9

Media Policy Transfer in Europe

Mission Failing

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9.1 INTRODUCTION

There are several ways to rethink media law in Europe, and to consider the law as a possible means to make media policy European and shape a policy that reflects what 'Europe is made of'. In the media field, the legal perspective is entangled with the important questions of guaranteeing freedom of expression in the European tradition: media freedom under the Article 10 framework of the European Convention on Human Rights (ECHR).[1] This context asserts that it is the role and the responsibility of the (nation) state[2] to guarantee media freedom[3] and to live up to its positive obligation to ensure media pluralism. The European media order was built on these pillars after World War II, born in the historical moment of recovery from the war and the genuine belief in controlling the media for the sake of peace and reconciliation.[4]

However, the structural and fundamental transformations in media content production and dissemination through the decades have risen above the level of the nation-state, and transfrontier services have become the norm. Digital content dominance has further diminished the possibilities of national-level control and jurisdiction and thus the achievement of domestic policy objectives in media control. Since then, the European legal order has struggled to relocate within global media governance and find appropriate mechanisms to ensure democratic freedoms and the necessary communicative context. Finally, the most recent shifts to privately

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[2] Jan Oster, *European and International Media Law* (Cambridge: Cambridge University Press, 2016), p. 30.

[3] Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge: Cambridge University Press, 2015), p. 269.

[4] Oliver Castendyk, Egbert J. Dommering and Alexander Scheuer, *European Media Law* (Alphen aan den Rijn: Kluwer Law International, 2008), p. 28.

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ordered and globally exerted rule over content on digital platforms have disrupted the constellations and prospects of 'making Europe'.[5]

In the European Union (EU) – which pursues a distinct but essentially aligned legal order to the ECHR – the Charter of Fundamental Rights of the EU's Article 11 framework stipulates the values and principles of media freedom, accompanied by policies on diversity and pluralism.[6] This policy context defines the future of media law in Europe with a mission to clarify what is 'European' about the media and its regulations. The enlargement of the EU offers an ideal case for identifying the sites of contestation across the Europeanisation of media governance and to envision the options for the future of the legal regime.[7] Studying the transfer of EU audiovisual media policy to certain EU candidate countries will highlight crucial issues about the suitability of the current legislative arrangements and their resilience for the future of the European media order.[8] This chapter will cover the transposition of the EU's Audiovisual Media Services Directive (AVMSD) in Serbia and Ukraine, both candidate countries, and Georgia, a potential candidate country subject to the EU Association Agreement.[9]

The chapter investigates the transfer arrangements in digital audiovisual media policy in the context of EU enlargement, focusing on the legal manifestation of European values and principles in the law-making process. First, it contemplates the transfer of European media policy and Europeanisation in media governance as embedded in the conditionality of legal alignment.[10] Next, with the help of a mixed-method approach – policy and legal analyses and three country case studies – the chapter maps out the critical matters for digital media policy and the junctures with Europeanisation. In-depth interviews were conducted by the author in March and April 2023 with the European Commission's representatives for audiovisual policy and those of the national regulatory agencies of the three selected countries. Finally, conclusions will be drawn about the options for the

[5] Matthias C. Kettemann, *The Normative Order of the Internet: A Theory of Rule and Regulation Online* (Oxford and New York: Oxford University Press, 2020).

[6] Article 11 'Freedom of expression and information' of the Charter of Fundamental Rights of the European Union, OJ 2012 No. C326.

[7] Sally Broughton Micova, 'Small and resistant: Europeanization in media governance in Slovenia and Macedonia', PhD Thesis, London School of Economics and Political Science, 2013, available at: http://etheses.lse.ac.uk/800/1/BroughtonMicova_Small_and_Resistant.pdf.

[8] Sarah Ganter, 'International entanglements in communication and media governance: Exploring the policy transfer approach', in Maria Löblich and Senta Pfaff-Rüdiger (eds.), *Communication and Media Policy in the Era of Digitization and the Internet* (Munich: NOMOS, Center on Governance, Communication, Public Policy and Law at Ludwig-Maximilians-Universität, 2013), pp. 29–43.

[9] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 2010 No. L95.

[10] Kevin Featherstone, 'Introduction: In the name of Europe', in Kevin Featherstone and Claudio M. Radaelli (eds.), *The Politics of Europeanization* (Oxford: Oxford University Press, 2003), pp. 3–26.

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future of media law, embodying core values such as cultural diversity, plurality, and the freedom of media services within Europe.

9.2 EU ENLARGEMENT AND EUROPEANISATION IN AUDIOVISUAL MEDIA POLICY

The objectives of EU enlargement are fostering peace and stability in regions close to the EU's borders through integration and cooperation corresponding with EU values, laws, and standards. The Treaty on European Union provides the legal basis for any European country to join the EU (Article 49) and expresses the values on which the EU is based (Article 2).[11] All candidate countries must satisfy the 'Copenhagen criteria', which include political elements (stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities), economic elements (a functioning market economy and the capacity to cope with competition and market forces), and administrative and institutional capacity (to effectively implement the EU acquis and take on the obligations of EU membership).[12]

The enlargement of the EU has been closely linked to the broader calls for a European public sphere and envisioned the media as a common infrastructure for creating a shared identity.[13] However, the EU's limited competencies in cultural policy and the largely economic-driven agenda have restricted the options for policy transfer to European accession and member countries.[14] Thus despite the cultural–historical–societal complexity of the terrain, accession negotiations in the audiovisual media field largely came down to legislative alignment with the EU acquis. The transposition of the AVMSD (the EU's single significant piece of audiovisual media legislation) into the national laws of accession and candidate countries became the most relevant conditionality factor.[15]

Europeanisation, according to Claudio Radaelli, refers to the '[p]rocesses of (a) construction, (b) diffusion, and (c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, "ways of doing things" and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities,

[11] Consolidated Version of the Treaty on European Union, OJ 2012 No. C326.

