸⁰

13.4.2. Opinion polls and exit polls

Similar to silence periods, prohibitions on the publication of opinion polls and exit polls have also been extended to online media in some member states. For example, in Russia, the Elections Statute prohibits, five days before voting day, the publication of various opinion polls online.⁴⁸¹ A similar prohibition exists in Italy, where the prohibition on the publication of opinion polls 15 days before the election also applies to online media. Indeed, the media regulator, Agcom, has banned a mobile app that published opinion polls.⁴⁸² Lastly, the prohibition on the publication of exit polls in many member states (such as in Russia⁴⁸³ and the UK) is equally applicable to online media.⁴⁸⁴

⁴⁷⁷ *La commission nationale de contrôle de la campagne électorale en vue de l'élection présidentielle*, <http://www.cnccep.fr/communiqués/index.html>.

⁴⁷⁸ For example, the Data Protection Commissioner in Ireland, <http://www.dataprotection.ie>.

⁴⁷⁹ See above, Chapter - Spain, section 11.2.

⁴⁸⁰ *L'article L. 48-1 du Code électoral*, <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070239>.

⁴⁸¹ Elections Statute, Article 45, para. 3, http://www.consultant.ru/document/cons_doc_LAW_37119.

⁴⁸² AGCOM, Comunicato stampa, 6 February 2013 (concerning the mobile app 'PoliticApp'), <https://www.agcom.it/documents/10179/539985/Comunicato+stampa+06-02-2013/392388be-19eb-45c0-9329-1fb97c73abb6?version=1.0>.

⁴⁸³ Elections Statute, Article 45, para. 7, http://www.consultant.ru/document/cons_doc_LAW_37119.

⁴⁸⁴ Representation of the Peoples Act 1983, Section 66A, <http://www.legislation.gov.uk/ukpga/1983/2/section/106>.

13.4.3. Political advertising

While a majority of member states prohibit political advertising in broadcasting, only a few member states have rules on political advertising online. For example, in Spain, from the calling of elections until the legal start of the campaign, it is prohibited to disseminate advertising or electoral propaganda via advertisements in any digital media.⁴⁸⁵ In Germany, election advertising via on-demand audiovisual media services is prohibited;⁴⁸⁶ in other “telemedia” it must be separated from other content, in accordance with Article 58(1) RStV.⁴⁸⁷

13.4.4. Political communication and data protection

In a number of member states, sending certain online political communications without the prior consent of the recipient is prohibited. For example, in the Netherlands, political messages cannot be transmitted by automated means without the prior consent of the subscriber or user concerned.⁴⁸⁸ Similarly, the UK Information Commissioner imposed a GBP 30,000 fine on a media group for sending emails on the day of the 2015 general election urging readers to vote for the Conservative party, as no prior consent had been given.⁴⁸⁹ In addition, some data protection commissions have issued guidance on the use of online media during elections and the application of data protection laws.⁴⁹⁰

13.4.5. “False information”

Lastly, the issue of “false information” in online media during elections featured in a number of country reports. Notably, proposed legislation addressing this issue is being discussed in the German⁴⁹¹ and Italian⁴⁹² parliaments, while a UK parliamentary

⁴⁸⁵ See above, Chapter - Spain, section 11.2.3.

⁴⁸⁶ Article 58(3)(1) in conjunction with Article 7(9) RStV,

http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/19_RfAendStV_medienanstalten_Layout_final.pdf.

⁴⁸⁷ See above, Chapter - France, section 4.2.3.3.

⁴⁸⁸ Telecommunication Act, Article 11.7, <http://wetten.overheid.nl/BWBR0009950/2017-03-10>.

⁴⁸⁹ Information Commissioner, “ICO fines Telegraph Media Group for election day email campaign”, 21 December 2015, <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/12/ico-fines-telegraph-media-group-for-election-day-email-campaign/>.

⁴⁹⁰ See, .e.g., Data Protection Commissioner, *Canvassing, Data Protection and Electronic Marketing*, 1 February 2016, <https://www.dataprotection.ie/docimages/documents/DPCanvasGuide.pdf>.

