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LEGAL OPINION

**on the Draft Law
on the Independent Media Commission of Kosovo***

Division for Cooperation on Freedom of Expression
Council of Europe

* This designation is without prejudice to positions on status and is in line with UNSCR 1244 and the ICJ opinion on the Kosovo Declaration of Independence

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List of Abbreviations

ACC	Audiovisual Commercial Communication
AVMS	Audiovisual Media Services
AVOD	Advertising video on-demand
AVMS Directive	Audiovisual Media Services Directive
DSA	Digital Services Act
DTT	Digital Terrestrial Television
EMFA	European Media Freedom Act
EPRA	European Platform of Regulatory Authorities
ERGA	European Regulators Group for Audiovisual Media
EEUOK	European Union Office in Kosovo
IMC	Independent Media Commission
IPTV	Internet Protocol television
KMShK	Kosovo Print Media Council / Press Council
NRA	National Regulatory Authority (for audiovisual media)
OSCE	Organisation for Security and Cooperation in Europe
OTT	Over the top
PACE	Parliamentary Assembly of the Council of Europe
TVOD	Transactional video-on-demand
SVOD	Subscription video-on-demand
UNHRC	United Nations Human Rights Committee
VSPS	Video-Sharing Platform Services

Introduction

The purpose of this Legal Opinion is to provide an assessment of the most recent Draft Law for the Independent Media Commission (IMC) which was approved by the Government on 27 December 2023.

The Council of Europe provided an assessment on a previous Draft Law from October 2022 and some comments from that review are included here. An earlier Draft Law from 2021 (2021 Draft Law amending the 2012 IMC Law) also underwent several reviews and was generally considered to incorporate many important elements of the revised Directive.

Regarding key legislation, Law No. 04/L-044 on the Independent Media Commission 2012 (the IMC Law 2012) regulates the establishment and functioning of the national regulatory authority (RA) – the Independent Media Commission (IMC). The law is unusual in comparison to the legislative frameworks of other countries, in that it also incorporates all the provisions relevant to the regulation of the audiovisual media sector (including the rights and obligations of audiovisual media services). It serves as the basis for alignment with the European Union acquis, particularly the Audiovisual Media Services Directive updated in 2018, and must also comply with the Council of Europe relevant recommendations.

The Draft Law was discussed at a meeting of the Parliamentary Committee on 26 April 2024, which gathered representatives of key institutions: the IMC, the EUOK, the OSCE Office, the Council of Europe Office and a Council of Europe Consultant. The EUOK and the OSCE provided written comments in advance of the meeting. This review refers to previous reviews and to the comments of the EUOK and the OSCE.

Executive Summary

Overall, the Draft Law aligns with the Audiovisual Media Services Directive. However, concerns have been raised about legal clarity, proportionality of measures, and deviations from the EU acquis and European, particularly Council of Europe, standards.

The review therefore provides an introduction covering key principles that should inform the drafting and implementation of the law: the importance of 'evidence-based and impact-oriented governance choice' and the need for a clearer concept document outlining the rationale for changes to the draft; the key principle of proportionality which should alleviate the regulatory burden placed on services and ensure a fairness regarding sanctions placed on services, and the need to have a graduated approach to different services; the importance of legal certainty, legal clarity and foreseeability in the terms used and the provisions in the law; the importance of inclusive, transparent manner and meaningful consultations.

In addition, with regard to the implementation of the Directive, the fundamental principles and conditions necessary for this are the independence of the national regulatory authority, the transparency of media ownership, the promotion of self and co-regulation, the cooperation between regulators, and the promotion of media literacy.

With regard to legal clarity and proportionality, the sections of the Draft Law dealing with sanctions are considered problematic and should be revised. As one example, Article 56 (1.2) introduces a very broad sweeping provision on fines – "a fine from EUR (500) to (20,000) shall be sanctioned legal entities who: 1.2.1 Do not adhere to obligations deriving from this Law." Sanctions and fines should be graduated clearly according to different types of violations.

Some comments from the previous review are reiterated. With regard to the Purpose of the Draft Law on IMC (Article 1), it is recommended that this Article should clearly state that one purpose of the law is to regulate the audiovisual media sector and to elaborate on the rights and responsibilities of audiovisual media services and video-sharing platform services (VSPS).

In several instances obligations are placed on the IMC but not on the audiovisual media services. Two key areas of regulation of audiovisual media that aim to protect and promote the rights of the most vulnerable members of society are not explicitly included under the obligations of audiovisual media services in the Draft Law on IMC. These issues are addressed under the tasks and responsibilities of the IMC. Obligations on audiovisual media service providers to protect minors should be explicitly included under Article 51. Obligations on audiovisual media service providers to provide accessible content for people with disabilities should also be explicitly included under Article 51. Similarly, the provisions of the Draft Law related to VSPS (unlike in all EU Member States and countries in the region that adopted laws, or drafted laws) do not directly place obligations on the VSPS to protect minors and protect the public from harmful and illegal content. Instead, the Law elaborates the duties and responsibilities of the IMC in this regard. All of the relevant provisions related to VSPS should be adjusted to place the obligations on VSPS. The role of the regulator will

be to develop by-laws or rules in the area and to assess whether measures taken by VSPs are appropriate to ensure they abide by their obligations.

The introduction a definition of 'online audiovisual media services' (under the definition of audiovisual media services), which does not exist under European Law has raised concerns with all the international institutions. Among others, this definition is not necessary as the definition for on-demand audiovisual media services, and the definition for video-sharing platform services (VSPS) will cover any relevant services online which should fall under the scope of the Directive and hence also the Draft Law. In addition, the definition incorrectly includes services providing access to user-generated content under a definition of online audiovisual media services - and hence also within the definition of audiovisual media services. VSPS are information society services, more specifically categorised by the AVMS Directive and the Digital Service Act as intermediaries. They fall under a different regulatory regime. Content on audiovisual media services is under the editorial control of the media service provider. User-generated content on VSPS is not under the editorial control of the provider.

Grouping different services under one heading when they should be dealt with under different regulatory approaches and rules introduces uncertainty in the law. It is therefore recommended that this definition of 'online audiovisual media' should be removed.

The Draft Law refers to permits, licences and registers and the difference between these is not clear. In particular the expression 'permit' is used for on-demand audiovisual media services and for VSPS. The review provides comparative European detail on the approach taken to these types of services. This indicates a limited extent to which on-demand audiovisual media services. It also indicates that VSPS are not licenced but are often required to register. Given that there are sanctions for operating without a permit from the IMC, it is recommended that this section of the Law needs to be clarified and brought into line with standards and practices in other European countries.

The review discusses the obligations placed on online media and emphasises the Council of Europe's recommendation that: "media and communication governance should be based on evidence showing the need for intervention and take account of its regulatory and human rights impact to allow for a graduated and differentiated response respecting the roles played by different actors in the production, dissemination, and use of content".

The key importance of the promotion of self and co-regulation and cooperation between the IMC and the self-regulatory body – the Press Council – is strongly emphasised. In particular, the IMC will continue to be responsible for the self-regulation of news and information content on online news media, while video content linked to news articles does not fall under the scope of the Directive. It is highly recommended that the self-regulatory body be supported and enhanced and that the IMC works with the self-regulator to enhance efficiency, share information, and as noted by the OSCE Office collaborate "with journalist organisations and the PCK (Press Council), utilising different types of self-regulatory

mechanisms, such as a code of conduct and strict moderation, to ensure that the right to reply and correction are available for readers of new portals as they are for the listeners and viewers of traditional media (radio and television)."

The independence and autonomy of the national regulatory authority (NRA) is not just something to be confirmed in a stated provision. It must also be apparent in the provisions around the functioning of the regulator, its financial resources and independence, the methods of appointing and dismissal of management and governing bodies, and also in the actual practice of implementation of the Law.

Some recommendations are made in the review regarding the lack of clarity related to the powers and competences of the IMC, e.g., regarding permits, licences, etc., and concerning assessing media ownership, among others.

Concerns have also been raised, in particular by the EUOK as regards the budget, and it is stressed that the Draft Law should "explain in a clear and precise language, preferably in the same provision, the IMC budget. In particular, it needs to enhance budget/financial guarantees to ensure its institutional independence. Further, in line with the AVMS Directive, the authorities need to ensure that the financial and human resources are appropriate for the IMC to implement its powers".

The appointment of the IMC is entirely carried out by Parliament, which is not in line with practice in many countries, particularly in the region where civil society plays an important role in many countries in the nomination of a fixed proportion (meaning they directly nominate members to fill specific seats) of the membership of the governing boards of regulators. In addition, the Draft Law also gives Parliament the power to elect the Chairman of the IMC.

Regarding the mandates of the members of the Council, this has been changed in the Law setting it to four years, which is not uncommon in other jurisdictions. When considering the length of mandate in many other jurisdictions, which may be equivalent, it is important to note that the procedures for appointment (see above) are quite different and involve the participation of civil society and not just parliamentarians. The EUOK raises concerns regarding how the process coupled with the longer mandates may raise problems regarding the political independence of the IMC.

The size of the Council will increase from seven to eleven members, although the rationale for the increase is not clear as noted in the EUOK and the OSCE comments. Some comparative information on the size of governing bodies in other countries is provided in the review. The OSCE expresses concern regarding potential blocks and delays to electing so many members as has happened in the past and recommends instead to increase the strength of the IMC with more highly qualified members.

It is also worth considering an increase in the staff and the competence of the executive office rather than expanding the IMC.

Of particular concern is the provision that allows for the dismissal of the entire IMC in case the Parliament does not approve the annual report of the IMC. This provision in the Draft Law introduces an arbitrary tool by which the Parliament can remove and replace the entire IMC on the basis of vague and non-defined criteria, which is not in line with European standards.

