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Legal Opinion
Montenegro Draft Laws on Media, Audiovisual Media Services, and Radio-Television of Montenegro

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Division for Cooperation on Freedom of Expression

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List of Abbreviations

AEM	Agency for Electronic Media
AVMS	Audiovisual Media Services
AZZK	Agency for Protection of Competition
CoE	Council of Europe
COM	Committee of Ministers
ECHR	European Convention on Human Rights
ECTT	European Convention on Transfrontier Television
EMFA	European Media Freedom Act
EU	European Union
PSB	Public Service Broadcaster
PSM	Public Service Media
RTCG	Radio-Television of Montenegro
VOD	Video-on-demand
VSPS	Video-Sharing Platform Service

Introduction

The action "Protecting freedom of expression and of the media in Montenegro (PRO-FREX)", is implemented by the Division for Cooperation on Freedom of Expression of the Council of Europe within the joint programme of the European Union and the Council of Europe "Horizontal Facility for the Western Balkans and Türkiye (2023-2026)". It aims at enabling the beneficiary institutions and civil society organisations in Montenegro to progress towards meeting their reform agendas in the field of freedom of expression and freedom of media, in line with the European standards.

This review of the Draft Laws relevant to the media sphere follows several reviews commissioned by the Council of Europe. In 2020, a "Legal Analysis of the Draft Law on Audiovisual Media Services of Montenegro", was carried out by two Council of Europe consultants. This was followed by an expert review, completed in April 2021, of the package of three laws being developed by the Working Group established for this purpose by the Government of Montenegro in September 2021[1].

In November 2022, the drafts of the three laws approved by the Working Group were further reviewed by the present Council of Europe consultants, Mr Paolo Cavaliere and Ms Deirdre Kevin, against the background of the recommendations previously formulated.

On 26 December 2023, the Minister for Culture and Media of Montenegro addressed to the Council of Europe Secretary General a request for further expert assistance in reviewing the amended drafts of the three above-mentioned media laws, in advance of their presentation to the competent parliamentary bodies.

On 15 January 2024, the Secretary General positively replied to the Minister, deferring provision of assistance to existing cooperation activities implemented by the Division for Cooperation on Freedom of Expression.

The English translations of the three drafts were made available on 17 February, with a table indicating the changes made compared to the previous drafts and with a request to deliver the Legal Opinion by 11 March. On 22 February, the Secretariat of the Council of Europe organised an online meeting between the two consultants engaged for this review, Ms Deirdre Kevin and Mr Paolo Cavaliere, and the representatives of the Ministry for Culture and Media, the Agency for Electronic Media and the European Union Delegation in Podgorica.

The present document was prepared by Ms Deirdre Kevin and Mr Paolo Cavaliere, Council of Europe Consultants. While examining the alignment of the three draft laws with relevant Council of Europe standards on freedom of expression and freedom of media, including the

[1] Expert review on the Draft law on Audio Visual Media Services (AVMS) and an assessment of the compatibility of the Draft AVMS Law, the Law on Media, and the Law on the National Public Broadcaster (RCTG), April 2021, prepared by Deirdre Kevin, Joan Barata and Siniša Gazivoda, Council of Europe consultants.

case-law of the European Court of Human Rights, and with the *EU acquis*, its scope is limited to those parts that the Ministry has indicated as being different from the previous drafts and exclusively based on the English translation made available by the Ministry, for whose accuracy neither the Council of Europe nor the consultants bear responsibility.

1. Review of the Draft Law on Audiovisual Media Services

1.1. General comments on the structure and content of the Draft Law

1.1.1. Subject matter of the Law

Article 1 of the proposed Law lacks reference to the independent National Regulatory Authority. In previous elaborations of the Draft, this is included:

> establishment, obligations, responsibilities, management and financing of public broadcasters, status and financing sources of the Audiovisual Media Services Agency (hereinafter referred to as the "Agency").

As the Law on Audiovisual Media Services is the key legislative framework governing the Agency for Media, it is important that the Agency is included in the subject matter of the Law.

1.1.2. Definitions

The structure of the Draft Law on Audiovisual Media Services departs from standard practice (EU Directives, EU Member States, countries in the region) in that the majority of key definitions are not included at the outset (under the proposed Article 6). It is noted that two key definitions for "Audiovisual Media Service" and "Audiovisual Media Service Provider" are provided under Articles 2 and 3, respectively. Other key definitions can be found throughout the document but some are incomplete or key elements of the definitions are found in different places (see further below). For the sake of clarity, it is recommended that all key definitions are included in full at the beginning of the Law and that they fully align with the AVMSD. A rationale is provided for this approach in the comparative documents but it is not clear what is meant by the explanation.

