2016 Annual Colloquium on fundamental rights
Public consultation on "MEDIA PLURALISM AND DEMOCRACY"

Response of ARTICLE 19

A. Identifying information

This is a contribution by ARTICLE 19 (http://www.article19.org), a civil society organization included in the Transparency register under ID-number 684821118979-74. This contribution may be published.

B. Media Freedom and Pluralism

5. In the context of media freedom and pluralism, what should be the role of the State, if any, in the regulation of media? What should be the role of self-regulation?

5.1. Positive Obligations of the State

Under international law, States have a positive obligation to create a legal and regulatory framework that ensures media freedom and pluralism of the media: the role of the State is to enable the development of a media landscape that represents and reflects society as a whole and that presents a maximum diversity of voices, viewpoints and languages. In that sense, the State should put in place effective measures to prevent undue concentration and to promote diversity of ownership within media sectors. Such measures should take into account the need for the media sectors as a whole to develop and for media companies to be economically viable.

5.2 Regulation and Self-Regulation

ARTICLE 19 considers that when it comes to promoting and achieving objectives of legitimate public interest, self-regulation constitutes the preferable approach as it is less restrictive on freedom of expression. The choice between regulation and self-regulation must be guided by the criteria of necessity: is self-regulation effective in achieving a given objective of general interest? Is public regulation strictly necessary in order to achieve a given objective of legitimate public interest?

In our view, regulatory authorities and self-regulatory bodies must meet certain conditions.

- Regulatory authorities should be protected against interference, particularly of a political or commercial nature. The legal status of these bodies should be clearly defined in law. Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:
    - specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
    - by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
    - through the rules relating to membership;

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- by formal accountability to the public through a multi-party body; and in funding arrangements.

- Self-regulatory bodies should be:
    - Independent from government, commercial and special interests;
    - Established via a fully consultative and inclusive process;
    - Democratic and transparent in their selection of members and decision-making;
    - Include a tripartite representation (journalists, media owners and members of the public);
    - Have the power to impose only moral sanctions, such as the publication of a correction or an apology. They should not be entitled to fine or ban media outlets or exclude individual members from the profession.

ARTICLE 19 also considers that self-regulation and regulation need to be meaningful and effective, in the sense that they must be capable of holding actors accountable and achieving protection of the public.

In situations where self-regulation does not happen spontaneously, States could introduce legal measures to encourage the development of self-regulation or co-regulation. However, such measures raise two important concerns:

- The independence of self-/co-regulatory bodies must be ensured;
- The State should in no way use self-regulation as an excuse to delegate its legal obligations to private actors, such as the decision on whether a particular content is lawful or not. ARTICLE 19 believes that pressuring companies to define and regulate prohibited speech is not only at odds with international standards on freedom of expression, it is also deeply inappropriate:
    - It puts companies - rather than the courts - in the position of having to decide the legality of content.
    - It allows law enforcement to pressure companies to remove content in circumstances where the authorities do not have the power to order its removal because the content itself is legal.
    - It deprives Internet users of a remedy to challenge wrongful removals since the vast majority of content removals are likely to be made on the basis of the company's terms of service.

5.3 Media pluralism in the contemporary context

Legal and regulatory approaches have traditionally varied according to the categories of media. In the broadcasting sector, the existence of an independent regulatory authority has been deemed necessary to allocate a scarce natural resource (spectrum). Regulatory authorities ensure that certain objectives of general interest are achieved in the broadcasting sector - including pluralism and diversity. In the print media industry, self-regulation has developed as an effective method to achieve certain objectives of general interest, such as the implementation of professional ethics in the news sector. Self-regulation can help improve the diversity of content presented in media (for instance: through codes of ethics, journalists and redactions are made aware of the necessity to present a diversity of viewpoints or of the manners to present sensitive issues without stigmatizing a minority). However, self-regulation is not appropriate to deal with issues of ownership of the media. This said, in the current context, State measures to ensure pluralism within the print sector mostly amount to public support (subsidies and various forms of state aids).

Competition law applies to the media industry; however, as pluralism of the media and the diversity of content is not part of the remit of competition authorities, they may not be able to safeguard pluralism, which is more than what is shown by economic indicators. In most European countries, specific concentration rules have been adopted for the media sector. The application of these sector-specific rules have been entrusted to the media regulatory authorities, and cooperation processes have often been set up between media regulators and competition authorities.