⁴⁹¹ Stefan Nicola and Birgit Jennen, “Germany Gets Really Serious About Fake News on Facebook”, *Bloomberg*, 4 April 2017, <https://www.bloomberg.com/politics/articles/2017-04-05/merkel-cabinet-backs-facebook-fines-to-stem-fake-news-in-germany>.

⁴⁹² Senate of the Republic, Bill no. 2688 of 7 February 2017, <http://www.senato.it/service/PDF/PDFServer/BGT/01006504.pdf>.



committee launched an inquiry into the issue in January 2017.⁴⁹³ Notably, it is prohibited under UK election legislation to make any false statement of fact in relation to a candidate's personal character or conduct during an election.⁴⁹⁴

⁴⁹³ Culture, Media and Sport Committee, 'Fake news' inquiry, 30 January 2017, <http://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/news-parliament-2015/fake-news-launch-16-17/>. (Inquiry ended with calling of the early election).

⁴⁹⁴ Representation of the People Act 1983, section 106, <http://www.legislation.gov.uk/ukpga/1983/2/section/106>.

14. Conclusion

Ronan Ó Fathaigh, Institute for Information Law (IViR), University of Amsterdam

During the period in which this IRIS Special was being written in the first half of 2017, numerous elections were held throughout the Council of Europe, with parliamentary elections in five member states,⁴⁹⁵ local and regional elections in nine member states,⁴⁹⁶ referenda in Switzerland and Turkey, and presidential elections in France and Serbia. In addition, a surprise early parliamentary election in the United Kingdom was announced in April 2017. In the meantime, in February and March 2017, the European Court of Human Rights delivered two landmark judgments concerning media and elections: one related to the election law rules being applied to print media,⁴⁹⁷ and the other concerned the liability of online news websites in respect of the reporting of serious allegations against a political candidate.⁴⁹⁸ And of course, there has been significant public debate on the influence of “false information” in online media during elections. This IRIS Special has attempted to provide a picture both of the regulation that is applicable to the media during elections and referenda, and the important topics of current debate. In this regard, this concluding chapter makes a few brief observations in the light of the issues addressed in the preceding chapters.

The first point concerns the source of regulation for all types of media during elections and referenda. It is not only broadcasting or media legislation which sets out the relevant rules; crucially, many rules are contained in election and referenda legislation. While election legislation may not specifically target the media, many rules of general application are nonetheless applicable to the media, including online media. Indeed, the country reports also reveal how media are also under the supervision of a number of regulators and commissions during election time, including media regulators, press councils, election commissions, polling commissions and data protection commissions.

Secondly, while the extent of rules applicable to broadcast media during elections is still quite considerable, there are some important examples of laws or regulation being reformed to allow more discretion for broadcasters. Two good examples are the French

⁴⁹⁵ Liechtenstein, United Kingdom (Northern Ireland), Netherlands, Bulgaria, and Armenia. See Council of Europe, 2017 electoral calendar of the Member states of the Council of Europe, <https://www.coe.int/en/web/electoral-assistance/2017-electoral-calendar>.

⁴⁹⁶ Austria, France, Germany, Finland, Switzerland, “the former Yugoslav Republic of Macedonia”, United Kingdom, Armenia, and Croatia. See Council of Europe, 2017 electoral calendar of the Member states of the Council of Europe, <https://www.coe.int/en/web/electoral-assistance/2017-electoral-calendar>.

⁴⁹⁷ *Orlovskaya Iskra v. Russia*, no. 42911/08, 21 February 2017, <http://hudoc.echr.coe.int/eng?i=001-171525>.

⁴⁹⁸ *Olafsson v. Iceland*, no. 58493/13, 16 March 2017, <http://hudoc.echr.coe.int/eng?i=001-171974>.



law reforms in 2016 concerning the allocation of airtime for candidates,⁴⁹⁹ and new rules in the UK in 2017 on the allocation of party-political broadcasts.⁵⁰⁰ However, it is difficult not to conclude that the task of broadcasters covering elections and referenda is quite complicated. Indeed, the task of media and election regulators during these periods seems equally challenging.