The definition of "audiovisual media service" provided under Article 2 is not in line with the AVMS Directive. It does not specifically reference on-demand audiovisual media or audiovisual commercial communications, although this is later referenced under Article 12. In addition, audio services (radio) should be defined separately as they do not qualify as audiovisual media. The definition lacks the phrase "where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes", and this phrase allows for the inclusion of other types of media where part of their services may qualify as audiovisual media services (following European Commission Guidelines) and hence fall under the regulatory framework for audiovisual media.

Some minor comments are included here regarding terminology, which may be related to translation issues. It is recommended to change in the English version of the law 'video content exchange platform service' to "video-sharing platform service" in line with the established legal term. Under Article 12 and throughout it is recommended to use the terms "on-demand audiovisual media service" and "audiovisual commercial communication", and "user-generated video".

The definition (Article 12) provided for "audiovisual commercial communication" (ACC) lacks the inclusion of "television advertising, sponsorship, teleshopping and product placement". These types of ACCs are referenced under Article 67. Hence, there are several examples where the full definition of a key term according to the AVMSD is not presented anywhere in the Law but elements are split in different parts of the Law. The Draft Law lacks a definition for "video-sharing platform service provider" (VSPS Provider).

Among others, the translation in English introduces a lack of clarity on the competences of the Agency regarding digital terrestrial broadcasting. It is highly recommended to improve the English draft of the Law before providing the Draft to the European Commission and to ensure that the two language drafts are precisely aligned (see Annex provided regarding language issues).

1.1.3. Misplacement of certain legal provisions in the Law on AVMS

As shall be clarified further below, there is a section of the EU acquis relating to public service media – specifically state aid rules – which has been misplaced in the legal framework (see 3.3). There is perhaps a confusion as to the significance of including a list of "commercial services" which the public service media (PSM) can provide. These services are frequently referred to as "audiovisual commercial communications" (in the Draft Law on RTCG, under Article 8), and under the Draft Law on Audiovisual Media Services. For example, see Article 40, which does not adequately reflect the full purpose of separate accounting: "The public broadcaster shall be obliged to keep separate accounting for the provision of public services from commercial audiovisual communications".

See also Article 187 (44): "as a public broadcaster, fails to keep separate accounting for the provision of public services from commercial audiovisual communications (Article 40, paragraph 2)".

It is highly recommended that the legal provisions that relate to the national public broadcaster – in particular with regard to the EU acquis on State Aid, and are key to the regulation of financing of the public broadcaster, remain in the Draft Law on RTCG. In addition, an assumption has been made that some of these provisions apply to all audiovisual media services, which is incorrect. Hence the previous Article 10 in the Draft Law on RTCG has been removed with reference made to Article 50 in the Draft Law on Audiovisual Media Services. The rationale for removing this is stated as: *"Prescribed exactly the same in the Proposal of Law on AVM services, as it is the basic legal document regulating the introduction of significantly new AVM services, For that purpose we removed it from this legal document."*

The Audiovisual Media Services Directive and the Draft Law on Audiovisual Media Services are not the relevant sources of regulation for the introduction of new services by public service broadcasters. Section 3.3 indicates the provisions which should be included in the Draft Law on RTCG, while Article 10 of the previous Draft Law should be reintroduced in the Draft Law on RTCG (and Article 50 removed from the Draft Law on Audiovisual Media Services).

It is also highly recommended that a more thorough review and checks for compatibility of these laws are made before adoption, to ensure that there are no anomalies and misinterpretations that could hamper legal clarity and the implementation of the laws.

1.2. Regulatory obligations on webcasting platforms

It has been noted that Article 85 (3) places excessive regulatory burdens on webcasting platforms by giving them equal obligations to that of broadcasters. The EUD noted that the scope was too broad and would also possibly place a heavy administrative burden on the regulator in trying to implement these provisions. The AEM noted that obligations regarding certain issues such as obligations related to participation of their own production, advertisement quotas, etc. are not justified. They recommended altering Article 85 (3) to include only the following obligations:

- registration with the competent authority for production and broadcasting of radio and television program;
- identification of television program;
- rights for revision and response; prohibitions of content as prescribed in the Article 15 of this Law;
- the protection of minors in contents and in audiovisual commercial audio-video communications;
- the use of language of the television program;
- prohibited activities related to offering of commercial audio-visual communications; and
- ownership transparency.

