



## -Executive summary<sup>1</sup>-

# Montenegro Media Sector Inquiry with Recommendations for Harmonisation with the Council of Europe and European Union standards

Report by

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<sup>1</sup>The integral version of the Inquiry will be available after the public presentation in pdf format, at web pages of:

- Council of Europe: <https://www.coe.int/en/web/freedom-expression/co-operation-activities>
- Council of Europe Programme Office in Podgorica: [www.coe.int/podgorica](http://www.coe.int/podgorica)
- Delegation of the European Union to Montenegro: <http://www.delmne.ec.europa.eu>



## Executive summary

The Montenegro Media Sector Inquiry aims to contribute to the development and implementation of a media policy promoting and enabling freedom of expression and media freedom in Montenegro. Its key ambition is to provide Montenegro with concrete and useful support in launching the National Action Plan on the AVMS Policy, outlining actions needed for a thorough review of the existing media instruments and practices in the context of the European Integration Process of which Montenegro is a part.

The inquiry revealed a weak and polarised media market with a high degree of state intervention and political parallelism, an inconsistent legal and institutional framework with obstacles to regulators' full independence and effectiveness, fragmented self-regulation, risks related to journalists' integrity and safety, as well as deviations from the principles of freedom of expression online.

In the very last days of 2017, in the concluding phase of this report,<sup>2</sup> it was announced that the Parliament had dismissed one of the most active members of the RTCG Council and replaced him by a well-known ex-functionary of the ruling party. This dismissal followed a series of early terminations of mandates not only of the RTCG Council Members, but also of an AEM Council Member. Given their extent and the fashion in which they are implemented, these moves represent a serious questioning of independence both of the national public service media company and the national regulatory authority.

In order to ensure an improvement of media policies, legislation and practices for the benefit of the citizens of Montenegro, a strong commitment of the State authorities to the EU acquis and the Council of Europe standards is required. Instead of deteriorating the already achieved level of harmonisation and hitting new lows in practices towards the media and governing bodies, the country should speed up and facilitate the reforms in a coordinated and responsible way.

Sustained efforts are needed to improve legal coherence, predictability and safety, strengthen implementation and enforcement of legislation, increase transparency of media funding and ownership, ensure conditions for the full transformation of the RTCG into a public service media company, and actively assert and bolster freedom of expression and of the media.

## Project background

The Inquiry was suggested by the European Commission (EC) and was carried out through the Council of Europe (CoE) and the European Union (EU) joint programme "Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX)" from August 2017 until January 2018. The overall objective of JUFREX, a three-year regional project, implemented in Albania, Bosnia and Herzegovina, Montenegro, Serbia, "the Former Yugoslav Republic of Macedonia", and Kosovo\*,<sup>3</sup> is to promote freedom of expression and freedom of the media in line with the Council of Europe standards.

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<sup>2</sup> The cut-off date of the report is the last working day of 2017, that is 29 December 2017.

<sup>3</sup> 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.

For the purpose of the inquiry, the CoE has established a team of international experts, selected via public tender in July 2017, with a mandate to conduct and complete the media sector inquiry by the end of January 2018.

The expert team was composed of Tanja Kerševan Smokvina (team coordinator and editor of the report), Jean-François Furnémont, Marc Janssen, Dunja Mijatović, Jelena Surčulija Milojević, and Snežana Trpevska (in alphabetical order).

Their contribution is based on qualitative and quantitative evidence and provides a comprehensive forward-looking assessment of the main areas and issues of the media sector in Montenegro, that is the market, legal and institutional framework, public service media (PSM), digital intermediaries, state aid and help schemes, media ownership and concentration, journalism, self-regulation, media literacy and copyright.

## Findings and proposals

A non-exhaustive summary of key findings of the inquiry, highlighting how the legislation impacting the media sector should evolve and how the responsible institutions should address the biggest challenges in the selected areas, is provided below. For an overview of key recommendations, addressing different groups of stakeholders, the reader is referred to the Recommendations at the end of the report.

### MARKET

The small and hardly sustainable Montenegrin media market, especially for such a high number of media as present in Montenegro, is affected by a tough competition from the neighbouring countries and by a harsh polarisation of media along the line of “alignment” with the government or the opposition. This polarisation is resulting in rather hostile relationships not only between the pro-opposition media and the state authorities, but also between the market players from different parts of the (political) spectrum and is preventing possibilities of stepping together for common goals.

One of the most critical elements contributing to constant worsening of the situation, confirmed also by declining media sustainability index scores (Bojović 2017), is the opaque public funding of media.