ARTICLE 19 considers that the analysis of media pluralism must take into account the current evolution of media landscapes.

5.3.1. The evolution of legacy media

The traditional categories of broadcast and print have become blurred. The evidence of this evolution may be found in the decision of the ECJ in NewsMedia online (NewsMedia Online GmbH v. Bundeskommunikationssenat, C-347/14, 21 Oct. 2015) where the Court decided that the video section of the website of a newspaper should be considered as an audiovisual media service and, as such, fell under the AVMS Directive and the jurisdiction of a broadcast regulatory authority. The boundaries of the jurisdiction of regulatory authorities are put into question.

The EU Commission's proposal for the revision of the AVMSD seeks to bring all audiovisual media services under the jurisdiction of regulatory authorities. While we understand that it may be necessary to bring online media services under similar rules as traditional broadcasters, we are concerned that the proposal will result in unnecessary regulation of web-based media. The proposal applies to all media service providers (the legal or natural person with editorial responsibility – Article 1.1.d), except for the financial contribution under Article 13. We cannot see the necessity of regulating small-size services and suggest that under the necessity/proportionality criteria only the regulation of the services that have a clear impact upon a significant part of the public can be justified. The notion of "significant part of the public" can be assessed through a combination of factors such as the market share of a media company, the audience share of a media service, the number of views of an online service over a certain period of time, the profit-making or not-for-profit nature of the company, the size of the enterprise, or the reputation of the media service in the general public. As a media service can be distributed on a variety of channels, the impact upon a significant part of the public should be assessed on the basis of its global reach. We recommend that, in order to comply with the principle of proportionality, an amendment adds a threshold in the definition in order to guarantee that only mass media services are concerned. Mass media could be defined as media services intended for reception by, and which have a clear impact on, a significant proportion of the general public, through a combination of distribution channels.

In the context of ongoing changes in the media landscapes, ARTICLE 19 is concerned that stricter public regulation might be imposed upon the print media as a result of the proposal for revision of the AVMSD. While we acknowledge that including the online video section of a newspaper's website in the definition of audiovisual media service is not necessarily in contradiction with international standards on freedom of expression, we are concerned that the extension of a regulatory authority's jurisdiction to audiovisual content published by print media could be conducive to a stricter control of the 'traditional' activities of the press, which could not be justified under international standards on freedom of expression. We recommend that the new version of the AVMSD explicitly protects the freedom of the press by an amendment that states that:

- where self-regulation of the press covers the online video content produced by print media, there is no need for further public regulation;

- where self-regulation of the press does not cover the online video content produced by print media, regulation under the AVMSD needs to be strictly limited to the separate online video section and cannot lead to the regulation of other activities of the print media sector.

5.3.2. Distribution of media content

On the other hand, new actors have gained a major position in the media landscapes. Internet intermediaries such as social media or video-sharing platforms now play a diversity of roles that range from producing content to mere hosting of third-party content. In particular, their influence in the visibility, findability and accessibility of media content has grown to significant proportions and has triggered lots of attention in academic and international circles.

ARTICLE 19 suggests that the activities of online platforms belong to either of three categories: producing content, hosting third-party content, and distribution.

- Production implies the exercise of editorial responsibility over content; provided that all requirements of international standards on freedom of expression are met, **media services** can be liable for the content they publish.

- Hosting third-party content implies that the hosting-service provider has no intervention on content itself; **intermediaries** are protected against liability for third-party content, as provided for in the limited liability regime of the e-commerce directive.

- The distribution of media content refers to the activities of online platforms that relate to the accessibility, findability and visibility of media content. Distribution refers to a combination of human and automated (aka, algorithmic) decision-making processes implemented by online platforms in order to select and push media content to the attention of an individual or of the public at large. The activity of **distribution** in the online environment is an emerging topic where responsibilities currently remain undefined.

While one company can be active in three roles, we consider that they each command a different approach. In other words, a platform such as YouTube or Facebook can be considered as a media company when they commission the production of videos to be published on their platform, as a host when they neutrally host user-generated videos, and as a distributor if it selects certain videos to be specifically promoted or pushed to the attention of an individual or of the public (e.g., under "trending topics").

From a public policy perspective, there is little or no clarity on how to deal with the influence of online companies on the distribution of media content. There are studies and proposals, but so far very little practice. In ARTICLE 19's view, this is a learning process of great importance for democratic societies.