This would be in line with the Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States 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. [2]

1.3. Introduction of licence or application for provision of video-sharing platforms

Articles 125 and 126 introduce a process for application for a provision of a video-sharing platform. The Draft Law states that this procedure should be the same as the procedure for Submitting a request for the provision of AVM services on demand under Article 106.

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[2] Recommendation CM/Rec(2022)11 of the Committee of Ministers to Member States on principles for media and communication governance. Available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a61712

It should be noted that the revised AVMS Directive had, as a key aim, the levelling of the playing field regarding linear and non-linear audiovisual media services. Hence the main provisions in the Directive refer to broadcasting and on-demand audiovisual media services (collectively defined as audiovisual media services).

However, the same approach is not taken with video-sharing platforms and the Directive does not require a procedure for authorisation or licensing of video-sharing platforms and the approach to regulation should not be the same as that for on-demand audiovisual media services. In Ireland, the regulator designates services as qualifying as VSPS and publishes the list, while in the United Kingdom the regulator published a set of guidelines and asked services to "self-designate" as VSPS using the guidance. However, there are some jurisdictions where the alignment of national law with the Directive has included the requirements for registration (such as Croatia, Spain, Slovenia, North Macedonia) for video-sharing platform services (VSPS). Hence an alternative approach could be to identify VSPS and inform them of the need to register. For example, it could be formulated as follows:

> 1) Video-sharing platform services are obliged to register their details with the Agency.
>
> (2) The Agency shall keep a Registry of video-sharing platform services particularly containing the following: the web page address of the operator; the name of the video-sharing platform and the specification of the service; the name and contact data of the contact person; a reference to on the basis of which of the conditions provided for in this Article or in other Articles in this Law the applicant falls under the jurisdiction of the Montenegro.
>
> (3) The Agency shall publish the data of paragraph (2) from the Registry on its website bearing in mind the protection of personal data provision.
>
> (4) The form and content of the Registry shall be prescribed by the Agency, including information required for registration, and grounds for removal from the registry.[3]

1.4. Articles related to limits on freedom of reception and retransmission

Articles 10 and 11 have been identified as not being aligned with the AVMS Directive. In previous reviews of the Laws it was noted that a distinction should be made regarding the procedures that apply to AVMS emanating from EU Member States and those from other countries.[4]

Provisions that are developed in order to deal with problematic services from EU Member States cannot be in principle applied to services from non-EU Member States. Regarding services from non-EU member States, they come under the rules agreed by the parties to the

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[3] From the updated Law on Audio and Audiovisual Media Services of the Republic of North Macedonia. See also the example from Spain here: https://avmsd.obs.coe.int/#art-28a-1_spain

[4] TECHNICAL PAPER: Expert review: assessment of the Draft law on Audio Visual Media Services (AVMS) regarding compliance with relevant European standards, by reference to the recommendations made in the April 2021 Technical Paper. Prepared and submitted by Paolo Cavaliere and Deirdre Kevin, November 2022.

Council of Europe Convention on Transfrontier Television (ECTT)[5]. In light of this, it appears that two separate options could be considered in this Law.

As a first option, it could be possible to amend the draft Law so that it complies with the requirements of the ECTT. In this case, it would suffice to require that, when a foreign audiovisual media service is responsible for certain severe violations of domestic standards, Montenegrin authorities would contact the transmitting party and attempt to resolve the issue. Should this fail, after two weeks Montenegro would be allowed to provisionally suspend the retransmission of the service.

In addition to the above, it would be possible to set up a different procedure for services transmitted from EU Member States, applying a procedure analogous to that provided in the AVMSD. Montenegro would, in this case, notify the media service provider and the Member State having jurisdiction over that provider after at least two separate violations happened in the previous 12 months, give the service provider the opportunity to express its view, and engage in consultation with it in pursuit of an amicable settlement before suspending retransmission. Montenegrin authorities could also consider the possibility of engaging in a conversation with the EU Commission to evaluate whether it would be willing to engage in the process, so as to completely align it with the provisions of the AVMSD. Below is a suggestion for achieving this.

