



**WORKING GROUP**

**DIGITAL MEDIA**

***New Media***

**On the redefinition of the meaning of media organisation**

## **Preliminary Point**

**The Board of the Regulatory Authority for the Media (ERC) decided to produce this study, titled *New Media: On the redefinition of the meaning of media organisation*, and to submit it for public consultation. To this end, this document has been made available on the ERC website for consultation and comment. Any interested party can submit their contributions. Without prejudice, the ERC has invited responses from bodies operating in the sector, economic agents and academic institutes.**

**The discussion period lasted for 30 working days, during which time the ERC received 11 responses from:**

- Portuguese Press Association (API – Associação Portuguesa de Imprensa)**
- Portuguese Broadcasting Association (APR – Associação Portuguesa de Radiodifusão)**
- Association of Christian Radio Stations (ARIC – Associação de Rádios de Inspiração Cristã)**
- Competition Authority (AdC – Autoridade da Concorrência)**
- Journalist Press Card Commission (CCPJ – Comissão da Carteira Profissional dos Jornalistas)**
- Civil Institute of Advertising Self-Regulation (ICAP – Instituto Civil da Autodisciplina da Publicidade)**
- MEO**
- Pedro Jerónimo, author of the doctoral thesis ‘Cyber Journalism of Proximity: The construction of online news in the regional press in Portugal’**
- Private Media Platform (PMP – Plataforma de Media Privados)**
- Union of Journalists (SJ – Sindicato dos Jornalistas)**
- Som à Letra**

**This document has been prepared having considered the contributions so far received.**

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## Statement of reasons and definition of object

### A. Aims

Developments in the digital world have had an enormous impact on the evolution, behaviour and profile of the media. This technological revolution has resulted in a transformation in the way in which content is conceived of and distributed, which demands a redefinition of the traditional concept of media organisations.

In addition to the idea of the media organisation, it is also important to discuss the material content of media activity, the role of the content producer and journalist and the methodologies underlying the work communications content they produce.

As well as the traditional bodies, the growth of the so-called new media has changed the way in which information and entertainment are created, which is characterised by its bi-dimensionality (in the sense of the exchange of content between the platform producers and site users), fluidity and hybridisation (presentation of similar content on the same platform as that available on the traditionally independent platforms, that is to say, the same electronic site – which presents itself as a media organisation – can, for example, present a video of an interview, an audio broadcast stream and archived text content).

In its Recommendation CM/Rec(2011)7, the Council of Europe called for the creation of a differentiated regulatory framework that was suited to this new fluid and multi-dimensional reality.

This document first seeks to conduct a survey of the new regulatory challenges. While doing so, it will also search out new ways to provide an appropriate regulatory response that is in the interests of the free flow of information and of citizen protection, both as content consumers and as actors in a new public media space in which, thanks largely to the state of current technology, are able to act as conscious or involuntary content authors/producers.

In this first phase we seek to: 1) **redefine what is meant by media organisation**, in order to establish what **content is subject to regulation**; 2) define **different levels of regulation**, depending on the nature of each media organisation; 3) **discuss** to what extent **the existing legal framework** is appropriate for these new

media and **identify what parts require to be altered**; 4) **draw attention to the interaction between content producers and users: the special case of user-generated content.**

## **B. Framework**

There are many examples to illustrate the problem at the heart of this document, with the following being just some of them:

- a) *Blogs* – were initially opinion pieces, a repository of diary-like writings (life blogs). However, these spaces can also be used to disseminate news and information that is of general interest, and is particularly attractive because of the speed of publication, intertextuality and interactivity. The US courts have recently ruled that when a blogger is dedicated to producing public interest news stories, like journalists, they benefit from the protection offered by the First Amendment to the US Constitution.<sup>1</sup> Even here there are bloggers who submit requests for the right to attend certain events and to have access to the press benches. This reality, alongside the potential for bloggers to influence the agenda of the traditional media, has been studied recently in a master's thesis presented at the University of Vigo.<sup>2</sup>
- b) *Social networks* – Facebook, Twitter... – networks that enable several users to be connected to each other and to share content, very often newsworthy content, that either is or can later be developed by traditional media. Because of their size and speed, these networks allow real-time user participation, which reveals their ability to influence debates, interviews or commentaries in the traditional media in real time.<sup>3</sup> It is also important to ask if the social network presence of media organisations, pages published under their 'brand', should or should not be subject to regulation (how to explain to an ordinary

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<sup>1</sup> <http://www.theatlantic.com/technology/archive/2014/01/us-court-bloggers-are-journalists/283225/>

<sup>2</sup> Moreira de Sá, Fernando, «A comunicação política digital nas eleições directas de 2010 no PSD pelo candidato Pedro Passos Coelho», Vigo, 2013.

<sup>3</sup> In this regard, see the controversy involving Fernanda Cândia, who was a guest on the programme *Pros e Contras* on 3 February 2014 when she used Twitter to make comments about the other participants in the debate. For example, <http://www.portalcoimbra.com/portal/fernanda-cancio-e-o-twitter-debate-da-praxe>

citizen the reason why a news organisation must provide them with a right to reply if it carries an item that could harm their good name on television or on its website but that it does not if it publishes the same item on its official social network channels is because the current regulations are insufficient?).

- c) *Content aggregators* (Google, Yahoo!, MSN News) – these services do not provide original news content, yet are able to influence its selection, by filtering it and making it available to the public. In respect of these organisations, the European Court of Human Rights has ruled that content aggregators are responsible for the comments they allow on their pages (in a case brought by Delfi AS, owner of a news portal in Estonia).
- d) *Web TVs and Web Radio* – linear broadcast platforms on supports that permit a great deal of interactivity between users and the service, that often results in the presence of content of a different nature [linear, non-linear or even user-generated content].

### **C. Context**

#### **(main reference instruments)**

a) **Council of Europe Recommendation**, 21 September 2011 (Recommendation CM/Rec(2011 )7 of the Committee of Ministers to member states on a new notion of media) notes:

- a new reality, in which new and traditional actors, must embrace a notion of media which is appropriate for such a fluid and multi-dimensional reality;
- the need for all actors, both new and traditional, to be offered a framework that provides a clear indication of their duties and responsibilities;
- the need for the response within the regulatory framework to be differentiated according to the role played by each of the media services.

b) **Joint Declaration on Freedom of Expression and the Internet**, 1 June 2011, by the United Nations' Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, who noted that 'regulatory approaches to other communications media – such as the telephone, radio and television – cannot simply be transferred to the internet, but they must be tailored specifically for this medium according to their nature'.

**(Experience of similar bodies)**

Below are some examples of the type of responses from European regulators to the advent of new/digital media.

*a) Belgium<sup>4</sup>*

In 2012, the CSA proposed a definition of audiovisual multimedia services (AMS) that included all new and digital media in order to be able to determine its material authority over the new audiovisual services, and in particular the internet, including web TV, video on-demand (VOD) channels and web radio.<sup>5</sup>

The CSA defines AMS as a service requiring editorial responsibility and for which the principal purpose is to communicate television or audio programmes to the public via electronic means of communication, with the aim of informing, entertaining or educating or as a means of ensuring commercial communication.<sup>6</sup> The Belgian regulator established its model on two competences: material and territorial.

The material competence is based on seven cumulative criteria for defining an audiovisual media organisation.

1. It is a service; 2. It is edited; 3. Its main purpose is to have audiovisual content; 4. It is aimed at the public; 5. It consists of television or audio programmes comparable to those broadcast by TV and radio stations; 6. It is distributed electronically; 7. Its aim is to inform, entertain, educate or ensure commercial communication. In a way, it covers all the objectives of a traditional media organisation.

Territorial competence covers all established publishers in the French-speaking region and in the bilingual Brussels-Capital region for those not exclusively associated with the Wallonia-Brussels Federation (FWB).

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<sup>4</sup> The regulatory model proposed by the ERC is based in part on the model proposed by Belgium's Audiovisual Council (CSA – Conseil Supérieur de l'Audiovisuel)

<sup>5</sup> <http://www.csa.be/pages/154> (accessed 11 June 2015).

<sup>6</sup> <http://www.csa.fr/Services-interactifs/Services-de-Medias-audiovisuels-a-la-demande-SMAD/Cadre-juridique> (accessed 11 June 2015).



In this way, the CSA has instigated different types of regulation for different kinds of media organisations, based on two criteria: linear or non-linear, and open or closed platform.

Non-linear audiovisual services are subjected to light regulation, since with the extent of control and choice being on the side of the consumer it is the public that chooses the content, what they want to see.

Likewise, audiovisual services on open platforms are subject to light regulation because of the unlimited nature of the supply. Thus, the majority of actors are published through an open platform (the internet) and are non-linear on-demand services that are subject to lighter regulation than so-called traditional audiovisual services.

Regardless of the type of regulation there is a set of obligations that is in common with traditional media organisations: they must not distribute content inciting hatred or which is against minorities, and they must comply with advertising regulations, etc.

*b) United Kingdom:*

In 2010 Ofcom, the United Kingdom's communications regulator,<sup>7</sup> decided the Authority for Television on Demand (ATVOD, an independent co-regulator) was the competent authority for digital services.<sup>8</sup> This body is charged with regulating on-demand programme services (ODPS) Although ATVOD was designated the responsible body for regulating these services, Ofcom retained a set of normative powers, including the authority to impose statutory sanctions on programme services that do not meet the required standard.

It is ATVOD's responsibility to ensure the editorial content rules are being met by VOD service providers. For example, one of the regulations concerns the ban on distributing content that incites hatred and controlling the distribution of age-restricted content (ensuring minors are not able to access material deemed appropriate only for those over the age of 18). In respect of material restricted to people over 18, ATVOD has recently worked with

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<sup>7</sup> <http://www.medialaws.eu/what-is-an-on-demand-programme-service-in-the-uk/> [accessed 12 June 2015].

<sup>8</sup> <http://www.atvod.co.uk/rules-and-guidance> [accessed 11 June 2015]. This decision was reverted and Ofcom is in charge of the regulation of on-demand services.

VOD programme operators to ensure the effectiveness of the Content Access Control System with the implementation of a number of tools that can be used to verify the consumer's age: confirmation using the user's credit card; a personal identity management service; or another comparable means allowing the user to prove their age.