The EU Commission's proposal seeks to apply public regulation to video-sharing platforms. However, we consider that the proposal seriously undermines the regime of limited liability provided for by the e-commerce directive. We also consider that the proposal fails to provide appropriate approach to the role of intermediaries in the distribution of media content, where self-regulation would be the appropriate way forward. (See below at question 40).

6. Could you provide specific examples of problems deriving from the lack of independence of media regulatory authorities in EU Member States?

While ARTICLE 19 has not been able to dedicate resources to the situation of EU Member States in that respect, it is our global experience that the lack of independence of media regulatory

authorities translates directly into a loss of effectiveness and credibility of media regulation as well as a negative impact on media pluralism and diversity of content.

7. What competences would media regulatory authorities need in order to ensure a sufficient level of media freedom and pluralism?
In ARTICLE 19's view, the regulatory authority needs to be independent, to be adequately funded, to be staffed and managed by people with relevant expertise, to have a clear remit, to be accountable to the public, and its decisions should be subject to judicial review (this is further detailed in our policy document "Access to Airwaves: Principles on Freedom of Expression and Broadcast Regulation", 2002, available at http://bit.ly/29B1Wy1 - see in particular principles 10 to 17).

In the context of convergence, the board and the staff of media regulators should in addition have expertise in the economic, political, social, cultural and technical dimensions of online communication.

8. What should be the role of public service media for ensuring media pluralism?
Generally, ARTICLE 19 considers that three components contribute to a diverse and dynamic media landscape: commercial media, local and community media, and public service media.

Public service media should represent society as a whole, in all its diversity, and be available to the whole population. They can make an important contribution to pluralism, by producing programmes in areas that are unprofitable and therefore ignored by the private channels, such as children's or minority language programmes. They can also promote the general public's right to know, by presenting a credible platform of balanced and accessible news and current affairs, both through traditional and modern formats, such as TV news, documentaries, current affairs programmes and entertainment programmes.

In times of important changes in the media landscapes, public service media can have a particularly important contribution in helping the population understand and appropriate the changes, including the importance of media pluralism and diversity of content in a democratic society.

9. How should public service media be organized so that they can best ensure the public service mandate?
ARTICLE 19 has published a model law on public service broadcaster which details all requirements of the organization of public service media (available at http://bit.ly/1OGv2sl).

For the purposes of this consultation, we would like to underline 3 points:
- Public service media should be independent from public and commercial interests;
- They should receive stable and adequate funding tailored to their remit;
- The governance of public service media should be transparent and participatory, allowing the public to understand, appropriate and participate in, the governance of their public media (see the Issue Discussion Paper of the Commissioner for Human Rights of the Council of Europe, "Public service media and human rights", 2011, available at https://wcd.coe.int/ViewDoc.jsp?p=&id=1881537&direct=true).

10. Have you experienced or are you aware of obstacles to media freedom or pluralism deriving from the lack of independence of public service media in EU Member States?
It is our experience globally that the lack of independence of public service media results in direct influence of public authorities or connected private interests, which seriously undermines the capacity of PSM to contribute to pluralism and diversity.

We have recently noted threats on the independence of public service media in countries such as the United Kingdom (http://bit.ly/25LBLtP) and Poland (https://go.coe.int/Ko9xF).

11. Are you aware of any problems with regard to media freedom and pluralism stemming from the lack of transparency of media ownership or the lack of rules on media ownership in EU Member States?
In ARTICLE 19's view, the complete transparency of media groups and their owners lies at the heart of modern media pluralism. It is our global experience that the lack of transparency of media ownership leads to the impossibility to assess and address media concentration. It also prevents the public from forming their own opinion on the value of the information disseminated by the media.

12. Please indicate any best practice on how to ensure an appropriate level of transparency and plurality of ownership in this area.
We observe that in the Commission's proposal, rules on transparency remain minimal: name, address, contact, regulatory authority (Article 5). Since Article 30 of the proposal includes media pluralism in the remit of national regulatory authorities, it would be adequate to reinforce the rules on actual transparency of ownership (see for instance the resolution of the Parliamentary Assembly of the Council of Europe: Resolution 2065 (2015) on Increasing Transparency of Media Ownership).

We suggest that rules on transparency should apply to all actors of the media landscapes, included ISPs and actors of online distribution, in order to reveal cross-ownership.