> The Agency may require an audiovisual media service provider under the jurisdiction of a European Union member state to comply with the provisions of Article 15 para. 1 and 2, Article 23 para. 1, 2, and 4, and Article 68 para. 4 to 9 of this Law.
>
> This can be done where, Montenegro
>
> (a) has exercised its freedom to adopt more detailed or stricter rules of general public interest; and
>
> (b) assesses that a media service provider under the jurisdiction of another Member State provides an audiovisual media service which is wholly or mostly directed towards Montenegro.
>
> The AEM may request the Member State having jurisdiction to address any problems identified in relation to this paragraph. Both Member States shall cooperate sincerely and swiftly with a view to achieving a mutually satisfactory solution.
>
> Upon receiving a substantiated request under the first subparagraph, the Member State having jurisdiction shall request the media service provider to comply with the rules of general public interest in question. The Member State having jurisdiction shall regularly inform the AEM of the steps taken to address the problems identified. Within two months of the receipt of the request, the Member State having jurisdiction shall inform the AEM and the Commission of the results obtained and explain the reasons where a solution could not be found.

[5] ETS No. 132, in force for Montenegro as of 1 June 2008.

Either country may invite the Contact Committee to examine the case at any time.

3. The AEM may adopt appropriate measures against the media service provider concerned where:

(a) it assesses that the results achieved through the application of paragraph 2 are not satisfactory; and

(b) it has adduced evidence showing that the media service provider in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable to it if it were established in Montenegro; such evidence shall allow for such circumvention to be reasonably established, without the need to prove the media service provider's intention to circumvent those stricter rules.

Such measures shall be objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives which they pursue.

4. The Agency may take measures pursuant to paragraph 3 only where the following conditions are met:

(a) it has notified the Commission and the Member State in which the media service provider is established of its intention to take such measures while substantiating the grounds on which it bases its assessment;

(b) it has respected the rights of defence of the media service provider concerned and, in particular, has given that media service provider the opportunity to express its views on the alleged circumvention and the measures the AEM intends to take; and

(c) the Commission has decided, after having requested ERGA to provide an opinion in accordance with point (d) of Article 30b(3), that the measures are compatible with Union law, in particular that assessments made by the Member State taking the measures under paragraphs 2 and 3 of this Article are correctly founded; the Commission shall keep the Contact Committee duly informed.

5. Within three months of the receipt of the notification provided for in point (a) of paragraph 4, the Commission shall take the decision on whether those measures are compatible with Union law. Where the Commission decides that those measures are not compatible with Union law, it shall require the Member State concerned to refrain from taking the intended measures.

If the Commission lacks information necessary to take the decision pursuant to the first subparagraph, it shall, within one month of the receipt of the notification, request from the AEM all information necessary to reach that decision. The time limit within which the Commission is to take the decision shall be suspended the AEM has provided such necessary information. In any case, the suspension of the time limit shall not last longer than one month.

1.5. Alignment of other articles with the AVMS Directive

Regarding Article 68 (paragraphs 10 and 11), it was noted that the language did not clearly reflect that of the AVMS Directive. Hence it is recommended that the wording be adjusted to

"'audiovisual commercial communication for medicinal products and medical treatment available only on prescription shall be prohibited".

A similar change should be made to Article 80(2) regarding product placement. Regarding sponsorship, Article 78 should include the following provision:

> The sponsorship of audiovisual media services or programmes by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking, but shall not promote specific medicinal products or medical treatments available only on prescription.

Regarding violations, a similar change should be made to Article 187(95), (96) and (143). In addition, Article 187 (137) misinterprets the provision regarding sponsorship (see above). There is no obligation to include the name of the sponsor as outlined under the current Draft Article 187 (137):

> 137) provides an AVM service or broadcasts a program sponsored by a legal or natural person whose activity includes the production or sale of medical devices and the application of treatment methods and procedures, without including promoting the name or reputation of that person (Article 78, paragraph 3);

A violation in this case would involve promoting the specific medicinal products or medical treatments available only on prescription, while the promotion of the name or the image of the undertaking involved in the manufacture or sale of such products is allowed.

