



ENTIDADE REGULADORA
PARA A COMUNICAÇÃO SOCIAL

From:

The Portuguese Regulatory Authority for the Media
[PT] Entidade Reguladora para a Comunicação Social - ERC
Avenida 24 de Julho, 58
1200-869 Lisbon - PORTUGAL

To:

David Kaye
The Special Rapporteur on the Promotion
of the Right to Freedom of Opinion and
Expression of the United Nations

E-mail: freedex@ohchr.org

C/c: Ministry of Foreign Affairs
Direção-Geral de Política Externa

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Excellency,

Following your letter of 23 January 2018, and taking in consideration the “Concept Note for the 2018 thematic report of the UN Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression” and the “call for submissions”, the Regulatory Authority for the Media of The Republic of Portugal (hereinafter, ERC) is pleased to inform as follows:

Circumscription of the reply within the scope of competences of ERC

The existence and main purpose of the Portuguese Regulatory Authority for the Media is set out in the Constitution of the Republic of Portugal, under the chapter “personal rights, freedoms and guarantees”. The article 39 of the Constitution foresees the existence of an independent administrative body to regulate the media, which shall be responsible for ensuring in the media,



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amongst other, the right to information and the freedom of the press, the respect for the personal rights, freedoms and guarantees, the compliance to the legal framework regulating the media activity, that different currents of opinion are able to express themselves and confront one another, the independence of the media from political and economic powers.

The Portuguese Regulatory Authority for the Media was established by the Law n. 53/2005, of 8th November (Bylaws of the ERC), under the name of *Entidade Reguladora para a Comunicação Social – ERC*. The ERC operates within the powers and duties set for it under the Constitution, and further developed in its bylaws, and under a number of Acts of the Portuguese Parliament, namely sectorial media Acts, such as Television Broadcasting Act, Radio Broadcasting Act, Press Act, and the Statute of the Journalists Act.

The ERC's principal duties and powers are, amongst others, within the media sector subject to its oversight, to safeguard: the free exercise of the right to information and the freedom of the press; the media independence before the political and economic powers and authorities; the respect for the individuals' rights, freedoms and guarantees; the effective expression and presence of the different trends of thought in respect of the principle of pluralism and the editorial stance of each media organization; the exercise of the rights to broadcast, to reply and of political argument; in association with the Competition Authority, the regular, effective, transparent and equitable operation of the print and audiovisual media markets; that media operators comply with the regulatory legal framework; to promote co-regulation and encourage the media, trade unions, associations and other bodies operating in the media sector to adopt mechanisms of self-regulation, and to restrict the flow from of services of the information society containing content subject to editorial treatment which violate or threaten to seriously jeopardize values such as human dignity or the public order, public health, and public security [article 24, n. 3, al. ae], of the ERC's Bylaws).

In order to comply with the above mentioned duties, ERC sets and enforces decisions and regulatory rules for the sectors for which ERC has responsibility [article 6 of the Bylaws of ERC] such as news agencies; the Press, regardless of the form of distribution; the Radio and Television broadcasters in relation to their programme services and any complementary editorial content, on any media, including electronic; the individuals or companies that use electronic communications networks to make radio or television programme services available

to the public, to the extent to which they are responsible for its selection and aggregation; Individuals or companies who regularly use electronic communications networks to make available to the public content submitted to editorial treatment and organized as a coherent whole.

Furthermore, under article 24, n. 3, al. ae), of the Bylaws of ERC, without prejudice of ANACOM's competencies on private, commercial or advertising electronic communications, ERC may restrict from circulating content arising from the information society/electronic commerce which has been subject to editorial treatment violating or threatening to seriously jeopardize:

- human dignity or public order, including minors protection, the fight against hate incitement based on race, sex, religion or nationality, namely, envisaging the prevention or repression of crimes or misdemeanors;
- Public health;
- Public security, namely focusing on national security and defense.
- Consumers, including investor.

In sum, the scope of action of ERC is mainly targeted at the media organizations/operators, not determined by the platform, the physical support, the distribution or the receiving device, but by the existence of a certain organization and content made available to the public, which was previously submitted to an editorial treatment, and which is organized as a coherent whole, in accordance to the description set out above, not excluding internet nor the information society where applicable.

