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EUROPEAN COURTS AS DIGITAL MEDIA REGULATORS

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CHAPTER 2

European Courts as Digital Media Regulators[(*)]

Susana de la Sierra

1. An analytical framework for judicial activity vis-à-vis the digital environment[(**)]

Recent developments in various jurisdictions show a move towards an institutional architecture which is not exactly the one we have come to be familiar with. The modern concept of the state and of political legitimacy was founded on well-known theories and paradigms related to the social contract and the principle of the separation of powers that are reflected in Constitutions and international legal norms, but which have evolved over time.[1]

The principle of the separation of powers in Europe is famously a legacy of 18th century revolutions and has ever since formed the basis of the constitutional state, according to article 16 of the Declaration of the Rights of Man and of the Citizen.[2] Yet slightly different notions of this principle have co-habited in history depending on each jurisdiction. For instance, the existence in some countries of a specific set of courts dealing with judicial review of administrative action distinct from ordinary justice and devoted to claims between citizens is a historical consequence of a strict conception of the separation of powers.[3] This is a reality, but at the same time other countries accept some interaction between powers as long as an adequate system of checks and balances is guaranteed. Indeed, in some legal orders there is no difference between courts deriving from the

(*) This chapter has benefited from the financial support of the Spanish Research Agency, No. PGC2018-101476-B-I00.

[1] Social contract theories have been used to try and develop a common understanding of the concept on a global level. See recently Frank Aragbonfoh Abumere, 'World Government, Social Contract and Legitimacy' (2019) 48/1 Philosophical Papers 9. Also, the social contract has been addressed by new paradigm studies, suggesting a new trend: Jaap Geerlof, 'A New Social Contract: Substituting the Neoliberal Public Policy with a Participatory Public Policy Paradigm' (2019) 75/4 World Futures. The Journal of New Paradigm Research 222. And, in connection with this and with the digital sphere, it has been proposed that a new social contract is required for cyberspace: see among others Hassan Hosseini, 'Agency, Cyberspace and Social Contract', 3/1 Journal of Cyberspace Studies 79. The notion of a new social contract for cyberspace has been developed in particular with regard to cybersecurity.

[2] A recent approach to the principle of the separation of powers in subconstitutional domains and in relation to the implementation of public policies by agencies can be found in Sharon B. Jacobs, 'The Statutory Separation of Powers' (2019) 129 Yale L.J. 378.

[3] Pascale Gonod, *Le Conseil d'État et la refondation de la justice administrative* (Dalloz 2014) [The Council of the State and the rebirth of administrative justice].

private-public divide, and Supreme Courts in those countries deal indistinctly with issues concerning all fields of law.

The classical horizontal separation of the three powers of the state has more recently been accompanied by a vertical separation of powers in countries with a federal or any other type of decentralised structure, where power is divided between various levels of government. This has led to an increasing number of public authorities passing norms and taking executive decisions.[4] As a consequence of this, and of other reasons, such as the rising number and complexity of norms, the workload of courts has also undergone an increase.[5]

Contemporary legal systems are indeed characterised by their complexity.[6] On the one hand, as already stated, the number of authorities has increased. On the other hand, the activity of public bodies has broadened, as it now covers sectors and includes responsibilities which it did not previously. Furthermore, in some specialised areas, such as regulated sectors, data protection, transparency and the media, new public bodies – for the most part independent agencies - have been created both to promote regulation and to control other bodies in their specific fields. Power is now more spread more widely, and one could argue that the dividing line between three powers with specific functions and a homogeneous and straightforward system of control no longer exists in pure and strict terms, as this dividing line is in many cases blurred. This argument is valid both for national and for supranational legal orders. Indeed, complexity in the European arena could be regarded as one of the key features of the system.

In this chapter a theoretical framework of analysis is presented. It is argued that the notion of digital media needs to be well defined, in order for it to be a useful concept from a legal perspective. Freedoms of expression and information are applied in a wide array of contexts and therefore an assessment is to be made of where and to what extent these freedoms apply in all of them, whether both are equally relevant in each case and how they are to be protected. Furthermore, the boundaries between both freedoms are blurred in some recent case law and scholarly analysis, while it is argued here that the distinction should be maintained. This is relevant, for instance, from the point of view of information and misinformation, or fake news. The notion of truth relates to facts and is linked to information, but at the same time not necessarily linked to expression or speech. Hence the scope of protection is different. The chapter is structured in four main parts that discuss the elements highlighted above: (1) the need for a clear and legal definition of digital media or of their main characteristics; (2) the role of regulators today, in defining

[4] In the European Union see Francisco Velasco Caballero and Jens-Peter Schneider (ed), *La union administrativa europea* (Marcial Pons 2008) [The European administrative union].

[5] The increasing workload of courts has been a recurrent argument regarding Supreme Courts in comparative law historically. See Leandro J. Giannini, 'Los filtros de acceso ante las Cortes Supremas' [Access filters before Supreme Courts], in Jordi Nieva Fenoll and Renzo Cavani (ed), *La casación hoy, cien años después de Calamandrei* (Marcial Pons 2021).