1.6. Political Advertising

Changes have been proposed in the law in relation to political advertising and the definition of political advertising has been adjusted. Among others, there is concern that it is too broadly formulated potentially posing a risk to the regulator's capacity to monitor and regulate (noted by the EUD). Under Article 82:

> Political advertising means advertising with or without financial compensation that directly or indirectly recommends the activities, ideas, or positions of political parties or candidates or represents positions related to issues during the election or referendum campaign in accordance with special rules.
>
> Unless otherwise stipulated, the provisions of this Law relating to advertising shall be applied accordingly to political advertising.
>
> The Council of the Agency shall prescribe rules of political advertising from paragraph 1 of this Article.
>
> Political advertising during the election or referendum campaign shall not be included in the allowed duration of advertising in the sense of Article 76 of this Law.

In addition, the AEM stated that,

> [although they] do not object the importance of such initiative, in order for it to come to fruition, it requires more than the change of definition of political advertisement expressed in this Draft Law. It requires the definition of conditions necessary for recognition of such

> subjects, as well as a detailed regulation of their rights and obligations. This implies the need for change of electoral laws and the law on financing of political parties, as laws that provide the framework for assurance of transparency of the electoral process.

Hence, they recommend that the provision read as follows:

> Political advertisement is advertisement, with or without financial compensation, that recommends activities, ideas or positions of an applicant of a confirmed electoral list or candidates during the election or referendum campaign, in accordance with special rules.

It may also be useful for the Drafters of the Law to take time to incorporate the newly adopted (February 2024) European Union Regulation on the transparency and targeting of political advertising,[6] and the Recommendation CM/Rec(2022)12 on electoral communication and media coverage of election campaigns, in both the national electoral laws and the media legislation.[7]

1.7. Obligations of broadcasters concerning programme contents

The Draft Article 23 outlines the obligations regarding programme content. This Draft Article has been updated to include the following:

> 1. free, truthful, complete, unbiased, and timely information to the public about events in the country and abroad; and
>
> 2. respect and promotion of basic human rights and freedoms, democratic values, institutions, and pluralism of ideas.

It was noted by the European Union Delegation that read in conjunction with Paragraph 13 which states that "[t]he Council of the Agency shall prescribe a detailed manner of fulfilling the broadcaster's obligations from paras. 1 to 11 of this Article, i.e., program standards", this provision threatens to encroach upon the sphere of self-regulation, as it puts AEM in a position to adjudicate on media outlets' compliance with professional and ethical reporting standards".

It is common in audiovisual media laws to include a "set of principles" that should guide the work of the media where ideas such as those outlined above are included. Such principles can be broader and, as in this case, also distinct from the strict regulation of content and hence are not within the remit of the regulator to monitor and sanction. In particular, Article 184 provides for sanctions for violations of Article 23. The EUD pointed to the Council of Europe 2017 Media Sector Inquiry on Montenegro where recommendations included the following:

> 21. Under no circumstances, these fines should be applicable to the journalistic professional standards, which should be dealt with exclusively through rigorous self-regulation.

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[6] Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0731

[7] Recommendation CM/Rec(2022)12 of the Committee of Ministers to member States on electoral communication and media coverage of election campaigns (Adopted by the Committee of Ministers on 6 April 2022 at the 1431st meeting of the Ministers' Deputies), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a6172e

> 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.[8]

In addition, equating specific rules regarding for example, the protection of minors, with a broad obligation to provide "free, truthful, complete, unbiased, and timely information" presents problems of interpretation, monitoring and implementation.

Currently an issue of intense discussion, attempting to regulate "truthfulness" as opposed to "falseness", "disinformation" or "misinformation" is widely debated in the sphere of media regulation, along with the dangers of trying to regulate these issues. These two obligations could be expressed differently as principles that should be respected in the work of the media. The regulation of these issues should be dealt with by internal self-regulatory rules, and/or by the self-regulatory system for journalism. In addition, complaints systems and the "right of reply" also provide for vehicles for redress of any untruthful information. Hence, it is recommended to remove these from the section that outlines content obligations of the audiovisual media.

1.8. Broadcaster associations and representation at the Agency Council meetings

Article 166 outlines the work of the Council of the Agency. Regarding transparency, the meetings of the Council are open to the public unless the Council of the Agency decides otherwise by a majority vote of the total number of members. The minutes of the meetings must be published on the website of the Agency within 5 working days after their adoption. The provision also stipulates that "the Director of the Agency shall have the right to participate in the session of the Council of the Agency without the right to make decisions". The presence of the Director at the meetings is necessary as s/he must ensure that the Agency implements decisions of the Council and may be called upon to provide additional information to the Council members.