Any ex-ante limitations of the number of media outlets in the market, as suggested by a part of the market players, would be unjustifiable in terms of freedom of expression and would hamper the development of potential innovative businesses. What appears more problematic is that, once these players are on the market and are clearly not profitable, the state *ex-post* puts in place several formal or informal systems which allow some of these media to artificially survive, such as writing off the debt they owe to various state bodies and state owned companies or be unjustifiably generous with them in terms of state advertising or other public support schemes.

There is a multiple and cumulative evidence that these funding mechanisms are used to support “pro-government media”. This is a highly destabilizing factor, threatening not only the market players, but also undermining the principal role of the media as well as the citizens’ trust in them.

Recommendations:

1. All kind of State aid to media, including the so-called state advertising, should be made transparent and rigorously objective. Also, writing off the debts of the industry towards the

state (taxes, fees) or state owned companies (the costs of services of the Radio difuzni centar – RDC) is a short term solution that does not constitute nor consolidate a coherent, ambitious and strategic media policy.

2. The provision of access to the electronic communications networks, electronic communications infrastructure and associated facilities by an operator should be guaranteed under the same conditions to all entities requiring the aforementioned services.
3. All necessary steps, including legislative and practical, to ensure transparency of ownership of all media outlets and proper implementation of competition rules, should be taken.
4. All the relevant kinds of media concentration should be taken into account, in order to take into consideration cross-ownership across the whole media industry.
5. Since media concentration should be regulated also in terms of the influence of the owners on editorial policies, legislative mechanisms should be adopted in order to secure editorial independence of newsrooms and legal protection of journalists when modifications of ownership and/or of editorial policy occur.
6. Public authorities, with the help of international partners, should set a programme to help bolster domestic audiovisual production, including both funding and training components.
7. Public authorities should assess the possibility of devising and implementing a consensually agreed system of audience ratings.
8. The private media should be strongly encouraged to engage in a dialogue with the national trade union, which has been working for a long time on a branch collective agreement; a draft has been ready for a year now and the employers have not taken any further action or reaction.
9. The journalists' labour and employment rights should be respected and properly implemented by the industry.

## LAW

The legal framework governing media in Montenegro is prescriptive, but with limited possibilities of enforcement. It is composed of a few key pieces of sectorial law and numerous other legal acts interfering with them. The sectorial law underwent a series of updating exercises with a view of harmonisation with the EU acquis, but there are still areas which were not correctly transposed (regulation of commercial communications) or are entirely missing (regulation of non-linear audiovisual media services).

Many important factors affecting the Montenegro's media market can be linked to laws and policies without a substantive connection with media policy or are a result of a poor implementation of otherwise appropriate legal solutions. The most critical area is the direct and indirect state funding of media which lacks the transparency and fair application of State aid rules. Also, other laws (for example the law regulating salaries in the public sector or anti-corruption legislation) are being used as an attempt to legitimise political interference in the work of the regulators and the media.

Recommendations:

10. A thorough, coherent and coordinated review of all the sectorial laws and laws governing or affecting the media sector for its alignment with the EU acquis and CoE standards in media regulation is needed.
11. The media law review should follow an action plan with clear, measurable objectives and assigned responsibilities.

12. When revisiting the media and related law, the legislator should bear in mind the proportionality of regulation, as well as practical implications for implementation, monitoring and enforcement.
13. The outdated, dysfunctional and conflicting legal instruments should be abandoned to make room for a less prescriptive, more flexible and targeted, risk- and evidence-based regulation.
14. Fragmentary and ad-hoc legal solutions should be avoided in favour of comprehensive approaches, supported by impact analysis, preventing unwanted consequences in the market, as well as legal uncertainties and conflicts of law.
15. Legal solutions interfering in the existing regulation that functions well, including the solutions deteriorating the existing safeguards of the independence of regulators and or public service media, should be avoided.

## INSTITUTIONS

There are a high number of institutions involved in media policy and regulation, however, due to the absence of a clear-cut division of responsibilities between authorities and effective enforcement, many issues fall between the legal and regulatory gaps. The lack of the political will to define and implement a clear media policy and also to correctly implement the existing legal safeguards enable a wide space for ad hoc and partial solutions, to the detriment of a coherent media policy. The inadequately conceived solutions are difficult to put into practice and are often harmfully affecting, weakening or disabling the existing solutions.