However, ARTICLE 19 is concerned that the application of a duty of transparency to individuals who are providers of media services would conflict with the right to anonymity (see ARTICLE 19's policy report on the Right to Online Anonymity, available at http://bit.ly/1T27AV4), which is another reason to restrict the definition of media services to mass media that have a clear impact upon a significant part of the public (see above).

13. What is the impact of media concentration on media pluralism and free speech in your Member State? Please give specific examples and best practices on how to deal with potential challenges brought by media concentration.
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14. Are you aware of any problems related to government or privately financed one-sided media reporting in the EU?
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15. Please indicate any best practice to address challenges related to government or privately financed one-sided media reporting while respecting freedom of speech and media pluralism.
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C. Journalism and New Media Players
16. What is the impact of media convergence and changing financing patterns on quality journalism?
The current context (media convergence) imposes pressure, notably in an economic perspective, on traditional media companies as well as on journalists. But there can be no doubt that the evolution also creates rich opportunities for journalists and media to innovate. It must also be emphasized that the digital empowerment of individuals in terms of freedom of expression and right to information is of great importance from a democratic perspective.

We consider that any legal or regulatory approach should be cautiously designed in order to respect freedom of expression in the online environment, in application of the 3-part test under international and European law on freedom of expression.

17. Have you ever experienced, or are you aware of, any limitation imposed on journalistic activities by state measures?
It is our global experience that, among other issues, laws on national security and the fight against terrorism, legal initiatives that aim at countering violent extremism, and laws that prohibit hate speech, tend to develop a chilling effect upon journalism unless they are very narrowly tailored. State surveillance is also a serious threat to journalistic activities (see for instance http://bit.ly/21c8Too). Blocking of news websites on the basis of an administrative or judicial decision can also seriously undermine press freedom (for a case related to Turkey, see https://go.coe.int/SN2PU).

18. Please indicate any best practice that reconciles security concerns, media freedom and free speech in a way acceptable in a democratic society.
Laws that prohibit incitement to terrorism, or the condoning thereof, tend to be overbroad and have a chilling effect on lawful expression. The slippery notion of 'hate speech' can have a similar effect.

ARTICLE 19 insists that under international law, offensive or inflammatory speech must be tolerated. It is only if it reaches a certain threshold of severity that it can be prohibited. Under international law, offensive speech can only be prohibited in limited circumstances. 'Hate speech' laws and laws on national security should prohibit discriminatory speech that constitutes incitement to discrimination, hostility or violence. It should be clear that law can only prohibit speech that:

- is *intended* to lead to discrimination, hostility or violence;
- is *likely* to lead to such consequences in the context where it is expressed or published; and
- creates an *imminent danger* of the audience actually engaging into prohibited action.

(See ARTICLE 19's Toolkit on Hate Speech, available at http://bit.ly/1PfLHh4.)

It is of the utmost importance that the media remain free to report on all events, including threats on national security (see for instance https://go.coe.int/TjUDA). In addition to the right of the media to investigate and report on such issues of general interest, the public also has the right to be informed about these events. In democratic societies, the public should be informed about, and free to discuss, the existence of terrorist threats and the reactions of the political authorities.

19. Have you experienced, or are you aware of, limitations related to privacy and data protection imposed on journalistic activities?
It is our experience globally that laws on defamation, on privacy and data protection, can have a negative impact upon lawful expression, including journalistic activities. Our views are detailed in:

- Draft Principles on Defamation (http://bit.ly/1T7sGpb);
- Draft Principles on Privacy and Freedom of Expression (http://bit.ly/1YfMx5U);
- The Right to Be Forgotten (http://bit.ly/29BUr5R).

20. Have you experienced, or are you aware of, problems linked to hate speech and threats directed towards individuals exercising journalistic activities?

Generally, the protection of journalists is part of ARTICLE 19's work on protection of individuals who are threatened because of their expression or contribution to investigation or reporting on issues of general interest.

We have joined the platform on media freedom of the Council of Europe in order to contribute to higher knowledge and awareness of threats on journalists and media. ARTICLE 19 and others have publicized individual cases on that platform. https://www.coe.int/en/web/media-freedom/the-platform

As an illustration of recent concerns, ARTICLE 19 released in June 2014 a report on threats on journalists and environmental activists in Europe and Central Asia. We noted that threats are not confined to countries with a tradition of authoritarianism: even in long-standing democracies, including the United Kingdom and the Netherlands, unlawful techniques are used against those who speak out about environmental hazards (see http://bit.ly/29z4rOi).