[12] European Council, 'Conclusions of the Presidency', SN180/1/93, 21–22 June 1993.

[13] Katrin Auel and Guido Tiemann, 'Europeanising European public spheres', European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, 2020, 38–41, available at: www.europarl.europa.eu/RegData/etudes/STUD/2020/654628/IPOL_STU(2020)654628_EN.pdf.

[14] Alison Harcourt, *The European Union and the Regulation of Media Markets* (Manchester: Manchester University Press, 2005).

[15] Alison Harcourt, 'Engineering Europeanization: The role of the European institutions in shaping national media regulation' (2002) 9(5) *Journal of European Public Policy* 736–55.

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political structures and public policies'.[16] This approach incorporates broad processes of institutionalisation and covers the political structure, public policy, identities, and the cognitive dimension of politics – all aspects with inherent relevance to the media. Moreover, 'EU-ization'[17] and policy formation are interconnected and influenced by experiences with EU accession and enlargement.[18] This begs the question of what lessons have been learned from Europeanisation and how this has informed, perhaps shaped, EU policy.

The first EU enlargement (1998 to 2002) covering the Central and Eastern European (CEE) countries shed light on several conflicts between national cultural identities and the European media model,[19] repeated later in the Western Balkans context.[20] The Europeanisation process back then was mainly concerned with countering the effects of Americanisation in the small and fragmented national markets with limited access to cross-border media distribution.[21] Western Europe wished to ensure the opening of new markets for their investments; thus, the CEE enlargement was a 'battle of models', especially about the promotion of public service broadcasters and European content in programming and the independence of public broadcasters from the state (i.e. privatisation).[22] Even though the EU enlargement agenda recognised media freedom as a political criterion, the only requirement for aspiring CEE states was to implement the Television without Frontiers (TVWF) Directive into their national legal systems.[23] Such legalistic conditionality ensured some policy aims, such as protecting European content, despite extreme political pressure from the United States and affiliated business interests.[24] However, other critical areas of media policy not covered by the TVWF Directive – the control of distribution markets and, in general, media

[16] Claudio M. Radaelli, 'The domestic impact of European Union public policy: Notes on concepts, methods, and the challenge of empirical research' (2002) 5(1) *Politique européenne* 105–36.

[17] Radaelli, 'The domestic impact of European Union public policy', 27.

[18] Tanja A. Börzel and Thomas Risse, 'Conceptualizing the domestic impact of Europe', in Thomas Risse (ed.), *Domestic Politics and Norm Diffusion in International Relations* (London: Routledge, 2003), pp. 150–71.

[19] Hedwig de Smaele, 'Audiovisual policy in the enlarged European Union' (2004) 12(4) *Trends in Communication* 163–80.

[20] Kristina Irion and Tarik Jusic, *Media Constrained by Context: International Assistance and Democratic Media Transition in the Western Balkans* (Budapest and New York: Central European University Press, 2018).

[21] Hedwig de Smaele, 'More Europe: More unity, more diversity? The enlargement of the European audiovisual space', in Katharine Sarikakis (ed.), *Media and Cultural Policy in the European Union* (Leiden: Brill, 2007), pp. 113–34.

[22] Alison Harcourt, 'The regulation of media markets in selected EU accession states in Central and Eastern Europe' (2003) 9(3) *European Law Journal: Review of European Law in Context* 316–40.

[23] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 No. L298.

[24] Harcourt, 'The regulation of media markets in selected EU accession states in Central and Eastern Europe'.

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concentration – remained mainly unresolved issues in the CEE countries that entered the EU.[25]

The TVWF Directive was revised in 1997 and 2007 before it was renamed and adopted as the AVMSD in 2010. Beyond in-depth analytical works comparing these legal acts, it needs to be known whether the experiences with the CEE enlargement have informed the review of the regulatory framework.[26] The formal EU announcement remained silent about any feedback on media policy issues experienced during and following the CEE enlargement and missed a resonance on the difficulties of small, linguistically isolated markets, lack of independence, and the failures of transition from state to public broadcasting.[27] The AVMSD established groundwork to create a level playing field for emerging audiovisual media in general, but without further specifics on what type of diversity was pursued by the policy. Similarly, safeguarding media pluralism remained mostly aspirational and an unenforceable aim in the AVMSD.[28]

As a novelty, the AVMSD, for the first time, introduced in 2010 the notion of independent national regulatory authorities (NRAs) in audiovisual media, aiming to address a typical and widespread policy problem across CEE. However, the national transpositions of the AVMSD remained in the *de jure* domain and failed to establish meaningful *de facto* independence of the NRAs across Europe.[29] This changed with subsequent revisions to the AVMSD in 2018,[30] which showed evident concern about the pervasive threats to media freedom in certain EU Member States.[31] Overall, the 2018 AVMSD strengthened the requirements for the independence of NRAs but there remained still a need to establish EU-level

[25] Josef Trappel, 'Television in the enlarged European audio-visual area – A Community perspective', in European Commission (ed.), *The Development of the Audiovisual Landscape in Central Europe since 1989* (East Barnett: John Libbey, 1998), pp. 15–26.

[26] Irini Katsirea, 'The Television without Frontiers Directive', in Karen Donders, Caroline Pauwels and Jan Loisen (eds.), *The Palgrave Handbook of European Media Policy* (London: Palgrave Macmillan UK, 2014), pp. 297–311.

[27] European Commission, 'Fourth report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers"', COM/2002/0778 final.