Only services with their head offices and editorial decisions taken in the United Kingdom are regulated by ATVOD.

While Ofcom does not regulate the press, media hybridisation and convergence has led to the regulator getting involved in this area. In 2011, ATVOD decided that the publication of video content on *The Sunday Times* website was ODPS content, and as such came under the remit of the 2003 Communications Act (the law consolidating all UK telecommunications and radio broadcast regulations, establishing Ofcom as the industry's regulator). This was one of the first decisions seeking to standardise the regulatory response to new/digital media, that is, standardising both linear and on-demand services.<sup>9</sup>

### *c) France*

The French CSA's jurisdiction is limited to traditional linear television and radio broadcasters and audiovisual media services on demand (VOD, which in French is SMAD – Services de médias audiovisuels à la demande, or VOD)<sup>10</sup>. In terms of the reach of VOD regulation, it is important to note that services such as Dailymotion and YouTube are not regulated by the CSA as this type of service is not classed VOD. The French CSA also only has jurisdiction over services that are headquartered in France.

In regulating VOD and traditional linear television and radio broadcast services, the CSA is responsible for safeguarding the following basic principles: respect for human dignity and protecting public order; ensuring a plurality of information and opinion sources; the broadcasting framework for cinematographic and audiovisual work and the contribution of television and VOD operators for the continued development of cinematographic and

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<sup>9</sup> <http://www.medialaws.eu/what-is-an-on-demand-programme-service-in-the-uk/> [accessed 12 June 2015].

<sup>10</sup> <http://www.hlMediacomms.com/2014/04/17/french-broadcasting-authority-makes-bid-to-regulate-internet-content/> [accessed 11 June 2015].

audiovisual production; protection of children and young people; advertising, sponsorship, telesales and product placement; programme accessibility; protection of the French language; and representation of social diversity and respect for women's rights in programmes.

In protecting minors from access to television and radio services on the internet, the French CSA has led or taken part in several child protection campaigns that seek to prevent and which highlight the problems to which minors are exposed through the internet: exposure to content that is either illegal or restricted to adults, the need to protect data capable of identifying minors (name, address, phone number, etc.), in respect of the right of the press (injury, defamation, etc.), image rights in blogs (use of images of minors without parental permission), illegal downloads, online harassment, etc.<sup>11</sup>

#### **D. Regulatory Scope**

Regulatory activity is the guarantor of the free exercise of press freedoms, and regulations do not, and should not be understood to constitute restrictions.

The existence of an administrative body to regulate the media is a constitutional requirement. It is a concept recognised in Article 39 of the constitution of the Portuguese Republic, contained in Title II concerning freedoms and guarantees, immediately following the protection of freedom of press, of which it is a guarantee. Moreover, in Portugal there are more than a dozen regulatory authorities, only two of which are established by the constitution: the Bank of Portugal (the body that supervises the banks) and the ERC.

Among its duties, the ERC has some that fit with the classic notion of an economic regulator. However, it is much more than this. It is also:

a) A classic sectoral regulator dealing with the rules that apply to that sector, of greater or lesser technicality, and which as a rule deals with matters bringing the freedom of private economic initiative into question. In addition to this, and as a result of the particular nature of the objects and subjects of its regulation, the ERC

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<sup>11</sup> <http://www.csa.fr/Television/Le-suivi-des-programmes/Jeunesse-et-protection-des-mineurs/La-protection-des-mineurs-sur-internet> (accessed 11 June 2015).

deals every day with the freedom of expression, the right to inform, freedom of the press, the right to privacy, to a good name and to one's image and words, often in situations that pose a threat to human dignity.

b) The duties of a classic sectoral regulator positions it on one of the sides of a triangle, with the operators and consumers on the other sides. The ERC's regulation involves a more complex and, therefore, more socially inclusive geometry:

- It involves those it regulates – media operators;
- It involves the media consumers, particularly the more sensitive public, including children, whose protection from harmful content is a priority for the ERC;
- It involves those targeted by the content carried by the media, the personality rights of which are constitutionally recognised, frequently come into conflict with the right to free expression through the media;
- It involves the state and public institutes as content producers, advertisers, and as sources with the potential to limit the media's freedom of expression;
- It involves the source of information activity and who retains control over access to these sources;
- Finally, it involves journalists, albeit indirectly. This is a matter that is rarely addressed. There is an entire dynamic to editing, a whole chain of power that passes from editors and managers to, perhaps, the owner of the media organisation, which must be taken into account.

The ERC was formed in 2005 as the independent regulator described above. The idea that freedom of expression is a right to be defended has been widespread among us since the 1974 revolution. With the nationalisation of the banks that owned the leading newspapers, public ownership of the media became commonplace, with the government owning radio and television broadcasters as well as newspapers. The 1976 constitution made provision for the creation of press councils within each section of the media under state control. The Press Law (Decree-Law 85-C/75 of 26 February) provided for the creation of a Press Council to protect freedom of expression in the print media. In the beginning, it comprised 24 members with various backgrounds and was declared to be independent. The constitutional revision of 1982 resulted in the creation of the Media Council. It was therefore during the post-revolutionary period that media regulation was

introduced, mainly in the public sector, which remained unchanged until the end of the 1980s, with the creation of the ERC's predecessor, the High Authority for the Mass Media (AACS), which was still not financially independent<sup>12</sup>.

The changes to the regulatory model accompanied the challenges posed by developments in the market during recent decades.

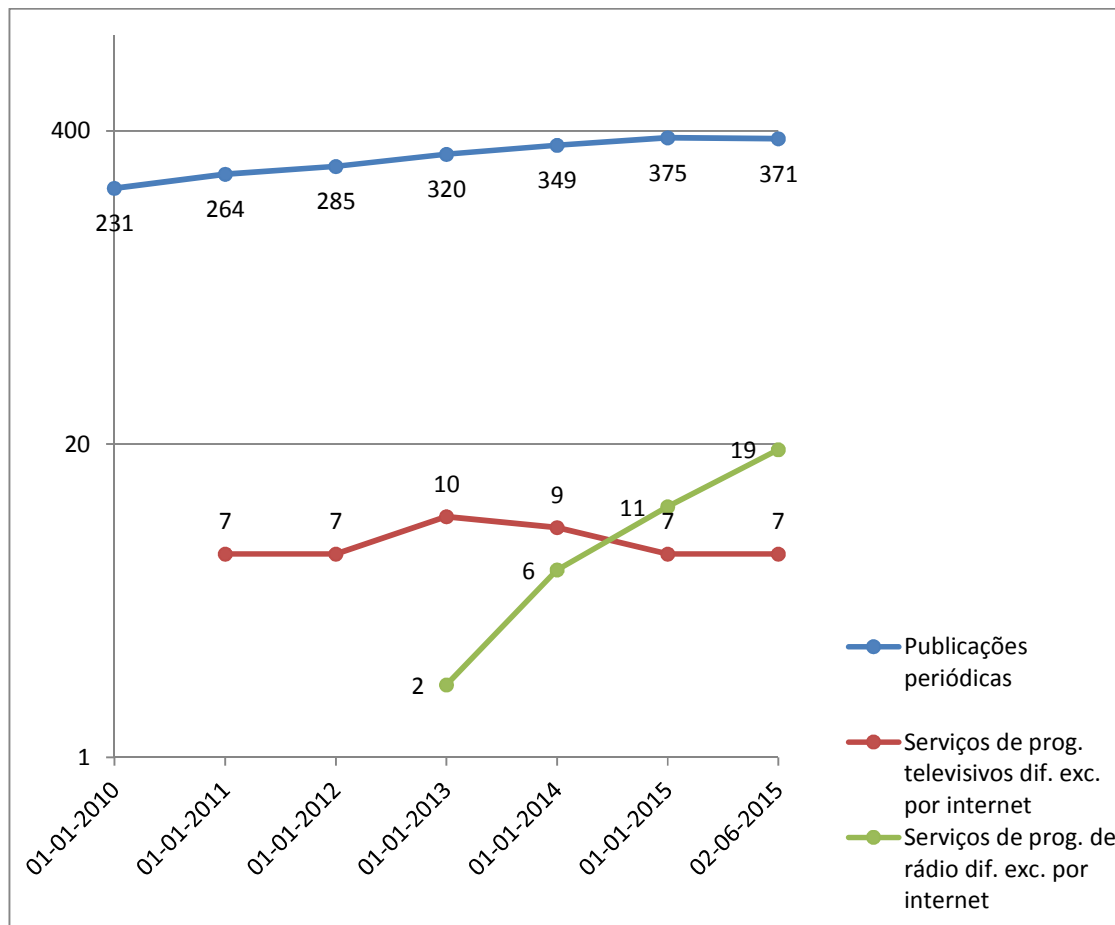
During the 1990s a number of economic groups were established and the legislation affecting the rights of journalists was improved. There were also regulatory improvements. There was also a reduction in state involvement in the sector. During the 21<sup>st</sup> century (i) we have entered a convergence phase, (ii) there has been a fragmentation of TV and radio audiences, (iii) there is a press crisis, (iv) there has been a growth in citizen journalism, (v) new TV signal distribution platforms have been developed, (vi) there is now an awareness of the global market – it is no longer possible to think of regulation within national boundaries.

Changes in the media geography in Portugal are now undeniable. Between 2008 and 2012 there was a 20% fall in the number of publications registered with the ERC. There has been a simultaneous reduction in the number of paper publications as the number of exclusively online publications has risen.

The advent of online, which now accounts for a considerable proportion of publications (see graphic below), means, if it is to define the extent of its operations, the regulator must have a more precise idea of what a media organisation is. This is a problematic that has been behind the reflection and proposals for changes to domestic and European legislation.

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<sup>12</sup> For more see Alberto Arons de Carvalho, António Monteiro Cardoso e João Pedro Figueiredo, *Direito da Comunicação Social* (2012), Texto Editores, p. 478-490.



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01/01/2014	01/01/2014
01/01/2015	01/01/2015
02/06/2015	02/06/2015
Publicações periódicas	Periodicals
Serviços de prog. televisivos dif. exc. por internet	Television services distributed exclusively via the internet
Serviços de prog. de rádio dif. exc. por internet	Radio services distributed exclusively via the internet

In the case of radio, there has been increased flexibility in changes to the ownership structure and the programming conditions allowed by law. Nowadays it is difficult for small operators that are obliged to establish synergies and to share content between each other during the daily transmission period. The financial crisis has forced operators to find creative solutions in order to survive.