21. Are you aware of cases where fear of hate speech or threats, as described above, has led to a reluctance to report on certain issues or has had a generally chilling effect on the exercise of freedom of speech?
See 20

22. Have you experienced, or are you aware of, problems concerning journalists' safety and security in the EU?
See 20

23. Please indicate any best practice for protecting journalists from threats against their safety and security.
ARTICLE 19 supports the UN plan of action on the Safety of Journalists (http://bit.ly/1fiyiXE) and the Human Rights Council's 2014 Resolution on Safety of Journalists (http://bit.ly/29BUxKF).

24. Have you ever experienced or are you aware of pressures put by State measures on journalistic sources (including where these sources are whistleblowers)?
ARTICLE 19's views on the protection of journalistic sources and the protection of whistleblowers are presented in our 2015 contribution to the UN Special Rapporteur on the right to freedom of expression (http://bit.ly/1E85IfW).

Regarding the protection of sources, ARTICLE 19 recommends that each State adopt a law which should:

- apply to all persons involved in a process carried out with the intent of providing information to the public;
- protect journalists from having to disclose the identity of sources, unpublished materials, notes, documents or other materials that might reveal information about their sources;
- limit demands to protected information to the most serious criminal cases, in which it is strictly necessary;
- protect journalists and sources from surveillance which has the intent to reveal source identity or information; and
- provide for sanctions and damages in cases where protections have been violated.

Regarding the protection of whistleblowers, ARTICLE 19 notes that whistleblowers form an integral part of freedom of expression, and indeed the right to freedom of information, but there are few comprehensive pieces of legislation which protect them, or provide adequate sanctions or remedy in cases where they have been unjustly reprimanded. Furthermore, the requirement, found in many pieces of legislation, that the whistleblower should prove that the disclosure was

made in 'good faith' is problematic, and often functions to prevent appropriate protection for public interest disclosures.

A particularly problematic area is that of whistleblowing in relation to national security: legislation regarding 'official secrets' and bodies tasked with protecting national security are often complicit in the silencing of whistleblowers' voices. Whistleblowers in national security situations must have the same protections and mechanisms of those in other cases.

ARTICLE 19 recommends that whistleblower protection is established in legislation which:

- has a wide application and should cover a wide variety of information in the public interest, including violations of laws, rules and ethical norms, abuses, mismanagement and misspending, failures to act, and threats to public health and safety;
- recognizes the importance of whistleblowing as an exercise of free expression, with any limits being subject to international law;
- does not incorporate a 'good faith' requirement;
- sets reasonable requirements to encourage and facilitate internal procedures for the disclosure and reporting of wrongdoing;
- creates or appoints an independent body to receive reports of violations of law, maladministration and other issues, advise whistleblowers, and investigate and rule on cases of discrimination; and
- has a broad definition of retribution that covers all types of employment sanctions, harassment, loss of status or benefits, and other detriments.

25. How would pressures on journalistic sources be best addressed?
See 24.

26. Please indicate any best practice for protecting the confidentiality of journalistic sources/whistleblowers.
See 24.

27. Have you experienced, or are you aware of, censorship (including self-censorship) in the EU?
See 20-24

28. Have you experienced, or are you aware of, any obstacles to investigative journalism, which may include legal provisions in force or a lack of resources?
See 20-24

29. Do you consider that the level and intensity of investigative journalism, the number of journalists engaged in such activity, the resources available, the space in print and the time available in audiovisual media for the publication of results of investigations has changed over time?
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30. Please indicate any best practice facilitating investigative journalism
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D. Hate Speech Online
31. What would be the most efficient ways to tackle the trivialization of discrimination and violence that arises through the spreading of hatred, racism and xenophobia, in particular online?
ARTICLE 19 is concerned that the Code of Conduct on Countering Illegal Hate Speech Online recently adopted by the EU Commission and major information technology companies is not compatible with international law on freedom of expression.

Under international law, restrictions on freedom of expression must be provided by law and be necessary and proportionate in a democratic society. While this does not necessarily imply that private companies cannot set the rules for the use of their services, the UN Special Rapporteur on freedom of expression has long held that censorship measures should never be delegated to private entities (A/HRC/17/27 at paras. 75-76). In his most recent report to the UN Human Rights Council (A/HRC/32/38), the UN Special rapporteur on freedom of expression, David Kaye, enjoined States not to require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extralegal means. In particular, he recommended that any demands, requests and other measures to take down digital content must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under article 19 (3) of the International Covenant on Civil and Political Rights.

