

ANALYSIS OF REGULATORY PROVISIONS GOVERNING THE PROTECTION OF MINORS IN AUDIOVISUAL MEDIA SERVICES AND ELECTRONIC PUBLICATIONS IN CROATIA

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Development of information and communication technologies and their convergence have served as the basis for the introduction of novel forms of dissemination of media content in digital form. This has led to many positive developments, but has also created some new challenges. Protection of minors is one such challenge which requires adequate regulation by the legislators both on the national and supra-national level. This paper analyzes the regulatory framework for electronic media in the context of protection of minors in the Republic of Croatia. Authors approach this issue by analyzing the rules applicable to harmful content and those which regulate the protection of privacy and personal data of minors against the freedom of expression and media. It is argued that the current regulatory framework generally provides sufficient protection against harmful content; however, certain changes could prove useful and would improve the level of protection. Regarding the protection of privacy and personal data, authors argue that current rules contained in the Media Act and the Electronic Media Act provide for an adequate regulation on the normative level, and stress the importance of their interpretation according to the standards developed in the case law of the ECtHR.

Keywords: electronic media, minors, protection of minors, linear audiovisual media services, on-demand audiovisual media services, electronic publications

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1. INTRODUCTION

The protection of minors from harmful media influence has become one of the major concerns in today's information society. Development and convergence of information and communications technologies (ICT) have enabled all media to distribute their content also in digital form through various digital platforms. Today more than ever, minors are exposed to various types of harmful content. In addition, in certain circumstances minors become not only the receivers of media services, but also the object of media attention. Abundance of media platforms and their accessibility are some of the factors that contribute to the aforementioned developments. In those circumstances protection of minors vis-à-vis the media is per definition a delicate issue, since it requires careful balancing between the fundamental human right to freedom of expression and the wider public objective of protecting minors. Those developments have imposed obligations on policy-makers and the international community to revise the approach to audiovisual media regulation and to take into account new forms of content and digital media when protection of minors is concerned. Like many other European countries, the Republic of Croatia is facing those same challenges.

The telecommunication and electronic media market in Croatia became fully liberalized only fifteen years ago, with privately owned companies entering the market. Today, after successful transition to digital video broadcasting (DVB-T) in 2010, there are 24 television broadcasters for linear audiovisual media services, with only one free-to-air specialized children's TV channel and eight on-demand audiovisual media service providers primarily owned by telecommunications companies.¹ The on-demand audiovisual media services are mainly broadcast via IPTV, which has a very high rate of penetration in Croatia.² That can partly be attributed to the development of broadband Internet access. Currently 70% of the population in Croatia is using Internet services, and 28% of them have mobile or fixed broadband access. This enables Croa-

¹ At the moment there are 10 national and 20 regional channels in the Republic of Croatia. Approximately 600 additional channels are available through various alternative platforms (IPTV, cable, satellite, Internet).

² In the year 2012 approximately 25% of households in Croatia had access to IPTV. Annual Activity Report of Croatian Post and Electronic Communications Agency 2012 on the following URL: [http://www.hakom.hr /UserDocsImages/ 2013/ izvjesca_i_planovi/Annual%20Activity%20Report%202012_HAKOM.pdf](http://www.hakom.hr/UserDocsImages/2013/izvjesca_i_planovi/Annual%20Activity%20Report%202012_HAKOM.pdf) [11.3.2014].

tian citizens, and especially young people, to access all sorts of new global digital media forms, which often provide better quality and consumer experience compared to content available through traditional broadcasting platforms. In short, the added values of these platforms are interactivity, mobility and ability to consume media content at any time, anywhere and on any device with Internet access. Those developments led to the necessity for the Croatian legislator and administrative bodies to revise the regulatory framework for electronic media and provide adequate legal solutions applicable to new forms of digital media and the recent developments in the media market. In the context of these developments, it was necessary to establish an appropriate level of protection of interests of minors.

Besides advancements in technology, which are calling for changes in the regulatory framework, there are also some positive legal obligations which imply the necessity for the state to protect minors in the digital environment. These obligations primarily emerge from the Constitution of the Republic of Croatia³ and its requirements for the protection of privacy⁴, as well as those aimed at the protection of children and youth.⁵ These provisions are also in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms⁶, and those laid down in the Charter of Fundamental Rights of the European Union.⁷ Finally, as one of the parties to the United Nations Convention on the Rights of the Child, Croatia is required to create an adequate legal framework for the protection of the child's right to freedom to receive and impart information⁸, the right to privacy⁹ as well as the parents' right to bring up their child.¹⁰

As the newest member state of the European Union, Croatia has, during the process of negotiation and accession, harmonized its regulatory framework

³ Constitution of the Republic of Croatia (Official Gazette No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014; hereinafter: CRC).

⁴ "Respect for and legal protection of each person's private and family life, dignity, reputation shall be guaranteed." Art. 35 CRC.

⁵ Art. 63, 64, 65 CRC.

⁶ Art. 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁷ Art. 24 of Charter of Fundamental Rights of the European Union.

⁸ Art. 13 United Nations Convention on the Rights of the Child (hereinafter: UNCRC).

⁹ Art. 16 UNCRC.

¹⁰ Art. 18 UNCRC; Art. 64 CRC.

for electronic media with the *acquis communautaire*. In 2009 the provisions of the Audiovisual media services Directive (hereinafter: AVMSD)¹¹ were implemented into the Croatian legal system via the Electronic Media Act (hereinafter: EMA).¹² Transposition of AVMSD had the effect of implementing graduated regulation for audiovisual media services, which includes the provisions governing the protection of minors in on-demand audiovisual media services and news websites as a specific form of electronic media. When it comes to the protection of privacy and personal data of minors, it is also necessary to take into account the provisions of the Media Act (hereinafter: MA)¹³ and the Personal Data Protection Act (hereinafter: PDPA).¹⁴ Finally, it is necessary to mention also some self-regulatory and co-regulatory initiatives for electronic media in Croatia. Although these initiatives are still in their inception, they contain some valuable solutions that need to be taken into account when the protection of minors is concerned.

In the light of the previous explanations, the aim of this paper is to conduct an in-depth analysis of the regulatory framework for electronic media in Croatia, with a special emphasis on the provisions governing the protection of minors.¹⁵ This will provide a basis for a critical evaluation of the current regulatory framework of electronic media and its possible developments, all from the perspective of the protection of minors.

¹¹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15/04/2010, p. 1–24. More on AVMSD see: Harrison, J., Woods, L., *European Broadcasting Law and Policy*, Cambridge University Press, New York, 2007.

¹² Electronic Media Act (Official Gazette No. 153/2009, 84/2011, 94/2013, 136/2013).

¹³ Media Act (Official Gazette No. 59/2004, 84/2011, 81/2013).

¹⁴ Personal Data Protection Act (Official Gazette No. 103/2003, 118/2006 and 41/2008, 130/2011; consolidated text: No. 106/2012).

¹⁵ This paper does not discuss provisions that have no direct connection to the content of audiovisual media services published on Internet like cyberbullying, social networks, identity theft etc.