[28] Kristina Irion and Peggy Valcke, 'Cultural diversity in the digital age: EU competences, policies and regulations for diverse audio-visual and online content', in Evangelina Psychogiopoulou (ed.), *Cultural Governance and the European Union*, *Palgrave Studies in European Union Politics* (Houndmills and New York: Palgrave Macmillan, 2015), pp. 75–90.

[29] Maja Cappello (ed.), 'The independence of media regulatory authorities in Europe' (2019) 1 *IRIS Special* 1–124 at 19–25.

[30] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ 2018 No. L303.

[31] Krisztina Rozgonyi and Sally Broughton Micova, 'Editorial' (2021) 12(3) *Journal of Digital Media & Policy* 337–44.

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monitoring and enforcement mechanisms that could credibly discipline evident implementation failures.[32]

The 2018 AVMSD revision was on other occasions not attentive to policy tensions within the EU. The updated rules adjusted the AVMSD to changing market realities where global – primarily United-States-based – digital platforms could acquire dominant positions in European media markets.[33] The AVMSD refit aimed to level the playing field for European media providers and expanded further into the regulation of online digital media.[34] The new provisions not only extended the scope of application of the AVMSD to video-sharing platforms (VSPs) but also updated and refined the rules and procedures on the restrictions to transmitting non-linear audiovisual content online. In both cases, Member States' NRAs are to implement norms on the most delicate issues of online content regulation while balancing national law, EU policy objectives, and international legal standards on freedom of expression.

Meanwhile, the queue of EU candidate countries – Montenegro, Serbia, Turkey, North Macedonia, Albania, Ukraine, Moldova, Bosnia and Herzegovina, and Georgia – are expected to align with the 2010 AVMSD and the 2018 update too. In the following sections, we look closely at the EU accession negotiations to see whether the AVMSD fits the purpose of passing on European values and principles on media freedom, pluralism, and diversity through the law, and how EU audiovisual media policy could (re-)integrate these values and principles for newcomers.

9.3 LESSONS FROM EU MEDIA POLICY TRANSFER FOR EU CANDIDATE COUNTRIES AND FOR THE UNION AS A WHOLE

EU enlargement gained dramatic momentum in 2022 when Ukraine, Moldova, and Georgia – which had been vassal states of the Soviet Union until its collapse – immediately applied for EU membership[35] in reaction to Russia's invasion of Ukraine.[36] The European Council – based on the Commission's recommendation – urgently granted Ukraine and Moldova the status of EU candidate countries and laid

[32] Gábor Polyák and Krisztina Rozgonyi, 'Monitoring media regulators' independence – Evidence-based indicators, Hungarian experience' (2015) 6(3) *International Journal of Digital Television* 257–73.

[33] Tim Raats, Sally Broughton Micova and Heritiana Ranaivoson, 'European audiovisual policy in transition: The editors' introduction', in Tim Raats, Sally Broughton Micova and Heritiana Ranaivoson (eds.), *European Audiovisual Policy in Transition* (Abingdon and New York: Routledge, 2023), pp. 3–17.

[34] Recital 44 AVMSD (2018).

[35] Ukraine presented its application for EU membership on 28 February 2022, five days after Russia's military aggression, followed by Moldova and Georgia on 3 March 2022.

[36] European Commission, 'Opinions on the EU Membership applications', 2022, available at: https://neighbourhood-enlargement.ec.europa.eu/factsheet-european-commission-opinions-eu-membership-applications_en.

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out the priorities for Georgia's candidacy.[37] Similarly, the proximity of Russia's war prompted the EU to re-evaluate the candidacies of Western Balkan countries, specifically of Serbia. Across the board, the fundamental criteria of freedom of expression, media freedom, and pluralism were communicated to the new candidate countries and re-assessed vis-à-vis those already in the process.

On behalf of the EU, there are two central contact points steering and operationalising enlargement: the Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR) is responsible for enlargement policies, and the Directorate-General for Communications Networks, Content and Technology (DG CNECT) oversees audiovisual media and digital content policies. The representatives of both DGs regularly exchange information on candidate countries' progress as assessed in annual reports. As was confirmed in an interview with a representative of DG CNECT, the 'legal perspective is always considered first' when scrutinising the readiness to accession, and the transposition of the AVMSD into national law is the focus. According to the 'stick and carrot approach', the law is the 'stick' and gaining access to the Creative Europe frameworks and accompanying EU funds is the 'carrot'.[38]

In general, the interviewee highlighted that the assessment was rather formalistic. It takes as a starting point the alignment of legal definitions and the compliance with certain principles of the AVMSD, such as the country-of-origin principle. At a later stage, the implementation of European content quotas and rules on advertising is considered. When it came to the transposition of the 2018 revision of the AVMSD, the extension of the scope of regulation to online digital platforms and VSPs was considered a risk. Still, DG CNECT believes that VSP regulation should not be the 'Wild West': there should be rules protecting citizens, and these rules should be enforced impartially and independently. In this regard, the candidate country has to guarantee the independence of the NRA to ensure the appropriate implementation of the national law transposing the AVMSD. However, it was acknowledged that DG CNECT could only gauge the *de jure* provisions of independence. *De facto* independence and the effective functioning of the NRA are political matters and are omitted in the formalistic assessment.

These constraints exemplify the circumstances surrounding legal accession and EU media policy transfer. In the following, the selected country cases – Georgia, Serbia, and Ukraine – should illustrate the specifics of the barriers and hindrances to enlargement and their impact on Europeanisation.

[37] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2022 Communication on EU enlargement policy', COM(2022) 528 final, 12 October 2022.