Similarly, the four special mandates on freedom of expression recently reiterated in their 2016 Joint Declaration on freedom of expression and countering violent extremism that States should refrain from pressuring, punishing or rewarding intermediaries with the aim of restricting lawful content

ARTICLE 19 believes that pressuring companies to define and regulate prohibited speech is not only at odds with international standards on freedom of expression, it is also deeply inappropriate:

- It puts companies - rather than the courts - in the position of having to decide the legality of content.
- It allows law enforcement to pressure companies to remove content in circumstances where the authorities do not have the power to order its removal because the content itself is legal.
- It deprives Internet users of a remedy to challenge wrongful removals since the vast majority of content removals are likely to be made on the basis of the company's terms of service.

ARTICLE 19 is therefore deeply concerned that, despite having a non-binding character, codes of conduct or community guidelines will lead to more censorship by private companies - and therefore a chilling effect on freedom of expression on the platforms they run. This is especially so in the absence of any independent or meaningful commitment to protect freedom of expression.

We are also concerned that the Framework Decision 2008/913/JHA of 28 November 2008, which is used as a reference in the Code of Conduct and in the proposal for the revision of the AVMS Directive (Preamble), is inconsistent with international standards on freedom of expression. In particular, it requires States to criminalise the following categories of expression:

- public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin;
- the above offence when carried out by the public dissemination or distribution of tracts, pictures or other material;
- publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) and crimes defined in Article 6 of the Charter of the International Military Tribunal, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group.

Under international law, however, States are merely required to prohibit "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". The Special Rapporteur on freedom of expression has clarified on numerous occasions that such advocacy becomes an offence only when the speaker seeks to provoke reactions on the part of the audience and there is a very close link between the expression and the resulting risk of discrimination, hostility or violence (A/66/290, para. 28). While "incitement to genocide" must also be prohibited under international law, the threshold test for this offence is much higher than the one laid down in the Framework decision (A/66/290, para. 24). In short, the Framework Decision lays down a threshold for the criminalization of expression, which is much lower than the one set under international law. Moreover, the Framework Decision fails to provide a clear benchmark in relation to the definition of 'hate speech' since States are accorded a degree of flexibility in transposing its provisions in national law, including for determining what severity threshold speech should meet before being criminalized. Ultimately, this is likely to create more legal uncertainty.

In terms of good legal practices, ARTICLE 19 considers that grounds for protection against 'hate speech' should include all those protected characteristics which appear under the broader non-discrimination provisions of international human rights law. With sufficient safeguards for freedom of expression, we consider that 'hate speech' provisions should be inclusive of the broadest range of protected characteristics. These should include but not be limited to: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, indigenous origin or identity, disability, migrant or refugee status, sexual orientation, gender identity or intersex status. Under international standards on freedom of expression, 'hate speech' laws should prohibit discriminatory speech that constitutes incitement to discrimination, hostility or violence. It should be clear that law can only prohibit speech that:

- is *intended* to lead to discrimination, hostility or violence;
- is *likely* to lead to such consequences in the context where it is expressed or published; and
- creates an *imminent danger* of the audience actually engaging into prohibited action.

(See our detailed analysis of the Code of Conduct at http://bit.ly/29BVUJh).

32. How can a better informed use of modern media, including new digital media ('media literacy') contribute to promote tolerance? Please indicate any best practice.

We insist that any policy measures to tackle 'hate speech' which are directed at the media should respect the fundamental principle that any form of media regulation should be undertaken by bodies independent of political influence, which are publicly accountable and operate transparently. Editorial independence and media plurality should not be compromised, as both are essential to the functioning of a democratic society.

All forms of mass media should recognize that they have a moral and social responsibility to promote equality and non-discrimination for individuals with the broadest possible range of protected characteristics. In respect of their own constitutions, mass media entities should take steps to:

- Ensure that their workforces are diverse and representative of society as a whole;
- Address as far as possible issues of concern to all groups in society;
- Seek a multiplicity of sources and voices within different communities, rather than representing communities as homogenous entities;
- Adhere to high standards of information provision that meet recognized professional and ethical standards;

- Promulgate and effectively implement professional codes of conduct for the media and journalists that reflect equality principles.