All of the decisions of the IMC require effective judicial review / or appeal, and this is not clearly reflected in the Draft Law, while the role of the former Appeals Board is now unclear.

Regarding Article 42 on media ownership, this should contain minimum standards on media ownership and definitions of media concentration. Those developed in the 'Regulation on Media Ownership and Concentration of Audiovisual Media Service Provider' should be included here including, for example, the meaning of ownership, and the threshold for a dominant position. If the basic standards are not in the Law then with each change of the IMC it is theoretically possible for there to be changes to the Regulation. The Draft Law gives the IMC powers in assessing media ownership and hence details should be provided on media ownership limits in the Law. As noted by the EUOK: through a by-law, rights and responsibilities are only explained in details. Thus, it is essential that the rights and responsibilities concerning media ownership and concentration are provided in the Draft Law.

A specific article prohibiting political ownership of the media has been removed from the Draft Law. The review indicates clearly how this represents a backward slide in terms of alignment with high-level standards in media legislation. At the level of the EU, the politicisation of media ownership is a key risk to the pluralism of the media.

Article 8 of the Draft Law proposes introducing a fund to support the media. In line with EU acquis regarding State Aid and also Council of Europe standards in this area, the Law should indicate the purpose of such a fund. Funds are generally acceptable where they promote media pluralism, quality journalism and support the production of 'public interest content'. As in all other countries who with such funds, the Draft Law should clarify what is meant by 'public interest content' by outlining a range of themes which should be covered in such content. Examples from other jurisdictions are provided in the review.

In addition, according to Council of Europe standards and European practice, the Draft Law should guarantee that the fund will be administered in a non-discriminatory and transparent manner by a body enjoying functional and operational autonomy, such as an independent media regulatory authority. Independent bodies responsible for the allocation of direct subsidies should publish annual reports on the use of public funds to support media actors.

The main recommendations on the Draft Law can therefore be summarised in the following way:

1. Clarify the purpose of the Law
 - Clearly state that the purpose of the Law is to regulate the audiovisual media sector and elaborate on the rights and responsibilities of audiovisual media services and video-sharing platform services (VSPS).

2. Define obligations of media services
 - Explicitly include the obligations of audiovisual media services to protect minors and provide accessible content for people with disabilities under Article 51.
 - Adjust provisions related to VSPS to place obligations directly on VSPS rather than on the IMC.

3. Remove unnecessary definitions
 - Eliminate the definition of “online audiovisual media services” to avoid confusion and ensure alignment with the AVMS Directive.

4. Differentiate regulatory approaches
 - Clearly distinguish between the regulatory regimes for on-demand audiovisual media services and video-sharing platform services to avoid applying a one-size-fits-all approach.

5. Clarify licensing and registration requirements
 - Introduce a notification or registration system for on-demand audiovisual media services and video-sharing platform services, rather than requiring permits.
 - Provide clear definitions and procedures for the issuance of licenses, permits, and registrations in line with European practices.

6. Establish proportional sanctions and fines
 - Ensure that sanctions and fines are proportional to the severity of the violations, clearly defining the types of violations and corresponding penalties.
 - Introduce a graduated system of sanctions that accounts for the economic capacity of media outlets to ensure fairness.

7. Conduct consultation and ensure inclusivity

- Conduct meaningful consultations with key stakeholders, including media operators, civil society, and regulatory bodies, ensuring transparency and inclusivity in the legislative process.
8. Clarify competences and powers of the National Regulatory Authority (NRA) and strengthen its independence
- Clearly define the competences and powers of the NRA in the law itself, without recourse to sub-laws, ensuring adequate financial and human resources for the IMC to carry out its functions effectively.
 - Ensure the independence and autonomy of the NRA through clear provisions around its functioning, financial resources, and methods of appointing and dismissing management and governing bodies.
 - Implement an independent nomination process for selecting the chairperson of the Independent Media Commission (IMC).
9. Enhance media ownership transparency
- Include minimum standards on media ownership and definitions of media concentration in the law, outlining criteria such as threats to media pluralism and risks of media concentration.
 - Reintroduce the prohibition on political ownership of the media to prevent politicisation and ensure media independence.
10. Establish a media support fund
- Clearly outline the purpose of the media support fund and define “content of public interest” to ensure alignment with European standards.
 - Guarantee that the fund will be administered in a non-discriminatory and transparent manner by an independent media regulatory authority, with clear governance standards.
11. Promote self-regulation and co-regulation
- Support and enhance the self-regulatory body, ensuring cooperation between the IMC and the press council to maintain high standards of journalism and media ethics.
 - Encourage the development of self-regulation frameworks that include professional and ethical standards, particularly in the coverage of election campaigns and handling of disinformation.

12. Address disinformation and promote media literacy

- Promote media education and digital literacy skills to counter disinformation and enhance public awareness.
- Encourage collaborative fact-checking initiatives and improvements in content moderation systems to maintain the integrity of information.

1. Commentary on principles of regulation

1.1. Evidence-based regulation

The European Union had highlighted the importance of evidence-based regulation and the development of regulation involving citizens, businesses, and stakeholders in the decision-making process. The Council of Europe has also emphasised the importance of consultations under its 2022 Recommendation on principles for media and communication governance', and these include: transparency and accountability; openness and inclusiveness; Independence and impartiality; evidence-based and impact-oriented governance choice; media and communication governance should be based on evidence showing agility and flexibility.¹

With regard to providing a reasoned argument for the changes in the Law, the EU Office has also (among others) raised the issue of evidence-based regulation - and the need for reasoning with specific evidence for the changes in the Law. The comments provided by the EU note that:

The Draft Law does not have a Concept Document that would provide for a detailed analysis of the issues encountered in the implementation of the law and the reasoning for the proposed changes presented in the draft law. The explanatory memorandum briefly explains the aim of the Draft Law, the process of consultation and offers some answers on the questions/comments raised by relevant institutions and civil society. However, it does not offer a complete overview of the issues identified and the recommended options, as if there would be a concept document drafted in line with Article 29 of Regulation No.09/2011 on the Work of the Government.²

1.2. Proportional regulation

Another key principle is Proportionality, whereby laws and regulations implementing EU Law must be proportional. In relation to alignment with the AVMS Directive, proportionality can relate to the regulatory burden placed on services and can also be relevant to the sanctions placed on services. The AVMS Directive repeatedly refers to proportionality and proportionate measures.

For example, in relation to on-demand audiovisual media services, certain obligations do not apply to media service providers with a low turnover or a low audience (see Article 13 AVMS Directive related to quotas for European Works).

¹ Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance.

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a61712

² Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUOK Kosovo.

Regarding VSPS, the “video-sharing platform providers under their jurisdiction will be required to apply certain measures. Those measures shall be practicable and proportionate, taking into account the size of the video-sharing platform service and the nature of the service that is provided” (Article 28b (3)). Furthermore, in applying the regime for VSPS and establishing the measures that should be taken by the providers:

[... the appropriate measures shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content as well as the general public interest ..](AVMS Directive, Article 28b (3)).

Hence, the regulation of all media outlets, and also online media requires a more complex and nuanced approach that sometimes requires a case-by-case examination of different services.

1.3. Legal clarity, legal certainty and foreseeability

It is vital that the law is clear with regard to terms and the definition of terms, and regarding specific provisions of the law. In the review of the Draft Law with the Committee, several examples of provisions which lacked clarity were noted. The discussion below on permits and licences (3.2) is one example, where the meaning of these terms is not clear. The United Nations Human Rights Committee (UNHRC) affirmed in its general comment No. 34 of 2011 that:

‘a norm, to be characterized as a ‘law’, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.’³

Similarly, the ECtHR has on several occasions stated that the notion of ‘lawfulness’ requires that the tests of legal certainty and quality of law be satisfied. Such a test of legal certainty requires that all laws be public and sufficiently precise to allow the citizen – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail⁴ and so as to avoid all risk of arbitrariness.⁵

³ Human Rights Committee, General comment No. 34 (2011) - Article 19 Freedoms of opinion and expression.

⁴ Steel v. UK, HL v. UK, Nasrulloev v. Russia

⁵ Hilda Hafstainsdottir v. Iceland, Amuur v. France, Dougoz v. Greece. See also: Guide on Article 5 of the Convention - Right to liberty and security European Court of Human Rights 14/64 Last update: 31.08.2022

Examples of provisions that lack legal certainty, which could lead to arbitrary decisions include the following (some of which are discussed in more detail in the relevant sections below). In the case of dismissal of the entire IMC, a completely arbitrary provision is introduced.

Article 17- 3.6. In case of non-approval by the Assembly of the annual report of the IMC, the Committee may initiate the dismissal of the Commission.

In addition, the IMC has powers (under Article 4) to review changes in ownership of audiovisual media outlets but no detail is provided as to the criteria by which the IMC will assess ownership changes.

2.8. IMC shall review and approve the change of ownership by 10% for all licensed and registered entities according to the definition in paragraph 2.2. of this Article.

This Article needs to outline criteria such as, for example, threats to media pluralism or risks of media concentration. For this to be possible, the Law also needs to define media pluralism and to provide a measure and threshold of media concentration. Hence, the provision of Article 42 in relation to media ownership needs to be further developed (see also 5.1 below).

Under Article 57, a range of additional possible sanctions are introduced which are not specifically linked to any particular violation. The IMC may, among others, (Article 57 (1)):

- 1.4 Require suspension of a part or all of the licence's programming schedules for a maximum of three months, if necessary, requesting from the suspended person the display on the screen of the notification about the suspension of the program;
- 1.5 Suspends the permit until the violations defined in paragraph 1 of this article are corrected;
- 1.6 terminate or refuse the continuation of the broadcasting permit;

The possibility to use such sanctions should be directly related to the most egregious violations, for example, a repeated violation of those listed under Article 51 (4).