2. PROTECTION OF MINORS AND GRADUATED REGULATION OF AUDIOVISUAL MEDIA SERVICES

2.1 Regulatory framework before the transposition of AVMSD

Prior to the transposition of AVMSD into its legal system, Croatia had implemented provisions that traditionally protected minors from harmful media influence. To begin with, Article 22 of the Television Without Frontiers Directive¹⁶ was partially adopted in 1990 via the Croatian Radio-Television Act (hereinafter: CRTA).¹⁷ Shortly thereafter (in 1994) the same provisions were also implemented into the Telecommunications Act (hereinafter: TA).¹⁸ Neither the CRTA nor the TA made a distinction between different categories of harmful content. Such a distinction was finally made in 2003, when Croatia implemented a horizontal approach to the regulation of electronic media by enacting the first Electronic Media Act (hereinafter: EMA 2003).¹⁹ That act was the first to introduce the distinction between content that might be seriously harmful to minors and the content that is potentially harmful to minors. Among other novelties, EMA 2003 established an independent regulatory body for electronic media - *the Electronic Media Council* (hereinafter: the Council), and introduced several provisions governing news websites.²⁰ Although EMA 2003 stipulated that visual symbols should be used to mark harmful programmes, it took more than six years for the Council to issue implementing regulations.

The distinction between seriously harmful and potentially harmful content in the EMA 2003 laid down the foundations for establishing graduated regulation in connection to the protection of minors. While the expression “graduated regulation” is mainly used today to point out different approaches in regulation of services based on their type of delivery (linear or on-demand), it should also be noted that the term “graduated regulation” can be used to

¹⁶ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17/10/1989.

¹⁷ See Art. 12 of Croatian radio-television Act (Official Gazette No. 28/1990).

¹⁸ Art. 59 Telecommunications Act (Official Gazette No. 54/1994): “Concessionaire of radio and television must not broadcast programmes that might have a harmful influence on physical, mental or moral development of child and youth younger than 18.”

¹⁹ Art. 15(3) Electronic Media Act (Official Gazette No. 122/2003).

²⁰ They were defined as *electronic publications*. See more *infra* 2.2.

differentiate between the levels of harmfulness of media content. Therefore it is possible to talk about two axes along which graduation occurs. The first axis represents differentiated content according to the level of harmfulness for minors (with the distinction between seriously harmful and harmful). The second axis of graduation is based on the differentiation of services according to their delivery characteristics.²¹

2.2 Regulatory framework after the transposition of AVMSD

In the process of negotiation with the EU and further harmonization of the Croatian legal system with the *acquis*, a new Electronic Media Act (EMA)²² was adopted in 2009. Almost all provisions of that act represent a verbatim transposition of AVMSD.²³ This especially pertains to the provisions regulating the protection of minors. Graduated regulation for linear and on-demand audiovisual media services was introduced, and some provisions that pertain to the independent regulatory body and the promotion of pluralism of media were revised. The final result was a so-called two-tier regulation in which a set of rules that acknowledge core societal values apply to all audiovisual media services, and a set of lighter rules apply to on-demand services where users can decide on the content and the time of viewing.

Closely related to EMA is the Media Act (MA).²⁴ EMA can be considered as *lex specialis* for electronic media and audiovisual media services, while the main principles relating to all media, printed and electronic, are included in the MA. Also, provisions governing the publication of minors' personal data and the provisions governing the *right to replay*²⁵ are included in MA. Those two Acts, together with the Implementing Regulations for the Protection of

²¹ Cf. Füg, C. O., *The Challenge of Double Graduation: The Protection of Minors against Developmentally Harmful Content in the Legal Orders of Denmark, Germany and Greece*, *Journal of Media Law* 4/2 (2012), 253–273, pp. 255-256.

²² See footnote 12.

²³ For the analysis of the EU Regulatory Framework Applicable to Broadcasting see: Garzaniti, L. J. H. F., O'Regan, M., *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation*, 3rd ed., Sweet & Maxwell, London, 2010, pp. 243-247.

²⁴ See footnote 13.

²⁵ There are also separate Rules on the Right to Replay in audiovisual media services providers programmes (Official Gazette No. 46/2010) passed by the Council.

Minors (issued on the basis of EMA)²⁶ now form the regulatory framework for electronic media in the narrow sense. In a wider sense, especially when the protection of minors is concerned, there are several other acts that should be considered. For example, the broadcasting of programmes on public television is regulated by the Croatian Radio-Television Act (CRTA)²⁷ from 2010, which contains only a few basic principles related to children and youth.²⁸ Furthermore, conditional access to audiovisual media services is regulated by the Electronic Communications Act²⁹, illegal content and its dissemination in the Criminal Code³⁰, and so on.

It is important to point out that specific regulation of certain information society services has been introduced in EMA. The definition of electronic media in the EMA³¹, beside audiovisual programmes and radio also includes *electronic publications*. Electronic publications are defined in Article 2(1/1) as edited websites and/or portals containing electronic versions of printed press and/or media information, thus being available to the general public regardless of their volume. It follows clearly from this definition that the legislative intent was to regulate so-called “online newspapers”. Similarly to German law, where some of the provisions for broadcasting apply to *telemedien*³², EMA seeks to regulate information society services provided by registered media publishers.³³ The difference here is that the use of the term “electronic publications” to describe specific information society services causes some discrepancies. Primarily, the chosen term itself has various meanings and can therefore have a very wide scope. Even within the Croatian legal system the term electronic

²⁶ Implementing Regulations for the Protection of Minors (Official Gazette No. 60/2010; hereinafter: RPM).

²⁷ Croatian Radio-Television Act (Official Gazette No. 137/2010, 76/2012).

²⁸ “In the broadcast of programmes ... respect privacy, dignity, reputation and honor of humans and basic human right and freedoms, especially of child and youth...” Art. 6(1) CRTA.

²⁹ Electronic Communications Act (Official Gazette No. 73/2008, 90/2011, 133/2012, 80/2013; hereinafter: ECA).

³⁰ Criminal Code (Official Gazette No. 125/11, 144/12; hereinafter: CC).

³¹ Art. 2(1/1) EMA.

³² Rundfunkstaatsvertrag (Interstate Broadcasting Agreement; hereinafter: RStV), term that is used in the German legal system to refer to information society services (TV-like telemedien – information society services with content similar to television in form).

³³ The same term “*electronic publications*” is used in Slovenia and Montenegro.

publications has been used to refer to different things.³⁴ Furthermore, there is no definition of provider of such services, like in the case of audiovisual media services. In order to be able to determine who the provider of such services is, it is necessary to consult provisions of the MA. Also, it is questionable if a clear distinction between electronic publications and other information society services can be made at all. For example, it is possible to have an Internet website that clearly publishes media information to the general public, for example a news aggregator, while its owner is not registered as media publisher, which means it will not be treated as an electronic publication and the rules of EMA will not apply to it.³⁵ This four-way division of electronic media, into linear and on-demand audiovisual media services, and radio and electronic publications does not play a significant role in the protection of minors in Croatia since the same provisions that pertain to linear audiovisual media services are applied to electronic publications. There is no specific set of rules that would apply to electronic publications, as we will discuss later in this paper.³⁶ Nevertheless, the legislator's intention to regulate part of media content on the Internet is commendable. Currently, Croatia is in the process of revising its regulatory framework for the media, and the new Media Strategy and Media Act, which should take into account recent changes in the media influenced by digital environment, are due by the end of 2014.³⁷

Before we proceed to analyze the provisions that regulate harmful content in audiovisual media services, it is important to note that AVMSD does not define key concepts such as 'minor'³⁸, 'might seriously impair', 'likely to impair' or 'pornography' which are left as a matter of discretion to the Member States. The protection of minors is typically a sensitive area of law, characterized by the diversity of cultural perception at Member State level.³⁹

³⁴ For example in the Library Act (Official Gazette No. 105/1997), in Article 38 the term 'electronic publications' is used to mark all electronic publications including CD-ROMs, various disks, magnetic tapes etc..