[38] Third countries – including acceding countries, candidate countries, and potential candidates – could be associated with the Creative Europe program (involving about two billion EUR from 2021 to 2027) according to Article 9 of the Regulation (EU) 2021/818 of the European Parliament and of the Council of 20 May 2021 establishing the Creative Europe Programme (2021 to 2027) and repealing Regulation (EU) No 1295/2013, OJ 2021 No. L189.

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9.3.1 *Georgia in the Crosshairs of AVMSD Transposition*

In 2014, Georgia signed an Association Agreement with the EU, which provides, among other things, for aligning its national legislation with the AVMSD.[39] In March 2022, Georgia applied for EU membership. The European Council stated that it was ready to grant the status of candidate country to Georgia once the priorities specified in the Commission's opinion on Georgia's membership application had been addressed.[40] Having been accepted for the preliminary track for EU membership in June 2022, Georgia was expected to take significant and urgent steps to align its audiovisual media services legislation.

In Georgia, the audiovisual media landscape is diverse but, at the same time, highly polarised in political fractions, with media owners often controlling editorial content. Television, the primary source of information for the Georgian population, often caters to disinformation and manipulated news content.[41] EU institutions, including the Parliament, raised concerns over Georgia's 'serious undermining of media freedom, which is part of the broader trend of democratic backsliding in the country'.[42] The transposition of the AVMSD coincided with proceedings and investigations against opposition media owners, and the national media regulator – the Georgian National Communication Commission (ComCom) – was expected to undertake more vigorous efforts to guarantee a free, professional, pluralistic, and independent media environment.[43]

At the end of 2022, the Georgian Parliament adopted amendments to the Law of Georgia on Broadcasting, transposing the AVMSD; however, they did not follow the recommendations of international experts on certain occasions.[44] Under the pretext of alignment with EU law, the Georgian legislators codified several new rules that may not align with international standards on freedom of expression and could likely be found to be in breach of Article 10 ECHR.[45] The most severe concerns relevant

[39] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ 2014 No. L261.

[40] European Council, 'Conclusions of the Presidency', EUCO 24/22, CO EUR 21 CONCL 5, 24 June 2022.

[41] Reporters Without Frontiers, 'Country report: Georgia', 2023, available at: https://rsf.org/en/country/georgia.

[42] European Parliament, Resolution of 14 December 2022 on the implementation of the EU Association Agreement with Georgia, Annual implementing report on the EU association agreement with Georgia, (2021/2236(INI), OJ 2023 No. C177, 63.

[43] European Commission, 'Opinion on Georgia's application for membership of the European Union', COM(2022) 405 final, 17 June 2022.

[44] Eve Salomon and Sally Broughton Micova, 'Initial expert opinion on three key aspects of the amendments package to the Law of Georgia on Broadcasting', Council of Europe, 2022, available at: https://rm.coe.int/initial-legal-opinion-medialaw3articles/1680a9379f.

[45] Council of Europe, 'Opinion of the Directorate General Human Rights and Rule of Law Information Society and Action against Crime Directorate Information Society Department prepared on the basis of the expertise by Council of Europe experts: Eve Salomon and Sally Broughton Micova on the law of Georgia on Broadcasting', Council of Europe, 2023, available at: https://rm.coe.int/eng-georgia-legal-opinion-law-on-broadcasting-feb2023-2777-8422-2983-1/1680aac48e.

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to digital media were raised about introducing a 'Code of Conduct' as a normative act adopted by ComCom to define the rules for providing services by media service and VSP providers.[46] Civil society organisations in Georgia were alerted to significant threats to media freedoms should the new Law on Broadcasting extend the scope of regulation to the online sphere and task ComCom with its enforcement.[47] In general, the new rules on VSPs were considered a 'slippery slope' that would extend state-controlled regulation to the digital realm, without sufficient safeguards or a solid track record of preserving fundamental rights.

Our interviewee, a member of ComCom, highlighted that neither on-demand audiovisual media services nor VSPs had been regulated in Georgia before this time, not even concerning copyright enforcement. The latest legislative drafts included new rules on these two areas, mainly as a 'copy and paste' from the AVMSD, while ComCom was expected to interpret and enforce the new norms. Specifically, ComCom would be required to adopt a Code of Conduct under the new law before it could apply sanctions on VSPs. At the time of writing, ComCom is preparing the code, looking at the United Kingdom's regulatory authority, Ofcom, as best practice – despite the UK no longer being an EU Member State. Meanwhile, the interviewee agreed that, at present, there was no EU practice to follow since Ireland – the country-of-origin regulator for most VSPs – did not transpose the AVMSD until the end of 2023.[48] Thus the concerns raised about the inappropriate alignment of the new VSP rules with the AVMSD have to be addressed by ComCom without a mature and good EU practice. ComCom has sought observer status at the European Regulators Group for Audiovisual Media Services (ERGA) to get advice on the AVMSD implementation. However, it was unable to achieve this due to administrative obstacles raised by the European Commission.

The case of Georgia alerts us to the consequences of initiating unabated EU media policy transfer without paying attention to the forging of corresponding institutional mechanisms for its implementation. In EU media policy, the regulation of VSPs is new in and of itself,[49] and there is no experience of enforcement to share. There is a risk that accession countries may misinterpret and misuse EU legal alignment as a pretext for advancing state-led media policy agendas that are contrary to EU values and principles.

At the same time, Georgia's broadcasting law has developed innovative governance modalities for national media regulators in small-country settings. Since copyright enforcement in the Georgian media was severely lagging, and there was no copyright-collecting organisation in place with adequate enforcement capacity, the

[46] The new Article 2(z_{20}) of the Law of Georgia on Broadcasting.

[47] Civil Georgia, 'Parliament adopts amendments to the Law on Broadcasting', 23 December 2022, available at: https://civil.ge/archives/519851.