4. Audiovisual media services provided by media service providers shall not contain any:

4.1 Incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a non-majority community, property, birth, disability, age or sexual orientation.

4.2 direct or indirect public provocation to commit a terrorist offence pursuant to the legislation in force in the Republic of Kosovo.

This would be more in line with the derogations provided in the Directive, which could also include situations where an audiovisual media service provided by a media service provider under the jurisdiction of another Member State 'prejudices or presents a serious and grave risk of prejudice to public security, including the safeguarding of national security and defence.' (Article 3 (3) of the AVMS Directive). The Directive also allows for derogation from freedom of reception and retransmission where an audiovisual media service provided by a

media service provider under the jurisdiction of another Member State manifestly, seriously, and gravely infringes the rules on protection of minors from content that may impair their physical, mental or moral development (Article 3 (3) of the AVMS Directive). Hence, any possibility to suspend or revoke licences should also clarify for which violations such a sanction would apply.

On a similar note, Article 56 (1.2) introduces a very broad sweeping provision on fines.

1.2 With a fine from EUR (500) to (20,000) shall be sanctioned legal entities who:

1.2.1 Do not adhere to obligations deriving from this Law;

Sanctions and fines should be graduated clearly according to violations. Certain types of violations are listed in Article 56, though notably no particular mention is made of the protection of minors which should be a primary consideration. The Comments to the Law provided by the OSCE office also stated that the drafters should 'consider introducing the principle of proportionality in determining fines, based on the severity of the violations'.

The OSCE does not consider the treatment of sanctions in the draft Law effective, as it would hardly deter any large group from misconduct. Nor is it proportional, as it fails to take into account the different severity of the sanctionable conducts. On the contrary, the current regulation can easily lead to arbitrariness, as it essentially leaves the determination of any sanction to the IMC with very little guidance (the only binding criteria being those of Article 56(2); the level of damage caused, time span, abstract mitigating or aggravating circumstances and the above-mentioned financial sustainability). The OSCE thus suggests that the draft Law should classify sanctionable actions according to their nature, clearly distinguishing between those that are procedural, technical, related to ethics, or any other category that may be necessary. For each category it should distinguish between minor, serious and very serious sanctions, each with its own, separate range of sanctions, including here the 'other sanctions' foreseen in Article 57, thus offering certainty as to the appropriate punishment for sanctionable actions. The draft Law should ensure proportionality by introducing a system of sanctions that accounts for the economic capacity of media outlets so as to not unfairly jeopardize their economic viability.⁶

1.4. Consultation

In its 2023 report on Kosovo, the European Commission stated that with regard to the audiovisual policy: 'the long-awaited amendment of the Law on Independent Media Commission (IMC) has been further delayed. This process should be conducted in an inclusive and transparent manner, with meaningful consultation with key stakeholders'.⁷ The

⁶ OSCE Mission in Kosovo Comments on the Draft Law on the Independent Media Commission, March 2024.

⁷ Commission Staff Working Document Kosovo* 2023 Report. https://neighbourhood-enlargement.ec.europa.eu/document/download/760aacca-4e88-4667-8792-3ed08cdd65c3_en?filename=SWD_2023_692%20Kosovo%20report_0.pdf

Council of Europe 2022 Recommendation on principles for media and communication governance provides a good overview of such inclusive, transparent, and meaningful consultations:

States and public authorities should, when developing and enforcing legislation, policies, and regulation applicable to the media, platforms, and communication in the public sphere, allow for the full participation of the affected media and platforms as well as civil society, taking into account their specific roles and responsibilities. This includes the responsibility to hold hearings and consultations on new policy proposals or regulatory reform, to invite and listen to all stakeholders affected or likely to be affected to participate in hearings and consultations, to allow sufficient time to respond to consultations, to inform publicly about the results and impact of such hearings and consultations, and to explain the reasoning behind considering or not considering submissions made.⁸

It is not clear the extent to which the current version of the Draft Law on the IMC has undergone 'a meaningful consultation with key stakeholders,' or the extent to which there has been 'an explanation of the reasoning behind considering or not considering submissions made.'

A very good practice example in the region was the Working Group in Montenegro that involved 25 members (meeting more than 25 times between 2021 and 2023) to draft updates of the relevant media legislation. The stakeholders included representatives of government, ministry, regulatory authority, civil society, and media operators. Recognising that the Government is not in a position to have such an inclusive consultation at this time, it would be highly recommended to revert to the previous version of the Draft Law (which already included media that would qualify as on-demand services, and included other services that would qualify as VSPS), and incorporate any changes necessary to align with the Directive or to meet European standards as already indicated in various reviews,⁹ in order to quickly meet the goal of aligning with the Directive. Hence, other proposals for change could undergo discussion and consultation and provide for a possibility to amend the law at a later date.

1.5. Other principles and conditions necessary for implementation

1.5.1. Independence of the national regulatory authority

A fundamental requirement for implementation of the media legislation is the independence of the national regulatory authority which is addressed in more detail (chapter 4) below.

⁸ Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a61712

⁹ For example: Technical Paper - Enhancing Media Regulatory Independence and Alignment with European Standards in Kosovo*: A Brief Review of the Draft Law for the Independent Media Commission and input to questions and comments of the IMC. prepared by Deirdre Kevin Council of Europe Expert, October 2023; and

1.5.2. Transparency of media ownership

The AVMS Directive emphasises (under recital 15) that ‘Transparency of media ownership is directly linked to freedom of expression, a cornerstone of democratic systems’. The AVMSD requires a minimum of public information about services (Article 5), and national lists of audiovisual media services (Article 2).

1.5.3. Promotion of self and co-regulation

The AVMS Directive has introduced a specific provision on self- and co-regulation (under Article 4a). The Recital of the 2018 Directive (paragraph 14), explains the meaning of self-regulation as a type of voluntary enabling stakeholders to adopt common guidelines amongst themselves and for themselves.

‘Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislative, judicial and administrative mechanisms in place and its useful contribution to the achievement of the objectives of Directive 2010/13/EU.’

It further discusses Co-regulation, which ‘provides, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. In co-regulation, the regulatory role is shared between stakeholders and the government or the national regulatory authorities or bodies’.

On numerous occasions, the Council of Europe has invited state authorities to encourage media self-regulation. Most recently, the 2022 Recommendation on promoting a favourable environment for quality journalism in the digital age states that:

the media’s commitment to verification and quality control should be complemented by effective voluntary self-regulatory mechanisms for the media such as ombudspersons and press/media councils. The public should be made aware of, and have access to, understandable, transparent, and expeditious complaint mechanisms allowing them to flag content breaching the journalistic professional, and ethical standards, also when distributed online, and to obtain corrections of inaccurate information. Complaints should be handled by independent bodies tasked with upholding journalistic professional and ethical standards. Such independent bodies should have stable financing and meaningful powers, in particular, to require the publication of prominent corrections and critical adjudications and apologies (para. 2.1.3).¹⁰

Empowering of press council has been emphasised by international organisations or a potential co-regulation.

¹⁰ Recommendation CM/Rec(2022)4 of the Committee of Ministers to member States on promoting a favourable environment for quality journalism in the digital age.

1.5.4. Cooperation between regulators

A further key issue regards the co-operation between regulatory authorities at both the international and local levels. Cooperation at the national level becomes even more important in relation to online media. In many countries, collaborative and cooperative approaches to the regulation of the online sphere have been developed. Many of these are outlined in detail in a recent report jointly authored by the European Audiovisual Observatory and the European Platform of Regulatory Authorities (EPRA) examining the issue of Media regulatory authorities and the challenges of cooperation.¹¹ These types of national cooperation include working with Press Councils or Commissions, Electoral Commissions, Competition Authorities, Consumer Agencies, Copyright Protection bodies, Data Protection agencies etc. Building a cooperative platform with other national regulators will help to prepare for future implementation of the Digital Services Act. Also key is the need to cooperate at the international and regional level with other national regulatory authorities via the EPRA and as observers at the European Regulators Group for Audiovisual Media (ERGA) in order to exchange experience and comply with the need for cooperation relative to the AVMS Directive.

1.5.5. Promotion of media literacy

Article 33a (1) of the Directive stipulates that Member States shall promote and take measures for the development of media literacy skills. Under Article 47 (5), the IMC has obligations regarding media literacy. Video-sharing platforms also have obligations in this area under Article 54. However, audiovisual media services should also have obligations in this area in the law. According to the recital of the Directive (59):

It is therefore necessary that both media service providers and video-sharing platforms providers, in cooperation with all relevant stakeholders, promote the development of media literacy in all sections of society, for citizens of all ages, and for all media, and that progress in that regard is followed closely.

¹¹ Cabrera Blázquez F.J., Denis G., Machet E., McNulty B., *Media regulatory authorities and the challenges of cooperation*, IRIS Plus, European Audiovisual Observatory, Strasbourg, December 2021. <https://rm.coe.int/iris-plus-2021en2-media-regulatory-authorities-and-the-challenges-of-c/1680a55eb1>

2. General comments on the Law – outstanding from the previous review

2.1. Purpose and scope of the Law

As noted in a previous review carried out by this author, 'Article 1 -Purpose' lacks additional detail. The purpose of the law should surely also be clearly stated as being to regulate the audiovisual media sector and to elaborate the rights and obligations of the operators.

The Purpose of the Law could reflect all (or most) of the key objectives of the Audiovisual Media Services Directive: to promote “media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition” (Article 30).