To proactively combat discrimination, media entities should consider:

- Taking care to report in context, and in a factual and sensitive manner;
- Ensuring that acts of discrimination are brought to the attention of the public;
- Being alert to the danger of discrimination or negative stereotypes of individuals and groups being furthered by the media;
- Avoiding unnecessary references to race, religion, gender, sexual orientation, gender identity and other group characteristics that may promote intolerance;
- Raising awareness of the harm caused by discrimination and negative stereotyping;
- Reporting on different groups or communities and giving their members an opportunity to speak and to be heard in a way that promotes a better understanding of them, while at the same time reflecting the perspectives of those groups or communities;
- Professional development programmes that raise awareness about the role the media can play in promoting equality and the need to avoid negative stereotypes.

ARTICLE 19 also observes that an increasing attention is being paid to the role of Internet intermediaries in identifying and responding to 'hate speech'. In our view, there are a number of concerns regarding the role of intermediaries in moderating content, including "hate speech," in particular:

- Inadequate protections for freedom of expression: the terms and conditions of many intermediaries tend towards limiting a greater breadth of expression than States are permitted to restrict under international human rights law. The scope of so-called "private censorship" is considerable, and raises questions in respect of moral and social responsibilities to promote and protect all human rights. Initiatives to encourage intermediaries to take these responsibilities seriously often overlook concerns over the right to freedom of expression. Furthermore, there are serious doubts over the suitability of businesses, primarily motivated by profit, to objectively judge competing rights and interests;
- A lack of transparency and accountability in the decision-making process of intermediaries when removing content, including how content is flagged and removed (e.g. if content moderation is automated, and if not what training and support exists for moderators). Many intermediaries do not publish information on removals made on their own initiative, as opposed to removals in response to requests from States or other businesses. This creates serious barriers to any analysis or evaluation of intermediaries' conduct in relation to "private censorship;"
- A lack of procedural safeguards, and a lack of access to an effective remedy in the removal of content, or the imposition of other sanctions by intermediaries. There are concerns that States may take advantage of reporting mechanisms or their influence over private companies to request content removals that they cannot legally compel themselves, or to circumvent procedural safeguards that limit any powers of compulsion they have in this respect. The delegation of the policing of content from the State to intermediaries denies users any opportunity to contest or defend against the sanctions employed against them.

Though there have been numerous innovations in recent years to empower users to report 'hate speech' content for removal, either because it is perceived to be unlawful or against an intermediary's terms of service, there have not been comparable advances to empower users to guard against the unfair or unjustified removal of content. Indeed, most intermediaries do not seem to provide users with notice or reasons for the content removal. Beyond the removal, other

sanctions imposed by intermediaries, such as the suspension or blocking of accounts, are rarely accompanied with notice or opportunities for appeal or remedy.

E. Role of Free and Pluralistic Media in a Democratic Society

33. How do developments in media freedom and pluralism impact democracy? Please explain.

In ARTICLE 19's view, the current evolution of the media landscapes renders the understanding of pluralism more complex. While transparency of ownership and other legal mechanisms (such as the obligation for broadcast regulatory authorities to achieve pluralism through the allocation of licences) remain relevant, the roles played by new actors demand different approaches (see below at 40).

34. Who do you think is the most suited to help increase media literacy? Please rank and explain why.

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35. Please give specific good examples or best practices for increasing media literacy.

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36. What would be concrete ways for free and pluralistic media to enhance good governance and transparency and thus foster citizens' democratic engagement (e.g. self-organization for political purposes, participation in unions, NGOs, political parties, participation in elections)?

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37. What are best practices of free and pluralistic media contributing to foster an informed political debate on issues that are important for democratic societies (e.g. in terms of the nature of the content or in terms of format or platforms proposed)?

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38. Which measures would you consider useful to improve access to political information across borders? Please indicate any best practice.

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39. Do you consider that social media/platforms, as increasingly used by candidates, political parties and citizens in electoral campaigns play a positive role in encouraging democratic engagement?

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40. Do you consider that there are specific risks or problems regarding the role of platforms and social media — in relation to pluralism of the journalistic press or more generally — as regards the quality of the democratic debate and the level of engagement?

As the regulation of media is questioned by the evolution of media landscape, we observe a serious threat on the regime of limited liability of Internet intermediaries. This legal framework, while it could be improved by the implementation of notice and notice procedures, is a necessary condition for the preservation of the individuals' capacity to express themselves online. In our view, the specific risks linked to social media and Internet platforms result from the combination of the dominance of certain actors and of their capacity to influence the visibility, accessibility or findability of online media content: in this respect, tech giant have acquired a significant power over the civic space, which commands attention.