³⁵ See more in Lisičar, H., Tomić, M., *Problemi pravne regulacije elektroničkih publikacija*, *Pravo u gospodarstvu* 53/4 (2013), 887-913.

³⁶ See *infra* 2.2.4.

³⁷ The Ministry of Culture of the Republic of Croatia is in charge of revising the regulatory framework and media strategy.

³⁸ In Croatia minors are children and young people under the age of 18.

³⁹ Machet, E., *The Protection of Minors in a Connected Environment, Comparative Background Document*, EPRA Secretariat I, Public revised version - 21 June 2013, p. 3. Available at: http://epra3-production.s3.amazonaws.com/attachments/files/2195/original/protectionofminors_final_publicversion.pdf?1372087443 [31.11.2013].

The Croatian legislator defined only the 'likely to impair' standard, in the Implementing Regulations for the Protection of Minors, leaving the other key concepts undefined.⁴⁰ Therefore, in order to give meaning to them, it is necessary to consult other acts from the Croatian legal system and apply them by analogy. For example, the definition of pornography can be found in the Criminal Code⁴¹, which criminalizes the provision of pornographic material to children (Article 165). According to this provision, pornography refers to "... material that visually or in any other way shows a person engaging in real or simulated sexually explicit behaviour or that shows sexual organs with a sexual purpose. Materials that have artistic, medical or scientific meaning are not considered pornography within the meaning of this Article."⁴² Since the transposition of AVMSD and the enactment of EMA have allowed providers of audiovisual media services in Croatia to show content that might cause serious harm to minors under certain conditions, it is important to make a distinction between this type of content and absolutely illegal content. Article 12 of the EMA provides a list of illegal types of content in audiovisual media services. Such content includes incitement to hatred, discrimination on any basis, or content that promotes anti-Semitism, xenophobia, or totalitarian regimes.⁴³ Although there is no clear definition of content that might cause serious harm to minors, Article 26 of the EMA cites "pornography and gratuitous violence" as such content.⁴⁴ That wording is taken over from AVMSD Article 27(1). Even though no other content is listed as one which could cause serious harm

⁴⁰ This is also the case in the Czech Republic, Malta, Lithuania, Luxembourg and Slovakia. *Ibid.*

⁴¹ See footnote 30. On negative effects of pornography in media see more: Ferguson, J. C., *Adolescents, Crime, and the Media - A Critical Analysis*, Springer, New York, 2013, p. 143.

⁴² Art. 165(3) CC. In Germany, for example, pornography, according to established practice, refers to a representation that, excluding all other human relationships, focuses on sexual activity in a grossly importunate and sensationalist manner and whose overall tendency is exclusively or primarily aimed at sexual stimulation; *Bundesgerichtshof, BGHSt*, 23,40,43 *et seq.* See more: Castendyk, O., Dommering, E. J., Scheuer, A., Böttcher, K., *European media law*, Kluwer, Alphen aan den Rijn, Frederick, MD, USA, 2008, p. 709.

⁴³ Art. 12(2) EMA. Although not listed within this article, child pornography is also considered as illegal content under Article 163 of CC. Both distributing and accessing such content is illegal. That is in accordance with Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography.

⁴⁴ Art. 26(2) EMA.

to minors⁴⁵, that does not mean *per se* that some other types of content could not be treated as seriously harmful to minors. If such content is broadcast through media services, the Council can make an assessment of such content and impose restrictions or penalties on the providers. Certain restrictions with regard to the protection of minors are also imposed on audiovisual commercial communications, for example the ban on tobacco advertising or advertising of alcohol beverages to minors. To be able to conduct a better analysis of all those provisions, further in the paper we will discuss the protection of minors from harmful media content in the different types of audiovisual media services.

2.2.1 Protection of minors and audiovisual commercial communications

The most elaborate rules within the regulatory framework for electronic media regarding the protection of minors are those that pertain to audiovisual commercial communications. Protection of minors from harmful influence of advertising has been in the focus from the early beginnings of media regulation. In EMA audiovisual commercial communications are defined as images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration, or for self-promotional purposes. Forms of audiovisual commercial communication include, *inter alia*, television advertising, sponsorship, teleshopping and product placement.⁴⁶ This very broad definition comprises most of the possible forms of advertising. Since advertising of goods and services includes many stakeholders and not just media providers, the protection of minors should be strictly regulated. This is done primarily through the legislative framework, and also with co-regulatory and self-regulatory measures.⁴⁷ The EMA includes an extensive list of provisions that regulate audiovisual commercial communications with regard to the protection of minors. The general provisions of EMA contain rules that pertain to all electronic media, and there is a separate set of rules for linear audiovisual media services. RPM also contains provisions pertaining to the protection of

⁴⁵ The same approach has been applied in Belgium (French and Flemish Community), Italy, Spain and Slovakia. See Machet, E., *op. cit.* (fn. 39), p. 4.

⁴⁶ Art. 2(1/14) EMA.

⁴⁷ More on self-regulation and co-regulation and the audiovisual media services see: Prosser, T., *Self-regulation, Co-regulation and the Audio-Visual Media Services Directive*, *Journal of Consumer Policy* 31 (2008), 99–113.

minors.

The extensive list of prohibitions imposed on audiovisual commercial communications within the general provisions of the EMA includes: surreptitious communications, subliminal techniques, communications which prejudice respect for human dignity, include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation, communications which encourage behaviour prejudicial to health or safety, promotion of tobacco products, communications concerning alcoholic beverages aimed at minors.⁴⁸ Furthermore, audiovisual commercial communications shall not: cause physical or moral detriment to minors, directly encourage minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage minors to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.⁴⁹ Additionally to the above, in linear audiovisual media services in advertising and teleshopping aimed at minors or using minors, anything that could jeopardize their interests must be avoided.⁵⁰ Furthermore, RPM specifically regulates audiovisual commercial communications with regard to the protection of minors and prohibits communications that could impair the physical, mental or moral development of minors or directly encourage minors to buy or hire a product or a service, whether personally or by persuading parents or other persons of their trust to do so.⁵¹ As concerns programmes intended for minors there is also a prohibition of audiovisual commercial communications that promote food or beverages whose excessive consumption in the overall diet is not recommended, as is the promotion of the cult of the body, social discrimination, weight loss, or minors shown in unreasonably dangerous situations.⁵²

Despite this extensive list of prohibitions and the regulations for audiovisual commercial communications transposed from AVMSD, some authors think⁵³ that the opportunity for better regulation of advertising with AVMSD

⁴⁸ Art. 16(1-6) EMA.

⁴⁹ Art. 16(8) EMA.

⁵⁰ Art. 30(1) EMA.

⁵¹ Art. 5(1) RPM.

⁵² Art. 5(2-5) RPM.