Recommendations:

16. There should be a co-ordinating body with an overall and overarching responsibility for media policy on the Government level. This responsibility should be placed on the line ministry for the issues related to media, which should take a more prominent and pro-active role in creating and advocating a coherent media policy, including monitoring its implementation and effects, for the benefit of all stakeholders and citizens.
17. A clear division of responsibilities and powers among different institutions should be set, avoiding duplication and sharing of responsibilities (as in the case of the Inspection Administration and the NRAs, that is EKIP and AEM).

## REGULATION

The Agency for Electronic Media (AEM), defined by the law as an independent regulatory body for audiovisual media services, acts in an extremely challenging environment. The AEM's ability to exercise its remit is limited not only due to the inconsistencies of the law, but also due to the lack of effective sanctioning instruments and inspection prerogatives. Also, there is a serious overlap of competencies between self-regulation and statutory regulation of audiovisual media. On one hand, the rather broad regulatory competencies of the AEM with regard to the journalistic professional standards create the possibility of excessive regulatory meddling in the work of journalists which should be supervised only by self-regulation, while on the other hand, the decision of the one self-regulatory organisation to deal with protection of minors and hate speech in electronic media as well, is blurring the responsibility for these two areas that are covered by the AVMSD and would be therefore better placed either within the sole remit of the audiovisual regulator, or, alternatively, redesigned into a co-regulatory system, provided that the regulator retains strong and effective backstop powers.

The Agency for Electronic Communications and Postal Services (EKIP) faces similar challenges as the AEM with regard to its ability for effective enforcement of the law governing electronic communications. Yet, in cases related to the use of online services during the last Parliament Elections (2016), they resorted to general, disproportionate and not sufficiently justified blocking measures, which were executed by the main country's operators without them challenging this order. The perceptible ease of their execution indicates the fragility of the freedom of expression online and is an unfortunate precedent for potentially more intervention of this kind in the future.

Recommendations:

18. During the media law reform, a special emphasis and attention should be given to the safeguards of the AEM independence, to prevent their deterioration.
19. For effective enforcement of AVMS regulation, the sanctioning system should be amended in order to allow for a more flexible, gradual, and proportionate response to infringements.
20. The regulator should be given back the inspection prerogatives and the possibility to impose adequate and proportionate fines for all the breaches that can be unequivocally established and do not require judicial consideration (for example all the violations of the standards set by the AVMSD and other objectively measurable issues).
21. Under no circumstances, these fines should be applicable to the journalistic professional standards, which should be dealt with exclusively through rigorous self-regulation.
22. Any content restriction should be prescribed by law, justified, proportionate and necessary in a democratic society.
23. In issues within the domain of journalism ethics, a large remit of the regulatory authority should be prevented. The professional standards should be within the remit of self-regulation of the media professionals and the room for a regulatory intervention that could be potentially detrimental to the freedom of expression clearly limited.
24. All the issues currently covered by the Rulebook on programme standards in electronic media, adopted by the AEM, should be geared toward self-regulation, except those derived from the AVMS Directive, which sets out a workable framework regarding hate speech and protection of minors and implies state responsibility for its implementation.
25. Online content restrictions, irrespective of whether requested by the state organs/regulators or initiated by intermediaries themselves, should be performed in the least restrictive way, and there should be effective remedies providing prompt and impartial redress for users, content providers and other affected parties.
26. The management and use of limited resources in electronic communications should be based on principles of objectivity, transparency, non-discrimination and proportionality, ensuring the predictability of business environment and level-playing field for business operators

## SELF-REGULATION

The main shortfall in self-regulation is the lack of a single body competent for all media, instead of the current fragmented alternatives. This does not allow the public to get a clear awareness about the competent body to complain to in case of alleged violations of journalism ethics, which results in serious doubts among the stakeholders about the effectiveness of self-regulation. The setup of a single self-regulatory scheme appears impossible as long as the polarisation between the "pro-government" and "pro-opposition" media outlets persists.

#### Recommendations:

27. Efforts should be put in raising the awareness about the various self-regulatory schemes in the areas where justified and aligned with the public policy objectives, with the support of the parties involved in the functioning of those schemes.
28. A wider adoption and successful functioning of self-regulatory frameworks (and/or development of co-regulatory mechanisms) should be encouraged through legislation supporting statutory recognition of self-regulation or other incentives for participating in self-regulation (and/or establishing a legal basis for co-regulation with a clear division of roles between the industry and the regulator, as well as effective monitoring and enforcement measures).
29. Turning the existing media self-regulation into a compulsory system should be avoided.
30. The scope of self-regulation by the industry should be clearly delineated from the scope of statutory regulation.
31. Effective oversight and compliance mechanisms, together with redress mechanisms, should be encouraged.
32. Funding of the functioning of self-regulation should be ensured via a transparent, possibly mixed scheme, combining an industry fee with public funds, and allowing independent implementation of self-regulation.