However, television seems to have successfully countered the economic downturn, with the emergence of new operators and exclusively cable services between 2008 and 2012. There have been three trends in the supply of cable television services: in terms of access there is a predominance of free cable subscription access to services; coverage is international; content has become more specialised.

Despite the economic crisis in Portugal, media organisations have invested in new content to be distributed through several platforms, which has profoundly altered competition in the sector.

Media consumption habits have also changed with a growing search for quality content across different platforms, with the response to this challenge involving financial investment and creative solutions. For more on this matter, we recommend reading 'Publics and media consumption: News consumption and digital platforms in Portugal and another 10 countries'.<sup>13</sup>

Currently, competition has led to investment in multi-platforms, since people are increasingly using different supports in their search for quality content. Competition is even greater because new actors have emerged to compete for content consumers, advertising revenues and a cut of the market. Some have a dominant position in their area of activity. For media organisations the challenge is to find where the people are, which involves high costs.

Requiring creative solutions in order to reach their audience, they must invest in distinctive and quality journalism, the development of which must be encouraged by the regulator.

This has resulted in clear alterations to the business structure, the media service provision model, consumption habits, distribution platforms and important markets. Article 6 of the ERC's statutes state it has a responsibility to intervene in the following areas (among others):

- a) News agencies;
- b) Individuals or companies that produce periodical publications, **regardless of the form of distribution;**
- c) Radio and television operators in relation to their programme services and any complementary editorial content, **on any media, including electronic;**
- d) **Individuals or companies that use electronic communications networks to make radio or television programme services available to the public, to the extent to which they are responsible for its selection and aggregation;**
- e) **Individuals or companies who regularly use electronic communications networks to make available to the public content submitted to editorial treatment and organised as a coherent whole.**

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<sup>13</sup><http://www.erc.pt/download/YToy0ntz0jg6ImZpY2hlaXJvJltz0jM40iJtZWRpYS9lc3R1ZG9zL29iamVjdG9fb2ZmbGluzS820S4yLnBkZil7czo20iJ0aXR1bG8iO3M6MTc6ImV4ZW51dGI2ZS1zdW1tYXJ5Ijt9/executive-summary> (accessed 11 June 2015).



The regulator cannot ignore market changes and fail to regulate activities that fall within its regulatory scope. It is only by regulating responsibly that it can fully comply with the goals of ERC regulation contained in articles 7 and 8 of its statutes (see below).

#### Article 7: Goals of regulation

The ERC will pursue the following goals in its regulation of the media sector:

- a) Promote and ensure cultural pluralism and the diversity in the expression of various schools of thought within media organisations that are subject to its oversight;
- b) Ensure the free transmission of media content and free access to content by those for whom the media content is intended in a transparent and non-discriminatory manner and in such a way as to avoid any kind of social or economic exclusion while ensuring the efficient allocation of scarce resources;
- c) Ensure protection of more sensitive audiences, such as minors, in terms of content and services that may prejudice their development and which is offered by the media subject to its oversight;
- d) Ensure the information supplied by providers of editorial services is guided by demanding criteria and journalistic rigour, making effective the duty of editorial responsibility towards the general public that falls within its jurisdiction, should the legal rules and principles be shown to have been violated;
- e) Ensure protection of recipients of media content services as consumers, in relation to the nature or commercial purpose of the product distributed via electronic means by service providers in cases where there has been a breach of advertising laws;
- f) Ensure protection of the rights of the individual whenever they are being threatened through the provision of media services subject to its regulation.

#### Article 8: Powers

The ERC has the following powers within the media field:

- a) To ensure the free exercise of the right to information and freedom of the press;
- b) To ensure there is no concentration of media ownership in order to protect pluralism and diversity, subject to the powers expressly assigned by law to the Competition Authority;

- c) To ensure media independence before the political and economic authorities; d) To guarantee respect for rights, freedoms and guarantees;
- d) To guarantee respect for rights, freedoms and guarantees;
- e) To ensure the effective expression and presence of the various schools of thought in respect of the principle of pluralism and the editorial stance of each media organisation;
- f) To ensure the exercise of the rights to broadcast, to reply and of political argument;
- g) To ensure, in association with the Competition Authority, the regular, effective, transparent and equitable operation of the print and audiovisual media markets;
- h) To collaborate in the definition of policies and sectoral strategies on which to establish and plan the division of the radio spectrum, subject to the legal powers provided to ICP-ANACOM;
- i) To monitor conformity with state advertising campaigns, ensuring the Autonomous Regions and local authorities operate within the constitution and the principles of public administration impartiality and independence;
- j) To ensure media activities comply with regulatory norms.

The ERC must also promote co-regulation and encourage the media, trade unions, associations and other bodies operating in the sector to adopt mechanisms of self-regulation (Article 9 of its statutes).

## **Contributions received as part of the public consultation**

**E. Contributions received during the period of public consultation**

The public consultation took place during December 2014 and was attended by 11 participants.

Responses were received from the following:

- Portuguese Press Association (API – Associação Portuguesa de Imprensa)
- Portuguese Broadcasting Association (APR – Associação Portuguesa de Radiodifusão)
- Association of Christian Radio Stations (ARIC – Associação de Rádios de Inspiração Cristã)
- Competition Authority (AdC – Autoridade da Concorrência)
- Journalist Press Card Commission (CCPJ – Comissão da Carteira Profissional dos Jornalistas)
- Civil Institute of Advertising Self-Regulation (ICAP – Instituto Civil da Autodisciplina da Publicidade)
- MEO
- Pedro Jerónimo, author of the doctoral thesis 'Cyber Journalism of Proximity: The construction of online news in the regional press in Portugal' (PJ)
- Private Media Platform (PMP – Plataforma de Media Privados)
- Union of Journalists (SJ – Sindicato dos Jornalistas)
- Som à Letra (SL)

**Summary of contributions:**

**1. Regulation of the new media:**

- National regulation will have little effect on global agents (MEO);

- It is important to question the dominant position of some intermediate auxiliary services. Question their influence as well as the challenges they represent for national regulation (AdC);
- Balanced regulation. More strict regulation could lead to some operators leaving the national jurisdiction and/or the European Union, leading to users having less protection. On the other hand, it could increase the inequalities between national operators and those from other jurisdictions (MEO and AdC);
- Regulation must be lighter (MEO and ARIC).

## **2. Media organisations**

- We need to redefine media organisations (CCPJ);
- Projects without any spirit of professionalism or entrepreneurial sense should not be classified as media organisations (APR);
- Assessment of the economic nature or vocation of the media service must be over a long time period (PMP);
- Essential requirements for qualification as a media organisation should include: editorial status, with at least one accredited professional, with it being possible to identify the date of the most recent updates (ARIC);
- Qualification as a media organisation depends on the cumulative fulfilment of media requirements and treatment as a traditional media organisation (MEO);
- Editorial control is a basic function of a media organisation (MEO);
- Of the new media, only those that exercise, in their own name, editorial control over the selection and preparation of news items can be comparable to traditional media organisations (MEO).

## **3. Media and media organisations**

- There must be a clear distinction between opinion (freedom of expression), media organisations and aggregators (SJ);
- There must be a clear distinction between the media and media organisations. The new media can be more comprehensive than a media organisation (MEO).

## **4. Recognition / identification of media organisations**

- Principles and rules must be the same for all media organisations (ARIC);
- Rules must be very clear (API);
- Registration with the ERC must be compulsory (API and ARIC). Registration must be optional (MEO)
- There must be a seal that can be used to identify trustworthy media organisations (ARIC).

#### **5. Status of the journalist / journalism:**

- Journalists must not be confused with content producers. (SJ and CCPJ);
- There are specific requirements for journalist status. All journalists or their equivalents must be subject to the same rights and obligations (SJ and CCPJ);
- According to the law, journalists must be employed and remunerated. However, we should note that an unemployed journalist or journalism student may practice their activities, so from the technical, ethical and deontological point of view they must be empowered to do so (PJ);
- It is also necessary to alter the Journalist Statute, because there are smaller media organisations at the local level, often with one person who does everything (PJ).

#### **6. Differentiated regulation**

- Disagreement at various levels of regulation (SJ, CCPJ and MEO);
- There must be differentiation between media organisations producing news content and those that don't: the distinction only makes sense if it differentiates between news production and content and entertainment (APR); distinguishing ethical standards and deontological rules for the production of news content, made by journalists, from the production of other content (PMP);
- The degree of regulation must take into account the influence media services have in shaping public opinion. The competitive impact of these services on the market in which they operate must also be taken into account. (PMP) There should be sufficient market competition, taking pluralism and diversity into account (AdC).

### **7. Classification of media organisations**

- General agreement. APR suggested another very similar grid.

### **8. User-Generated Content**

- Online comments must be regulated (SJ);
- A media organisation's official social network pages must be subject to regulation (SJ);
- Even although it is our belief that citizens do not do journalism, we must nevertheless defend their role as a source, producer and distributor of information, a role that is increasingly important in the news creation process (PJ);
- The internet and the content produced by it, along with the lack of resources, is responsible for producing sedentary and passive journalism (PJ).

### **9. Copyright:**

- Calling attention to the violation of copyright by content producers that do not have media organisation status (PMP);
- Businesses associated with the creation of content and cultural activities can be rendered non-viable as a result of piracy (AdC).

### **10. Intermediary auxiliary services:**

- It is important to have access to intermediary auxiliary services that distribute content that ensure market competitiveness and encourage innovation (AdC);
- It is important that there is competition on the content distribution platforms. It is important to question some dominant positions (AdC).

## **Regulatory analysis of the new media framework**

### **1. A new Media concept**

As outlined above, and in view of the ERC's regulatory responsibilities of the media sector, it is important, first of all, to reappraise the realities that must be brought to the concept of communication body, or, more broadly, to the concept of media, establishing the boundary between the activity of organised mass communications and personal spaces in which the authors express their opinions (regardless of the number of followers or influence they may have) and who do not have this pretention and who should, therefore, remain unregulated.