The 2022 review of the Draft Law on Audiovisual Media by the Council of Europe noted the high level of transparency required and stated that it was unusual for a regulator to hold public meetings by default, which could result in undue pressure and backlash in case the Council discretionally decides to hold its sessions behind closed doors.

The new draft of the Law introduces a further stipulation that "associations of broadcasters have the right to appoint an authorised representative who attends the sessions of the Council

[8] Council of Europe (2017): Montenegro Media Sector Inquiry with Recommendations for Harmonisation with
the Council of Europe and European Union standards. Jufrex Publication. https://rm.coe.int/montenegro-media-sector-inquiry-with-the-council-of-europe-and-europea/16807b4dd0

of the Agency without the right to decide". It is not clear why the broadcaster associations would have the same level of inclusion as the Director of the Agency. As the sessions are open to the public, and the Rules of Procedure of the Council outline the way in which other persons can be invited to contribute to sessions, it is not clear why this provision is necessary. Also, Article 185 (paragraph 2) stipulates that "the representative of the service provider shall have the right to attend the session of the Council of the Agency where the appeal based on the decision on temporary or permanent withdrawal of license is discussed".

In addition, without a similar option for all other relevant stakeholders (civil society, consumer groups) and particularly regulated entities (providers of on-demand services, providers of video-sharing platform services, distributors of linear audiovisual media services and non-linear audiovisual media services) to have a designated representative, this provision can be seen as discriminatory.

1.9. Brief comment regarding provisions on accessibility for people with disabilities

Article 18 almost completely implements the provision of the Directive regarding accessible content for people with disabilities. However, the terminology should be adjusted. Accessible content should be provided "continuously and progressively". The terms "progressive" and "gradual" are not synonymous. The language under Article 141 (point 15) with regard to the "Jurisdiction of the Agency" should be adjusted as the AVMSD no longer speaks about "encouraging" services to improve the accessibility of audiovisual media services. The Directive requires that Member States should "ensure without undue delay," that services are made continuously and progressively more accessible to persons with disabilities. It is recommended that Article 141 (15) be adjusted as follows (to align with Article 18), that the Agency shall "(15) ensure that AVMS providers continuously and progressively more accessible to persons with disabilities make their services more accessible to persons with disabilities".

An ideal approach and standard good practice in other European countries would involve the Agency developing a secondary act in this area in cooperation with stakeholders in order to provide clarity on the terms "continuously and progressively", and "proportionate measures". Such a secondary act should provide guidance for the AVMS providers regarding how to achieve this. In addition, the act could distinguish between the obligations to be placed on different types of AVMS providers – for example between national commercial broadcasters and local broadcasting services. Article 18 already states that the Agency is obliged to "(1)by using proportional measures, ensure that AVM service providers constantly and gradually make their services more accessible to persons with disabilities". Hence, it is recommended that Article 18 include the additional clause: "The Council of the Agency shall, in consultation with all stakeholders, outline the proportionate measures required to implement this Article".

1.10. Independent functioning of the regulatory authority

The independence of national regulatory authorities is a key area of standards for the Council of Europe and these have had an important influence on the provisions in the Audiovisual Media Services Directive (Article 30) regarding the independence of media regulatory authorities.

The Recommendation Rec(2000)23 addressed the general legislative framework; the appointment, composition and functioning of regulatory authorities; their financial independence; powers and competence; and accountability.[9]

This was followed by a Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector in 2008,[10] which reiterated these standards and stressed the need for Member States to (among others):

> provide the legal, political, financial, technical and other means necessary to ensure the independent functioning of broadcasting regulatory authorities, so as to remove risks of political or economic interference.

The AVMS Directive, under Article 30, emphasises that national regulatory authorities be legally distinct from government and functionally independent of governments:

> 1. Each Member State shall designate one or more national regulatory authorities, bodies, or both. Member States shall ensure that they are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. This shall be without prejudice to the possibility for Member States to set up regulators having oversight over different sectors.[11]

Article 139 (paragraph 1) of the Draft Law states that:

> The Agency is an independent legal entity and is functionally independent from state authorities, state administration authorities, local self-government authorities, and local administration authorities, and from all natural and legal persons engaged in the provision of AVM services.