⁵³ Cf. Garde, A., *Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interests of... Commercial Operators?*, *International Journal of Children's Rights* 19/3 (2011), 523–545.

was missed.⁵⁴ The main objections are that provisions of the AVMSD, which forbid the advertising of unhealthy or unsafe products are not specific enough to prohibit advertisements for unhealthy food. Furthermore, despite the broadening of the scope of the Directive and despite the fact that consumer protection is also provided by other Directives, such as the Directive against Unfair Commercial Practices, European legislation has not found an answer to the problem of overweight and obesity of children and young people.⁵⁵ In authors opinion same objection applies to Croatian regulatory framework.

2.2.2 Protection of minors and linear audiovisual media services

In the EMA linear audiovisual media services are defined as television media services or television broadcasts provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule.⁵⁶ A media service provider of those television broadcasts (linear audiovisual media services) is referred to as television broadcaster.⁵⁷ This definition is exactly the same as the definition in AVMSD, but it should be noted that despite the use of the term “television”, this definition also refers to live streaming, webcasting, near-video-on-demand or any other service that is provided regardless of the platform of distribution and on the basis of programme schedule⁵⁸ as linear audiovisual media services. EMA has no specific provision that regulates webcasting or simulcasting, and near-video-on-demand is defined separately.⁵⁹ For the definition of the term “television” we have to consult ECA, which defines television as electronic communication comprising conveyance, transmitting and/or receiving image and sound and other data intended for direct reception by the public.⁶⁰ Thus, we can conclude that since television is

⁵⁴ Cf. Haug, T. W., *The new Audiovisual Media Services Directive as a missed opportunity in view of the protection of children and young people against harmful influences of advertisement in nowadays' media*, European Law/Europarecht 4/1 (2008), 35-41 (available at: <http://www.hanselawreview.org/pdf6/Vol4No1Art03.pdf> [12.11.2013]).

⁵⁵ *Ibid.*, p. 41.

⁵⁶ Art. 2(1/11) EMA.

⁵⁷ Art. 2(1/9) EMA.

⁵⁸ Rec. (27) AVMSD.

⁵⁹ Art. 2(1), p. 13 defines near-video-on-demand as an audiovisual media service provided by a media service provider for the viewing of programmes chosen momentarily by the user and at his individual request on the basis of a programme schedule.

⁶⁰ Art. 2(1/70) ECA.

defined as electronic communication⁶¹ it has a much wider scope than solely transmitting programmes over radio waves; it also includes transmission over telecommunications networks, so services like webcasting, and live streaming can also be considered as linear audiovisual media services under EMA.

With the enactment of EMA one of the biggest changes in the regulation of linear audiovisual media services with regard to the protection of minors was the introduction of more elaborate provisions for graduation of content according to its harmfulness to minors. Because of the notion that linear audiovisual media services are more influential and accessible to users, stricter provisions are applied.⁶² Including the general provisions that list illegal content on all of audiovisual media services, as discussed earlier, EMA stipulates that audiovisual programmes that offend human dignity, contain immoral and pornographic content, or in any manner encourage, promote and glorify violence and crime and encourage citizens, especially children and young people, to use tobacco products, alcohol or drugs shall be prohibited for broadcasting through linear audiovisual media services.⁶³ Furthermore, there is also a total ban on programmes that *might seriously impair* the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.⁶⁴ Broadcasting of audiovisual programmes, which are *likely to impair* the physical, mental or moral development of minors is allowed only if certain conditions are met.⁶⁵ Those conditions represent a combination

⁶¹ Within ECA the term *electronic communication* refers to the provision of electronic communications networks and/or the provision of electronic communications services. Art. 2(1), p. 12 ECA.

⁶² The authors do not agree with this general opinion. In today's information society there is a growing tendency, especially among children and youth, of extensive use of the new media, technologies and Internet for the consumption of digital content. Those new media have already become more important than traditional media when younger generation is concerned.

⁶³ Art. 26(1) EMA.

⁶⁴ Art. 26(2) EMA. See more on discussion about implemented provisions in AVMSD: Füg, C. O., *Save the Children: The Protection of Minors in the Information Society and the Audiovisual Media Services Directive*, Journal of Consumer Policy 31 (2008), 45-61, p. 54.

⁶⁵ Art. 26(3) EMA. Television broadcaster must ensure, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts. When such programmes are broadcast in unencoded form, the broadcaster shall ensure that they are preceded by an acoustic warning or are identified by the presence of visual symbols throughout their duration.

of content categorization, technical measures and the concept of watershed⁶⁶, and are prescribed by the Electronic Media Council within the Implementing Regulations for the Protection of Minors.⁶⁷ Article 2(1) of RPM defines content that is *likely to impair* the physical, mental or moral development of minors as all types of programmes that involve scenes of gratuitous violence, sex, vulgar expressions and scenes, scenes of drug or tobacco abuse as well as other scenes which are likely to impair the physical, mental or moral development of minors. Those programmes shall not be considered detrimental if they are appropriately used to elaborate the subject matter of educational, documentary, scientific and informational broadcasts.⁶⁸ This definition should not be construed strictly, but rather as a set of criteria for assessing content. Most of the EU countries do not have a specific list of content that is considered to be “likely to impair” the development of minors; instead, they evaluate content in the context and on the basis of how it is presented using pre-established criteria. For example, Spain uses seven criteria for evaluating the harmful nature of content and rule on its age classification: violence, sex, fear and anxiety, drugs, discrimination, racism and xenophobia, rude language, uncivil conduct and values.⁶⁹ Germany, on the other hand, uses a separate list of criteria for assessing depictions of sexuality and depictions of violence that could impair the development of minors.⁷⁰

The provisions contained in the RPM also lay down measures for the categorization, visual labelling and allowed time for broadcasting programmes that are likely to impair the development of minors. The age classifications are as follows: “Category 18” - programmes shall not be broadcast in the period from 07:00 to 23:00; “Category 15” - programmes shall not be broadcast in the period from 07:00 to 22:00; “Category 12” - programmes shall not be broadcast in

⁶⁶ “Watershed” is an hour before certain programmes that may impair children’s healthy development cannot be broadcast in order to avoid them being viewed by minors. So, in using this way of selecting time of broadcast, a time should be determined after which harmful contents may be included in programmes. Bakos, E., *Co-regulation Regarding the Audiovisual Media Service Providers in Order to Ensure Minors’ Protection*, Romanian Journal of Communication and Public Relations 13/2 (2010), 7-18 (available at: http://journalofcommunication.ro/archive2/022/22/Bakos_22full.pdf [11.12.2013]).

⁶⁷ See footnote 26.

⁶⁸ Art. 2 RPM.

⁶⁹ Article 7.2, Spanish General Law 7/2010. See Machet, E., *op. cit.* (fn. 39), p. 27.