2.2. Obligations of IMC versus obligations of the audiovisual media sector

The previous review also noted that the elaboration of provisions places obligations on the IMC but does not clearly place obligations on the media services. For example, under Article 47, the IMC should take appropriate measures to ensure that audiovisual media services provided by media service providers under their jurisdiction shall include no programme which might seriously damage the physical, mental, and ethical development of juveniles, in particular programmes with a pornographic content or extreme violence. These requirements should be included under Article 51 - Duties and Responsibilities of a Media Service Provider - but they are not there. This is despite the fact that these provisions address the most vulnerable members of society. In addition, under Article 49, the IMC shall ensure that services provided by media service providers under its jurisdiction are made continuously and progressively more accessible to persons with disabilities through proportionate measures. However, an obligation should be placed on audiovisual media services to provide such programming – again under Article 51.

A further example concerns the provisions related to VSPS. Article 54 outlines the “Duties and responsibilities of IMC towards video distribution platform providers” where it should address the obligations and responsibilities of video-sharing platform providers.

Hence, it is recommended that several adjustments be made in the law to clearly state the obligations of the audiovisual media services and the obligations of the video-sharing platform service providers. Otherwise, as shall be seen below, the majority of provisions in the law are well in line with the AVMS Directive. However, according to the elaboration of certain provisions (as above), the responsibility rests mainly with the regulator. It is not clear whether this is due to the nature of the Law (Law on IMC), but in the absence of any other legal framework to regulate the media, the obligations of the services should be included here – by adding to Article 51, and by adjusting all of the provisions related to VSPS to place the obligations on VSPS. The role of the regulator will be to develop by-laws or rules in the area and to assess whether measures taken by VSPS are appropriate etc.

While these issues may be further addressed in by-laws, it is fundamentally important that the obligations of the services be clearly elaborated in the law.

3. Approach to the regulation of online media

3.1. Definition of online media

The law introduces a definition of 'online audiovisual media services', which as emphasised in the Comments to the Draft Law provided by the EUOK, does not exist under European Law.¹² This definition is contained under Article 3 (paragraph 1.1.3). Article 3 (1.1) is the definition for 'Audiovisual media service'. Hence, the Draft Law changes the meaning of 'audiovisual media service' under EU Law and introduces additional types of media.

The Article 1.1 lacks the full phrase 'where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes'. This should be fully integrated into Article 1.1 as it provides the basis for assessing whether a service is an audiovisual media service.

The introduction of 1.1.3 and 1.1.3.1 and 1.1.3.2 are problematic and shall be discussed further below for example with regard to the mention of user-generated videos within a definition of audiovisual media services.

1.1.3 Online audiovisual media services- services the principal purpose of which is the provision of programmes in order to inform, entertain or educate. The principal purpose requirement should also be considered to be met if the service has audiovisual content and form which are dissociable from the main activity of the service provider, such as stand-alone parts of online newspapers featuring audiovisual programs or user-generated videos where those parts can be considered dissociable from their main activity.

1.1.3.1 A service from sub-paragraph 1.2 of this article, should be considered to be merely an indissociable complement to the main activity as a result of the links between the audiovisual offer and the main activity such as providing news in written form.

1.1.3.2 Channels or any other audiovisual services under the editorial responsibility of a provider can constitute audiovisual media services in themselves, even if they are offered on a video-sharing platform which is characterized by the absence of editorial responsibility. (Draft Law on IMC, Article 3)

Firstly, it should be noted that this definition is largely unnecessary. There already exists a definition for 'on-demand audiovisual media service' under Article 3 (1.24).

1.24 On-demand audiovisual media service - (i.e., a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider. (Draft Law on IMC, Article 3)

¹² Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUOK Kosovo.

This definition is in line with the Directive and will include certain other services where providing on-demand programming under the editorial control of the service represents the main activity or a dissociable section, provided that this term 'dissociable section' is introduced in Article 1.1.

On-demand audiovisual media services can be free and supported by advertising (AVOD – advertising video on-demand), transactional video-on-demand as a type of pay per view service (TVOD, for example on iTunes or Amazon), or subscription video-on-demand (SVOD, for example Netflix, Disney+ etc).¹³

Also, there is a separate definition of 'video-sharing platform services' in the Draft law (Article 3 (1.3)), and it should be noted that these are not audiovisual media services. A video-sharing platform service is an information society service. Both the AVMS Directive and the Digital Services Act (DSA) recognise that these are services known as 'intermediaries', which impact the content in terms of its organisation via algorithms, tagging, sequencing, etc. Where an online platform is providing access to user-generated videos, it must then be assessed whether this part of their service can be qualified as a video-sharing platform service and not an audiovisual media service.

The comments of the EUOK also strongly advise that this definition be removed:

In this regard, as done in similar situations, we advise to get as close as possible to the definitions of the Directive, to avoid any possible legal uncertainty and unintended misalignment with AVMS Directive.¹⁴

3.1. Applying one regulatory regime without distinction across all these services

Secondly, by grouping these types of media under audiovisual media services, the Law applies the same regulatory regime to all types of services. This is not in line with the EU acquis or European standards.

One of the key objectives of the 2018 Directive was to level the playing field between broadcasters and on-demand audiovisual media services in terms of regulation. From the preamble to the AVMS Directive 2018, it is noted that the appropriate measures for the protection of minors applicable to television broadcasting services should also apply to on-demand audiovisual media services.

However, there are other areas which diverge, such as in relation to certain types of sponsorship and product placement, where on-demand services should comply with the criteria applicable to television advertising and teleshopping for alcoholic beverages but are

¹³ Cabrera Blázquez F.J., Cappello M., Fontaine G., Valais S., On-demand services and the material scope of the AVMSD, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2016 <https://rm.coe.int/1680783488>

¹⁴ Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUOK Kosovo.

not expected to comply with the rules on sponsorship and product placement related to alcoholic beverages. The approach to European Works is also different. Also, while certain principles are laid down for audiovisual commercial communications on all audiovisual media services, there are additional specific rules for television advertising.

In the case of platforms providing access to user-generated content, which as explained above, may qualify them as video-sharing platform services, these then fall under a different regulatory regime as outlined under 'Chapter VI - Provisions applicable to video distribution platform services'.

It is important to understand that there are different regimes, regulatory approaches, and practices for different types of online media. They cannot be grouped together but must be addressed separately. Video-sharing platform services (VSPS) must respect the rules on the protection of minors, the rules on content and identification related to audiovisual commercial communications, and the rules on illegal content. However, the approach of the regulator to VSPS is different, requiring them to introduce a range of measures and then assessing if the measures introduced are effective to meet these obligations.

3.2. Licences, permits, registrations, authorisations

The introduction a definition of 'online audiovisual media services' (under the definition of audiovisual media services), which does not exist under European Law has raised concerns with all the international institutions. Among others, this definition is not necessary as the definition for on-demand audiovisual media services, and the definition for video-sharing platform services (VSPS) will cover any relevant services online which should fall under the scope of the Directive and hence also the Draft Law. In addition, the definition incorrectly includes services providing access to user-generated content under a definition of online audiovisual media services - and hence also within the definition of audiovisual media services. VSPS are information society services, more specifically categorised by the AVMS Directive and the Digital Service Act as intermediaries. They fall under a different regulatory regime. Content on audiovisual media services are under the editorial control of the media service provider. User-generated content on VSPS are not under the editorial control of the provider.

Grouping different services under one heading when they should be dealt with under different regulatory approaches and rules introduces uncertainty in the law. This definition of 'online audiovisual media' should therefore be removed.

Both the Comments on the draft Law from the EUOK¹⁵, and the Comments of the OSCE Mission in Kosovo¹⁶ recommend providing clarity in the law on these issues, and aligning

¹⁵ Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUOK Kosovo.

¹⁶ OSCE Mission in Kosovo Comments on the Draft Law on the Independent Media Commission, March 2024.

these terms and the Draft Law with the Law on Permit and License System. Under Article 4 - Powers of the IMC -, it states that the IMC:

2.2. It shall issue permits to the audiovisual media services, video-sharing platforms, distribution operators, network operators, and multiplex operators.

Article 27 lists the permits by the types of operators including for on-demand services and for video-sharing platform services but again without any distinction between them. It is not common European practice to licence or require a permit for either on-demand audiovisual media services or for video-sharing platform services.

3.2.1. Licences and notifications for on-demand services in Europe

Regarding on-demand audiovisual media services, a recent comparative overview indicates that 21 countries operate what is known as an 'open system', with no requirements to notify, or register. In Finland, the United Kingdom, and Portugal on-demand services are required to notify the regulator of their intention to provide a service. In Greece and Slovenia, these services must be registered. In Cyprus and the Czech Republic Public non-linear services are licensed, while just in Hungary, on-demand services in general are licensed. Hence, it is advised to introduce a notification or registration system for these services.¹⁷ As the revised AVMS Directive requires a register or database of audiovisual media services to be kept by the regulator (as included under Article 4 (2.7) of the Draft Law), it is advisable to introduce a registration system for on-demand media services.

3.2.2. Licences and notifications for broadcast services in Europe

The comparative study also provides an overview of the different regimes for linear audiovisual media services (broadcasters) and the types of licences or notifications or registrations needed. Leaving aside DTT (Digital Terrestrial Television) whereby, generally speaking, all services need to be licenced due to the use of the radio frequency spectrum over DTT multiplexes, the following indicated the regimes for cable, satellite, IPTV, and OTT services. Individual Cable, satellite, and IPTV licences are issued in 13 countries,¹⁸ what is termed a formal licence (but is actually a stronger type of notification system)¹⁹ are required in six countries, while notifications are required in ten jurisdictions.²⁰

Regarding OTT services (those distributed online but not within an IPTV service), individual licences are issued in 9 countries, and what is termed a formal licence (but is actually a

¹⁷ Mapping of licensing systems for audiovisual media services in EU-28, European Audiovisual Observatory, Strasbourg, 2018. <https://rm.coe.int/licensing-mapping-final-report/16808d3c6f>

¹⁸ CZ, HR, IT, NL, SI, SK, DE, EE, FR, GB, GR, IE, LT, LV, MT, PL, PT, RO, SK

¹⁹ The study defines 'formal licence' as being where an applicant is granted a licence automatically upon

the fulfilment of basic formal conditions (such as providing the requested legal information about the applicant, being established in the country, having the appropriate legal status, etc.).