We should clarify the methodology to be followed here. The main instrument of reference is Council of Europe Recommendation [2011]7. In this document, the expression media is understood as a media organisation. This does not mean that the present work will not adopt an orientation that distinguishes between a category that is common to all suppliers meeting certain criteria (described below), a category that can be designated media and a more restricted category, called media organisations, but with different obligations and a more intense level of regulation that will designate mainly news media organisations.

Therefore, using Council of Europe Recommendation [2011]7 as a frame of reference, we propose observance of the following criteria.

1. Definition/criteria

Non-determining	Determining
<ul style="list-style-type: none"> <li>• Diffusion media</li> <li>• Content format</li> <li>• Structure housing the media organisation</li> </ul>	<ul style="list-style-type: none"> <li>• Content Produce, aggregate or disseminate content, purpose and objectives</li> <li>• Editing and organisation of content</li> <li>• Communication for the public in general</li> <li>• Determination of the production of content and codes</li> <li>• To be a service</li> <li>• Territorial competence</li> </ul>



	<ul style="list-style-type: none"> <li>• Project continuity</li> </ul>
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Non-determining

- **The form of transmission support does not determine (or exclude) what is or is not a media organisation**

Media may use different transmission supports – paper, radio, TV, internet or mobile app – without these being taken into consideration in assessing the qualification as a media organisation.

- **Content format is not a determining factor**

Content may be presented as video, text with video, audio, only text, photographs and text, or any other combination that is supported on any transmission platform.

- **The structure housing the media organisation is not a determining factor**

In the case of classic media, the support is also the transmission platform. In respect of content distributed via the internet, the technological potential that is enhanced by the digital environment broadens the possibilities. The technology used in the production and distribution of content must not be taken into account, assuming its live or delayed presentation on a CGU aggregation platform, on a site, in a blog or in a mobile app.

In sum, the definition of a media organisation **is not determined by the platform, the physical support, the distribution or the receiving device.**

Determining:

**Important criteria in qualifying as a media organisation**

- a) **Produce, aggregate or disseminate media content:** despite the actual paradigm shift, the basic aims and goals of media remain unchanged. The service provider must have the desire to participate on the public stage through the production of content designed to inform, entertain or educate, alongside the desire to reach a large audience.
  
- b) **Editorial control:** implies the existence of editorial treatment and the organisation as a coherent whole of all the content produced (see the coincidence with the working of Article 6, paragraph e of the ERC statutes).

**Editorial treatment** is defined as a process or range of activities involved in the selection, transformation and presentation of content designed for dissemination to the public through the media. Editorial treatment assumes the planning of issues/programming according to some editorial criteria that is revealed with the supplier retaining this ability at a **time prior** to publishing the content.

**Organisation as a coherent whole** involves planning and deciding on the generic structure of the means of communication, and among other things deciding on the editorial, thematic, programmatic, graphic and iconographic levels. It also assumes control of the publication/transmission via the respective communications channel. It also assumes independence of decision-making in respect of the selection, elaboration and presentation of content. It also implies the permanent availability and regular updating of the services.

- c) **Intention to operate as a media:** this must be revealed through the existence of, for example, typical media working methods, through respect for professional norms, by the existence of mass communications devices and by the presenting itself as media.

- d) **Reach and dissemination:** the service provider must make every effort to ensure the content produced is mass communication. It does not matter if the audience received is small. What is important is its potential public ['expansive vocation']. It also does not matter if the content is paid for or free, only that it is possible to access it.
  
- e) **Respect for professional standards<sup>14</sup>:** is an indication that we are in the presence of a media organisation that observes all the ethical and legal responsibilities applicable to the profession of journalism (applicable in the case of news media). Equally important is the existence of press councils, ombudsmen, complaint procedures, rights of reply and other formal or informal procedures in relation to the content provided.
  
- f) **To be a service:** with economic return in terms of users, advertisers, the political authorities or simply through donations. An audiovisual media service is also considered a media organisation if it aims to compete with the traditional media.
  
- g) **Territorial competence:** the media organisation is under Portuguese jurisdiction.
  
- h) **Project continuity:** it makes sense for the ERC to allow a certain period for the project to mature after the media organisations' registration request.

The combination of the criteria outlined above requires careful assessment since certain criteria must be given precedence over the others. This is the case with the existence of editorial control and the reach of distributed media.

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<sup>14</sup> The concept of a media organisation is more comprehensive than the concept of a news media organisation. Naturally, the rules applying to some are differentiated and more detailed in the latter case.

In light of what has been outlined above, it could be that the media organisations engaging in media activities present themselves as a service, demonstrating respect for professional norms, have an expansive vocation and make available content that has been subjected to editorial treatment and organised as a coherent whole. Within these we highlight the news media organisations subjected to much tighter regulation, because of the rigour required in the provision of information which the public demands.

It is imperative that a media organisation has *a priori* editorial control. It may also be exercised *a posteriori* and cumulatively, but this type of editorial control is not enough on its own. Therefore, service providers, intermediaries or media auxiliaries that do not present (or will not present) their own editorial control and responsibility should not be thought of as media organisations.

The concept of new media does not differ from the concept of media. This is because the novelty is somewhat relative and with the speed of developments in the evolution of the digital media, this novelty is wearing off. However, the API has suggested emphasising the following traits. The new

- a. media permits better information management, greater interactivity, easy archiving, the compression of information that enables the storage of large quantities of information, the impartiality of digital information in relation to forms of presentation, to the owner and the creator and the manner in which it was previously used;
- b. combining computing and information technologies, communication networks (internet), digital and information media (data) in digital format: hypertext and hypermedia;
- c. are multimedia (the aggregation of several media on the same platform);
- d. digital media (media content that combine and integrate data, text, images, digital sound storage that enables its complete dematerialisation and its transmission through electronic systems).

This has happened with other media. The new media can be classified simply as media, communications bodies and news media organisations.

## 2. Regulation

Submitting the new media (that can be defined as media organisations) to regulation is a result of our legal system as it is configured between us and the regulation of the communications sector. Moreover, we should not forget that, with regard to media regulation, this is not characterised by an economic-style regulation, but rather by regulations designed to protect fundamental rights, the preservation of which are also necessary in the digital environment.

Having accepted that regulation is necessary, the next problem is how to decide what kind of regulation is necessary and how to introduce it.

It is appropriate, then, to first establish a set of principles to which the regulation must adhere:

- ✓ The principle of equal treatment
- ✓ The principle of support neutrality
- ✓ The principle of not introducing distortions to competition
- ✓ The principle of pluralism
- ✓ The principle of regulatory need, proportionality and appropriateness

The principle of equal treatment requires regulatory remedy to prevent the attribution of undue advantage or disadvantage through the creation of obstacles to new media that may either favour or prejudice it in comparison with traditional media. In this context, some of the responses to the public consultation to which the preliminary study was submitted state that there should be no distinction in the levels of regulation (light regulation and classic or traditional). In effect, it was stated that the new media organisations can capture a large share of advertising revenues, and its regulation should be identical to that already in place in order not to prejudice the traditional media.

The concerns outlined above should certainly be taken into account. However, recognising that it is appropriate in this area to provide different intensities of regulatory authority, the ERC does not seek to establish the principle of giving favourable treatment to the new media. Behind this decision for graduated regulation is the recognition that the digital environment permits the appearance of a media service with very disparate profiles, content and operations. The heterogeneity of realities to be regulated calls for a conscious and cautious choice for different levels of regulation depending on the nature of the object being regulated. At issue is the requirement to treat differently that which presents different characteristics. Only this ensures substantively equal treatment.

The principle of support neutrality indicates that the adjustment is not defined by the type of distribution platform used, although this aspect deserves some careful consideration.

It is also important to ensure that the regulation does not operate as a barrier preventing the entrance of new players into the national market, or that it distorts the terms of competition dictated by the supply and demand between new media and traditional media by the consumers. In respect of the digital media, it must not be forgotten that, given the global nature of communications, regulation considered too intrusive could lead to some service providers moving to neighbouring jurisdictions.

Regulation must always seek to protect the principle of freedom of expression and promote the conditions that favour the multiplicity and diversity of services providers with the promotion of pluralism being one of its goals.

Finally, as with the idea of administrative action, so too must regulatory intervention obey the principles of need, proportionality and appropriateness, which will be fully assured with the recognition of different levels of regulation.

Following the assessment of a certain reality as a media organisation (in a broad sense, or without restriction if its content is predominantly news) in accordance with the criteria outlined above, it is important to decide the level of regulation to which it will be subject. Thus, in the wake of the guidelines contained in the Council of Europe recommendation mentioned above and in the Audiovisual Media Services Directive (paragraph 58), we call for the adoption of a differentiated regulatory

framework that will take into account the role developed in each service the media develops. In practice, this is the same as establishing **different regulation levels:** classic or traditional and light regulation, assuming still that the regulation will be graduated in situations that do not fully conform to a model of light or classic regulation.

Classic or traditional regulation consists in the application of regulations typically applied to traditional media and to some new media, that is, submission to legal rules applicable to the media and the dispositions imposed by the regulator as part of the more intense supervision and monitoring processes and acceptance of its role in the resolution of disputes with individuals and the defence of the rights of journalists (as provided in the ERC statutes).

The pedagogic, modelling and sanctioning behaviour of the regulator. Subject to more bureaucratic registration processes and provision of the elements required for the assessment on non-concentration and ownership transparency, according to the nature of the medium in question.

Light regulation only applies to media organisations distributing doctrinal, educational or entertainment content that are not required to meet the rigorous journalistic standards for news and debate or other stipulations designed to ensure accuracy in the provision of news.

Nevertheless, in exercising media activities, those agents wishing to position themselves as such must respect the rights of third parties and the applicable legal regulations. Light regulation must also be used in the creation of expedited processes relating to the operation of the media register and the elements contained in it. It is also believed that regulation and supervision fees must also be differentiated and, in the interests of proportionality, should be lower for service providers subject to light regulation. Finally, light regulation will help prevent regulatory impositions from being a barrier to new players entering the market. This regulatory method gives preference to an educational approach over one that is more authoritative or punitive.

It is recognised that in some cases, given the nature of the hybridisation of some media, that a graduated regime combining elements of both classic and light regulation might be more appropriate.