[48] Kenneth Murphy, 'The regulation of video-sharing platforms and harmful content in Ireland and Europe' (2021) 12(3) *Journal of Digital Media & Policy* 513–20.

[49] Krisztina Rozgonyi, 'Negotiating new audiovisual rules for video sharing platforms: Proposals for a responsive governance model of speech online' (2020) 61 *Revista Catalana de Dret Públic* 83–98.

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legislator delegated to ComCom the task of 'certifying the fulfilment of requirements of the legislation of Georgia on copyright and related rights'.[50] This rather unusual setting could inform the next revision round of the AVMSD and serve as a potentially efficient governance model for convergent regulation of digital media content.

9.3.2 *Serbia and the AVMSD in Crossfire*

Serbia applied for EU membership in December 2009 and was granted EU candidate status in March 2012. EU–Serbia accession negotiations began in January 2014. Since then, Serbia's progress has been assessed in annual reports, particularly regarding freedom of expression, media freedom, and pluralism. Despite the prolonged process, progress has been limited in this domain. Serbia delayed implementing the Media Strategy and the corresponding Action Plan,[51] affecting necessary amendments to the Law on Public Information and Media and the Law on Electronic Media.[52] Concerning the Serbian Regulatory Authority for Electronic Media (REM), the Media Strategy requires 'functional, competent, professional and open institutions' that can resist 'against outside pressure' and 'consistently apply public policies and regulations'. However, civil society advocates and academics criticised the Serbian Media Strategy as a formal gesture towards the EU without any proof of political will for a fundamental change in media governance.[53]

Recently, the European Parliament harshly referred to Serbia as a safe haven for Russian media owners and urged the Serbian government to increase the transparency of media ownership and financing and ensure the REM's independence.[54] Media transparency and the independence of the regulator became the focal points of the accession negotiations, and the transposition of the revised AVMSD has, inevitably, run into heated political debates, causing further delays.

One of the main innovations brought by the 2018 revision of the AVMSD has been the introduction of provisions on the transparency of media ownership, drawing a direct link between such transparency and freedom of expression.[55] However, transparency is not a substitute for regulating media ownership and concentration,

[50] Article 70(9) of the Law of Georgia on Broadcasting.

[51] Government of Serbia, 'The strategy for the development of public information system in the Republic of Serbia', Official Gazette of RS, Nos 48/18, and 'Action plan for the implementation of Strategy for the Development of Public Information System in the Republic of Serbia for the Period 2020-2025', Official Gazette of the RS, No 11/20.

[52] European Commission, 'Staff working document, Serbia 2022 report', SWD(2022) 338 final, 12 October 2022.

[53] Darija Stjepić, 'Serbia's media strategy: Path towards media freedom or a front for the EU?', 2022, available at: https://europeanwesternbalkans.com/2022/12/21/serbias-media-strategy-path-towards-media-freedom-or-a-front-for-the-eu/.

[54] European Parliament, 'Resolution of 10 May 2023 on the 2022 Commission report on Serbia', 2022/2204(INI), 10 May 2023.

[55] Recital 15 and Art. 2(5) AVMSD.

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and the AVMSD has left this aspect to the EU Member States. In Serbia, media concentration and opaque ownership were reported as being the highest risks to media pluralism.[56] Specifically, it has been impossible to determine the extent of political control over online media content and to establish where there is direct or indirect ownership.[57] The transposition of the new AVMSD rules on media ownership transparency, including on who are beneficial owners, were expected to improve the situation.[58] Meaningful media transparency, however, needs independent oversight and enforcement by competent NRAs.[59] The Serbian REM does not yet live up to the standard of independence required for impartial enforcement of media ownership transparency. More broadly, EU Member States' national transpositions of the new AVMSD rules will not be sufficient to achieve media pluralism through improved transparency alone.[60]

The EU and other international organisations have critiqued the level of independence and accountability of the REM. In 2017, the Council of Europe commissioned a dedicated report on the independence of Serbia's REM.[61] While media regulators across Europe should be central actors in safeguarding pluralism, measuring their independence level has been methodologically challenging and is often politically unwelcome. With the adoption of the 2018 revision, Article 30 of the AVMSD formulates requirements for the independence and functioning of the competent national authority tasked with implementing and enforcing the Directive.[62] But would this be sufficient in Serbia to bring a meaningful change in the governance of the media? The evidence from within the EU suggests the opposite, especially in countries with democratic problems such as Serbia and Hungary.[63] There is a high

[56] Centre for Media Pluralism and Media Freedom, 'Monitoring media pluralism in the digital era: Application of the media pluralism monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the year 2022. Country report: Serbia', Centre for Media Pluralism and Media Freedom (CMPF), 2023, available at: https://cadmus.eui.eu/handle/1814/75736.

[57] Ibid., 10.

[58] Art. 5 (2) AVMSD.

[59] Heritiana Ranaivoson et al., 'Media ownership and transparency in the EU', in European Commission, *Directorate-General for Communications Networks, Content and Technology*, *Study on the Implementation of the New Provisions in the Revised Audiovisual Media Services Directive (AVMSD) – Final Report* (Luxembourg: Publications Office, 2021), pp. 127–233.

[60] Heritiana Ranaivoson and Krisztina Rozgonyi, 'The Audiovisual Media Services Directive and the effectiveness of media transparency requirements', in Tim Raats, Sally Broughton Micova and Heritiana Ranaivoson (eds.), *European Audiovisual Policy in Transition* (Abingdon and New York: Routledge, 2023), pp. 135–53.

[61] Kristina Irion et al., 'The independence and functioning of the regulatory authority for electronic media in Serbia', Study Commissioned by the Council of Europe, 17 November 2017, available at: https://rm.coe.int/the-independence-and-functioning-of-the-regulatory-authority-for-elect/16808c9c75.