[6] The role of Courts in this complex panorama is extensively dealt with in Marin Belov (ed), *The Role of Courts in Contemporary Legal Orders* (Eleven 2019).

digital media and their legal regime; (3) the relationship between courts and regulators in doing this; and (4) the relevance of courts in setting the legal framework for digital media in the absence of clear, hard law regulation.

2. Digital media: a legal concept defined by case law

Defining what digital media actually are is an ongoing debate and one which still requires clarification from a legal perspective.[7] Discussions in the field of communication studies, economics or political science can help in the process of accurately defining the concept in legal terms.[8] Yet there is still much room for legal construction and interpretation, something which reveals itself as essential in order to assess the specific legal regime to be applied in each case. The exercise of rights and freedoms – such as freedoms of expression and information - depends to a large extent on how each category of digital media fits into the existing legal framework or on future norms, thus leading to a "constitutional moment" where classical concepts and guarantees need to be reconsidered.[9] As a result, national and European courts – both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) – are contributing to framing the notion of "digital media" from a fundamental rights' perspective as they assess whether the existing law applies to them equally when interpreting any new rules enacted for digital media. This is valid, for instance, in relation to freedoms of expression and information, where the ECtHR has decided that new realities such as YouTube, blogs or certain apps are media for the purposes of those freedoms.[10] And this is also valid, to a lesser extent, for the CJEU, which is not a fundamental rights Court for the most part. Yet, it has approached this matter from various viewpoints (such as copyright law)[11] and defines the media in certain legal areas, as occurs with the definition of audiovisual media services.

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[7] Some attempts to do so exist already, such as Recommendation CM/Rec(2011)7 of the Committee of Ministers of the Council of Europe to member states on a new notion of media. In the European Union, reference should be made to the Audiovisual Media Services Directive, which defines, in article 1, what an audiovisual media service is for the purposes of the Directive. It is not a definition of "media" and is related only to "audiovisual" and not to other types of media, yet it is relevant here, and even more so in a context of media convergence. See Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive/AVMSD), 10 March 2010, OJ L 95, 15.4.2010, p. 1–24, as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council, 14 November 2018, OJ L 303, 28.11.2018, p. 69–92.

[8] In 2014 the results of the project 'Mapping digital media' were made public, starting out from a broad concept of digital media: <https://www.opensocietyfoundations.org/publications/mapping-digital-media-global-findings> accessed 1 December 2021.

[9] Nicolas Suzor, 'A constitutional moment: How we might reimagine platform governance' (2020) 36 Computer Law & Security Review <https://doi.org/10.1016/j.clsr.2019.105381> accessed 1 December 2021.

[10] See chapters 7 and 8 in this book.

[11] See chapter 6 in this book.

Concepts of digital media which are broad, but not necessarily legal yet - from a fundamental rights perspective - include of course traditional media such as television, radio or the press, but also social media, videogames, virtual reality systems, artefacts deployed using artificial intelligence, a variety of apps (such as weather apps) and innovative means of marketing and advertising. As a consequence of this, in terms of contents, those designed by users may also be included in the concept of digital media, thus building an ever-growing category that requires attention from a legal perspective, in order to clarify – among other aspects – how rights and freedoms apply.[12] User-generated content may consequently embrace the concept of "information" through citizen journalism, but this should also be differentiated from user-generated content with no informative purpose or substance. In this very broad sense, the notion of digital media refers to any content in a digital format, regardless of the nature of the content and the specific asset used to store or distribute that content. Also - and this is legally relevant - this broad concept of media, which refers both to outlets and to contents, embraces contents which go beyond information. Nevertheless, it should be noted that, even if the media, in the classical fundamental rights' tradition, have always been referred to in relation to information, the European Union (EU) legal concept of "audiovisual media services"[13] includes those whose goal is to inform, but also to entertain and to educate. Digital media are thus an environment where different purposes can be achieved and this heterogeneity needs to be adequately addressed from a legal perspective, so as to identify the various underlying public goods and the appropriate legal protection of each of them.

A narrower approach limits the notion of "digital media" to journalistic contents or any source of news or information through digital - and not analogical - means. This narrow sense may be used with the particular focus of engaging in the specific problems of the news in digital environments, thus linking to debates such as freedom of information, disinformation, fake news or even "post-truth" scenarios.

A key element for this analysis is, therefore, information and the protection thereof. It should be recalled that UNESCO promoted the adoption of World Press Freedom Day in a conference in Windhoek, Namibia, in 1991.[14] At the time the conference focused mainly on the printed press, even though other types of media were already in existence. Since 1991, technological and professional developments have occurred, and 2021 was the year in which UNESCO commemorated World Press Freedom Day through a campaign advocating the notion of "information as a public good". According to the UNESCO concept note, it is a notion with its own content, which goes beyond the particular discussion on disinformation and hate speech, and is distinct from entertainment and (mere) data.[15] Consequently, one could conclude that specific legal protection is required.

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[12] This is to be found for instance in the AVMSD as reformed in 2018, where user-generated videos are included in the scope of the norm.
[13] Article 1.1.a) AVMSD.
[14] <https://en.unesco.org/news/30th-anniversary-windhoek-declaration> accessed 1 December 2021.
[15] <https://en.unesco.org/sites/default/files/wpfd_2021_concept_note_en.pdf> accessed 1 December 2021.