- **Criteria for defining the level of regulation:**

- ✓ linear / compulsory / user has no choice
- ✓ non-linear/ optional/ on request
- ✓ open platform
- ✓ closed platform
- ✓ competitive position occupied

**Light regulation is only applicable in the case of non-news, non-linear media organisations on open platforms, with these being necessarily cumulative criteria.**

**Graduated regulation can be applied in the case of non-news, linear media organisations on an open (competitive) platform, with these being necessarily cumulative criteria.**

**All remaining media organisations are subject to traditional regulation.**

The concepts of open and closed platforms were rendered operational by Belgium's CSA. An open platform is one in which the editor may distribute content without being limited in the manner in which the content is distributed. For example, over the internet. On a closed platform, this ability is limited and managed by a distributor. To gain access, the editor must in principle have the ability to distribute or access a distributor. For example, via cable, satellite or terrestrial broadcast.

Non-linear, non-news services are subject to light regulation because they operate on request; that is to say, it is the public that chooses the content they wish to see and they, in the majority of cases, are aware of and informed about it.

Non-linear news services cannot be subject to the light regulation standard, given the precautions necessary and legal standards required in the production of news content, the applicability of which cannot be restricted as a function of the platform or the non-linearity of the service.



Services provided on open platforms (like the internet) are subject to light or graduated regulation because of the unlimited nature of the supply. In such cases, the public has the power to make use of the content it sought and which it deliberately accessed.

In the case of closed platforms, the choice the public has is determined by the content available at a certain hour or by a schedule. Therefore, the need for protection is greater on closed platforms where the choice is limited.

The table below describes the type of platform used and the level of content choice available to the public. The combination of both, along with the classification of content as news or not news, and except in situations in which there is no market competition, will determine whether to apply classic, graduated or light regulation.

**Figure 1 Media classification by distribution and public access**

Media	Linear (compulsory)	Non-linear (optional)	Open	Closed
Television	X			X
Radio	X			X
WEB TV (with streaming)	X		X	
VOD (open platform)*		X	X	
WEB Radio (with streaming)	X		X	
Apps*		X	X	
Blog*		X	X	
VOD (closed platform, such as cable)		X		X
Site*		X	X	

Light regulation applies to non-news organisations and in cases in which two criteria are simultaneously verified.

### 3. Legal framework for new media

#### a) media organisation register

The redefinition of media organisation and the understanding that new media call for different levels of regulation mean the regulator must determine to what extent the legislation – created in a media environment established by traditional media organisations – is up to the new challenges.

The first question to be asked concerns the submission or not to mandatory ERC registration. Regulatory Decree 8/99, of 9 June, which was republished in Regulatory Decree 2/2009, of 27 January, determines the media organisations' obligations to register with the ERC. This document shows the following categories<sup>15</sup>: periodicals/journalistic and news organisations; radio operators/radio programme services; television operators/television programme services; and programmes distributed only on the internet.

Imagine the difficulty in deciding whether a blog meeting these conditions, elements that qualify it as a media organisation,<sup>16</sup> should be registered with the ERC.

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<sup>15</sup> While the document refers to the registration of media organisations and does not contain any other categories it remains interesting to note that the legislator understands the concept of “new sites submitted to editorial treatment”, outlined in Article 12 of the legislation governing ERC fees, its treatment in respect of exemption from the regulation and oversight fee (this is implicit recognition that a site containing news content and where there is editorial content is a media organisation).

<sup>16</sup> Most of the blogs on the internet exist to entertain and share the tastes and interests of the users over a wide range of topics. As such there is no editorial concern, desire to act as a media outlet or intention to act in accordance with professional journalistic standards as defined above in the criteria for identifying a media organisation. It makes no sense, therefore, to require them to hold to a set of duties, such as pluralism, debate, rigour, respect for ethical and legal rules consistent with the exercise of journalism, among others, since we are not dealing with a media organisation. To place this content under the regulatory remit of the ERC would exceed its competence since the activity being exercised is not a media activity. However, there are blogs with other aims. Today some blogs are used to distribute information, with its content subjected to editorial treatment. It is in relation to this category of blogs that the question arises with greater acuity.

Regulation of a blog that has the characteristics of a media organisation, unless it contains news content, falls under the scope of light regulation, which is less intense than the classic regulation governing traditional media organisations. But should the lower intensity mean it does not need to register? The answer to this is not necessarily positive: Article 1 of Regulatory Decree 8/99 of 9 June, republished in Regulatory Decree 2/2009 of 27 January, states that “it is the responsibility of the ERC to maintain a register of national media organisations and those under Portuguese jurisdiction in accordance with international law”. Moreover, the regulatory functions are most efficient when it is possible to identify who is responsible for producing content, ensuring a contact for the resolution of any non-compliance.

As the body responsible for organising the register of media organisations, the ERC may recognise new media, but the registration process follows a typology principle that prevents the creation of new categories that are not recognised in law. However, the document governing the register is not suitably adapted to this new reality. It makes no sense to discuss the frequency of a blog as that is a concept that is applicable only to periodical publications, albeit in digital form <sup>17</sup>. On the other hand, defending the ERC’s right to recognise this new media does not mean the regulator can apply any kind of sanction for the absence of any voluntary “accreditation”. To do so would depend on the provision of such a sanction in law, which is only possible with new legislation.

We should be aware that for some of these new players the obligation to register with the ERC is a legal requirement, as is the case with WebTV and digital periodical publications. For the rest, while waiting for a review of the media organisation registration scheme, the regulator can issue a directive outlining the conditions for submission for public recognition that will enable these new players to be identified as media organisations, subject to the principle of transparency, request ERC recognition and comply with the legislation applicable to their media activities.

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**17** There may be situations when a news blog reaches an agreement with an online periodical. However, in this case, the ERC’s focus would be on the online periodical. It should obey the principle of format neutrality, but be aware of the periodic nature of publication. Moreover, periodic publications in digital format cannot begin their activities without first being registered with the ERC. Nevertheless, this highlights the increasing difficulty in defining the current reality of constant hybridisation. Moreover, the director of a publication must, in accordance with the Press Law, be treated as a journalist, a situation that is governed by the CCPJ and not the ERC. On the other hand, periodical publications are subject to a classification system that does not sit well with the variety of content available digitally.

Another aspect to take into account are the regulatory and supervision fees and charges that the traditional media organisations registered with the ERC must pay and the absence of taxes on similar new media activities,<sup>18</sup> with any changes in this matter being the responsibility of the legislator.

As an example, here is a possible classification that could encompass the new realities subject to regulation (exclusively in relation to content):

- **Classification of media organisations according to the media for the purpose of registration and the application of differentiated regulatory regimes**

Proposed classification:

- ✓ Press
- ✓ Radio (includes classic and exclusively online radio)
- ✓ Audiovisual
  - a) television (linear - includes classic and exclusively online television)*
  - b) on-demand media service (non-linear)*
- ✓ **Multimedia (media like or news sites subject to editorial treatment)<sup>19</sup>**

Now, accepting the registration or, depending on the example, public recognition of the new media, the elements of the registration must also be re-evaluated. The registration of all media organisations, regardless of the medium used, must contain the following:

- ✓ the identity of the owner (personal and contact details to which notifications may be delivered)

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<sup>18</sup> News sites that are submitted to editorial treatment are exempt from paying the regulatory and supervision fees (Article 12 of the legislation governing ERC fees), in the short- to medium-term they can provide strong competition for the traditional media.

<sup>19</sup> This last designation has the advantage of being expressed in Portuguese, but it may be more restricted than the term media like.

- ✓ The identity of the editor/person responsible for the direction and supervision of content.
- ✓ The identity of the editor/person responsible in the case of news content
- ✓ editorial status

Registration as a news media organisation does not automatically provide a blogger with the status of journalist, for example. While it is possible to register a blog as a news media organisation (once the determining elements of its identification as a media organisation have been verified), this does not mean the CCPJ, an independent organisation with its own responsibilities, will issue a professional press card to a blogger. This is another asymmetry<sup>20</sup> that both organisations need to resolve. Although it should be noted that admitting these professions as journalists (which would grant them the rights of the profession) is a decision for the CCPJ, and the ERC has no intention of getting involved.

In the wake of some contributions received during the public consultation and given that one of the purposes of this study is to “accredit” new media so that the public can recognise it as a source of differentiated knowledge, it is considered opportune to create a **seal** that can be used by these bodies and awarded by the ERC as part of the public recognition process.

As seen above, attribution of this prerogative – use of the seal - assumes registration with the ERC, and for this registration to be effected the regulator will have to assess the “candidate” according to the criteria outlined above, identifying the existence of a media organisation.

The seal can be removed should the regulator discover changes in the editorial project that are incompatible with the said criteria that justified its qualification as a media organisation. The right to use the seal can also be withdrawn from those bodies that seriously fail to comply with the rules governing the media.

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<sup>20</sup> It should be highlighted that this question has already been posed in respect of traditional media, with the CCPJ refusing to issue a journalist press card to those working on “Dica da Semana” (Tip of the Week), despite this publication being registered with the ERC as a general interest periodical. Another case concerns the development of the site “tugaleaks”, which initially appeared as a personal digital site for reporting illegal situations, which was required to register with the ERC as a daily general interest publication. Following registration, the owner and director requested the CCPJ grant them journalist status, which has apparently been granted.

## **b) Compliance with the rules governing media activities**

There are four main legal documents behind the rules governing media activities, without prejudice to other documents with less impact: the Television Law<sup>21</sup>, the Radio Law<sup>22</sup>, the Press Law<sup>23</sup> and the Journalist Statute<sup>24</sup>. The applicability of the provisions contained in the first three documents to the new media, in accordance with the similarities with classical media, are less problematic because they are based on the principle of services provided.

A linear transmitted webTV (while included in the new media concept and subject to graduated regulation) must observe the limits to programming freedom contained in Article 27 of the Television Law. Another possible example of this concerns the exercise of the right of reply: it is not unreasonable to argue that a blog considered a media organisation on account of its content should be obliged, by analogy with Articles 26ff of the Press Law, to allow the right of reply.