⁷⁰ Art. 4 Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien (Jugendmedienschutz-Staatsvertrag - JMStV).

the period from 07:00 to 21:00.⁷¹ This kind of categorization is mostly in line with the categorizations of other EU countries, with a small difference within the categorization of programmes for the youngest audience, where some EU countries have a fourth category for children under the ages of 10, i.e. 7.⁷²

A distinction is also made on the basis of the form of broadcasting. If the programmes are broadcast in an unencoded form, visual symbols for each category should be displayed throughout their duration.⁷³ Otherwise, if the programme is broadcast in an encoded form, a visual symbol should appear immediately before the beginning of the relevant programme and the written warning “*The following programme is not suitable for children and minors.*” should be displayed.⁷⁴ Furthermore, in unencoded programmes pornographic contents shall not be broadcast.⁷⁵ The responsibility for the categorization and labelling of programmes lies on the media service providers, where pre-existing markings for rebroadcast programmes can be used if they are not below the prescribed standards of RPM.⁷⁶ A special responsibility lies on the media service providers for marking their own production programmes, thus establishing a form of self-regulation where protection of minors and categorization of programmes is concerned.⁷⁷ Supervision of the categorization and labelling of broadcast programmes is a responsibility of the Council. This arrangement has its shortcomings. The main objection would be that all of the control is *ex post*. In numerous cases the Council has had to issue warnings or misdemeanour reports against television broadcasters for inadequate categorization and labelling of programmes, especially in the case of programmes of their own production.⁷⁸ In the authors’ opinion more effective control and protection of minors would be established if some of the categorization would take place *ex ante*, i.e. if pro-

⁷¹ Art. 9 RPM.

⁷² For example Belgium and France.

⁷³ Art. 8(1) RPM.

⁷⁴ Art. 8(3) RPM.

⁷⁵ Art. 6 RPM.

⁷⁶ Art. 10(1) RPM.

⁷⁷ Art. 10(2) RPM.

⁷⁸ In March 2014 – misdemeanour report – infringement of Art. 26(3) EMA by Nezavisna televizija broadcaster; in August 2013 warning issued to RTL Croatia – misdemeanour report – infringement of Art. 26(3) EMA and Art. 8 and 9 of RPM (labeling and time of broadcast); in October 2013 warning to the Croatian National Television – HRT, infringement of Art. 26(3) EMA; in November 2011 – RTL Croatia – infringement of Art. 26(1-3) EMA; in June 2012 – NOVA TV – infringement of Art. 26(3) EMA etc.

grammes were assessed before broadcasting in some kind of co-regulation, like in the German legal system.⁷⁹ Both the Council and television broadcasters would benefit from this. The Council would be able to express their opinion on programmes beforehand and the television broadcasters could mark the programmes appropriately to avoid unnecessary costs. In the end, the main goal of provisions is not to impose fines on media providers but to protect minors from harmful content.

All those measures represent a good framework for the protection of minors from harmful content in linear audiovisual media services but it should be noted that the ultimate responsibility for the protection of minors from harmful content lies on the parents. The purpose of the system of the categorization and labelling of programmes is to help parents decide to what extent their children will be exposed to certain programmes and their harmful influence. In today's information society, where audiovisual programmes are more accessible than ever, that has become an extremely difficult task and any involvement of the state is welcome.⁸⁰

2.2.3 Protection of minors and on-demand audiovisual media services

The implementation of two-tier regulation and the introduction of on-demand audiovisual media services in the Croatian regulatory framework for electronic media required a revision of EMA in 2009. With the transposition of AVMSD, as in the case of linear audiovisual media services, provisions incorporated in the EMA are almost identical to provisions from AVMSD. In the EMA, on-demand audiovisual media services are defined as audiovisual

⁷⁹ Three bodies carry out the co-regulation system in Germany: the Supreme Regional Youth Authorities (Oberste Landesjugendbehörden), with the support of two voluntary self-regulatory bodies, Voluntary Self-Regulatory Organisation of the Film Industry (Freiwillige Selbstkontrolle der Filmwirtschaft – FSK) and Voluntary Self-Regulatory Organisation of the Entertainment Software Industry (Unterhaltungssoftware Selbstkontrolle – USK) under a co-regulation system. The Supreme Regional Youth Authorities adopt the result of the examination carried out by these bodies under a joint agreement in the form of a decision. Cf. Scheuer, A., Bachmeier, C., *The Protection of Minors in the Case of New (Non-Linear) Media*, IRIS plus 2012-6, available at: http://www.emr-sb.de/tl_files/EMR-SB/content/PDF/Jugend-Beitraege/scheuer_bachmeier_protection_minors_ipius_2012.pdf [24.12.2013].

⁸⁰ Cf. Gosselt, J., Van Hoof, J., De Jong, M., *Media Rating Systems: Do They Work? Shop Floor Compliance with Age Restrictions in The Netherlands*, *Mass Communication and Society* 15/3 (2012), 335–359, p. 340.

media services provided by a media service provider for the viewing of programmes at a moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.⁸¹ There is no need to obtain a concession to be able to provide on-demand audiovisual media services (like in the case of linear services). All that is needed is to obtain a license from the Council.

Although AVMSD leaves plenty of room for Member States to implement stricter rules, especially concerning on-demand audiovisual media services, Croatia failed to seize that opportunity, unlike some other EU countries.⁸² Within this two-tier regulation in the EMA, and the exception of illegal programmes, on-demand audiovisual media services which might seriously impair the physical, mental or moral development of minors can be made available in such a way that ensures that minors will not in normal circumstances hear or see such on-demand audiovisual media services.⁸³ This provision imposes an obligation on broadcasters to carefully choose the technical means of broadcasting of such content, but even a bigger responsibility lies on the parents. If they do not want their children to be exposed to such content they must be well informed and able to use all technical means (like PIN codes) to prevent such exposure. Since the enactment of AVMSD and EMA, in 2007 and 2009 respectively, there have been a number of changes in terms of technology and the way that young people consume content. In Croatia in 2009 most of the on-demand services were still in the process of development and they did not represent a grave danger to minors. Today, when 70% of households have access to the Internet and almost 30% of them have access to IPTV, the risk of exposure of minors to content that might seriously impair their development is much higher. In the authors' opinion, there is a growing tendency among younger population to entertain and inform themselves through on-demand audiovisual media services. Moreover, we think that in the very near future on-demand audiovisual media services will be the primary source of entertainment and information, especially for young people.⁸⁴

⁸¹ Art. 2(1/12).

⁸² Total ban of such audiovisual media services is implemented in France, French Community of Belgium but also Bulgaria, Lithuania, Sweden and Poland; In Germany certain content that could seriously impair minors development is banned in both linear and on-demand services. Art. 4. JMStV.

⁸³ Art. 20(1) EMA.

⁸⁴ Cf. Sifunakis, N., *The European Union's Media Policy: The Role Of The European Parliament*, in: Terzis, G. (ed.), *European Media Governance: The Brussels Dimension*, Intellect Books, Bristol, 2008, p. 46.

Regarding the programmes in on-demand audiovisual media services that are likely to be harmful to minors, there are no restrictions in the Croatian regulatory framework. With the premise that such services are not accessible to everyone and are provided only on demand, the legislator did not introduce restrictions on the broadcasting of such services. The only obligation imposed on media providers of on-demand audiovisual media services is to assign a written indication (visual symbols) to such programmes within their catalogue. Article 14(1) of RPM stipulates that when providing programmes which are likely to impair the physical, mental or moral development of minors, an on-demand service provider shall ensure that they shall be readily recognizable by visual symbols.⁸⁵

Supervision of the provision of on-demand audiovisual media services through IPTV providers that have obtained a license from the Council does not represent a problem since the license can be revoked and certain penalties can be imposed on them if they fail to provide services in accordance with EMA. The real problem with on-demand services is when they are provided on the Internet without a license. Most of them are provided on online newspapers television broadcasters' websites. Currently, there is an ongoing debate in the EU member states as to whether those services should be treated as on-demand audiovisual media services and subject to the pertinent rules. Seeing as online newspapers and similar websites that are edited and contain media information available to the general public are subject to EMA regulations as *electronic publications*, we will discuss that problem in the following chapter.