Following this conception, digital media for the purposes of this chapter are digital media relevant for the judiciary – and, in general, for the legal community - from the point of view of diverse public goods, rights and interests that have traditionally been present in legal approaches to traditional media: 1) freedom of information and the establishment of an informed public opinion, necessary for democracies and democratic processes;[16] 2) freedom of expression concerning those elements linked to opinions and not necessarily only to information; 3) other rights, freedoms and values that help shape the public sphere. This is all in line, moreover, with the European Democracy Action Plan, which seeks to strengthen media freedom and counter disinformation, among other goals, through a series of actions identified in the Plan.[17]

The thesis here is that in such an uncertain and fragmented legal environment the role of courts is essential as they help define the legal framework in a constantly changing reality. Yet they may also need the "assistance" of other monitoring bodies, such as independent agencies, and also of individual experts in the field, which will in a way prepare in advance the debates that take place in courts. This could help provide accurate and prompt responses to potential violations of fundamental rights.

3. An institutional approach: legal framework and regulators

According to the rule of law, courts are granted the last word in legal disputes. Any system of courts is hierarchically organised and therefore generally speaking, it will fall on Supreme Courts to provide final interpretations of the norms.[18] Wherever Constitutional Courts exist, these are also included in the concept of Supreme Courts for the purposes of this chapter, although they follow certain procedures for specific aims foreseen in the respective Constitutions. One concept that embraces all courts, as it has been developed by litigation scholars, is the concept of "vertex courts", the term that will be used here to refer to this broad notion of Supreme Courts, which includes also Constitutional Courts.[19] These are, therefore, the courts that occupy the highest position in the judicial hierarchy. Furthermore, Member States of the European Union and signatories to the European Convention on Human Rights are also subject to the scrutiny of the Court of Justice of

[16] An ambitious and very thought-provoking approach to WhatsApp as a political forum is discussed in Duncan Omanga, 'WhatsApp as "digital publics": the *Nakuru Analysts* and the evolution of participation in county governance in Kenya' (2018) 13 Journal of Eastern African Studies < https://doi.org/10.1080/17531055.2018.1548211> accessed 1 December 2021.
[17] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European democracy action plan [COM/2020/790 final].
[18] Pelayia Yessiou-Faltsi (ed.), *The Role of the Supreme Courts at the National and International Level* (Sakkoulas 1998).
[19] Michele Taruffo, *Il vertice ambiguo. Saggi sulla Cassazione civile* [The ambiguous vertex. Essays on the civil cassation [(Il Mulino 1991).

the European Union and the European Court of Human Rights, respectively,[20] and as a result these courts play the role of "vertex courts" in their areas of competence.

In addition to courts, there is an increasing trend towards the creation of a system of specialised, non-judicial public bodies for the monitoring of certain sectors and legal fields. This is clearly the case of former state monopolies, such as telecommunications or energy services, which are now ruled by norms that protect public interests even though the service is provided by a private company, which is usually the case. Connections to the functioning of digital platforms, where public goods' rights and interests are at stake, are apparent. Such a system of specialised agencies is to be found also in fields where independence from public authorities is required, such as transparency, data protection, control of public procurement or, in the case in hand, the media. And on many occasions the existence of an independent public authority, separate from the acting administration, is a requirement of European institutions in order to regulate and monitor the application of law in a specific sector, as is the case with audiovisual media services.[21]

3.1. Control by public bodies: independent authorities and their scope of action

The traditional media have been subject to different types of regulation and different types of control. On the one hand, the printed press has not traditionally been the object of much regulation and external control, a situation that has generally led to creation of self-regulatory or co-regulatory models[22] based on deontological or ethics' codes. On the other hand, broadcasting has received more attention from legislators, for various reasons, including the limited space existing in the past for broadcasting signals and the need to distribute this space according to general and objective criteria. Neither should we forget the perspective of competition law and antitrust regulation in a sector linked to structures that are relevant for democracy and democratic processes.[23] Against this background, it should be noted that the Recommendation of the Committee of Ministers of the Council of Europe on a new notion of media[24] proposes a differentiated approach to this concept, as it is not homogeneous and embraces various realities which each require a specific (legal) treatment.

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[20] See among others Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003).
[21] Article 30 AVMSD.
[22] See Adeline Hulin, 'Statutory media self-regulation: beneficial or detrimental for media freedom?' (2014) 127 RSCAS EUI Working Papers, Robert Schuman Center for Advanced Studies/Center for Media Pluralism and Media Freedom.
[23] Evangelia Psychogiopoulou (ed), *Understanding media policies: A European Perspective* (Palgrave 2012) and, in general, all materials produced in the framework of the MEDIADEM project <https://www.eliamep.gr/en/project/mediadem/> accessed 1 December 2021.
[24] See note 7 of this chapter.

Leaving aside purely self-regulatory approaches now[25], what follows focuses on control exercised by external bodies, be they public authorities (public bodies, mainly independent authorities) or judicial bodies (individual judges and courts).[26] The former will be addressed here, whereas the judiciary will be discussed afterwards. It should be stressed that control exercised by independent authorities has various advantages (such as the economic cost for litigants, which is usually much lower than the cost of a judicial process). Also, independent authorities take informed decisions based on experts' knowledge, thus leading, in many cases, to the termination of litigation or eventually clearing the path towards a more structured and unambiguous legal discussion upon reaching the court.