There are certainly always obligations that affect all agents subject to regulation, for example, the ban on distributing content that incites hatred and controls on the distribution of age-restricted content. However, even when there is ample understanding of the legal framework in such situations, the regulator may lack the appropriate means to intervene swiftly in order to protect the citizen, particularly in respect of its powers of sanction, which rely on express provision.

The limitations noted above condition the scope of the regulator's activity. Thus, in the early phase and alongside the suggestion for possible changes in the law, the regulator can decide to act in a more accessible and educational way, inviting the new media to adhere to a voluntary code of conduct.

It is therefore essential to have a conversation about the rights and responsibilities contained in the Journalist Statute. This is a document that refers to the status of a profession; however, the provisions are not restricted to the ethics of the profession. The statutes of the ERC state that its regulatory purpose is "to ensure

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**21** Law 27/2007 of 30 July, amended by Law 8/2011 of 11 April.

**22** Law 54/2010 of 24 December.

**23** Law 2/99 of 13 January.

**24** Law 1/99 of 13 January, amended by Law 64/2007 of 6 November.

information is ruled by criteria of demand and journalistic rigour” with the ERC being responsible for “ensuring respect for the legal principles and limits to content distributed by bodies that engage in media activities, particularly in respect of the protection of rights, freedoms and personal guarantees” (Article 7, Para (d) and Article 24, Para 3(a) of the document). It is written into the regulator’s powers and attributions that it is responsible for ensuring that the published contents comply with the rules applicable to the practice of journalism, and in particular, as noted above, in matters of the accuracy of news and the protection of rights, freedoms and personal guarantees.

The verification referred to in the final part of the preceding paragraph can also be applied to media content made available via new media, particularly in respect of new media distributing news content. In this case, the regulator can also invoke civil law in respect of the protection of the basic rights of those targeted in journalistic items (for example, image rights, the right to a good name, the right to a private life).

In particular, with respect of the **editorial responsibilities** to which the new media must be subject, **with special emphasis on bodies that provide news content**, the following are highlighted:

- ✓ independence, accuracy and impartiality;
- ✓ respect for journalism’s legal and ethical responsibilities;
- ✓ respect for the editorial status;
- ✓ clear differentiation between news, opinion and advertising;
- ✓ respect for the right to privacy;
- ✓ respect for the right to a good name;
- ✓ observance of the rights of children. Particular attention must be paid to content relating to minors, which must also take into consideration their future development. In another aspect of the analysis, the record of contents about and produced by children cannot be permanently accessed because it may affect their dignity, safety or private life in the present and the future;
- ✓ non-discriminatory in respect of race, religion, nationality or gender;

- ✓ respect for presumed innocence – no accusation without proof;
- ✓ debate – hearing other relevant stakeholders;
- ✓ respect for intellectual property rights;
- ✓ respect for the protection of personal details;
- ✓ guarantee a right to respond and correction; and
- ✓ reject hate speech or the promotion of discrimination or of stereotypes, or any other forms of inciting violence, particularly against ethnic, religious, sexual, gender or other minorities.

### **c) Rights conferred on content producers: protection for new media**

This is one of the most complex aspects of this analysis. It is the regulator's duty to protect freedom of expression, guarantee the effective expression and presence of the various schools of thought in respect of the principle of pluralism and the editorial stance of each media organisation; ensure the free exercise of the right to information and freedom of the press and safeguard the independence of bodies engaged in media activities from the political and economic authorities (Article 8 of the ERC statutes).

The regulator must also be engaged in protecting the rights of these new actors in respect of: access to sources of information (including the right of access to public spaces), to professional confidentiality, protection of the freedom of expression in the event of any possible attempt to curtail it. The regulator must always be sensitive to the different business structure in which these producers operate. The internet enables the distribution of content with the characteristic of low-cost media without the need for a structure analogous to that of traditional media. As a result, most of the projects will involve one person who is also responsible for the project's economic management and content. This situation requires special care: while on the one hand the ERC must not "strangle" this activity in the



incompatibilities regime imposed on journalists,<sup>25</sup> on the other it cannot dispense with a regime that safeguards the necessary guarantees of impartiality and of rigour in the production of news content, clearly preserving the separation between journalistic and advertising content.

Bringing Council of Europe Recommendation [2011]7 to the issue highlights the concerns with protection of those responsible for the new media, in order to ensure the promotion of their freedom of expression. Therefore, we recommend adoption of measures to:

a) avoid political or economic pressures<sup>26</sup>, whether direct or via the intermediation of providers whose contents are hosted in the expectation of removing certain digital content (the risk of 'private censorship') or even refusing to host certain media as a result of the lack of competition and of ideological pluralism;

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**25** Journalists are forbidden from producing advertising content, even if it is completely separate from the journalistic content they produce. The future legal regime that will be designed to protect this activity within the framework of freedom of information will have to consider whether the concerns and establishment of this type of incompatibilities are justified.

**26** Other competitive concerns must also be highlighted. The fragmentation of the European market and defensive and protectionist policies restrict global competition. This benefits large companies based outside of Europe. The owners of traditional media gain increased power online. Nevertheless, the internet economy is dominated by new players: Google, Microsoft, Yahoo, Apple, Facebook and Twitter, which provokes three concerns:

a) they do not produce content. They are intermediaries or gatekeepers (search, aggregation, social media and applications). New players limit themselves to aggregating. Traditional media limits itself to redistribution. Neither one nor the other significantly increase their content or the quality of their product.

b) there is an increased risk of concentration, which can be seen with the acquisition of other giants, such as YouTube and Skype. It is, moreover, very difficult to compete in markets where these players are present. With a market share of 84% in 2011, Google dominates the search market. Facebook continues to dominate the social networks. According to *eMarketeer*, in the United States it has a 71% share of the sector, compared to Twitter's 6% and LinkedIn's 4%. All the other social networks have a combined share of 15%. In terms of users, the difference is even smaller. Facebook has 900 million, Twitter 500 million and Google+ has 250 million. It is a winner-takes-all dynamic.

According to the "EU Media Future Forum: Final Report, September 2013", at a time of digital convergence, at this stage the transfer to online advertising does not cover the losses being experienced by traditional media, essentially by the press. On top of this, there has been a reduction in advertising.

The changes in the media landscape have been rapid and profound, and the traditional media has been unable to adapt to the new business models. There has also been an increase in competition in the advertising market with the entry of new players. There have been calls for the creation of an internal European market for the industry that would enable it to grow in scale and become competitive.

Alterations in the value chain are among the most challenging changes in the current media market. In the analogue world there existed a clear line of value for each player. Presently there are strong interconnections between the production, aggregation, distribution and consumption of content. The new ecology is multi-directional.

The new players operate as content gatekeepers, not by controlling the content, but by controlling access to it by mining consumer data. There are few players and they interact in an industry of fragmented content in order to obtain the greatest return.

Faced with this scenario, it is necessary to ensure that there is a return for those who invest in content production. This is essential now that the future of the entire sector depends on the health of each part of the system.

- b) prevent the misuse of commenting as defamatory and offensive comments can infringe the right to free expression; likewise, the right to exaggerate and to criticise must be extended to the new media.
- c) extend to the new media and those responsible for it the right to invoke protection of the freedom of information in the same way as is used by the traditional media.
- d) identify, preserve and promote in the new digital media space; the right of media content authors to develop their research.
- e) enable the accreditation process. The right of journalists to investigate can be facilitated by accreditation systems; when applicable, professionals working for the new media must be able to access accreditation without discrimination, delay or unwarranted impediment;
- f) avoid the surveillance of media professionals, including those involved in the new media. Any form of surveillance must be carefully considered and be subject to strong safeguards. The privacy of communications and protection against the seizure of professional material must be assured.

The protection of sources is a legal matter. There is a need to provide sources with robust protection. In the new media space the protection of sources must be extended to all agents producing public interest content on shared online platforms, which can be designed in a mass interactive environment, which includes sharing on social networks. It may also be necessary for measures to authorise the use of pseudonyms in situations where the release of a real identity could lead to a risk of retaliation.

There is also room for regulatory intervention, with the regulator required to be aware of the influence of power in the media space and resist any restriction of the freedom of information and of expression enjoyed by these agents.

The protection of sources and the exercise of the right to access information, which in the current plan depends on receiving a press card,<sup>27</sup> represents aspects in which the regulatory response is lacking. The extension of these rights to those without a press card is suggested now because there is currently a large lacuna in

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<sup>27</sup> Note that the Journalist Statute associates the position of the journalist with the activity undertaken, and not with the platform or support on which the content is distributed. According to this document: “journalists are individuals who, in editorial terms, research, gather, select and treat facts, news and opinions. The result of this journalistic activity can be expressed in text, images or sound. Journalism assumes its exercise is functionally directed towards the distribution of mass communication content, whether in print, through news agencies, radio, television or any other

the appropriate regulatory framework that requires legal resolution. On the other hand, the attribution of press cards is a matter over which the regulator has no authority.

The right to access is provided in the freedom of the press. According to Jónatas Machado, “the undue restriction of the journalist’s right to gather information is a form of censorship in the broadest sense” (see Jónatas Machado, “Liberdade de Expressão – dimensões constitucionais da esfera pública no sistema social”, Coimbra, Coimbra Editora, 2002, p. 546). Regarding the right of access, it cannot be denied that there are special rules in place for these professionals, particularly concerning notification of events of public interest in spaces closed to the general public.

Note that this is a journalist’s right, the exercise of which assumes, without prejudice to the contents of Article 15 of the Journalist Statute, possession of a press card. The law intends to remove any potential obstacles that may in this way be placed in the path of journalists seeking to exercise their right of access. Consequently, it is no longer necessary for these professionals to demonstrate the existence of a legitimate interest in the information they wish to access.

The law also states journalists have the right to access locations open to the public in order to obtain information, or to access locations that are not open to the public but which are open to the media (Article 9 of the Journalist Statute). Journalists simply need to show their press card to prove the existence of a reason for access.<sup>28</sup>

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electronic distribution support. Additionally, the distribution must have news content. This does not mean that a journalist cannot produce opinion pieces or other non-news items, it simply means they must be clearly differentiated.

The journalist must exercise these functions as part of their main permanent occupation. This does not mean a journalist must exclusively dedicate their time to this occupation, without prejudicing the incompatibilities regime (see note to Article 3), but they cannot exercise them just occasionally (see, Maria Manuel Bastos e Neuza Lopes, Comentário à lei de Imprensa e ao Estatuto do jornalista, Coimbra, 2001, p. 162).