²⁰ AT, BE FR, BE NL, BG, DK, ES, FI, FR, HU, SE

stronger type of notification system) are required in six countries, while notifications are required in sixteen jurisdictions.²¹

This indicates the wide variety of approaches to licensing and notification across Europe. In general, the strongest licensing requirements (having an individual licence or winning a beauty contest or tender to provide content) relate to digital terrestrial television. Cable/satellite and IPTV tend to be more lenient with the potential for minimal notification only in ten countries and a stronger notification system in six. Providing linear audiovisual media services over OTT are the most lenient with a minimal notification only in 16 jurisdictions and a stronger notification system in six.

3.2.3. Notification and registration for Video-sharing Platform services in Europe

With regard to video-sharing platforms, the Directive does not require a procedure for authorisation or licensing of video-sharing platforms. A recent comparative overview indicates that there are notification/information-request procedures in 29 cases.²² These predominantly relate to requesting data on contact details and legal representation, as well as jurisdictional determinations (AT, BE FR, BE NL, BG, CZ, DK, EE, HR, HU, LU, MT, NL, PL), the description of VSP services (BE FR, BE NL, HU, LU) and the drafting of general conditions of use of the VSPs (BG, CZ).²³

Hence, it is strongly advised to introduce a notification/registration system where certain information should be provided to the regulator also as the regulator is again required to keep a register of video-sharing platforms. The key differences outlined above (2.2.1, 2.2.2, and 2.2.3) indicate where an operator needs 'permission' to provide a service (something that could be interpreted as being a 'permit', assuming the translation of the Draft Law is correct), in contrast to those operators who should inform/ notify the authorities of their services, and potentially also register with them.

This is also relevant with regard to sanctions. Under Chapter IX, Article 56 there is a fine for lack of permits:

1. For violation of the provisions of this Law the IMC undertakes the following measures: 1.1 With a fine from EUR (500) to (4,000) shall be sanctioned natural persons who operate without an IMC permit.

More clarity should be provided regarding the term 'permit' and a system of registration should be introduced for certain types of services as outlined above.

²¹ AT, BE FR, BE NL, BG, DK, ES, FI, FR, HU, LT, LU, PL, PT, SE

²² AT, BE FR, BE NL, BG, CY, CZ, DE, DK, EE, ES, FI, FR, GB, GR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK

²³ Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online - 2022 update, European Audiovisual Observatory, Strasbourg, 2022. <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

3.3. Obligations placed on online media

With regard to certain media online who may broadcast programming or videos for which they have editorial control - there should not be excessive regulatory burdens. A recent review of the Draft Law on Audiovisual Media Services of Montenegro also discussed the issue of regulation of linear services online (OTT services) and emphasised that giving them equal obligations to broadcasters could place on them an excessive regulatory burden and possibly also possibly place a heavy administrative burden on the regulator.²⁴ Key obligations could include registration with the NRA; identification of the service, address and contact information and transparency of ownership; prohibition of illegal content; protection of minors in content and in audiovisual commercial communications; right of reply; and rules on prohibited advertising.

On the other hand, national production quotas or quotas on European works could be considered as excessive burdens. In this context, it is important to take note of the 2022 Council of Europe Recommendation on principles for media and communication governance that emphasises (among others) that:

media and communication governance should be based on evidence showing the need for intervention and take account of its regulatory and human rights impact in order to allow for a graduated and differentiated response respecting the roles played by different actors in the production, dissemination and use of content.

As outlined above, online audiovisual media that fall under the definition of audiovisual media services can be regulated according to the AVMS Directive – in particular, the Directive includes on-demand audiovisual media services. The Directive now also includes video-sharing platform services in its scope, falling under a different regime of regulation.

Hence, it would need to be assessed by the IMC according to Guidelines and Criteria provided by the European Commission the extent to which any online news portals that provide videos on demand or facilitates video-sharing may partly fall under the Directive as far as their audiovisual content is concerned. It needs to be emphasised again that providing videos-on-demand is a different service (with editorial responsibility) to that of providing user-generated content (facilitating video-sharing without editorial responsibility but determining the organisation of the content by automatic means or algorithms in particular by displaying, tagging and sequencing), and hence different approaches and different sets of rules apply.

²⁴ Legal Opinion - Montenegro Draft Laws on Media, Audiovisual Media Services, and Radio-Television of Montenegro. For the Council of Europe Division for Cooperation on Freedom of Expression. Prepared by Paolo Cavaliere and Deirdre Kevin. March 2024.

3.4. Cooperation with self-regulatory bodies and empowerment of self-regulatory bodies

An important approach is the cooperation with self-regulatory bodies and the need to include online news portals which adhere to media and journalism ethics and function as professional media outlets in the regulatory system. Where, as noted above, it is clear that a dissociable section²⁵ of an online portal or publication is in fact an 'on-demand service', the rules for on-demand services can be applied in a proportionate manner. Where an online portal or publication has a dissociable section allowing users to upload content, the rules for video-sharing platform services can be applied in a proportionate manner.

The news and textual content (and connected videos) will still need to be regulated by the self-regulatory body in Kosovo, as the audiovisual media acquis in the EU does not include this content. Hence cooperation with this body is highly recommended. The Kosovo Print Media Council (KMSHK) was formed in 2005, with the support of the Organization for Security and Cooperation in Europe (OSCE), and it bases its work on the Code of Ethics that the members of the Council have approved, regularly update and undertake to respect.²⁶ The OSCE noted in their comments on the Draft Law that 'The Press Council of Kosovo (PCK), which serves as the self-regulatory body for print and online media, including the Association of Journalists of Kosovo, have expressed their opposition to any form or regulation on online media/news portals.'²⁷ The OSCE document also European Commission (TAIEX) report which 'recommended that the IMC supports elements of self-regulation of news portals in collaboration with journalist organizations and the PCK, utilizing different types of self-regulatory mechanisms, such as a code of conduct and strict moderation, to ensure that the right to reply and correction are available for readers of new portals as they are for the listeners and viewers of traditional media (radio and television).'

It is important to have a system that allows for online news portals which adhere to media and journalism ethics to be included as professional media outlets in the regulatory system. In North Macedonia, the self-regulatory body – the Press Council – established a voluntary Registry of professional online news media, known as "Promedia". The Press Complaints Commission decides also on complaints including on the ethical and professional reporting standards in the online media sector and printed press. Promedia lists its members, who (among other criteria) provide transparency of ownership, and contact details and commit to adhere to journalism standards and ethics.²⁸

²⁵ As recognised in the Draft Law, video content directly linked to news articles are not covered by the AVMS Directive.

²⁶ https://sbunker-org.translate.google/en/analyze/tentimdisiplinimi-i-mediave-online-nga-shteti/?x_tr_sl=sq&x_tr_tl=en&x_tr_hl=en&x_tr_pto=wapp

²⁷ Citing : See <http://presscouncil-ks.org/kmshk-dhe-agk-kundershtojne-rregullimin-e-mediave-online/>

²⁸ Information from the project EU for Freedom of Expression in North Macedonia. Link to Promedia available in English, Macedonian and Albanian: <https://promedia.mk/index.php?lang=en>

The purpose of recognising and including legitimate online media that are transparent and commit to ethical behaviour can lead to a system of rewards for such media. For example, the inclusion in an official register (at a Ministry or the regulator) and the additional criteria of transparency of ownership, commitment to standards and ethics, having terms and conditions for users, dealing with comments, etc., can all become qualifying criteria for support or funding. For example, no funding support, political or state advertising, support for journalism development, etc., would be open to any online media who do not conform to a set of basic principles. The Promedia example from above, facilitated by the Press Council in North Macedonia is a good starting point for such a system.

There are several examples of where such online media have already been defined, included in the legislation, and given obligations in certain areas. For example, in Croatia, the Electronic Media Act includes electronic publication services via electronic communication networks in its scope (Article 1). Article 15 includes obligations for electronic publications (the same as for audiovisual media) to publish accurate information, respect human rights and fundamental freedoms; contribute to the free formation of opinions, and comprehensive and objective information to listeners and viewers, as well as their education and entertainment; promote Croatian cultural assets and encourage listeners and viewers to participate in cultural life; promote international understanding and the public's sense of justice, defend democratic freedoms, serve to protect the environment, promote equality between women and men; promote the equality of members of national minorities; promote the equality of persons with disabilities and children with developmental disabilities.²⁹

In the new Electronic Media Act 2021 in Croatia, electronic publications are obliged to take all measures to protect minors, prevent the publication of content that incites violence or hatred, prevent the publication of content that encourages criminal acts of terrorism, and prevent criminal offences related to child pornography and criminal offences related to racism and xenophobia (Article 94 (2)). The Act also includes a provision on the liability of providers of electronic publications (e.g., news portals) in relation to all the content published on such electronic publications, including content generated by users if they fail to register users and warn them about rules on commenting in a clear and easily visible manner (Article 94 (3)).³⁰ This last element is an important area to be considered in self- or co-regulatory systems. In particular, electronic publications should include “terms and conditions” that outline the rules regarding comments on news portals.