Thirdly, the country reports suggest that while print media do enjoy considerable editorial freedom, many rules exist in member states regulating the content of newspapers during elections and referenda. The legislation of some member states imposes, in particular, numerous obligations on newspapers concerning “silence periods”, the publication of opinion polls and exit polls, political advertising, and “false information”.

Fourthly, in relation to online media, the country reports suggest that regulation is being extended to online media, including rules governing silence periods, opinion polls, exit polls, and political advertising. Notably, rules on data protection are also being applied during election periods. Again, it is worth reiterating the point that legislation of general application, such as legislation governing elections, is where the rules for online media during elections are to be found. In addition, the issue of “false information” and “fake news” featured in a number of country reports. While none of the reports suggest that new laws have been passed in respect of this issue, both Poland and the UK have existing laws that address the issue of the dissemination of “false information” during elections. Notably, social media are also seeking to address the issue.⁵⁰¹ Research on the role of “false information” during elections is growing,⁵⁰² while international bodies are also warning about the risks associated with legislating in this area.⁵⁰³

The final point concerns the distinction between different media, and whether election-time rules will remain relevant in the future. In this regard, it may be helpful to refer to the recent 2017 French presidential elections. Just as the silence period was coming into effect, 9 gigabytes-worth of a candidate's confidential campaign documentation were published online.⁵⁰⁴ This forced the presidential election commission, CNCCEP, to issue

⁴⁹⁹ Amélie Blocman, “Change in rules on politicians’ speaking time in the media”, IRIS 2016-6/13, <http://merlin.obs.coe.int/iris/2016/6/article13.en.html>.

⁵⁰⁰ Ofcom, Ofcom’s rules on due impartiality, due accuracy, elections and referendums, 9 March 2017, https://www.ofcom.org.uk/_data/assets/pdf_file/0030/98148/Due-impartiality-and-elections-statement.pdf.

⁵⁰¹ Jen Weedon, William Nuland and Alex Stamos, “Information Operations and Facebook”, Facebook, 27 April 2017, <https://fbnewsroomus.files.wordpress.com/2017/04/facebook-and-information-operations-v1.pdf>.

⁵⁰² See, e.g., Clementine Desigaud et al., “Junk News and Bots during the French Presidential Election: What Are French Voters Sharing Over Twitter In Round Two?”, Comprop Data Memo 2017.4 (Oxford University), 4 May 2017, <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/04/What-Are-French-Voters-Sharing-Over-Twitter-v9.pdf>.

⁵⁰³ UN Special Rapporteur on Freedom of Opinion and Expression, et al., “Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda”, 3 March 2017, <http://www.osce.org/fom/302796>.

⁵⁰⁴ Kim Willsher, “French media warned not to publish Emmanuel Macron leaks”, *The Guardian*, 6 May 2017, <https://www.theguardian.com/world/2017/may/06/french-warned-not-to-publish-emmanuel-macron-leaks>.



statements on the eve of the elections,⁵⁰⁵ urging both traditional media and online media to refrain from reporting on the content of the leaks. It seems that the French media generally heeded the call,⁵⁰⁶ in the interests of ensuring free expression of the opinion of the people and the “sincerity of the vote”.⁵⁰⁷ Indeed, discussion of election-time regulation of the media in the future should always bear this ultimate guiding principle in mind – that of ensuring free and fair elections in the CoE.

⁵⁰⁵ *Commission nationale de contrôle de la campagne en vue des élections présidentielles* (CNCCEP), “Suites de l’attaque informatique qu’a subie l’équipe de campagne de M. Macron”, 6 May 2017, <http://www.cnccep.fr/communiqués/index.html>.

⁵⁰⁶ Rachel Donaldio, “Why the Macron Hacking Attack Landed With a Thud in France”, *The New York Times*, 8 May 2017, https://www.nytimes.com/2017/05/08/world/europe/macron-hacking-attack-france.html?_r=0.

⁵⁰⁷ CNCCEP, “Recommandation aux médias suite à l’attaque informatique dont a été victime l’équipe de campagne de M. Macron”, 6 May 2017, <http://www.cnccep.fr/communiqués/cp14.html>.

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