Public authorities competent in media issues already have a long history. Prior to their existence on the European continent, the Federal Communications Commission (FCC) in the United States was created through the Communications Act as early as in 1934, replacing its predecessor, the Federal Radio Commission.[27] The scope of action of the FCC is defined today by a double criterion: outlets affected by its regulatory scope (communications by radio, television, wire, satellite and cable) and areas of competence (broadband access, fair competition, radio frequency use, media responsibility, public safety and homeland security).[28] Yet both perspectives – structures and policy areas – are connected and the second one is related directly or indirectly to contents provided using the above-mentioned settings. It is in this respect that freedoms of expression and information may be compromised. The main purpose of the FCC (its "mission") is to "make available so far as possible, to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, rapid, efficient, Nation-wide, and world-wide wire and radio communication services with adequate facilities at reasonable charges".[29] The focus is on the service provided (as is the case with the AVMSD), independently of the means of providing it, a service that needs to meet the criteria established in the Act, and in relation to which access at reasonable rates

[25] As stated in the introduction to Recommendation CM/Rec(2011)7 on a new notion of media, self-regulation is promoted whenever possible as a regulatory technique in this field.

[26] Authors such as Malaret promote a dual control system of both administrative and judicial bodies, so as to guarantee effective protection. See Elisenda Malaret i García, 'Hacia un modelo de justicia dual: tribunales administrativos y jurisdicción contencioso-administrativa. Justicia administrativa: instituciones administrativas e instancias jurisdiccionales, una perspectiva necesariamente de conjunto del control de la actividad administrativa' [Towards a model of dual justice: administrative tribunals and judicial review. Administrative justice: administrative and judicial bodies, necessarily a perspective of the control of administrative activity as a whole], in Jorge Agudo González (ed). *Control Administrativo y Justicia Administrativa* (INAP 2016).

[27] <https://transition.fcc.gov/Reports/1934new.pdf> accessed 1 December 2021.

[28] It has more recently broadened its scope of action, including initiatives e.g. in the fields of telehealth or unlawful robocalls: <FCC Initiatives | Federal Communications Commission> accessed 1 December 2021.

[29] Section one of Communications Act 1934. It is also interesting to note that the FCC has identified four goals in its 2018 – 2022 Strategic Plan, which are the following: Closing the Digital Divide, Promoting Innovation, Protecting Consumers & Public Safety, and Reforming the FCC's Processes.

needs to be guaranteed. It seems then that the act of communication is the key factor here, and the intended scope of coverage is any communication environment.

The reason why the FCC is mentioned here is the fact that it was a forerunner of this type of agencies and has served as a model for others, since in time these agencies also appeared in other countries and were promoted by the EU institutions at a later stage for areas within the framework of some EU competences. In particular, as already noted, the AVMSD requires Member States to have such an independent body. Yet a homogeneous profile has not been provided so far, to serve as a common legal and detailed framework for the creation and functioning of these bodies. Consequently, their competences differ from one another to a large extent.

On the basis of these broad provisions, and even before their existence, various regulators have been created in Europe. Their scope and functions vary, whereas the nucleus related to traditional audiovisual media remains.[30] Some of them already refer more generally to digital media, something which is likely to be more frequent in the future. These regulators share a common institutional umbrella under the European Platform of Regulatory Authorities (EPRA),[31] which covers 47 countries. In this network regulators with a classical yet diverse range of bodies - such as audiovisual media authorities, communications authorities - co-exist with regulators which specifically refer in their names to electronic media, i.e. media through electronic or digital means (Bulgaria, Croatia, Latvia, Montenegro, Serbia). In other countries, such as in the case of Italy, the digital perspective is included both in the activities of the relevant body, Agcom, as well as in its internal structures. Indeed, an Observatory on Disinformation exists in Agcom, alongside other similar structures designed to deal with issues such as online platforms.

It could be argued that, in general, these regulatory authorities have jurisdiction over traditional media (the printed press in a few cases, such as in Italy, and mostly television and radio) off and online. Here, it is for regulators to assess in the first place how and when the legal framework applicable offline also applies online, and to consider the difference between information and other types of communication. This is relevant in order to assess, for instance, whether the activity lies within the scope of freedom of information, freedom of expression or both. Moreover, it also falls to these authorities to frame and control the norms applicable to new digital media, i.e. media that only exist online and which do not always easily fit in with the classical concept of the media to date, that is to say, means of social communication with the purpose of contributing to the public debate. Hence, social media such as Facebook, Twitter or WhatsApp, tools such as blogs or YouTube represent new forms of communication, but they do not always

[30] A discussion of some of these aspects in a more general framework can be found in Elda Brogi and Pier Luigi Parcu, 'The Evolving Regulation of the Media in Europe as an Instrument for Freedom and Pluralism' (2014) 9 RSCAS EUI Working Papers, Robert Schuman Center for Advanced Studies/Center for Media Pluralism and Media Freedom.
[31] <https://www.epra.org/> accessed 1 December 2021.

constitute media in a strict legal sense, connected to the concept of information and to the pairing of public opinion and democracy.