It is necessary, however, to ensure that this functional independence is working in practice. It was emphasised by the AEM that:

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[9] Recommendation Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e0322

[10] 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 at the 1022nd meeting of the Ministers' Deputies). https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d3c1e

[11] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A02010L0013-20181218

> The application of the Law on salaries in the public sector to the work of Agency and the public broadcasters, as well as the Law on Public Administration, and Law on Budget and fiscal responsibility provide inappropriate interference with the work of these authorities, and question their operational and functional independence.

They therefore recommended that Article 198 of the Law on Audiovisual Media be adjusted as follows:

> On the day of entering to force of this Law, the following laws cease to exist: The Law on Electronic Media, the dispositions of the Law on Salaries in the Public Sector, its part referring to the Agency for Electronic Media and Public Broadcasters, as well as dispositions pf the Law on Public Administration, and the Law on the Budget and fiscal Responsibility, their parts that refer to the Agency for Electronic Media.

With reference to the Council of Europe standards in this area, outlined above, it is recommended that any laws or procedures that impede on the institutional independence and autonomy of these institutions in actual practice be revised.

1.11. Media ownership, mergers, competition and the role of the regulator

The Council of Europe 2018 Recommendation recognised the importance of a specific approach to media mergers:

> 3.10. The relevant independent regulatory authority or other designated body should be vested with powers to assess the expected impact of any significant proposed concentration on media pluralism and to make recommendations or decisions, as appropriate, about whether the proposed merger or acquisition should be cleared, subject or not to any restrictions or conditions, including divestiture. Decisions of the independent authority should be subject to judicial review. [12]

Examples of procedures where the media regulatory authority provides opinions on mergers and acquisitions exist in the United Kingdom, Ireland, Austria, Croatia (and the draft Media Law in Slovenia), while Germany has a specific media concentration regulator, the Commission for Determining Concentration in the Media (KEK).

This is also reflected in the forthcoming European Media Freedom Act (EMFA), which introduces provisions on the assessment of media market concentrations under Article 21.[13] It is recommended that the AEM in Montenegro is also tasked with providing opinions to the Agency for Protection of Competition (AZZK) in the case of media mergers.

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[12] Recommendation CM/Rec(2018)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

[13] 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

1.12. Organisation of commercial broadcasters via coverage zones

The Agency for Electronic Media (AEM) noted that Article 41 should be updated to reflect the reality of the market (number of administrative units, number of municipalities included in the coverage, the % of the population of the municipalities as well as the % of general population of Montenegro). As this is a technical issue requiring local expertise and knowledge of the local and regional markets, the Experts have no comment to make on this issue. We include the proposal for Article 41 below:

> A commercial broadcaster may conduct production and broadcasting of linear AVM services as:
>
> 1) A national commercial broadcaster, if they cover no less than 85% of general population, that is situated over 14 units of local administration (through terrestrial radio-diffusing frequencies and/or electronic communication networks for distribution of linear AVM services) and over 75% of general population where they cover the entire territory of Montenegro.
>
> 2) A regional commercial broadcaster, if they cover no less than 85% population on a territory that includes between 4 and 13 units of local administration that are situated in certain geographic area (through terrestrial radio-diffusing frequencies and/or electronic communication networks for distribution of linear AVM services) and over 20% of general population of Montenegro where they cover more than one local administration unit; and
>
> 3) A local commercial broadcaster, if they cover no less of 85% of population on the territory of one to three units of local administration (through terrestrial radio-diffusing frequencies and/or electronic communication networks for distribution of linear AVM services) and less than 20% of general population of Montenegro where they cover more than one unit of local administration.

2. Review of the Draft Law on Media

2.1. Definitions

2.1.1. Journalism

Article 3 introduces a definition of "journalist" that was not included in the previous draft. The definition is rather open-ended and broad enough to capture the different aspects of this complex profession. The purpose of introducing this definition seems to be attribution of certain privileges, such as granting access to any event organised by public sector entities (Article 35) and exemption from liability for publications on matters of public interest (Article 44). However, it is crucial to ensure that this definition is not used exclude other individuals who do not fit in it, for any reason, from exercising their fundamental right to freedom of expression through any chosen means, including the Internet. In this sense, it is worth recalling that the 1996 Council of Europe Recommendation on the protection of journalists in situations of conflict and tension stated that :

> [s]ystems for the accreditation of journalists should be introduced only to the extent necessary in particular situations. When accreditation systems are in place, accreditation should normally be granted. Member states shall ensure that … the exercise of journalism and journalistic freedoms is not made dependent on accreditation. [14]

Similar to this principle, the introduction of a statutory definition of journalism should not be used to limit the exercise of equivalent functions by general members of the public.