29 Information taken from the following JUFREX report which provides further detail on these issues: “TECHNICAL PAPER: Mapping of European co-regulatory practices for combating harmful online content – the context in Bosnia and Herzegovina and the search for efficient models of media coregulation”. Prepared by Deirdre Kevin and Asja Rokša- Zubčević Under the JUFREX2 Project for the Council of Europe, 2022.

30 Ibid

Article 6 of the European Media Freedom Act (EMFA) introduces obligations on all media that provide news and current affairs whether online or offline. These obligations concern transparency of ownership and editorial independence.³¹

Article 6 - Duties of media service providers providing news and current affairs content

1. Media service providers providing news and current affairs content shall make easily and directly accessible to the recipients of their services the following information: (a) their legal name and contact details; (b) the name(s) of their direct or indirect owner(s) with shareholdings enabling them to exercise influence on the operation and strategic decision making; (c) the name(s) of their beneficial owners within the meaning of Article 3, point 6 of Directive (EU) 2015/849 of the European Parliament and of the Council.

2. Without prejudice to national constitutional laws consistent with the Charter, media service providers providing news and current affairs content shall take measures that they deem appropriate with a view to guaranteeing the independence of individual editorial decisions. In particular, such measures shall aim to: (a) guarantee that editors are free to take individual editorial decisions in the exercise of their professional activity; and (b) ensure disclosure of any actual or potential conflict of interest by any party having a stake in media service providers that may affect the provision of news and current affairs content.

3. The obligations under this Article shall not apply to media service providers that are micro-enterprises within the meaning of Article 3 of Directive 2013/34/EU.³²

There should be clear benefits for those who function as professional media outlets, are transparent regarding ownership and adhere to media and journalism ethics, and include clear terms and conditions for users regarding comments on portals – such as benefits in relation to funding, support, access to public funds, accreditation of journalists etc. Any initiative to regulate this sector should not interfere with freedom of expression or editorial autonomy.

In line with the comments of the EUOK and OSCE with regard to the Law, it is also recommended here that self and co-regulation be strongly supported in relation to the regulation of online media.

it is important for the Draft Law to ensure standards-compliant independent and professional regulatory body, and when appropriate foresee the possibilities for

31 Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0457>

³² <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0457>

self-regulation and/or co-regulation, in line with the AVMS Directive, Venice Commission, and relevant legislation.³³

As noted earlier, the 2022 Council of Europe Recommendation on promoting a favourable environment for quality journalism in the digital age states that:

the media's commitment to verification and quality control should be complemented by effective voluntary self-regulatory mechanisms for the media such as ombudspersons and press/media councils. The public should be made aware of, and have access to, understandable, transparent, and expeditious complaints mechanisms allowing them to flag content breaching the journalistic professional, and ethical standards, also when distributed online, and to obtain corrections of inaccurate information. Complaints should be handled by independent bodies tasked with upholding journalistic professional and ethical standards. Such independent bodies should have stable financing and meaningful powers, in particular, to require the publication of prominent corrections and critical adjudications and apologies (para. 2.1.3).³⁴

3.5. A comment on the issue of disinformation

Online portals are sometimes the sources of disinformation and/or hate speech, and several legislative initiatives attempted to address issues of "disinformation" and or "false news". A particular problem arises in attempts to regulate or legislate vague notions such as "disinformation" or "false news". Unfortunately, there have been a growing number of examples of national legislation that have attempted to do this and in all cases, the threats to freedom of expression have been emphasised in legal reviews by the Council of Europe and by the Venice Commission.³⁵ These examples highlight the complexity of trying to legislate in this area and the inevitable concerns and criticism that come not only from national stakeholders but also from international organisations with regard to potential threats to freedom of expression.

A key issue raised in these reviews is that emphasised in the Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, stating that "general prohibitions on the dissemination of information based on vague and ambiguous ideas,

³³ Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUOK Kosovo.

³⁴ Recommendation CM/Rec(2022)4 of the Committee of Ministers to member States on promoting a favourable environment for quality journalism in the digital age.

³⁵ See for example the Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe - On the draft amendments to the Penal Code regarding

the provision on "false or misleading information" in Türkiye.

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2022\)032-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2022)032-e)

including ‘false news’ or ‘non-objective information’, are incompatible with international standards for restrictions on freedom of expression (...) and should be abolished.”³⁶

The fight against disinformation needs a concerted effort by a range of national institutions and should follow the Guidelines and Recommendations of the EU and the Council of Europe. One standard of particular interest in this context is the Parliamentary Assembly of the Council of Europe (PACE) Resolution of 2020 providing guidance regarding disinformation in the context of elections.³⁷ The table below outlines the key recommendations.³⁸

PACE RESOLUTION - Democracy hacked? How to respond?

Among others, the PACE calls on Member States to address disinformation challenges in the context of democratic elections. In summary, in order to achieve this, Member States should (among others):

- promote media education and digital literacy skills;
- encourage and support collaborative fact-checking initiatives and other improvements in content moderation and curation systems;
- secure adequate funding to independent public service media, so that the media can allocate enough resources to innovation in content, form, and technology to foster their role as major players in countering disinformation and propaganda;
- strengthen transparency in political online advertising, information distribution, algorithms and business models of platform operators;
- guarantee where political parties and candidates have the right to purchase advertising space for election purposes, equal treatment in terms of conditions and rates charged;
- develop specific regulatory frameworks for internet content at election times and include provisions on transparency in relation to sponsored content on social media, so that the public is aware of the source that funds electoral advertising or any other information or opinion;

³⁶ Joint Declaration adopted by The United Nations, Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information. <https://www.osce.org/files/f/documents/6/8/302796.pdf>

³⁷ Council of Europe, Parliamentary Assembly Resolution 2326 (2020): Democracy hacked? How to respond? Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28598&lang=en>

³⁸ Taken from the JUFREX 2 Report “TECHNICAL PAPER: Mapping of European co-regulatory practices for combating harmful online content – the context in Bosnia and Herzegovina and the search for efficient models of media coregulation”.

- address the implications of the micro-targeting of political advertisements with a view to promoting a political landscape that is more accountable and less prone to manipulation;
- support researchers' access to data, including datasets with deleted accounts and content, to examine the influence of strategic disinformation on democratic decision-making and electoral processes;
- consider national and international regulations to share best practices and increase co-operation among security agencies, for instance by creating a specific mechanism for monitoring, crisis management, and post-crisis analysis and sharing resources that already exist in various countries;
- call on professionals and organisations in the media sector to develop self-regulation frameworks that contain professional and ethical standards relating to their coverage of election campaigns, including enhanced news accuracy and reliability and respect for human dignity and the principle of non-discrimination;
- initiate judicial reforms and set up specialised divisions for judges and prosecutors focusing on disinformation and hate speech.

4. Independence of the national regulatory authority

Council of Europe (CoE) standards have had a strong influence on the development of legislative frameworks regarding the establishment and functioning of national regulatory authorities (NRAs) and the measures needed to guarantee their independence.

In 2000, the Council of Europe issued a recommendation addressing the general legislative framework; the appointment, composition, and functioning of regulatory authorities; financial independence; powers and competence; and accountability.³⁹ A further Declaration of the Committee of Ministers was published in 2008.⁴⁰ These standards also played a significant role in the development of the relevant provisions in the AVMS Directive (Article 30).

4.1.1. Independence and autonomy of NRAs

The Independence and autonomy of the NRA is not just something to be confirmed in a stated provision. It must also be apparent in the provisions around the functioning of the regulator, its financial resources and independence, the methods of appointing and dismissal of management and governing bodies, and also in the actual practice of implementation of the Law.

4.1.2. Competences and powers of the national regulatory authorities

The AVMS Directive (Article 30 (3)) requires that 'Member States shall ensure that the competences and powers of the national regulatory authorities or bodies, as well as the ways of making them accountable are clearly defined in law'. As noted above, the lack of clarity regarding permits, licences etc. (see 2.2) implies that the powers are not clearly defined in this instance.

As emphasised in the Comments from the EUOK, the Drafters of the Law should 'consider presenting such conditions in a separate provision under CHAPTER IV-LICENSING, of the Draft Law'.⁴¹ The Comments from the OSCE Office also stress the need for the powers and competences of the regulator 'to be clearly and exhaustively defined in the law itself, without recourse to sub-laws.'

The Directive also states that:

"Art. 30 (4) - Member States shall ensure that national regulatory authorities or bodies have adequate financial and human resources and enforcement powers to carry out their functions effectively..."

³⁹ Committee of Ministers Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector.

⁴⁰ Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers on 26 March 2008.

⁴¹ Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUOK Kosovo.

In accordance with the detailed comments provided by the EUOK, it is recommended to adhere to the recommendation that:

The Draft Law needs to explain in clear and precise language, preferably in the same provision, the IMC budget. In particular, it needs to enhance budget/financial guarantees to ensure its institutional independence. Further, in line with the AVMS Directive, the authorities need to ensure that the financial and human resources are appropriate for the IMC to implement its powers.⁴²

4.1.3. Appointment and dismissal of the IMC and the Chairperson

According to the OSCE, the draft Law foresees the IMC Chairperson be elected by the Assembly through a simple majority vote, which departs from the current regulation where the Chairperson is elected by the IMC itself. This could increase the political influence on the IMC, particularly as all appointments to the IMC are from parliament. This is not in line with European standards and particularly the standards in the region. Civil society plays an important role in the nomination of a fixed proportion (meaning they directly nominate members to fill specific seats) of the membership of the governing boards of regulators.

The OSCE document further emphasises that according to international/European standards/good practices, as a priority there should be an independent nomination process for selecting the chairperson of the Independent Media Commission.