**28** According to ERC Deliberation 3/DJ/2008, dated 29 May, from the rule cited (Article 9.1) it can be inferred there is generally no need for any credential or document other than the press card. Furthermore, in association with Article 3.1 of Decree-Law 305/97, dated 11 November (a rule corresponding in meaning to that contained in Article 5.1 of Decree-Law 70/2008, dated 30 April, which is currently in force), which established the press card as sufficient proof of journalist status and access to the rights conferred by law, it supersedes the assumption that possession of a press card constitutes the basis for the presumption its holder is there in the exercise of their duties: that is, that access to the location sought by the holder of the press card is required for news-gathering purposes (Article 9.1 of the Journalist Statute) The reason for seeking to gather news clearly does not need to be stated by the holder of a press card: it is enough to show the document. This conclusion

The right to professional confidentiality is protected by Article 11 of the Journalist Statute. This standard provides that, “without prejudice to the criminal law<sup>29</sup>, journalists are not obliged to reveal their sources, and cannot be directly or indirectly sanctioned for maintaining their silence”. This right is exceptionally important, according to Jónatas Machado: “having begun as an ethical imperative of a pragmatic nature, it has always been associated with the activity of journalism, the professional confidentiality of the journalist in relation to their sources of information that is today a principle of a juridical and constitutional nature, establishing the freedom of information and of the press, which is particularly important at a time when the exercise of investigative journalism has become generalised” (Op. cit, p. 579). Without a press card, bloggers and other media content producers in the new technological environment cannot claim similar rights.

There is only one caveat to clarify that the rights of journalists described above are often confronted by other fundamental values, such as the right of property (in the case of right of access) and the proper functioning of justice. Caution should always be exercised when attributing certain prerogatives, which because they limit other rights must only be granted to those who are at the service of the right to inform and who are in a position to comply with the obligations placed on journalists.

It is often said that the rights granted to journalists must remain restricted to a certain class of professionals, or the activity will become banal and the professionalism will be lost, with a consequent loss in the quality of the content. This paper must make it clear that it calls for a change in the criteria based on the content produced (object). However, the ability to identify journalistic content should be assessed and only those who produce clearly journalistic content should be able to demand the prerogatives that are today reserved for those in possession of a press card.

#### **4. The interaction between content producers and users: the special case of user-generated content**

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can also be reached through the principle of *dubio pro libertate*, being aware of the fundamental nature of freedom of the press and the right of journalists to gain access to sources recognised in Article 38.2 (b) 1 of the Portuguese constitution.”

<sup>29</sup> The rules governing the removal of professional confidentiality are very strict and are governed by a particular process. (See Article 135 of the Criminal Procedure Code).

The advent of the internet more than just introduced journalism to a new way of distributing information. It has also introduced changes to the way journalism is carried out. The speed at which the internet enables information to circulate has radically transformed the temporal dynamic, the circulation of information and the working methods of so-called traditional journalism. The proliferation of blogs and personal pages, which have brought new sources and new ways of producing and distributing news content has challenged the traditional boundaries between journalists and readers, resulting in new concepts, such as citizen journalism, citizen media, pro-am journalism, web journalism, wiki journalism, interactive journalism, etc.

Today, for example, it is now common for online newspapers to encourage an interactive relationship with its readers by providing them with the means and the space to comment on news items.

The democratisation of access to devices that can capture images and sounds and the technological move towards digital convergence has in turn reinforced citizen participation. Today the ordinary citizen can capture photos, videos and audio, and can quickly publish them on the internet through blogs or social networks. Any citizen can report on any event before any media organisation, and can even publish it *in loco* as it happens: they can film any event on their smartphone or tablet and quickly upload the images to YouTube, Facebook or any other social network.

The internet is an enormously rich source of information and there are ever more citizens and organisations producing their own content. Neither journalism nor journalists can escape this trend. User-generated content, whether by online or traditional journalism, is a growing resource<sup>30</sup>.

The growth of user-generated content is not – and cannot be – a problem. It is above all an opportunity that can and must be exploited. Since some of this content is extremely important and, at the same time, since the journalists must exercise their activities within an ethical and legal framework, the use of user-generated content is also a challenge for news editors.

The main assumption of information produced by a media organisation is that it is credible, that its content is verified and validated. With user-generated content, however, this assumption is not assured, at least not completely (by publishing such information the media organisations find themselves in a ‘grey zone’).

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**30** See Ana Leal's report on the “Meco tragedy” that allegedly used information from social and discussion forums as journalistic elements, see <http://www.tugaleaks.com/tvi-ana-leal-meco.html>

It is essential for media organisations and for the commitment they have made to their audiences that this assumption, this credibility, is not undermined. On the other hand, the loss of confidence is accelerated because now more than ever it is very easy for any citizen to denounce any errors made within an editorial structure.

As Craig Silverman says<sup>31</sup>:

'Never before in the history of journalism—or society—have more people and organisations been engaged in fact checking and verification. Never has it been so easy to expose an error, check a fact, crowdsource and bring technology to bear in service of verification.

Not surprisingly, the price for inaccuracy has never been higher. The new world of information abundance, of real-time dissemination, of smartphones and digital cameras and social networks has brought the discipline of verification back into fashion as the primary practice and value of journalists.<sup>32</sup>

The principles governing editorial activity, either with or without user-generated content, remain the same. What is new is that the skills and practices need to be continuously improved. Journalists today need to know how to gather user-generated content, but they also need to know how to validate and edit it:

'The complexity of verifying content from myriad sources in various mediums and in real time is one of the great new challenges for the profession.<sup>33</sup>

Many media publications have created rules and guidelines for the use of user-generated content in the production of news. For example, the BBC created the UGC Hub, a team responsible for gathering, authenticating and distributing user-generated content to the company's news services. Lila King, a contributor to the iReport<sup>34</sup>, CNN's citizen journalist space, confirms nothing that arrives in the editorial office, including photos and videos, is published until the user-generated content has been comprehensively verified and authenticated:

'Vetting is the heart of [iReport](#), CNN's platform for citizen journalism. You won't see iReports on television or on CNN.com (outside the special iReport section, that is) before they've been fact checked and cleared.

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**31** Author of the blog "Regret the Error" (<http://www.poynter.org/category/latest-news/regret-the-error>), which is dedicated to identifying mistakes and/or their corrections in journalistic pieces

**32** <http://www.nieman.harvard.edu/reports/article/102762/A-New-Age-for-Truth.aspx> (accessed 19 December 2013).

**33** Ibid.

**34** <http://ireport.cnn.com/>

The vetting process is rigorous and sometimes time-consuming. It usually starts with a phone call, most often from the iReport desk in Atlanta, where eight full-time producers tab through hundreds of incoming photos and videos every day, looking for the ones we think will make an impact.<sup>35</sup>

If the new forms of communication are closely associated to developments in technology, this demands journalists and newsrooms exercise greater scrutiny and develop more skills in the use of these technologies as work tools.<sup>36</sup> It is because of these changes that media organisations must, in addition to investing more in training and skills, develop ethical principles and rules of good practices governing the use of user-generated content.

Another question concerns online comments allowed by media organisations on their pages, which raises several questions concerning the level of protection of fundamental rights.

Bearing this framework in mind, a policy was developed that seeks to highlight the main rules of good practice in relation to the use of this type of content. Because of its specialist nature, this work is being carried out separately from this study.

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**35** <http://www.nieman.harvard.edu/reports/article/102767/Vetting-Citizen-Journalism.aspx> (accessed 19 December 2013).

**36** There are a number of online tools that could be used to verify and validate user-generated content (and not just that of journalists). These include domain tools (<http://www.domaintools.com/>), which verifies the ownership of domains; trendsmap (<http://trendsmap.com/>), which finds the geographic location of content published on Twitter; TinEye (<http://www.tineye.com/>) which can tell if an image has been digitally altered; Snopes, which is a site containing a list of fraudulent stories circulating on the internet (<http://www.snopes.com/>), among others.

# Conclusions

## Conclusions

1. Consumer behaviour has changed as a result of the myriad of experiences on offer. Citizens now expect to see anything, anywhere, at any time and on whatever device they choose;
2. On the content supply side, together with the traditional media, the so-called new media has changed the way information and entertainment is created and consumed;
3. Developments in technology, changes in patterns of consumption and the growth of services available have resulted in the redefinition of what is meant by media organisation, introduced different levels of regulation; discussed to what extent the existing legal framework is appropriate for this new media and drawn attention to the interaction between content producers and users, such as in the special case of user-generated content;
4. It proposes as important criteria for qualification as a media organisation: the production, aggregation or distribution of media content, the existence of initial editorial control, the intent to operate as a media organisation (revealed, for example, through the existence of typical media working methods), reach and distribution, respect for professional standards, presentation as a service; and to be under Portuguese jurisdiction;
5. In the light of the criteria outlined above, it could be that the media organisations that engage in media activities present themselves as a service, demonstrating respect for professional norms, have an expansive vocation and make available content that has been subjected to editorial treatment and organised as a coherent whole. Within these we highlight the news media organisations subjected to much tighter regulation, because of the rigour required in the provision of information which the public demands;



6. The ERC is responsible for the organisation of a register of media organisations, which in the parallel logic of “public recognition” can be extended to new media. However, this option must take into account the shortcomings of current rules that are based on the tripartite typology of press/television/radio;
7. At present it is possible to register linear television services such as webTV, a category resulting from the subdivision of “television services” contained in Regulatory Decree 2/2009, of 27 January, and of the European directive on audiovisual services. In contrast to this there is a category of non-linear services (VOD), the providers of which can also be identified;
8. New media with content submitted to editorial treatment and other criteria for determining its qualification as a media organisation must also fulfil the requirement of being a periodical in order to be registered as such. That is to say, if it is an online periodical, then it should register as such. If it does not fit in with the concept of a periodical, then it may be “accredited” via the attribution of a seal;
9. In any case, it is necessary to create a new category of media organisations by changing the law, proposing the following categories: press, radio, audiovisual and multimedia;
10. Presently within the actual legal framework the regulator can create a directive concerning the registration or public recognition of new media, outlining its obligatory nature (where this exists) and the procedures to be followed;
11. Given that one of the purposes of this study is to accredit new media so that the public can recognise it as a source of differentiated knowledge, it is considered opportune to create a **seal** that can be used by these bodies and awarded by the ERC as part of the public recognition process;