The role of these authorities, which promote regulation and control of the activities of digital media, is relevant in practice, because, in so doing, they are filling the legal gaps, contributing to defining the notion of digital media, and thus framing legal debates. Yet these authorities are of course subject to judicial control, as a guarantee of the rule of law.

Courts have competences which are different and more general than those conferred on independent authorities or any other public body. In countries with no internal division of courts according to subject matters or the public-private divide, such as those in the Anglo-Saxon legal culture, the scope of action of courts may seem limitless and, if a claim lies within their sphere of activity, they are obliged to provide a response. In other countries, which follow the French or the German traditions, where there may be different sets of courts for different issues (civil law, administrative law, labour law, criminal law), competences are divided among all these courts. As far as Supreme or "vertex courts" are concerned, again, different models exist: (1) either a system of various Supreme Courts (in France, for instance, *Conseil d'État* and *Cour de Cassation*, depending on the litigation matter) or (2) different chambers within one Supreme Court (in Spain, the Civil, Criminal, Administrative, Labour and Military Chambers).

These institutional differences may be relevant, as on some occasions case law concerning the media comes from the same court, whereas on others it is produced by various courts using potentially diverse criteria and approaches - possibly even placing importance on different public goods. The approaches of the CJEU and of the ECtHR are also different, and their judgments arrive ultimately after national judges [32]– and possibly independent authorities – have expressed their views on the legal treatment of a particular issue. Accordingly, the intricacies of this institutional setting should be borne in mind when assessing the scope and width of judicial pronouncements.

3.2. Judicial control and its relationship with the regulators

As has been argued in the preceding lines, independent authorities or regulators play an important role, as they initially set out the framework of the area they aim to regulate and control. In addition, they find themselves in a powerful position and their number has increased over the years. On the one hand, they are highly specialised, a specialisation that courts cannot emulate, as the latter are competent for much broader issues and they do not usually have specialised human resources for each field. This may explain the deference of courts towards their decisions.[33] Recent cases show how courts tend to

[32] This is not the case of preliminary rulings before the CJEU, yet here too the interpretation of the European Court is the one that eventually prevails.

[33] See a thorough analysis of this debate in Elisenda Malaret (ed), *Autonomía administrativa, decisions cualificadas y deferencia judicial* (Thomson Reuters Aranzadi 2019) [Administrative autonomy, qualified decisions and judicial deference]. From a comparative law perspective see Luis E. Mejía,

accept a broad margin of appreciation in highly specialised matters not only by regulators[34] but even by ordinary public administrations, including the European Commission.[35] This would imply that even if judicial control exists, public decisions in these cases, when challenged before courts, are likely to remain untouched and interpretation of the law as proposed by public bodies and regulators will prevail. Whenever and wherever independent authorities are conferred competences in the framework of the media, this may lead to them assume a role like the one described above. On the other hand, not all decisions may reach a court and those that do may be studied by courts only after some years have passed. This situation has led to some argument as to whether the rule of law may be jeopardised.[36] This may be the case either because these decisions do not reach courts for various reasons (for instance, because of the legal framework of judicial review, which may exclude certain decisions from control, such as those which do not attain a specific economic threshold) or indeed because of delayed justice, a judicial decision that arrives too late. Effective judicial protection as part of the rule of law is therefore compromised and this concern should be added to the equation.

Against this background, it is necessary to understand judicial action when controlling the decisions of regulators – ultimately European Courts, of course, - as in principle courts have the last word in defining the legal framework of any issue, and now this is the case for digital media, too. We should add, though, that one of the benefits of independent authorities for litigants is that they are either free or low-cost. Therefore, if citizens wish to bring a case to these authorities, they may not be willing to lodge an appeal at court afterwards if the authority's decision does not satisfy them. In this sense, regulators acting as controlling authorities may in some way be occupying the role of courts. Therefore, even if there is clear case law dealing with digital media which does not originate from a decision taken by a regulator, this type of independent authority is discussed here in depth precisely because of the quasi-judicial role that has been highlighted above.

'Judicial review of regulatory decisions: Decoding the contents of appeals against agencies in Spain and the United Kingdom' (2021) 15 Regulation & Governance 760. Recently, discussing controversial agency decisions in the US and arguing in favour of more intense judicial review, see Robert E. Glicksman/Emily Hammond, 'The Administrative Law of Regulatory Slop and Strategy' (2018-2019) 68 Duke L.J. 1651.

[34] One milestone in Spanish case law is the decision of the Spanish Supreme Court (Administrative Law Chamber) issued on 20 December 2018 (case n. 6552/2017), which deals with the notion of the "relevant market" in competition law. Following the case law of the Court of Justice of the EU, it is argued that complex economic decisions such as the definition of relevant markets are subject to judicial control by lower judges (i.e. not the Spanish Supreme Court) and it is for them to assess whether the regulator has used enough and adequate information to define the relevant market in the way that it has.

[35] José Luís da Cruz Vilaça, 'The intensity of judicial review in complex economic matters – recent competition law judgments of the Court of Justice of the EU' (2018) Journal of Antitrust Enforcement 173. The argument is valid for other complex matters beyond economics.