Regarding the mandates of the members of the Council, this has been changed in the Law setting it to four years, which is not uncommon in other jurisdictions. When considering the length of mandate in many other jurisdictions, which may be equivalent, it is important to note that the procedures for appointment (see above) are quite different and involve the participation of civil society and not just parliamentarians. The EUOK raises concerns regarding how the process coupled with the longer mandates may raise problems regarding political independence of the IMC.

Further, as in any legislative initiative, the sponsoring institution should duly justify the changes proposed in the draft law for the mandates of the ICM members, and provide for reasons/ issues that were encountered, if any, with the implementation of the Law in force including in the light of impact it might have on the independence of the institution.⁴³

Also, the OSCE notes that under the proposed procedure it is likely that all members of the IMC could theoretically be elected during a single parliamentary term.

The OSCE recommends that the model proposed by the draft Law on IMC be reconsidered to strengthen the IMC's independence. A more diverse tenure of the IMC membership, with the elements of the current system of rotation, could be

⁴² Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUOK Kosovo.

⁴³ Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUOK Kosovo.

established, for instance, by partial election of IMC members by halves so that the selection process of all members does not fall within a single electoral cycle.⁴⁴

Regarding the size of the Council, it has been noted that the size of the Council will increase from seven to eleven members, although the rationale for the increase is not clear as noted in the EUOK and the OSCE comments. A brief review of some countries shows an average of 5-9 members of the governing bodies (Ireland 3-5, Netherlands 2-4, Italy 3-6, France 9, Croatia 5).⁴⁵

The comments from the OSCE note that:

The IMC has historically had 7 members, and at times even these positions could not be filled by the Assembly for various reasons, making the IMC dysfunctional due to a lack of quorum. IMC members only review and vote on cases that are prepared by the executive office; hence the argument that more IMC members will be needed to execute the new IMC competencies does not necessarily hold. The quality or effectiveness of decision-making by the IMC is more likely to be strengthened by the membership of qualified experts in relevant specialist fields than by a larger number of members. On the contrary, larger decision-making bodies always bring with them increased challenges of coordination and risks of decision blockages.

Given the comment from the OSCE regarding the role of the executive office in preparing documents and briefs for the IMC, it may be advisable to consider instead increasing the staff and the competence of the executive office rather than expanding the IMC.

In relation to the dismissal of the IMC members, the provision for dismissal of the IMC members in case the Parliament does not approve the annual report of the IMC is highly problematic. The Law on Audiovisual Media in Moldova has been highly criticized for having a similar provision. A review carried out for the OSCE stressed that:

‘according to applicable Council of Europe standards, appointments of this nature must be made for a specific term and can only be shortened in limited and legally defined circumstances. It is also important to note that appointments and dismissals ‘must not include differences over editorial positions or decision’ (Recommendation CM/Rec(2012)1). Such a vague legal provision puts in the hands of the parliamentary majority the decision to dismiss and replace Board members based on mere convenience and political criteria. Such scenario may seriously erode the independence and the proper performance of managerial decisions by the members of the Board.’⁴⁶

⁴⁴ OSCE Mission in Kosovo Comments on the Draft Law on the Independent Media Commission, March 2024.

⁴⁵ See examples on the AVMSD Database of the European Audiovisual Observatory: https://avmsd.obs.coe.int/#art-30-5_austria

⁴⁶ Legal Analysis on the Law on Amendment of the Code of Audiovisual Media Services of the Republic of Moldova. Commissioned by the OSCE Representative on Freedom of the Media from Dr. Joan Barata Mir, independent media freedom expert. December 2021.

This provision in the Draft Law introduces an arbitrary tool by which the Parliament can remove and replace the entire IMC on the basis of a vague and non-defined criteria, which is not in line with European standards. It also implies that a new incoming Parliament can also dismiss arbitrarily the entire IMC after the presentation of the annual report and replace them with other members.

During the meeting with the Parliamentary Committee, there was a lack of clarity as to whether they now consider the appeals Board to be a complaints body (from the public) or an Appeals body (for the audiovisual media service providers to appeal decisions. It has been noted that the Media Appeals Board's role reduced to a non-significant department within the IMC, in comparison to its current role as one of three pillars composing the IMC, along with the members of the IMC and the executive office. It was previously established by parliament and will now to be elected by the IMC. This issue is still unclear and hence difficult to comment on. It is important to discuss these issues with experts and with staff of the IMC to understand the institutional history related to this body. All of the decisions of the IMC require effective judicial review / or appeal. There is mention of the possibility to lodge a complaint with the appropriate court in the event of non-concurrence with the prescribed sanctions under Article 57 but not under Article 56. In addition, appeals should be possible in relation to the granting, revoking, or renewing of licences (among others).

5. Media Ownership and media pluralism

Article 51 of the Draft Law provides for rules on transparency of media ownership. Article 42 of the Draft Law addresses 'Media ownership and concentration' but leaves the development of this area to a secondary Act to be elaborated by the IMC. In September 2022, a review was provided by this author, via the JUFREX project, of a draft 'Regulation on Ownership and Concentration of Audiovisual Media Service Providers of Kosovo.'⁴⁷

This document provided input on the draft regulation and included recommendations on definitions, broader policies related to media pluralism, and the need for provisions on media transparency.

5.1. Detail needed under Article 42 Media Ownership

Article 42 should contain minimum standards on media ownership and definitions of media concentration. Those developed in the 'Regulation on Media Ownership and Concentration of Audiovisual Media Service Providers' should be included here including, for example, the meaning of ownership, and the threshold for a dominant position. If the basic standards are not in the Law then with each change of the IMC it is theoretically possible for there to be

⁴⁷ TECHNICAL PAPER - Review of Updated Draft Regulation on "Ownership and Concentration of Audiovisual Media Service Providers of Kosovo.*" Jean-François Furnémont and Deirdre Kevin for the Council of Europe.

changes in the 'Regulation on Media Ownership and Concentration of Audiovisual Media Service Providers.' The law should incorporate the standards while Bylaws provide more detailed implementing rules. It was noted above (1.3) regarding the power of the IMC (under Article 4) to review changes in ownership of audiovisual media outlets but no detail is provided as to the criteria by which the IMC will assess ownership changes.

2.8. IMC shall review and approve the change of ownership by 10% for all licensed and registered entities according to the definition in paragraph 2.2. of this Article.

This Article needs to outline criteria such as, for example, threats to media pluralism or risks of media concentration. For this to be possible, the Law also needs to provide definitions and measures relevant to ownership and concentration. As highlighted by the EUOK:

For the IMC, to continue regulation of media ownership and the concentration, the Draft Law should have concrete provision(s) regulating the latter as rights and responsibilities are constitutional and legal categories. Through by-law, rights, and responsibilities are only explained in details. Thus, it is essential that the rights and responsibilities concerning media ownership and concentration are provided in the Draft Law.⁴⁸

5.2. Political ownership of the media

The Draft Law removed part of the original Article 24 (now Article 26), which read as follows.

3. The broadcasting permit shall not be issued to: 3.1. a political party, a group or organization which is managed by an individual who holds an elected post or is a member of an executive body of a political party.

Removing this prohibition represents a backward slide of standards. While there is no specific provision in EU Law prohibiting political ownership of the media, this type of ownership has raised concerns in both EU and Council of Europe documents. At the EU level, the European Commission established the Media Pluralism Monitor⁴⁹ which is implemented by the European University Institute and covers the EU Member States plus Albania, Montenegro, the Republic of North Macedonia, Serbia, and Türkiye. An annual assessment of the countries is carried out based on the criteria developed in the so-called 'Indireg Study'.⁵⁰

The Media Pluralism Monitor under section 11 deals with the variable 'Political Independence of the Media', which 'assesses the existence and effective implementation of regulatory safeguards against the control of media by government and politicians'. The risk of excessive politicisation of media ownership/control is usually tackled through legislative measures

⁴⁸ Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUOK Kosovo.

⁴⁹ See the reports here: <https://cmpf.eui.eu/media-pluralism-monitor-2023/>

⁵⁰ 2009 Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach carried out by KU Leuven, JIBS, CEU, Ernst & Young, and a team of national experts. <https://digital-strategy.ec.europa.eu/en/library/study-indicators-independence-and-efficient-functioning-audiovisual-media-services-regulatory>

ensuring the separation of political and media power (for instance, rules obliging broadcasters to be independent from political parties).

In relation to threats to democracy in the EU Member States, the European Parliament has highlighted the problems with politicisation of the ownership of the media, for example in relation to Hungary. The European Parliament, resolution of 12 September 2018 related to Hungary⁵¹ emphasised a key problem as being political ownership of the media and referred to the findings of the election observation mission of the OSCE Office for Democratic Institutions and Human Rights:

access to information as well as, the freedoms of the media and association have been restricted, including by recent legal changes, and that media coverage of the campaign was extensive, yet highly polarized and lacking critical analysis due to the politicisation of media ownership and an influx of the government's publicity campaigns.

The 2018 Recommendation of the Committee of Ministers on media pluralism and transparency of media ownership outlined measures to be taken to ensure 'A favourable environment for freedom of expression and media freedom', including:

1.3. National legislative and policy frameworks should safeguard the editorial independence and operational autonomy of all media to ensure that they can carry out their key tasks in a democratic society. These frameworks should be designed and implemented in a manner which prevents States, or any powerful political, economic, religious or other groups from acquiring dominance over and exerting pressure on the media.⁵²

Hence, it is highly recommended that the provision that prohibits political ownership of the media be reinstated in the law. With regard to religious ownership of the media, there are various approaches in Europe. At the same time, the Council of Europe Recommendation also made reference to the undesirability of powerful religious groups from acquiring dominance over the media.

5.3. Introducing a fund to support the media

Article 8 of the Draft Law introduces the possibility to provide a fund to support the media.