2.2.4 Protection of minors and electronic publications

The biggest threat for minors regarding harmful media content in today's information society comes from the content published on the Internet.⁸⁶ On the one hand, there is an exponential growth of new content and Internet users, especially among the younger population, while on the other hand there is a growing need for regulation of this environment. Most EU countries have only recently started to deal with those problems and there are still many unanswered questions. The same situation can be found in Croatia. The introduction of EMA in 2003, which tried to regulate some of the content

⁸⁵ Art. 14(1) RPM.

⁸⁶ Cf. Savirimuthu, J., *The EU, Online Child Safety and Media Literacy*, International Journal of Children's Rights 19/3 (2011), 547–569, p. 548.

published on the Internet by media providers, failed to produce results. Provisions were enacted but in reality, implementation of those provisions did not take place. Although Croatia transposed the E-commerce Directive⁸⁷ with the Electronic Commerce Act⁸⁸ in 2003, including the provisions stipulating possible restrictions on the provision of information society services harmful for minors⁸⁹ and the provisions recommending self-regulation and co-regulation⁹⁰ where information society services and protection of minors are concerned, it did not produce satisfactory effects. In 2009, when the new EMA was enacted and the definition of electronic publications was revised, the Council started to monitor registered Internet websites. Today, for the provision of electronic publications in Croatia, the media publisher must be registered with the Council and comply with EMA. As regards the protection of minors, EMA stipulates in Article 80(1) that provisions of Article 26 are to apply to electronic publications.⁹¹ Article 26 of EMA regulates illegal content and the protection of minors in linear audiovisual media services, as discussed above.⁹² Considering the broad availability of electronic publications, prohibiting the content that might cause serious harm to minors and prescribe additional obligations for the content that is likely to cause serious harm to minors is, in the authors' opinion, a reasonable measure. Additional obligations for media providers enacted in RPM stipulate that in the case of publishing contents that are likely to impair the physical, mental or moral development of minors in an electronic publication, a media service provider shall ensure that no inappropriate image or content is published on the home page.⁹³ If the aforementioned contents are made available, they should be marked with a visual symbol and a written warning indicating that the content which follows is not suitable for

⁸⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L 178, 17/07/2000, pp. 1-16.

⁸⁸ Electronic Commerce Act (Official Gazzete No. 173/2003, 67/2008, 36/2009, 130/2011, 30/2014; hereinafter: ECA).

⁸⁹ Art. 5a(1) ECA.

⁹⁰ Art. 21a(5) ECA. See more on protection of minors and co-regulation in: Lievens, E., Dumortier, J., Ryan, S. P., *The Co-Protection of Minors in New Media: A European Approach to Co-Regulation*, UC Davis Journal of Juvenile Law & Policy 10/1 (2006), 97-151.

⁹¹ Art. 80(1) EMA.

⁹² See *supra* 2.2.2.

⁹³ Art. 15(1) RPM.

persons under 18.⁹⁴ Proscribing the publishing of such content on the “home page” of a news website can be problematic since there could be a “home page” for each thematic section of an electronic publication that can be published on subdomains. Also, the biggest challenge is how to monitor electronic publications. Currently, there are 149 electronic publications registered with the Council. The Council does not have sufficient financial or technical means to adequately monitor all those media services, so they mostly act on the basis of complaints from consumers. Although publishers of printed media and television broadcasters who run electronic publications mostly comply with journalism standards and ethics, it is clear that there is an urgent need to establish some kind of co-regulatory framework between the Council and the providers of electronic publications regarding the protection of minors. All the involved parties could benefit from this kind of framework. Media providers would have pre-established rules that they would have to comply to, while the Council would take part in establishing those rules and the resulting protection of minors from harmful content would be better.

Furthermore, there is the question of publishing video content as part of electronic publication. The issue is whether that part of an electronic publication should be treated as a separate service, an on-demand audiovisual media service, or the service as a whole should be treated as an electronic publication. It is an important question not just in terms of the protection of minors, but also in terms of the general treatment of those services. Examining current practice of the Council in Croatia, it is clear that such mixed media content on the Internet is treated solely as electronic publication. The Council did not impose an obligation on media providers of electronic publications with video content to also register as on-demand audiovisual media providers. Most Croatian online newspapers include video in their publications; sometimes that video is linked from other sources (e.g. YouTube), but sometimes they also include video that is their own production. Under current rules, such video must be in accordance with Article 26 EMA, meaning that video that might seriously harm minors is prohibited. Video that is likely to harm minors can be published only if certain conditions are met, as discussed above.⁹⁵ Divergence of opinions on that subject can also be found between EU member states.

⁹⁴ Art. 15(2) RPM.

⁹⁵ That is often not the case. There are numerous examples of media providers not complying with those provisions. They usually publish harmful video content without including any warning or visual label.

In the UK, an example is the case between “News Group” and ATVOD (the Authority for Video On Demand), where ATVOD first decided that the video services on “Sun Video” (part of “The Sun” news website) was to be considered as an on-demand audiovisual media service, and where later Ofcom⁹⁶ revised that decision and set aside ATVOD’s decision. This case set a useful and important precedent that altered the way ATVOD interprets the scope of regulatory framework of on-demand audiovisual media services.⁹⁷ Contrary to that, a recent decision of the Austrian regulatory body clearly states that the video section of newspaper website is a notifiable on-demand service. In the case of “Tiroler Tageszeitung”, which provided access to videos on their subdomain and argued that the videos merely supplemented the rest of the website, the Austrian *Bundeskommunikationssenat* (Federal Communications Senate - BKS) ruled that the video section of a newspaper’s website met all the criteria of an on-demand service and was notifiable and subject to regulations under the *Audiovisuelle Mediendienste-Gesetz* (Audiovisual Media Act - AMD-G).⁹⁸ So clearly, there is no common position on the subject within the EU despite the implementation of AVMSD. In the authors’ opinion, if the video is provided on a separate domain or subdomain and access to that video is in some way protected (with a password for registered and paying users), this service should be treated as on-demand audiovisual service. Otherwise, if the video is freely accessible, it also depends on the regulation that is imposed on such media service providers. If the content that might cause serious harm to minors is banned altogether from any kind of media, then video that is not banned can be made available, with visual labels and warnings when needed. Since the Internet has become the “main” medium, especially for children and younger people, seriously harmful content should be made available only with restrictions and under strict supervision.

One of the most important subjects as regards the protection of minors is the protection of their right to privacy and the protection of their personal

⁹⁶ An independent regulator and competition authority for the UK communications industries.

⁹⁷ See more Pimlott, N., Lewis, D., *Regulation of video on demand services following the Sun Video appeal*, Entertainment Law Review, 29 Feb 2012, available at: <http://www.ffw.com/publications/all/articles/sun-video-appeal.aspx> [21.12.2013].

⁹⁸ Cf. AT-Austria: Matzneller, P., *Video Section of Newspaper Website is Notifiable On-Demand Service*, Institute of European Media Law (EMR), Saarbrücken/ Brussels, IRIS 2013-3/9, available at: <http://merlin.obs.coe.int/iris/2013/3/article9.en.html> [22.12.2013].

data, both in audiovisual media services and electronic publications. Since media providers in Croatia infringe on those rights, especially through electronic publications, this has become a very important issue. For this reason, the following chapter features an analysis of the provisions governing those rights.