[62] Irion and van Til, 'The evolution of independent regulatory authorities in the audiovisual media sector in European Union law', 23.

[63] Gábor Polyák, 'Monitoring the independence of the media regulatory body as an effective enforcement mechanism for the implementation of the AVMSD' (2022) 13 *Journal of Digital Media & Policy* 1–19.

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chance that transposing the new AVMSD could add legal guarantees on independence without producing the desired effect. EU law, moreover, does not provide for efficient monitoring and accountability mechanisms that could detect and sanction inequitable or politically motivated regulatory actions by its own Member States. Hence legislative alignment by EU candidate countries will deliver only half-empty policy solutions.

Serbia has yet to publish the official legislative text of its AVMSD transposition: only a working document has been published. Serbian drafters were eager to follow the rules of the AVMSD closely, in many cases with verbatim insertions into national law. The REM was consulted throughout the legislative process and was also party to progress report discussions with the EU representatives. An interview with a senior legal advisor for international cooperation at the REM reaffirmed that the EU expected Serbia to strengthen the independence of the REM, especially by involving civil society actors in media regulation. Yet there are no EU best practices to follow, and the EU's internal struggles with the independence of certain NRAs gave Serbian stakeholders the impression that the EU expects a governance model that it has not yet been able to achieve. At the same time, the REM was expected to 'get ready' for implementing the entire 'package of digital online media regulation', including the revised AVMSD, the Digital Services Act,[64] and the European Media Freedom Act.[65]

Meanwhile, the REM has received support to prepare to regulate digital online content and VSPs only from training projects primarily run by the Council of Europe.[66] Serbia has observed the European Platform of Regulatory Authorities and its working groups at the EU level, but it has yet to receive additional assistance to build the required capabilities. From the perspective of the REM, which wanted to engage in knowledge transfer and sharing, there have yet to be any in-depth policy transfer arrangements from official EU bodies. The REM expert pointed out that Serbia was a relatively small market to 'go alone'; thus they would wish for more opportunities to get involved in regulatory cooperation, with direct contacts within the ERGA as 'living' cooperation. Unfortunately, due to unnamed administrative obstacles, REM was not eligible for EU-financed twinning projects or collaboration in the European Audiovisual Observatory either.

In Serbia, the implementation of the revised AVMSD coincides with political – including geopolitical – fights for the control of the public sphere, fought by the

[64] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ 2022 No. L277.

[65] Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), OJ 2024 No. L2024/1083.

[66] Council of Europe, 'Horizontal facility: Freedom of expression and freedom of the media in South-East Europe', JUFREX 2, available at: www.coe.int/en/web/freedom-expression/jufrex-2.

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government, the EU and its allies, and Russia. The most sensitive matters – media ownership transparency and an independent and functioning NRA – have been turned into a formal exercise by the adoption of new rules, which have already fallen short of bringing about media freedom and pluralism within the EU. In parallel, EU enlargement negotiators have seemingly abandoned meaningful capacity-building opportunities for crucial institutional actors such as the REM. In sum, even in the most optimal scenarios, EU candidate countries in the Western Balkan region, such as Serbia, are likely to adopt non-resilient EU policy and will get to regulate digital media content without the necessary preparedness. Instead, the EU should listen to the calls of the REM and other EU candidate countries' NRAs to become, much sooner and more intensively, members of the EU's professional community, in particular the ERGA and EU-twinning projects, which could ease not only accession but also later 'living together' phases.

9.3.3 *Ukraine and the Limits of the AVMSD in Times of War*

Ukraine applied for EU membership in June 2022 and agreed to align its laws in thirty-three EU acquis chapters, including on information society and media.[67] According to the first assessment by the European Commission, media freedom in Ukraine has improved significantly in recent years, mainly thanks to online media, but 'oligarchs have disproportionate influence and control over the media, notably in the segment of television'.[68] On audiovisual policy, Ukraine was expected to align with the 2018 AVMSD 'particularly as regards the role of the media regulator, transparency of media ownership, and equal market conditions'.[69] Meanwhile, the implementation of AVMSD-conforming rules on the freedom of reception and retransmission for TV and radio became another central matter triggered by Russia's hybrid and massive disinformation attacks.[70]

Ukraine adopted its Statute on the Media in December 2022. It is 279 pages long, a massive piece of legislation.[71] The new law was hailed as an achievement in the journey towards EU accession. However, international press freedom advocates were concerned that under the EU harmonisation pretext, it also aimed at expanding the government's power to control the media, thereby 'endangering press

[67] See also Chapter 4 by Andrei Richter and Anna Smulders in this handbook.

[68] European Commission, 'Opinion on Ukraine's application for membership of the European Union, Communication from the Commission to the European Parliament, the European Council and the Council', COM/2022/407 final, 17 June 2022, 12.

[69] Ibid., 18.

[70] European Commission, 'Staff working document, analytical report following the Communication from the Commission to the European Parliament, the European Council and the Council Commission Opinion on Ukraine's application for membership of the European Union', SWD(2023) 30 final.

[71] Statute of Ukraine 'On the Media', 13 December 2022, No. 2849-IX, available at: https://zakon.rada.gov.ua/laws/show/2849-IX#Text.

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freedom and media pluralism in the country'.[72] Along with attending to civil society critique, the Council of Europe invited international experts to analyse the new law according to European legal standards on freedom of expression and the transposition of AVMSD rules and principles.[73] The experts stated that '[t]o the extent that the Law covers the topics contained in AVMSD, it broadly aligns with the Directive, and the same applies regarding its compliance with Council of Europe standards'.[74] However, the experts warned that the law does not provide sufficient safeguards for the independence of Ukraine's media regulator, the National Council of Television and Radio Broadcasting, and that the new law was not consistent with the European Convention on Transfrontier Television (ECTT) regarding freedom of reception of transfrontier broadcasting.