40.1 Limited liability of intermediaries

ARTICLE 19 is concerned that Article 28a of the proposal for the revision of the AVMSD seriously undermines the limited liability of Internet intermediaries.

- Article 28a targets video-sharing platforms. Article 28b refers to subsidiaries, parent companies and groups, in order to ensure that at least one Member State can exert jurisdiction over international providers of video-sharing platforms. Video-sharing platforms are defined as service that "consist in the storage of a large amount of user-generated videos" in the principal purpose of providing programmes to the general public (Article 1 (aa)): the definition clearly targets services such as YouTube, but would possibly extend to social media (video is increasingly important on services such as Facebook and Twitter). Despite vowing to respect the limited liability of intermediaries ("without prejudice of Articles 14 and 15" of the ECD), Article 28 is clearly in conflict with the ECD.

Under Article 28, States should ensure that video-sharing platforms take "appropriate measures" to protect minors from "content which may impact their physical, mental or moral development" and all citizens from incitement to violence or hatred. Appropriate measures include:

- definition of incitement to violence and hatred, and content harmful for minors, in terms and conditions.
- age-verification systems, rating systems, reporting systems, parental control systems.

ARTICLE 19's concerns are threefold:

- Even if Article 28, 5, provides that Member States should respect the e-commerce directive and ensure that complaint and redress mechanisms are available, the proposal raises similar concerns to those raised by the recent EU Commission Code of Conduct on Countering Illegal Hate Speech Online for IT companies (see above).

We reiterate that pressuring companies to define and regulate prohibited speech is not only at odds with international standards on freedom of expression, it is also deeply inappropriate:

- It puts companies - rather than the courts - in the position of having to decide the legality of content.
- It allows law enforcement to pressure companies to remove content in circumstances where the authorities do not have the power to order its removal because the content itself is legal.
- It deprives Internet users of a remedy to challenge wrongful removals since the vast majority of content removals are likely to be made on the basis of the company's terms of service.

ARTICLE 19 is therefore deeply concerned that, despite having a non-binding character, codes of conduct or community guidelines will lead to more censorship by private companies - and therefore a chilling effect on freedom of expression on the platforms they run. This is especially so in the absence of any independent or meaningful commitment to protect freedom of expression.

- The "appropriate measures" under Article 28 would unavoidably translate in some form of monitoring of third-party content by intermediaries, which is not compatible with the ECD.

- In addition, the NRAs will be responsible for establishing the appropriate measures: this brings Internet intermediaries under the jurisdiction of regulatory authorities, while there is no sufficient clarity or legal certainty as to what those measures might be.

40.2 The role of dominant intermediaries in the distribution of media content

From Netflix to Facebook and Twitter, online platforms rely on a combination of algorithms and human minds to bring content to their users. As they select the content that they push forward, they actively contribute to the visibility of entertainment, information and ideas. Beyond the discussion of the "bubble-effect", the influence of tech giants upon the agenda-setting and discussion of public affairs gives rise to questions and controversies (see for instance the recent report by Martin Moore, *Tech Giants and Civic Power*, http://bit.ly/1VfTMsR).

As discussed above, we suggest to use the term "distribution" to refer to these activities (by contrast with mere hosting or content production).

ARTICLE 19 considers that the power of dominant Internet technological companies over the civic space and the media has grown to a significant degree. Intentionally or not, these organizations are in a position to influence the public agenda, the trends in public opinion, the topics and arguments of public debates. The extent of this power should be part of all analysis of media pluralism and plurality of media content in democratic societies.

On the other hand, we acknowledge that technologies as well as social practices evolve at a fast pace. It is also quite complex to measure with scientific precision the influence of giant intermediaries over public debate, if only for reasons linked to the opacity of their practices and algorithms.

We suggest that:

1. Civil society, academia, corporate actors and others should collaborate on analysis and research to build a better understanding of how to address the role of regulation of media in the digital age, including the impact on civic space, media pluralism and the diversity of content;

2. Increased transparency should be provided relating to decisions and methodologies, including automated decision-making, in the distribution of media content;

3. Discussions should be held on the development of appropriate remedies, possibly including algorithms, that ensure users' exposure to a diversity of content;

4. Actors whose activities include media production and distribution via the Internet should hold public consultations on the need for and form of appropriate, transparent and participatory self-regulatory bodies and processes.