12. As seen above, attribution of this prerogative – use of the seal - assumes registration with the ERC, and for this recognition to be effected the regulator will have to assess the “candidate” according to the criteria outlined above, identifying the existence of a media organisation;
13. The seal can be removed should the regulator discover changes in the editorial project that are incompatible with the said criteria that justified its qualification as a media organisation. The right to use the seal can also be withdrawn from those bodies that seriously fail to comply with the rules governing the media;
14. Currently, regulatory actions within a panorama comprising media organisations with very different configurations and various media functions must be established on differentiated levels: light, graduated and classic or traditional regulation. Light regulation is reserved for non-news, non-linear services on open platforms. The remainder of the media is subject to graduated or classic regulation. Graduated regulation will be reserved for non-news content on closed platforms and non-competitive media or linear services;
15. Classic or traditional regulation consists in the application of regulations typically applied to traditional media and to some new media, that is, submission to legal rules applicable to the media and the provisions imposed by the regulator as part of the more intense supervision and monitoring processes and acceptance of its role in the resolution of disputes with individuals and the defence of the rights of journalists (as provided in the ERC statutes).
16. Light regulation does not exempt media subject to it from complying with the legal obligations applicable to all media. In carrying out media activities, those agents who wish to position themselves must respect the rights of third parties and all other applicable laws (part of the laws applicable to media activities arising from the Journalist Statute that are not applicable to the non-news new media; in effect, media organisations distributing doctrinal, educational or entertainment content are not required to meet the rigorous journalistic standards for news and debate or other stipulations designed to ensure accuracy in the provision of news.) Light regulation must also be used in the creation of expedited processes relating to the operation of the media

register and the elements contained in it. It is also believed that regulation and supervision fees must be differentiated and, in the interests of proportionality, should be lower for service providers subject to light regulation (a matter deserving legislative intervention). Finally, light regulation will help prevent regulatory impositions from being a barrier to new players entering the market. This regulatory method gives preference to an educational approach over one that is more authoritative or punitive.

17. Thus, light regulation will be more accessible and educational, inviting the new media to subscribe to a code of conduct (an “editorial statute”) that they will observe voluntarily. Without prejudice to any more forceful intervention in the event of serious violations of basic rights and the protection of vulnerable people;
18. It is recognised that in some cases, given the nature of the hybridisation of some media, that a graduated regime combining elements of both classic and light regulation might be more appropriate;
19. Qualification as a media organisation, including multimedia organisations, requires the adoption of certain editorial responsibilities (which are even stronger in the case of news organisations): independence, accuracy and impartiality, respect for the fundamental rights of the subjects, respect for the editorial status, adoption of behaviour that reflects concern for the protection of minors in respect of access to inappropriate content, etc.;
20. It is the regulator’s duty to protect freedom of expression, guarantee the effective expression and presence of the various schools of thought in respect of the principle of pluralism and the editorial stance of each media organisation; ensure the free exercise of the right to information and freedom of the press and safeguard the independence of bodies engaged in media activities from the political and economic authorities (Article 8 of the ERC statutes). The regulator must also be engaged in protecting the rights of these new actors in respect of: access to sources of information (including the right of access to public spaces), to professional confidentiality, access to public places, protection of the freedom of expression in the event of any possible attempt to

curtail it. The Council of Europe has also expressed concern for the protection of new media, and is fighting for rights to be granted similar to those enjoyed by professionals working for traditional media organisations;

21. There is also room for regulatory intervention, with the regulator required to be aware of the influence of power in the media space and resist any restriction of the freedom of information and of expression enjoyed by these agents.

## **APPENDICES**

APPENDIX 1

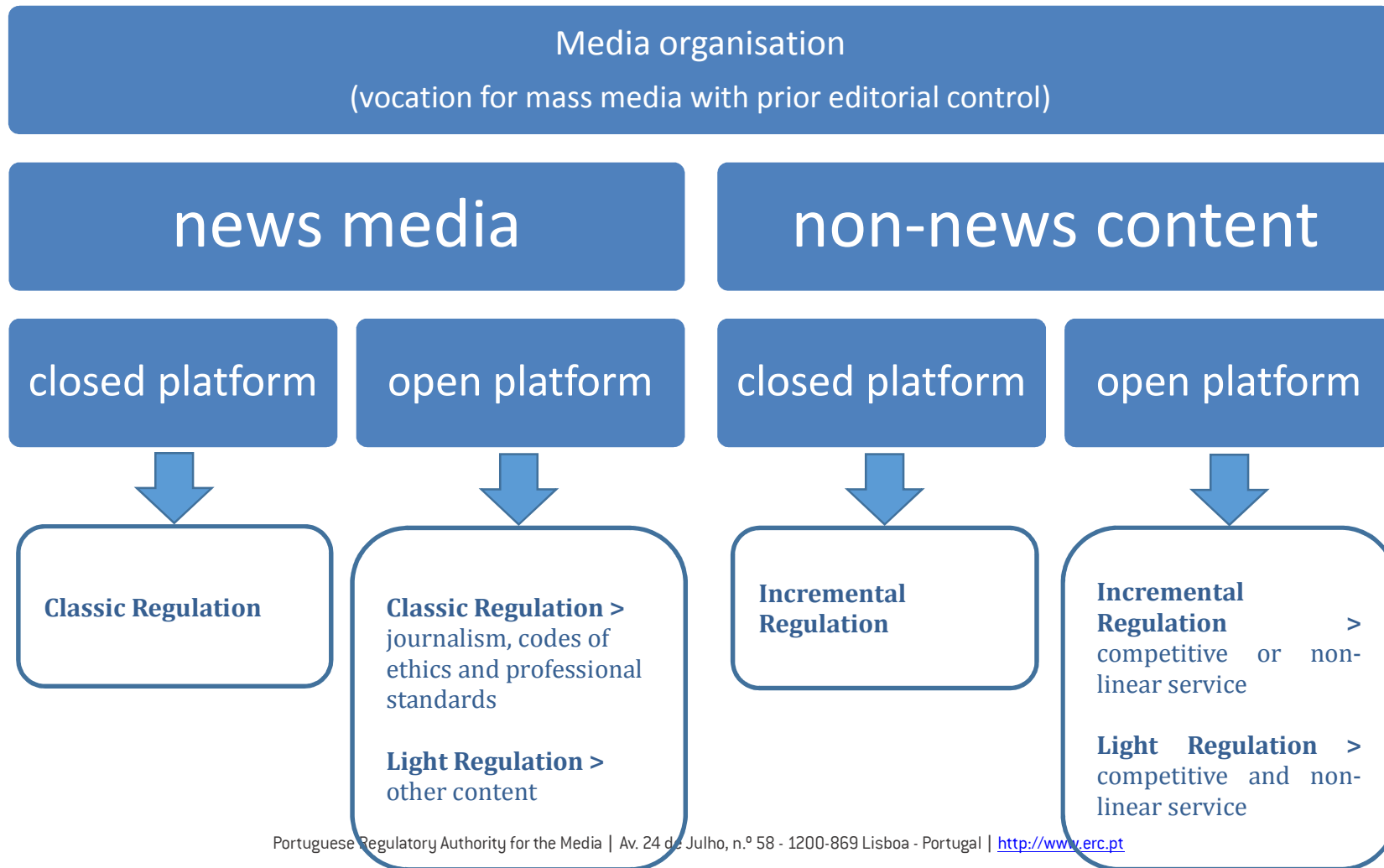
(possible framework for future regulatory action)

REGULATORY ACTION		
	CURRENT	A POSSIBLE FUTURE FRAMEWORK
MEDIA ORGANISATION REGISTER	<ul style="list-style-type: none"> <li>• WebTV and VOD services register</li> <li>• Registration of media services similar to the press via the concept of “electronic periodical publication”</li> <li>• Recognition of other media organisations in accordance with the regulations adopted by the ERC</li> <li>• Adoption and attribution of a “seal”</li> </ul>	<ul style="list-style-type: none"> <li>• Proposed legal change to the OCS registration document to include the following categories: press, radio, audiovisual and multimedia.</li> <li>• Proposed change to the schedule of fees charged by the ERC in order to prevent situations of unjustified positive discrimination</li> </ul>
PROTECTION OF CONTENT PRODUCERS	<ul style="list-style-type: none"> <li>• If those responsible for digital content production are classed as journalists, they are guaranteed the right of access and the exercise of other rights resulting from their status.</li> <li>• When the content is not produced by journalists, the regulator must still ensure the free exercise of the right to information and freedom of the press and safeguard the independence of bodies engaged in media activities from the political and economic authorities (Article 8 of the ERC statutes).</li> <li>• Work with the CCPJ</li> </ul>	<ul style="list-style-type: none"> <li>• Proposed legal change to the Journalist Statute in order to admit a third class of professionals responsible for this type of content;</li> <li>• revision of the incompatibilities regime;</li> <li>• articulation of the attribution of prerogatives to media professionals with these bodies being assessed and registered according to ERC criteria.</li> </ul>
PRESCRIPTIVE ACTIONS	<ul style="list-style-type: none"> <li>• Under light regulation, the work must be differentiated by proximity, pedagogy and awareness of the different media</li> </ul>	<ul style="list-style-type: none"> <li>• Proposed legal change to the substantive regime of digital media activity (either by a law aimed at this sector or by</li> </ul>

	<ul style="list-style-type: none"> <li>• Coercive and punitive action limited by the adoption of the existing legal framework</li> <li>• Authority to produce regulations in the terms of the ERC statutes</li> </ul>	framework legislation with a normative framework with independent support]
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APPENDIX 2

(Representation of regulatory levels)







Platform used, level of competition and qualification or not as a news media organisation determines the different levels of regulation: light, incremental or classic.  
All are capable of being described as media. All must be registered or recognised (as per law) by the ERC and may, if they wish, display a “seal”. In the future, they all must be eligible to pay the regulatory and supervision fee (albeit at different levels according to the principle of proportionality and relevance)