The EU's Fundamental Rights Charter laid the groundwork for broadcasting freedom, and the AVMSD calls for freedom of reception and retransmission following the country-of-origin principle.[75] A derogation from this principle is permissible only under strict conditions, including manifest, serious, and grave infringements by media service providers distributing content that incites hatred.[76] Under the EU's internal market prerogative, any restriction is allowed only under exceptional circumstances and must be approved by the European Commission following an established procedure.[77] The AVMSD rules on retransmission came into the spotlight when certain Baltic countries took measures against Russian-language television channels and related audiovisual media services. During the 2014 conflict between Russia and Ukraine, the Latvian[78] and Lithuanian[79] NRAs decided to suspend rebroadcasting Russian TV programmes in their respective countries. It turned out that the complexity and the length of the suspension

[72] International Federation of Journalists, 'Press release Ukraine: IFJ calls on the government to revise new media law', 12 January 2023, available at: www.ifj.org/media-centre/news/detail/category/press-releases/article/ukraine-ifj-calls-on-the-government-to-revise-new-media-law.

[73] Council of Europe, 'Opinion of the Directorate General Human Rights and Rule of Law, Information Society and Action against Crime Directorate, Information Society Department, prepared on the basis of the expertise by Council of Europe experts Eve Salomon and Tanja Kerševan on the Law "On Media" of Ukraine', DGI (2023)03, 24 February 2023, available at: https://rm.coe.int/dgi-2023-03-ukraine-tp-law-on-media-2751-9297-4855-1-2753-6081-2551-1/1680aa72df.

[74] Ibid., 5.

[75] The country-of-origin principle, which enables the 'free flow of information', is a core principle of the AVMSD, codified in Articles 2 and 3 AVMSD, including the principle of 'mutual recognition'.

[76] Art. 3(2) AVMSD.

[77] For linear audiovisual media services (Article 3(2)-(3) AVMSD), there must be manifest and serious violations against human dignity (incitement to hatred) or children (e.g. pornography, gratuitous violence); for non-linear audiovisual media services (Article 3(4)-(6) AVMSD), restrictions could also be justified where there is a grave risk to other aspects of public policy, health, or security, or to consumers.

[78] See the overview of events at https://digital-strategy.ec.europa.eu/en/news/decision-latvia-suspend-broadcast-tv-channel-rossiya-rtr-compatible-eu-law.

[79] See the timeline of events at https://digital-strategy.ec.europa.eu/en/news/lithuanias-decision-suspend-broadcast-russian-language-channel-rtr-planeta-complies-eu-rules.

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procedures under the AVMSD did not correspond well with the urgency of escalating aggression and conflict. The 2018 AVMSD revision took on board some of the concerns learned in the Baltic cases.[80] It introduced a novel fast-track procedure for 'urgent cases',[81] and simplified rules when derogating from the country-of-origin principle.[82] However, it was also apparent that 'the courts and the national regulators struggle[d] in their analysis of propaganda, hatred, incitement, and war' when handling such cases.[83]

The ability to restrict the retransmission of foreign media services constituted a significant pillar of the new Statute on Media in Ukraine.[84] The law by and large conforms to AVMSD principles although potentially conflicting with the ECTT.[85] The requirements on VSPs during armed aggression, requesting them to restrict access to foreign linear media programmes,[86] were deemed contrary to the AVMSD.[87] In an interview, a representative of the National Council, which will be responsible for enforcing the new rules, believed that the new law was a 'huge compromise'. According to him, Ukraine's implementation of the AVMSD was highly challenging since the EU law 'did not reflect the realities of the media in Ukraine'. He pointed out that the ability to restrict retransmission in Ukraine had become crucial since many EU Member States licensed previously Russian media service providers even though these providers exclusively targeted Ukraine from within the EU. In his view, 'the EU do not fully understand Ukraine's intentions to defend its informational space from interventions from Russian, pro-Russian and mimic-Russian media', and the AVMSD was 'not designed for the times of war'.

While drafting the Statute on Media, several EU legal experts contributed to the Ukrainian working group, specifically focusing on aligning with legal standards on freedom of expression and the AVMSD. These efforts coincided with the outbreak of the war, when the EU immediately sanctioned Russia and banned state-owned media outlets from broadcasting in the Union. On 1 March 2022, the Council of

[80] European Commission, 'Staff working document ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU accompanying the document – Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities', COM(2016) 287 final, SWD(2016) 171 final.

[81] Art. 3(5) AVMSD.

[82] Sally Broughton Micova, 'The Audiovisual Media Services Directive', in Pier Luigi Parcu and Elda Brogi (eds.), *Research Handbook on EU Media Law and Policy* (Cheltenham: Edward Elgar Publishing, 2021).

[83] Andrei G. Richter, 'Legal response to propaganda broadcasts related to crisis in and around Ukraine, 2014–2015' (2015) 9 *International Journal of Communication* 21.

[84] Art. 4 Statute of Ukraine 'On the Media'.

[85] Council of Europe, 'Opinion on the Law "On Media" of Ukraine', 7.

[86] Art. 124(5) Statute of Ukraine 'On the Media'.

[87] Council of Europe, 'Opinion on the Law "On Media" of Ukraine', 18.