[36] Brent Skorup and Christopher Koopman, 'How FCC Transaction Reviews Threaten Rule of Law and the First Amendment' (19 May 2019) *Mercatus Working Paper* <https://www.mercatus.org/publications/technology-and-innovation/how-fcc-transaction-reviews-threaten-rule-law-and-first> accessed 1 December 2021.

4. A new role for courts in Europe and its impact on the legal framework of digital media

The role of courts has always been the subject of intense discussion in scholarship from various viewpoints. Alexis de Tocqueville pointed out the political dimension of courts in the United States of America, based mainly on their competence to directly apply the Constitution and assess the conformity of any norm or public action with it.[37] Since then, the sources discussing the political dimension of courts in the United States, and more specifically of the Supreme Court, have been vast. As vast, in the context of the European Union, as the literature discussing how the CJEU has been key to integration and the development of the law, and also as the literature on the standards used by the European Court of Human Rights in its case-law, where it has also been discussed whether the Strasbourg Court is a judicial activist in defining legal frameworks that may not be expressly included in existing norms.[38]

4.1. New remedies, new role and the context of digital justice

A common trend may be observed in some Member States of the European Union and in the EU's institutional setting. The workload of courts has increased due to various factors, such as the increasing complexity of the law and the fact that the population obtains access to courts more often than they did before. This situation has led to legal reforms designed to improve the judicial system and guarantee the right to effective judicial protection.[39] Following these reforms, a high degree of discretion is conferred on courts in selecting the cases they will decide upon. Broad criteria, such as "objective interest" or "special relevance", guide courts in this process, which may also have an impact on decisions related to digital media, as it will be up to the courts to decide whether these cases are of interest in order to later render a decision.

In Spain, for instance, and simply to illustrate this point, a legal reform took place in 2015, inspired by similar reforms in other countries. It indirectly followed the example of the *certiorari* system in the United States, although with relevant differences.[40] According to

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[37] Alexis de Tocqueville, *La démocratie en Amérique* (first published 1835, I, Folio 1961) 164.

[38] For an updated bibliographical review see Susanne K. Schmidt, 'The European Court of Justice as a Political Actor', chapter two of her book *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford Scholarship Online 2018). See also Mark Dawson, Bruno de Witte and Elise Muir (ed), 'Judicial activism at the European Court of Justice' (Elgar Publishing 2013). On the ECtHR see among others Dragoljub Popovic, 'Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights' (2008-2009) 42 Creighton L. Rev. 361. Of particular interest is Janneke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (September 2018) 18/3 Human Rights Law Review 495. Incrementalism is indeed a technique used in new and/or complex matters.

[39] See L. Giannini, quoted.

[40] The origins of the reform are well explained in the Report preceding it: Francisco Velasco (ed), 'Informe explicativo y propuesta de anteproyecto de ley de eficiencia de la Jurisdicción Contencioso-

the new system, the Administrative Chamber of the Supreme Court sets its own agenda by selecting the cases it will review and decide upon.[41] There are some legal criteria that reduce the Court's discretion, but aside from certain exceptions, it is for the Court to decide what it rules upon.[42] The main objective is to provide general interpretations of the law in order to grant legal certainty and guide the action of lower courts. In this way, effective judicial protection would improve.

As has already been stated, some Supreme or "vertex courts" do not differentiate *a priori* between public and private law cases, and indeed this is applicable for European Courts (i.e. they do not have an internal division of Chambers according to each relevant area of law, whether administrative, private labour, tax or criminal law, for instance). This implies that equivalent interpretative standards and techniques are used both for public and for private law, thus leading to the interaction of both legal areas. Secondly, and as a consequence of this, with regard to media law, in countries where the public-private divide has organisational consequences vis-à-vis competent courts, some cases are dealt with by civil courts whereas others are dealt with by administrative courts (as they revise decisions of independent authorities), both of which in principle have a different viewpoint. Therefore, it may be more difficult to try and identify the legal framework constructed by courts in countries following the continental tradition than in countries following the Anglo-Saxon one, because in the former case-law is split among various judicial bodies.

To complete this section, a note regarding future developments should be added. The digitalisation of justice is a process that is slowly taking place in all countries at different paces. The Warsaw Declaration on the Future of Justice in Europe recognised that the administration of Europe's justice systems in the 21st century will change radically as a result of the use of information and communication technology,[43] and digitalisation of

Administrativa' [Explanatory report and proposal for a Statute on efficiency of administrative justice] (Ministry of Justice 2013).

[41] Similar reforms had already been introduced in previous years referring to other Chambers of the Supreme Court. For an overview of this process see Luis María Cazorla Prieto, Raúl Cancio Fernández and Jesús Avezuela (ed), *Estudios sobre el nuevo recurso de casación contencioso-administrativo* (Aranzadi 2017).