Article 8 Media Pluralism

⁵¹ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)). <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018IP0340>

⁵² Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member States on media pluralism and transparency of media ownership. https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13

IMC shall establish a special fund in accordance with the legislation to support media programs and licensed or registered media outlets in accordance with the principles of this Law in the areas of education, democracy, arts, sports, and the economy.

This is a very important and welcome tool that can promote media pluralism. The majority of smaller European countries have established funds for pluralism and/ or journalism with the aim of promoting and preserving national identities and culture and also supporting national democracies. However, Article 8 should include some minimum standards in relation to such a fund.

European Union State Aid contain certain exceptions on the prohibition of state aid, including aid to promote culture and heritage conservation (Article 107.3 (d) TFEU). 'Aid to the audiovisual sector needs to promote culture. In line with the subsidiarity principle enshrined in Article 5 TEU, the definition of cultural activities is primarily a responsibility of the Member States.' Generally, aid to the audiovisual media sector should promote content that is 'public interest content'. Article 8 mentions 'the areas of education, democracy, arts, sports, and the economy' but this is not a detailed outline of the concept of public interest content.

The 2013 report of the European Commission - High-Level Group on Media Freedom and Pluralism recommended that: 'there should be a provision of state funding for media which are essential for pluralism (including geographical, linguistic, cultural and political pluralism), but are not commercially viable. The state should intervene whenever there is a market failure leading to the -provision of pluralism, which may be considered as a key public good.'⁵³ The 2018 Council of Europe Recommendation on media pluralism and transparency of media ownership recommends, among others:

2.14. Support measures should have clearly defined purposes and should be based on predetermined, clear, precise, equitable, objective, and transparent criteria. They should be implemented in full respect of the editorial and operational autonomy of the media. These support measures could include positive measures to enhance the quantity and quality of media coverage of issues that are of interest and relevance to groups which are underrepresented in the media.⁵⁴

Examples of public interest content are provided here from the Croatian Electronic Media Law regarding the 'Fund for Encouraging Pluralism and Diversity of Electronic Media':

Funds allocated to projects, programs and contents that are of public interest and aimed at: - realization of citizens' right to public information - encouragement of

⁵³ European Commission - High Level Group on Media Freedom and Pluralism (2013): A free and pluralistic media to sustain European democracy.

https://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf

⁵⁴ Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member States on media pluralism and transparency of media ownership

cultural diversity and nurturing of heritage - development of upbringing and education - development of science and arts - encouraging creativity in the dialects of the Croatian language - supporting national minorities in the Republic of Croatia – encouraging the development of awareness of gender equality and other values of the constitution - encouraging awareness of equality of gender identities and sexual orientation - encouraging quality programs for children and young people to promote their wellbeing - raising public awareness of the abilities and contribution of people with disabilities, as well as the promotion and respect of their rights and dignity, including the fight against stereotypes, prejudices and harmful actions towards people with disabilities; - development and encouragement of media literacy programs - environmental protection - promotion of health and encouragement of health culture.⁵⁵

Hence the Law should clearly outline the purpose of such a fund and the nature of public interest content. In addition, the Law should introduce the standards of governance for such a fund. The 2018 Council of Europe Recommendation states that:

2.15. Support measures should be administered in a non-discriminatory and transparent manner by a body enjoying functional and operational autonomy, such as an independent media regulatory authority. Independent bodies responsible for the allocation of direct subsidies should publish annual reports on the use of public funds to support media actors.⁵⁶

Hence, it is also of key importance that management and governance of such funds align with European standards. The Irish Sound and Vision Scheme managed by the regulator follows a range of principles including that the application, assessment, and award processes are transparent, equitable, and verifiable. The Scheme also states that the management of the funds should be: Fair – in processes, procedures, and decisions; Independent; and Accountable – regarding decisions, governance, and resources. For the decision-making on the allocation of funds, it is common to establish independent expert Committees to advise the funding bodies. In Slovenia, the members of the relevant Expert Commission who assess and evaluate projects are appointed by the Ministry of Culture. These cannot be any of the following:

officials, members of parliament, and workers employed in state bodies; members of the leadership of political parties; workers who are regularly employed by a media publisher or an advertising organization; persons who, as external collaborators, have a contractual relationship with a media publisher or an advertising organization; persons who own more than 1 percent of the capital or management or voting rights in the assets of the media publisher or in the advertising organization.⁵⁷

⁵⁵ Electronic Media Law, Croatia: <https://www.zakon.hr/z/196/Zakon-o-elektroni%C4%8Dkim-medijima>

⁵⁶ Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member States on media pluralism and transparency of media ownership.

⁵⁷ Law on Media, Slovenia Article 4a (7): <https://www.akos-rs.si/zakoni-in-priporocila/zakoni>

While it is still necessary for the IMC to develop a Bylaw in order to develop in more detail the procedures and processes for running such a fund, the Law should include at a minimum: the purpose of the fund; a clarification of the meaning of 'content of public interest' and guarantees that the fund will be ' administered in a non-discriminatory and transparent manner by a body enjoying functional and operational autonomy, such as an independent media regulatory authority.'

Conclusion

In conclusion, while the Draft Law aligns with the Audiovisual Media Services Directive, it requires revisions to enhance legal clarity, proportionality, and compliance with EU and Council of Europe standards. Key principles for improvement include evidence-based governance, proportional sanctions, and legal certainty. Specific recommendations involve revising broad sanctions, explicitly including obligations for protecting minors and providing accessible content, and clarifying distinct regulatory approaches for different media services. Ensuring the independence of the national regulatory authority, transparency of media ownership, and effective self-regulation are also crucial. Addressing these issues will strengthen the Draft Law, supporting freedom of expression and fostering a robust, transparent, and fair media regulatory environment in line with European standards.

References

European Union laws, Regulations, Directives, Resolutions, Reports

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), as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0457>

European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)). <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018IP0340>

Commission Staff Working Document Kosovo* 2023 Report. https://neighbourhood-enlargement.ec.europa.eu/document/download/760aacca-4e88-4667-8792-3ed08cdd65c3_en?filename=SWD_2023_692%20Kosovo%20report_0.pdf

European Commission - High Level Group on Media Freedom and Pluralism (2013): A free and pluralistic media to sustain European democracy. https://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf

2009 Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach carried out by KU Leuven, JIBS, CEU, Ernst & Young, and a team of national experts. <https://digital-strategy.ec.europa.eu/en/library/study-indicators-independence-and-efficient-functioning-audiovisual-media-services-regulatory>

Council of Europe Recommendations, Resolutions, Reports

Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance.

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a61712

Recommendation CM/Rec(2022)4 of the Committee of Ministers to member States on promoting a favourable environment for quality journalism in the digital age.

Council of Europe, Parliamentary Assembly Resolution 2326 (2020): Democracy hacked? How to respond? Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28598&lang=en>

Declaration of the Committee of Ministers on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, adopted by the Committee of Ministers on 26 March 2008

Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member States on media pluralism and transparency of media ownership.

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13

Committee of Ministers Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector.

Legal Opinion - Montenegro Draft Laws on Media, Audiovisual Media Services, and Radio-Television of Montenegro. For the Council of Europe Division for Cooperation on Freedom of Expression. Prepared by Paolo Cavaliere and Deirdre Kevin. March 2024.

Technical Paper - Enhancing Media Regulatory Independence and Alignment with European Standards in Kosovo: A Brief Review of the Draft Law for the Independent Media Commission and input to questions and comments of the IMC. prepared by Deirdre Kevin Council of Europe Expert, October 2023

TECHNICAL PAPER: Mapping of European co-regulatory practices for combating harmful online content – the context in Bosnia and Herzegovina and the search for efficient models of media coregulation. Prepared by Deirdre Kevin and Asja Rokša- Zubčević Under the JUFREX2 Project for the Council of Europe, 2022.

TECHNICAL PAPER - Review of Updated Draft Regulation on “Ownership and Concentration of Audiovisual Media Service Providers of Kosovo” Jean-François Furnémont and Deirdre Kevin for the Council of Europe.

Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe - On the draft amendments to the Penal Code regarding the provision on “false or misleading information” in Türkiye.

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2022\)032-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2022)032-e)

Case Law of the ECtHR

Steel v. UK, HL v. UK, Nasrulloev v. Russia

Hilda Hafstainsdottir v. Iceland, Amuur v. France, Dougoz v. Greece. See also : Guide on Article 5 of the Convention – Right to liberty and security European Court of Human Rights 14/64 Last update: 31.08.2022

European Audiovisual Observatory Reports

Cabrera Blázquez F.J., Denis G., Machet E., McNulty B., Media regulatory authorities and the challenges of cooperation, IRIS Plus, European Audiovisual Observatory, Strasbourg, December 2021. <https://rm.coe.int/iris-plus-2021en2-media-regulatory-authorities-and-the-challenges-of-c/1680a55eb1>

Cabrera Blázquez F.J., Cappello M., Fontaine G., Valais S., On-demand services and the material scope of the AVMSD, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2016 <https://rm.coe.int/1680783488>

Mapping of licensing systems for audiovisual media services in EU-28, European Audiovisual Observatory, Strasbourg, 2018. <https://rm.coe.int/licensing-mapping-final-report/16808d3c6f>

Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online – 2022 update, European Audiovisual Observatory, Strasbourg, 2022. <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

Other Documents from International Organisations

Human Rights Committee, General comment No. 34 (2011) - Article 19 Freedoms of opinion and expression.

Joint Declaration adopted by The United Nations, the Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information. <https://www.osce.org/files/f/documents/6/8/302796.pdf>

Legal Analysis on the Law on Amendment of the Code of Audiovisual Media Services of the Republic of Moldova. Commissioned by the OSCE Representative on Freedom of the Media from Dr. Joan Barata Mir, independent media freedom expert. December 2021.

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