Therefore, ERC does not regulate internet as such, although it may regulate the activity of the mass media operators in digital support made available to the public on internet sites or platforms. In principle, social platforms or search platforms, as such, fall outside the scope of ERC competencies.

The Portuguese media regulation model is designed to protect fundamental rights which must also be ensured in the digital environment, subject to the principles of equal treatment and neutrality of the media support, the principle of pluralism, and the principle of regulatory need, proportionality and appropriateness.

ERC has addressed questions raised by the digital presence of media operators, which may be of interest under the scope of questions 5, 8 and 9 of the call for submission.

The journalistic treatment of user generated content (UGC)

In 2014, ERC issued the Directive n. 2/2014, addressed to media operators, guiding them through the best practices on the treatment of user generated content (UGC – content generated by users which are third parties towards the mass media operators) within the context of journalistic production¹.

ERC acknowledges that for news agencies, press and broadcasting operators the UGC may represent relevant, up to date, and easily available source of information. At the same time, it is a way of the citizens freely express themselves. Currently, there is a growing number of media operators, directly or indirectly, using UGC on the news edition and production. Nevertheless, caution must be paid as UGC were not *ab initio* produced according to the journalistic procedures and deontological rules. It is the media operators' and journalists' responsibility to act within their legal, ethical and deontological framework, which is still fully applicable when it comes to using UGC. The main value of the news produced by a mass media operator lies in its credibility, in the guarantee that the news content was checked and validated according to the journalistic rules and news broadcasters' legal framework. Therefore this changing journalistic and mass media environment and framework requires the definition and adoption of the best practices on the treatment of UGC.

The UGC beyond editorial control (the case of videos, postings and comments within social networks, forums, blogs, etc.) is not addressed by ERC as it falls outside ERC's regulatory scope of action.

In what concerns the usage of **UGC subject to edition by a media professional and/or incorporated into a news story, as well as to UGC produced by a media professional in cooperation with experts (the case of scientific/technical texts that are edited together with**

¹ ERC's Directive n. 2/2014, of 29 October 2014. Available at: <http://www.erc.pt/download/YToyQontz0jg6ImZpY2hlaXJvJltz0jM50iJtZWRpYS9maWN0ZWlqY3Mvb2JqZWN0b19vZmZsaW5lLz13NC5wZGYi03M6NjoidGI0dWxvJltz0jE10iJkaXJlY3RpdmUtMjJwMTQ030=/directive-22014>

informational contents), ERC points out the steps to be taken in order to confirm content veracity, to acknowledge the content context, and to the releasing of the content. It also addresses the media operator presence in the social media.

The guidelines refer to the need to identify the UGC by means of a direct contact (which should not put the source in risk), and the tracking of its origin, assessing authenticity of the content, and where necessary, resorting to technological tools and specialists. It also addresses the competency to take the decision of using and editing the UGC (which should be taken by a responsible editor) and the editorial decision of broadcasting controversial or highly sensitive content (which should be taken by the editor in charge). The use of UGC which has already entered media professional circuit requires checking if it has been subjected to previous validation. It is the media operator's responsibility to check and add value to the information in the UGC and the "undoubtedness" of the said content shall not wave the obligation of following up the story, acknowledging its context, searching for further developments and applying the contradictory principle. The UGC shall be clearly identified as such, identifying its author and the context of its production. If identification is not possible, that must be acknowledged and informed to the public. Where the UGC is used as source of news, journalists may resort to professional secrecy in order to safeguard the identity of the source of information. In case the identity of the source cannot be revealed, the public shall be informed of the reason for not identifying the author of the content. The media operator shall take in consideration that UGC requires viewing and most of the times editing, and that resolution of releasing the UGC shall not take priority over verifying its credibility. The media operator shall be aware that UGC release may expose minors, victims or other persons in vulnerable situations. The use of UGC must respect copyrights and avoid plagiarism. In case errors occur, the media operator shall transparently take the responsibility for correcting the information, the correction shall be clearly identified, and it must be made available in all platforms where the content was released.