3. PROTECTION OF PERSONAL DATA AND PRIVACY OF MINORS IN ELECTRONIC MEDIA

Minors enjoy special protection in the Republic of Croatia not only regarding access to harmful content, but also when they are themselves objects of media attention. Issues arising in this context are connected with the divergent nature of interests regarding the protection of privacy and personal data of minors, on the one hand, and those of freedom of expression and freedom of media⁹⁹, on the other. The aim of this chapter is, therefore, to present the regulatory framework for the protection of privacy of minors against activities of the media and to establish relevant legal standards which should be used in considering the interests at stake. In order to do so, it is necessary to analyze relevant provisions of the Constitution of the Republic of Croatia, the Media Act, the Electronic Media Act and the Personal Data Protection Act.

3.1 Constitution of the Republic of Croatia

In discussing the protection of privacy and personal data of minors in the media, there are several very important provisions of the Croatian Constitution that have to be taken into account.

Interests of privacy and data protection are subject to Articles 35 and 37 of the Croatian Constitution. The first of these Articles includes a general protection of privacy clause, and the latter provides basic principles regarding the protection of personal data. According to Article 35, “respect for and legal protection of each person’s private and family life, dignity, reputation shall be guaranteed.” On the other hand, Article 37 of the Constitution deals specifically with the protection of personal data. According to the first paragraph of that Article, the right to safety and secrecy of personal data is guaranteed to everyone. Furthermore, the same provisions stipulate that personal data may be collected, processed, and used only with the consent of the person

⁹⁹ For a general introduction to the scope and limitations of the freedom of expression and media see Verpeaux, M., *Freedom of expression*, CoE Publishing, Strasbourg, 2010.

concerned or, without such consent, under the conditions specified by law. In addition, the Constitution prohibits any use of personal data contrary to the expressed purpose of their collection¹⁰⁰ and requires that protection of data and oversight over the operations of information systems in the state be regulated by the law.¹⁰¹

On the other hand, the freedoms of expression and the media also enjoy strong constitutional protection. In this context, the provisions of Article 38 are relevant. According to Article 38(1), freedoms of thought and expression are guaranteed to everyone. Freedom of expression is defined very broadly in the Croatian constitutional legal order and includes “freedom of the press and other media, freedom of speech and public opinion, and free establishment of all institutions of public communication” (Article 38(2)).¹⁰² Censorship is forbidden and journalists have the right to freedom of reporting and access to information (Article 38(3)). Finally, anyone whose rights have been violated in the process of informing the public is guaranteed the right to correction (Article 38(5)).

When it comes to the balancing of constitutionally protected rights, Article 16(2) mandates that any restriction of freedoms or rights be proportionate to the nature of the need to do so in each individual case.

All of the above mentioned rules regarding the protection of privacy and personal data are applicable to all natural persons, regardless of their race, colour, gender, language, religion, political or other beliefs, national or social origin, property, birth, education, social status or other characteristics.¹⁰³ Additionally, some other provisions of the Constitution require that the interests of children and minors be given special protection. In this context, it is necessary to mention Article 62, which stipulates that “the state shall protect maternity, children and youth,...” as well as Article 64, according to which “everyone shall have the duty to protect children and infirm persons”.

¹⁰⁰ Art. 37(3) CRC.

¹⁰¹ Art. 37(2) CRC.

¹⁰² For a general discussion regarding freedom of expression and media in Croatian legal order see Alaburić, V., *Povreda prava osobnosti informacijama u medijima*, in: Klarić, P. (ed.), *Odgovornost za neimovinsku štetu zbog povrede prava osobnosti*, Narodne novine, Zagreb, 2006.

¹⁰³ Art. 14(1) CRC.

3.2 Media Act and Electronic Media Act

The Media Act (MA) is the basic Croatian source of law which regulates the functioning of media in general. Some additional rules regarding audio, audiovisual and electronic publication services are prescribed by the Electronic Media Act (EMA).

The Media Act seeks to establish an adequate balance between the interests of protection of privacy and freedom of the media. It does so in a manner consistent with the aforementioned constitutional requirements, and is strongly influenced by the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). First of all, Article 1(2) of the Media Act stipulates that “the provisions of this Act shall be applied and interpreted in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms.” Although the requirement of ECHR-compliant interpretation follows logically from Article 134 of the Constitution, according to which international treaties which have been concluded, ratified, published and which have entered into force make part of the domestic legal order and have primacy over domestic law, the provision of the Article 1(2) MA is still very important since it emphasizes the relevance of ECtHR’s case law for the interpretation of its provisions.

Article 3 of the MA provides for the protection of the freedoms of expression and the media. Although these freedoms are very broad, they are not unlimited. According to Article 3(3) of the MA, they can be curtailed (1) by law, (2) only if it is necessary in a democratic society and to the extent necessary in such society, and (3) only for specific purposes, namely for the interests of national security, territorial integrity or the public order, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of confidential information, or for maintaining the authority and impartiality of the judiciary. The structure and wording of this provision show that it was modelled after Article 10 of the ECHR, which provides for a three-step test of possible limitations of the freedom of expression.¹⁰⁴

Regarding the right to privacy, MA contains several important provisions. First of all, Article 2 of that Act contains a definition of the term privacy, according to which it refers to “private and family life, and primarily the right

¹⁰⁴ Cf. Omejec, J., *Konvencija za zaštitu ljudskih prava i temeljnih sloboda. Strasbourški acquis*, Novi informator, Zagreb, 2013, pp. 1237-1253.

to live according to one's own choices and decisions". Protection of human personality, privacy and dignity is, according to Article 3(2) of the MA, one of the duties of the media which is inherent to media freedom.

As explained above, some of the possible limitations of the freedom of the media according to the MA (and ECHR) are those aimed at the protection of reputation or rights of others. In this context, Article 7 of the MA provides some very important guidance. According to the first paragraph of that Article, every person has the right to the protection of her privacy, dignity, reputation and honour. However, there are certain additional criteria that need to be taken into account when balancing freedom of the media and the right to privacy. Firstly, the second paragraph of Article 7 provides that persons who work in public service or hold public office also have the right to protection of their privacy, except in cases connected with their service or office. Furthermore, according to Article 7(3) of the MA, a person who attracts the interest of the public by her statements, behaviour and other acts connected with her personal or family life cannot expect the same level of protection of her privacy as other citizens. Finally, Article 8 of the MA stipulates, as a general limitation, that the right to privacy is not infringed if a justified public interest regarding the information prevails over the interest of privacy protection.

The general legal framework regarding the protection of privacy in the media is supplemented by several provisions of the MA which are applicable in some special circumstances. First of all, according to Article 16(1) of the MA, the media are required to respect the privacy, dignity, reputation and honour of citizens, and especially those of children, youth and family, regardless of their sex or sexual orientation. Also, it is prohibited to publish information which reveals the identity of a child, if that would jeopardize his well-being. Additionally, the next paragraph (Article 16(2) of the MA) prescribes that the media should respect the right to the protection of identity of witnesses and victims of crimes, and prohibits that their identity be revealed without prior consent of the person concerned. These provisions are further elaborated in Article 12 of the EMA. According to the third paragraph of that Article, it is prohibited to publish information revealing the identity of a child under the age of 18, who has been involved in cases of violence of any kind, regardless of whether the child was a witness, a victim or the perpetrator, or if the child has attempted to commit or has committed suicide, or to reveal details of family relations and private life of a child.