#### PUBLIC SERVICE MEDIA

RTCG's transition from a state media to a public service media is considered to be incomplete. The appointment process of the Council members ultimately resting in the hands of Parliament and the easiness of dismissals of individual members or the Council as a whole, indicates that the whole management structure, including the Editorial Board, is usually strongly tied and connected to political interests. Worth attention are also the local public broadcasters. Being funded mostly by municipalities, they, as well, are often described as the voice of local politicians in power.

#### Recommendations:

33. RTCG should continue its efforts to evolve into a public service media company, accountable first and foremost to the Montenegro public and actively advocating and implementing the professional journalistic and quality standards, as well as standards stemming from the AVMSD.
34. RTCG should continue with organisation restructuring and modernisation of business processes to keep up with social, cultural, technological and business change.
35. RTCG should set an example in promotion of the European AV works, including the works of independent producers, and should strengthen production of its own or commissioned original content, addressing different social groups.
36. The funding should guarantee predictability and transparency for the RTCG and local PSMs and should not be used as a means of pressure, reward or subordination.
37. Apart from financial mechanisms, legal safeguards should be set up in order to guarantee the editorial independence of the local public service broadcasters.

#### JOURNALISM

The violence against journalists is a very worrying trend and shall be put high on the priority list of policymakers, legislator, judiciary and industry. The unresolved violent attacks on some journalists have



shaken the profession in the last years, but there are also reports of undue and intrusive pressures from media management and from politicians, exercised in the newsrooms on a daily basis.

Despite the decriminalisation of defamation, which was a positive development, there are indications that in some instances the judicial branch does not provide for independent judicial review of defamation cases, and is deemed to be under the influence of political and other power structures.

Another legal aspect relevant for journalists, but also for citizens, is related to the right to access information, which is not correctly implemented in practice – despite being safeguarded by the Constitution. Remedies can be found in court proceedings, but these take long and are not practical for the work of journalists.

Recommendations:

38. The Government should secure a safe and enabling environment for journalists to perform their job.
39. The Government should vigorously, openly and promptly condemn and process any threat to the safety of journalists.
40. The efforts to implement the Montenegrin Journalists' Code of Ethics by the industry should be continued, preferably with the support of the relevant international organisations (EU, Council of Europe, OSCE Representative on Freedom of the Media and UNESCO).
41. The Government should provide full support to effective and efficient work of the Commission for investigation of crimes against journalists, as well as the full transparency of the work of the Commission.
42. There should be trainings ensured for the Prosecution office of Montenegro in relation to crimes committed via social networks, as well as those related to technical and legal aspects of safety of journalists.
43. Full transparency of the work of the Government and public administration bodies should be provided, respecting the citizen's right to information.
44. The defamation cases should be properly dealt with and should not be used to silence media. Related to that, the Prosecution office of Montenegro should guarantee adequate, accurate and timely information safeguarding the necessary transparency on cases of investigation against journalists.
45. The industry should safeguard journalists against interference in their work and any kind of pressures, guarantee them healthy and secure working conditions, invest in their skills and knowledge, and promote implementation of the Code of Ethics and professionalism in journalism.
46. The media professionals and journalists of Montenegro should seek to overcome political divisions in favour of the common goals of their profession, such as higher levels of professionalism, media pluralism, healthy working environment and best possible conditions for media freedoms.

## MEDIA LITERACY

There are no laws regulating media literacy in Montenegro, nor are there any institutions entrusted with responsibilities to promote media literacy, coordinate the necessary activities or report on the levels of media literacy among citizens. The concept is primarily associated with media education for development of critical and creative knowledge and skills for understanding complex ideas, identification of misinformation and manipulation, and creating opinion based on impartial and reliable

information in the media, but there is no single or widely accepted definition of media literacy in Montenegro.

Recommendations:

47. The concept of media literacy, aligned with the EU policy framework, should be enshrined in the legislation governing media.
48. The Government should develop a national policy for promotion of media literacy across all segments of society for building the capacities for active, critical and creative use of media and raising the awareness of viewers and listeners regarding their media rights and safe use of media services.
49. The policy framework should be based on a multi-stakeholder approach, encouraging, among others, initiatives stemming from the industry itself.
50. The AEM should be given the responsibility and the staff to monitoring the media and information literacy developments and to coordinate the activities aimed at research and promotion of media literacy, in strong partnership with the relevant ministries.
51. The Government of Montenegro should secure a long-term funding scheme for the activities advancing media and information literacy.