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the EU adopted a Decision[88] and a Regulation[89] prohibiting 'operators to broadcast or to enable facilitate or otherwise contribute to broadcast, any content by the legal persons, entities or bodies' enlisted in the corresponding legal acts. Although '[i]n a normal situation, the EU does not have the competence to impose on Member States restrictions on the activities of a broadcaster under media law', but … '[i]n very exceptional situations, such as the situation at hand, the sanctioning rules deriving directly from the ECTT [should] apply'.[90] International legal scholars heavily criticised these unusual steps,[91] and Ukrainian stakeholders described them as 'explicit acknowledgements of the incapability of the AVMSD to tackle critical situations, such as the war and aggression' and called the EU's stance on the alignment with the legal standards as a matter of 'Westsplaining'.

Arguably, the future of media law in Europe and the AVMSD will depend on the facing of such legitimate critique. The stress tests of the law within these EU enlargement countries offer valuable and highly relevant opportunities for learning and reflection. The accession procedures could bring equal-level exchange venues for EU policymakers and legislators if meant for mutual recognition. As the Ukrainian representative emphasised, 'we need to be part of Europe, and not the end of Europe'. The struggles of Ukraine in defending its information space from intrusions, as manifested in claiming jurisdiction over foreign media under exceptional circumstances such as periods of armed aggression, were found 'unusual but not prohibited within AVMSD and CoE standards'.[92] These legal innovations could inform discussions about the prospects for the AVMSD and echo the experiences of those involved with enforcement in times of crisis.

9.4 RETHINKING MEDIA LAW – RETHINKING EUROPEANISATION

This chapter has pointed out some crucial matters for digital media policy, the law, and junctures with Europeanisation in the context of EU enlargement. The intriguing question about how the EU has utilised the law as the vessel of Europeanisation

[88] Council of the European Union, Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ 2022 No. L65.

[89] Council of the European Union, Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ 2022 No. L65.

[90] European Audiovisual Observatory and Francisco Javier Cabrera Blázquez, 'The implementation of EU sanctions against RT and Sputnik', European Audiovisual Observatory, 2022, 1, 4.

[91] Natali Helberger and Wolfgang Schulz, 'Understandable, but still wrong: How freedom of communication suffers in the zeal for sanctions', Media@LSE, 10 June 2022, available at: https://blogs.lse.ac.uk/medialse/2022/06/10/understandable-but-still-wrong-how-freedom-of-communication-suffers-in-the-zeal-for-sanctions/.

[92] Council of Europe, 'Opinion on the Law "On Media" of Ukraine', 5.

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in the accession process sheds light on the controversies of policy transfer and reveals opportunities for rethinking the law for the future of Europe.

Recently, European media law has been confronted with systemic attacks on human rights, including the freedom of expression and the traditional safeguards enabling a free and pluralistic media environment. Disinformation, foreign propaganda during a war of aggression, and intrusions in the European public sphere have paralleled the decline and erosion of trust in democratic institutions such as the news media. On the fringes of Europe, the current EU media order has faced the harsh realities of internal political influence on the media and foreign propaganda and interventions in the digital information space. On several occasions – exemplified in Georgia, Serbia, and Ukraine – it became evident that EU audiovisual policy exports did not 'fit' the local situation. The legal formalism of transposing EU law was also open to exploitation by 'staging' EU compliance.

Under Europeanisation's current procedural and legal settings, policy transfer mechanisms from the EU have proved incomplete, and policy adaptation and reflection mechanisms have been insufficient. EU law was an overloaded vessel of transfer in the absence of accompanying resilient governance and accountability mechanisms. These transfer procedures sometimes import bad practices and 'wicked problems'[93] of media governance under the pretext of EU legal alignment. Newcomers have been exposed to EU-internal issues with non-independent and non-accountable NRAs in the politically salient media sectors of EU candidate countries, deficient and inconsistently enforced rules on media transparency and ownership, and inefficient and rigid procedures against information attacks through the media – all of which reflect decades-long, complex, and unresolved non-tame problems of European media policy. Newcomers were also without meaningful safeguards against systemic failures.

At the same time, the enlargement procedures were not designed to exploit the opportunities for providing feedback on EU media policy. No reciprocity elements were built into the accession negotiations, and there were no instances of considerations or feedback. The one-way, overwhelmingly top-down dictation of conditions completely missed the aspect of the 'making of Europe' and the essence of the cultural, historical, political, societal, and linguistic diversity that should form the stronghold of European integration. These settings repeated the past failures of the previous EU enlargement round in CEE. Back then, 'the acquis (which forms the basis of every negotiation) [wa]s non-negotiable' and the EU candidate countries could 'at best, influence the pace, but not the content',[94] and this pattern seems to carry on even today. The historic call of the High-Level Group on Audiovisual Policy in 1998, for EU institutions and bodies to acknowledge

[93] Horst W. J. Rittel and Melvin M. Webber, 'Dilemmas in a general theory of planning' (1973) 4(2) *Policy Sciences* 155–69.

[94] Smaele, 'Audiovisual policy in the enlarged European Union', 117.

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(newcomer) 'countries as partners in a joint endeavour and not merely as markets and work with them to enable them to make their contribution to common goals', has remained unechoed.[95]

If future media law is to counter attacks on the fundamentals of the European democratic order, Europeanisation should take strength in learning and adapting to media systems at the borders of Europe, which are subject to such attacks on a large scale. The recent European Media Freedom Act is an attempt at put right the many policy failures of the past and the wicked problems of independence, ownership transparency, and media capture. It is also an opportunity to take seriously the making of Europe. 'More Europe', in terms of openness and mutual exchange, could bring resilience to the European dimension vis-à-vis global digital platform dominance or aggression against European values and principles. Necessarily, this would call for re-conceptualising the underlying policy processes, translating into the making of the future of Europe.

[95] High-Level Group on Audiovisual Policy, 'The digital age: European audiovisual policy – technical report', Office for Official Publications of the European Communities, 1998, 30.

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