[42] In the US see the seminar H.W. Perry, Jr., *Deciding to Decide. Agenda Setting in the United States Supreme Court* (Harvard University Press 1991). There is already a great deal of literature on the new Spanish system concentrating on the relevant concept of "objective review interest", which determines whether a case is or is not going to be subject to review. I referred to this in Susana de la Sierra, 'El recurso de casación contencioso-administrativo en el marco de las mutaciones de la justicia administrativa' [Judicial review by the Spanish Supreme Court in the framework of the changes in administrative justice], Roberto O. Bustillo Bolado (ed), *Partidos políticos y control del poder público* [Political parties and control of public power] (Andavira 2020) 129.

[43] The General Assembly of the European Network of Councils for the Judiciary, 'The Warsaw Declaration on the Future of Justice in Europe, 1- 3 June 2016 <https://www.encj.eu/images/stories/pdf/GA/Warsaw/encj_warsaw_declaration_final.pdf > accessed 1 December 2021.

justice is one of the policy goals of the European Commission in the framework of a Europe fit for the digital age.[44]

This change is already taking place in various countries and at EU level, as well as in the framework of the Council of Europe. On 7 October 2020, the Council of the European Union agreed on conclusions concerning access to justice and opportunities in the age of digitalisation, recognising that "the judicial systems, as a central pillar of the rule of law, are facing up to these evolving demands and are making the appropriate technological possibilities available to citizens. The EU Justice Scoreboard, a comparative information tool published annually by the European Commission, also already provides data on several indicators of the digitalisation of judicial systems for all Member States, such as online access to judgments or online claim submission and follow up".[45]

The use of information and communication technologies in justice – including the use of artificial intelligence - will have an impact on access to justice,[46] including in (digital) media law cases. It has been argued that digital justice, where the concept of space or territory may lose importance for many purposes,[47] could lead to a profound change in the organisation of courts. This being so, while territorial organisation may in the future diminish in significance, other organisational criteria may arise. This could involve a judicial organisation according to specialised criteria, more specialised than broad areas of law such as civil, criminal, labour or administrative law. In this way courts could mirror regulators and become as specialised as the latter are, yet with justice being exercised by judges following the classical principles that guide judicial action. Courts and judges competent only for digital issues[48] or for the media could be accommodated within this system.

Another possibility is that, together with self-regulation or co-regulation, systems of online dispute resolution may be developed in areas such as the media, and several proposals have already been put forward in this regard.[49]

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[44] <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/digitalisation-justice_en> accessed 1 December 2021.

[45] <https://data.consilium.europa.eu/doc/document/ST-11599-2020-INIT/en/pdf> accessed 1 December 2021.

[46] Ephraim Nissan, 'Digital technologies and artificial intelligence's present and foreseeable impact on lawyering, judging, policing and law enforcement' (2015) AI & Society 3.

[47] Jordi Nieva Fenoll, *Inteligencia artificial y proceso judicial* [Artificial intelligence and judicial process] (Marcial Pons, 2018) 31.

[48] Moisés Barrio Andrés, *Formación y evolución de los derechos digitales* (Ediciones Jurídicas Olejnik 2021) 119.

[49] Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford Scholarship Online 2017). Chapter 5 focuses on social media and what is labelled there as anti-social media. Also, John Zeleznikow, 'Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts?' (May 2017) International Journal for Court Administration 30.

4.2. Courts' approach to digital media: the need to clearly define information

Courts in general and European Courts in particular are gradually building up a legal framework for digital media. The concept of digital media is being defined mainly through judicial decisions, as no general normative definition exists for such a category, and one might well wonder if one is required. Indeed, a homogeneous concept that does not reflect the plurality of options may not be compatible with democracy and the public's right to make informed decisions.[50] This would be indeed so, precisely because not all voices would be included in the public debate, only those expressed through canonical media in the referred homogeneous sense. The proposal of a complex and non-homogeneous definition of the digital media is coherent also with the plural approach to this notion proposed by the Committee of Ministers of the Council of Europe in its Recommendation on a new notion of media, cited above. Therefore, a case-by-case strategy of defining and regulating the digital media differentiating various categories may be adequate. This would also allow adjustment to the rapid evolution of technologies and society. Courts may well contribute to the development of such a differentiated legal framework for digital media, yet on the basis of legal instruments previously adopted by the legislator, regulators or of self-regulation.

Over the following lines I shall refer to some of the methodological questions courts address directly or indirectly when dealing with digital media cases, and I will insist on the need to clarify the scope of freedoms of expression and information, in order to effectively protect public goods, rights and interests. This debate is connected to the observations already made in the analysis of the concept of digital media.

The classical approach to the media from a legal perspective is based on the differences between media outlets. The reasons for this approach and the public goods, rights and interests protected thereby have been widely discussed in the relevant literature.[51] Due to this plurality, various areas of law have been used to protect and promote public goods underlying the media, mainly legal instruments to directly protect rights and freedoms and competition law.