3.3 Personal Data Protection Act

Besides the laws regulating media and electronic media, the protection of minors vis-à-vis activities of the media can also come under the scope of the Personal Data Protection Act (PDPA).¹⁰⁵ The Croatian PDPA implements EU Directive 95/46/EC and regulates the collection and processing of personal data regarding natural persons by controllers situated in the Republic of Croatia and in foreign countries, in accordance with the principles defined in the Directive. When it comes to the protection of personal data of minors, all of the general principles and provisions of the PDPA apply. In this context, one has to consider the requirements that personal data be processed fairly and lawfully, as well as that they be relevant for the purpose for which they are processed and not excessive in relation to that purpose. From the perspective of protection of minors, it should be stated that the PDPA contains only one provision aimed at the protection of their personal data. According to Article 7(3) of the PDPA, “personal data relating to minors may be collected and processed in accordance with this Act and by applying special protective measures prescribed by special acts.” However, this provision is not particularly relevant in cases of processing personal data in the course of media activities, since its object is primarily information contained in personal data filing systems.

Unfortunately, the Croatian legislator failed to explicitly implement (into PDPA) Article 9 of the Directive 95/46, which calls for Member States to provide for exemptions or derogations for the processing of personal data carried out for journalistic purposes if such exceptions are necessary to reconcile the right to privacy with the rules governing the freedom of expression. In these circumstances, it is also necessary to apply the general principles governing the protection of privacy in the media (MA and EMA) to possible requests for the protection of personal data under the PDPA. That would require domestic courts and administrative bodies (Personal Data Protection Agency) to balance the interests of personal data protection against those of the freedoms of expression and the media using the standard of the contribution of processing of personal data to the debate of public interest. From the media standpoint, the simplest solution that could be used to avoid possible infringement of the PDPA would be to anonymize information concerned, so that it no longer falls under the definition of “personal information” under Article 2 of the PDPA.

¹⁰⁵ In Croatian legal theory protection of personal data is considered to be one aspect of the right to privacy. Cf. Dragičević, D., *Privatnost u virtualnom svijetu*, Zbornik Pravnog fakulteta u Zagrebu 51/3-4 (2001), pp. 620-621.

4. CONCLUSION

Rapid changes in the electronic media environment and the way that minors relate and adapt to them require special attention and an examination of current policies. More than ever, minors are consuming media content published on the Internet through smartphones, tablets and personal computers. Convergence has played a main role in erasing the line between the traditional media and the modern digital media. As stated in the implementation report of the European Commission on the Protection of Minors and Human Dignity, “these new developments offer many opportunities for minors, but bring some challenges regarding their protection, considering that parents often have difficulties in carrying out their responsibilities in relation to new technology products and services that are usually less known to them than to their children.”¹⁰⁶

In such circumstances the regulatory framework has a leading role, both in protecting the minors but also in helping parents protect their children. The transposition of AVMSD provisions into the Croatian regulatory framework for electronic media and introduction of two-tier regulation established somewhat satisfactory protection of minors with regard to the new media services. The regulation of linear audiovisual media services has mostly remained unchanged seeing as the graduation of programmes according to their harmfulness had been established even before the adoption of AVMSD. The biggest objection to EMA would be the missed opportunity to impose stricter regulation of the content that might cause serious harm to minors. Allowing providers of on-demand audiovisual media services to broadcast such programmes, regardless of imposed restrictions, can be a serious threat to minors. As stated above, minors in today’s information society are often more technologically literate than their parents, which enables them to circumvent those restrictions. The second objection is aimed towards lacking rules that govern the publishing of content in electronic publications. Simply applying rules for linear

¹⁰⁶ Report from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on the application of the Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity and of the Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and online information services industry-Protecting Children in the Digital World, COM/2011/0556 final, 13/09/2011.

audiovisual media services on online news websites is not sufficient. Moreover, it represents grave disregard of the possibilities of new media forms and their threat to minors. Regulation of such a comprehensive medium as electronic publications, which can combine all of the media forms together with direct interaction with consumers, demands a more thorough approach.

Regarding the right to privacy and personal data protection of minors, the analysis of the relevant regulatory framework shows that there are relevant safeguards in the Croatian legal order. The analysis of the Croatian Constitution, the Media Act and the Electronic Media Act shows that they call for a case by case balancing of the right to privacy against the freedoms of expression and the media. Such balancing should be based on the relevant standards established in the practice of the European Court for Human Rights, since both Article 134 of the Constitution and Article 1(2) of the Media Act require that relevant provisions of the latter act be interpreted in accordance with the ECHR. However, when the object of expression is information regarding minors, the Media Act goes further by prohibiting the publication of information revealing the identity of a child if it would jeopardize his well-being. In cases when a child has been a witness or victim of a crime, the Media Act prohibits that his identity be revealed without prior consent. These provisions are further supplemented by the Electronic Media Act, according to which it is prohibited to publish information revealing the identity of a child who has been involved in cases of violence of any kind, regardless of whether the child was a witness, a victim or the perpetrator, or if the child has attempted to commit or has committed suicide. Finally, the Electronic Media Act also provides for the general prohibition of publishing details of family relations and the private life of a child. On the other hand, the Personal Data Protection Act does not provide for clear standards to be applied when personal data relating to minors are being processed by the media. However, it is argued that, by analogy, the test of balancing the limitation of the right against the freedom of expression established under the Media Act should also be used in cases of requests for the protection of personal data under the PDPA.

Sažetak

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USLUGAMA I ELEKTRONIČKIM PUBLIKACIJAMA U
REPUBLICI HRVATSKOJ**

Razvoj informacijsko-komunikacijskih tehnologija i njihova konvergencija osnova su za pojavu novih oblika medijskih usluga i emitiranja sadržaja u digitalnom obliku. To dovodi do brojnih pozitivnih pomaka, ali istovremeno i nameće nove izazove. Zaštita maloljetnika jedan je od tih izazova. Nameće se potreba za primjerenom regulacijom na nacionalnim i nadnacionalnim razinama. Ovim radom analiziramo regulatorni okvir za elektroničke medije u kontekstu zaštite maloljetnika u Republici Hrvatskoj. Autori analiziraju odredbe koje reguliraju emitiranje štetnog sadržaja za maloljetnike te zaštitu privatnosti i osobnih podataka maloljetnika u odnosu na slobodu izražavanja u medijima. Iako je zauzet stav da sadašnji regulatorni okvir pruža dostatnu razinu zaštite maloljetnika, predlažu se određene izmjene radi bolje zaštite maloljetnika od štetnih sadržaja. U pogledu zaštite privatnosti i osobnih podataka maloljetnika autori tvrde da sadašnje odredbe sadržane u Zakonu o medijima i Zakonu o elektroničkim medijima pružaju primjerenu zaštitu na normativnoj razini te naglašavaju važnost njihove interpretacije prema standardima uspostavljenima sudskom praksom Europskog suda za ljudska prava.

Ključne riječi: elektronički mediji, maloljetnici, zaštita maloljetnika, linearne audiovizualne medijske usluge, audiovizualne medijske usluge na zahtjev, elektroničke publikacije

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