When it comes to the **pages or official accounts of media organizations subject to ERC's regulation**, ERC sets out guidelines addressing the media operators' identification, the information-collection procedures and content sharing on social networks. Media operators acting within social media shall:

- Set forth best practices guidelines for their employees when interacting with the public.

- Act according to the same framework governing content edition at the newspaper/broadcaster.
- Act with transparency towards its social network users. Journalists should identify themselves as such, using their real names (and not nicknames), and clearly assume the type of information that they are searching for, as well as the intention of using and releasing data considered relevant, and that information obtained from that interaction may be published.
- Take the responsibility for correcting the information, clearly identifying the correction made, which shall be made available in all platforms where the content was previously released;
- Hold the release of content which have not yet been subject to a complete editorial process;
- Use accurate language, avoid sensationalist contents and make a distinction between facts and opinions.
- Be aware of the level of privacy involved in the content. Many people, especially young people, are not aware of how risky it is for their privacy to publish contents of their intimate and personal sphere. Voyeurism shall not be admitted and a very clear criterion on the relevance of the use of those contents should be assumed.

In what concerns **online comment moderation on a media operator's website**, ERC considers that online comments fall under the media editorial responsibility and that the editor may be held responsible to the content of the posts made available to the public.

ERC acknowledges that the media operator may apply the following forms of moderation of its user's online comments: pre-moderation, post-moderation and reactive moderation (subject to complaints, removal requests, warnings).

The media operator shall set the standards and terms of use for comments posting. These rules aim at safeguarding freedom of speech and privacy, and preventing incitement to violence and hatred, and ethnic, racial, and sexual discrimination. The compliance with these rules shall be preferably ensured by members of the staff and not (exclusively) by automated systems.

ERC advises media operators to adopt a set of best practices on comments online, such as (amongst others):

- It is mandatory to set forth terms of use and make them permanently available to the public and to provide an e-mail address that allows users to get in touch with moderators;
- To limit moderation criteria exclusively to the terms of use. Terms of use shall be clear and avoid ambiguity in order to prevent the risk of any infringement of the freedom of speech.
- Comments moderation shall preferentially be carried out by the editor of the original content or by someone accountable before the editorial direction.
- To avoid moderation to be carried out by third parties which may not be bound by the same deontological codes applicable to the media operator.
- To notify the commenter, wherever possible, that the content has been removed.
- When the comment is used as news source, journalists may resort to professional secrecy in order to safeguard the identity of the source of information.
- To validate by e-mail (or other source with the same reliability) the electronic identification of the user, who should not be allowed to have more than one identification or account. If the participation of non-validated commenters is allowed, the comment postings shall be subject to pre-moderation;
- At the chronological order of the comment section, a reference shall be made to a comment posting which has been removed;
- When a comment does not breach the terms of use but a third party has requested its removal, responsible editor shall apply the same criteria and procedures applicable to editorial content.
- The use of a moderation mechanism shall be confined to the posting concerned and not be extend to all comments posted by the same author.
- To resort to reactive moderation systems through “reports” by users on comment postings in breach of the terms of use, but one should prevent it from being determinant or the only criterion considered. The final decision shall always be made by the editorial staff of the publication.
- Moderation and/or filters shall not distort the messages within comment postings.

This study aimed at mapping the main regulatory challenges arising from the technological changes within the digital mass media industry and consumption, and also at searching out new ways to provide an appropriate regulatory response that is in the interests of the free flow of information and of the protection of the citizen rights, both as content consumers and as actors within a new public media space.

The study 1) redefined what is meant by media organization, in order to qualify which digital content shall be subject to regulation; 2) defined different levels of regulation, depending on the nature of each media organization; 3) discussed to what extent the existing legal framework was appropriate for new media and identify which amendments to the legal framework would be required; 4) drawn attention to the interaction between content producers and users, in special to the case of user-generated content.

It also concluded that despite the legal framework in force which empowers ERC to regulate media within the internet, further legislative measures already set forth by ERC need to be adopted in order to address certain media regulation aspects within the digital environment. The definition of the regulatory framework of the digital media operators is therefore still a work in progress. The ERC restates its role in the promotion and protection of the right to freedom of opinion and expression within the media sector encompassing the digital media.

Best regards,

THE CHIEF OF STAFF,



Telmo Gonçalves