With the appearance of the Internet new challenges arose. The Internet is regarded in many cases as one of the existing media,[52] in addition to the more traditional ones. Nevertheless, the Internet is a technology that provides a new environment where our lives are replicated, something which has been fostered even more during the pandemic

[50] Nils Finholt, 'Busting Up the Consolidation of Media & Restoring a True Democracy' (Media Policy Analysis, Media & Change, 13 March 2011) <https://sites.google.com/a/uw.edu/media-and-change/policy/homogenization-of-media> accessed 1 December 2021.
[51] From a comparative perspective I would refer to the seminal Daniel C. Hallin and Paolo Mancini, *Comparing Media Systems: Three Model of Media and Politics* (Cambridge University Press 2004).
[52] Merrill Morris and Christine Ogan, 'The Internet as Mass Medium?' (1 March 1996) 1/4 Journal of Computer-Mediated Communication <https://academic.oup.com/jcmc/article/1/4/JCMC141/4584353> accessed 15 November 2021. As early as in 1996 these authors proposed a conceptualisation of the Internet as a mass medium and insisted on focusing not on the specific technology, but on the type of communication.

caused by SARS-CoV-2.[53] Education, health, entertainment, family relations: these are all, among others, aspects of life that are now conducted in many cases via the Internet, yet this does not grant it the status of medium of communication.

One relevant aspect of a medium of communication from a constitutional perspective is its nature as an instrument of democratic processes. A strict concept of information is key, as is a space of public and political communication based on plurality and transparency. Traditionally, both freedom of expression and freedom of information have been relevant for the protection of this space. They are connected on many occasions, and legal texts contemplate both of them under the same umbrella. This is notably the case of article 10 of the European Convention on Human Rights, which conceives freedom of expression both as the freedom to hold opinions and the freedom to receive and impart information and ideas without interference by public authority.

Article 11 of the Charter of Fundamental Rights of the European Union follows the same path, although it refers expressly to two different rights, freedom of expression and freedom of information, the latter being included in the former. It adds, however, that freedom and pluralism of the media shall be respected. National Constitutions, such as the German Basic Law (article 5) or the Spanish Constitution (article 10) include differentiated freedoms and the case law on both again has nuances that vary from one to the other. For instance, the concept of "truth" does not operate in the same way when referring to information as when referring to expression/opinions. Information refers to facts and is in principle linked to truth (however complex this concept may be). For this reason, diligence is required from those seeking to inform. Conversely, expression refers to opinions, which may be based on true facts or not, yet its purpose is not to reflect facts but personal views. There are clearly some converging elements, yet the core of both freedoms is different and this is the reason why they have been historically separated.

It could be argued that, in a sense, the freedoms of expression and information increasingly share certain features and that they are converging, at times making it difficult to assess whether the analytical framework should be one or the other. Other chapters in this book show how European Courts usually only place legal debates on digital media under the umbrella of freedom of expression, while in some cases also integrating aspects that have traditionally been connected to freedom of information but without clearly delimiting both freedoms. As the Internet embraces everything, the tendency towards confusion is real. Indeed, the newly-coined notion of post-truth in a sense relates to this blurred boundary between both freedoms. Accordingly, it is up to courts to carefully delimit the scope of action of each of them and the consequences thereof.

[53] On the role of courts during the pandemic, also in a context of disinformation, see https://verfassungsblog.de/effective-pandemic-management-requires-the-rule-of-law-and-good-governance/ accessed 1 December 2021.

5. Final remarks

In this chapter it has been argued that the legal framework of digital media is still vague and imprecise; it finds itself under construction. Several different norms co-exist and they are produced by an increasing number of legislators and public bodies, both national and international. In addition, there is no consensus as yet regarding the notion of digital media: broad concepts include any content provided through digital technology, whereas narrower concepts refer to traditional media using that same digital technology. In order to assess precisely what rights and freedoms apply and under what conditions, a legal approach to the concept of digital media is required.

Complexity is therefore a key word here: on the one hand, complexity results from the increasing number of public bodies passing norms and taking decisions. On the other hand, it is related to the vagueness of a concept, digital media, which is key to exercising rights and freedoms that connect with the essence of democracy.

In this uncertain panorama, courts play an essential role. They are the fora in which legal discourses are conducted and where open questions need to be closed to solve cases. In media law cases they sometimes review the decisions of independent authorities or regulators, a type of public body that has also gained importance over the last few years. The specialisation of these bodies is one of the main features that should be underlined: their decisions may be challenged but they are taken by experts in the field. Also, the fact that no fees are normally required when litigating before independent authorities or regulators makes these bodies attractive and may dissuade citizens from challenging their decisions before courts. As a consequence of this, their potential in constructing the legal framework of media law should be noted.

With or without the prior decision of an independent authority or a regulator, courts always have the last word in defining legal concepts and in assessing what law is to be applied and how. The role of Supreme or "vertex courts" – including the CJEU and the ECtHR - is worth mentioning here, as their interpretation is the one that generally prevails. Reforms in various countries and at supranational level have taken place in order to strengthen the position of "vertex courts" as a means of dealing with the overloading of courts and in order to guarantee effective judicial protection. According to this new model, inspired by others such as the certiorari in the United States, "vertex courts" set their own agenda and select the cases they wish to decide upon. And they do so when they undertake to judge a case according to the corresponding norms or, on the contrary, when they declare it non-receivable. In a sense, through the selection of cases and the interpretation of law, they are contributing to the public agenda, thus being placed in a position very reminiscent of that of a co-legislator. As a result, their role as policy actors is consolidated, also in the area of media law. Whether or not they will contribute to the clarification of the concept "digital media" and of their legal regime is something to be observed over coming years.