2.1.2. Media

2.1.2.1. Definition of media

Article 3 defines "media" as "actors involved in the production and dissemination of media content intended for an unspecified number of people, who have editorial control or supervision over that content". The approach recommended in the Recommendation CM/Rec(2011)7 on a new notion of media and reiterated in Recommendation CM/Rec(2022)11 on Principles for media and communication governance is the following:

> The media includes those providers of services that meet the following criteria, or a combination thereof, as proposed by Recommendation CM/Rec(2011)7 on a new notion of media: they have the intention to act as a media outlet, they act with the purpose of producing and disseminating content, they have editorial control over content, they follow professional standards, they seek outreach and are subject to the expectations of the public. This definition encompasses print, broadcast and online media, including audio and video-streaming services

The definition contained in Article 3 fails to mention the criterion of "professional standards" and appears too broad and capable of capturing online entities without the intent, or capacity,

[14] Committee of Ministers, Recommendation no. R(96)4 of the Committee of Ministers to Member States on the protection of journalists in situations of conflict and tension, 1996, Principle 11

to act as media outlets and who should not be therefore compelled to abide by the same regulatory frameworks. It is recommended thus that the definition under Article 3 aligns with the aforementioned Recommendations, defining "media" as "service providers" instead of "actors" and includes further criteria such as adherence to professional and ethical standards, adequate outreach and expectations from the public.

2.1.2.2. Media as legal persons

Article 10 introduces the concept that media entities can be recognised as legal entities. This suggests that media outlets can be legally distinct from their founders, who are natural persons. In other words, it should necessarily follow that the media company, as a legal entity, and its founder, as a natural person who establishes it, are two separate entities. Throughout the draft, however, there appears to be a consistent merging of the two entities, to the extent that even the email addresses and premises of the founder and those of the outlets are assumed to be identical. Recurring expressions such as "the founder of the media outlet, i.e., the media" (Article 12) or "founder of the media outlet, that is, the media outlet that published the imprint and data on the ownership structure of the media outlet" (Article 16), and all those equivalent (Articles 10, 11, 14, 19, 21, 22, 24, 25, 29, 30, 32, 39, 66, 70 ,71 and 72), should be amended to clearly indicate that the provisions and obligations outlined in this law refer to the media outlet as a separate legal person.

2.1.3. News agencies

The category of media under Article 10 also includes news agencies. Although a similar approach can be found in a few other States that are parties to the European Convention on Human Rights (ECHR) (e.g. France), this is not the most common practice at the comparative level and, in the interest of keeping the scope of this law consistent, it is recommended to remove "news agencies."

2.1.4. Clear definition of audiovisual media service in relation to online publications

Article 8, paragraph 4 should properly reflect the relevant definition of an audiovisual media service to include the phrase "where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, to the general public, in order to inform, entertain or educate".

2.2. Establishment and operational procedures

2.2.1. Application of the law

The provision in Article 9 seems worded in a rather circular manner ("The provisions of the law governing AVM services and the national public broadcaster shall apply to the establishment and operation of the media") and could be re-drafted to make it more immediately clear.

2.2.2. Registration

Article 11 requires media outlets to submit an application for registration within 30 days from the day of the establishment. Media outlets that fail to submit such application will not be able to access public funds, pursuant to Article 26, and will incur penal sanctions, pursuant to Article 69. As a general note, it is worth recalling that the European Court of Human Rights, in *Gaweda v. Poland* (App. No. 26229/95, 14 March 2002),[15] found that while an obligation to register the name of a title of a printed periodical does not constitute a violation of Article 10 ECHR *per se*, a refusal of registration does constitute an interference, whose proportionality needs to be considered and ensured. Media outlets that fail to obtain a registration could be precluded from applying for public funds but should not be entirely precluded from exercising their freedom of expression altogether. In this respect, authorities should be cognizant that pecuniary sanctions have been found to constitute a direct interference with freedom of expression and also to exert a negative "chilling effect" on media companies (see *Flux v. Moldova (no. 6)*, App. no. 22824/04, 29 July 2008).[16] The Court has often emphasised the negative impact of even a "symbolic" fine, finding that the low or merely symbolic nature of a sanction "cannot be sufficient, in itself, to justify the interference with the applicant's right of expression" (see *Brasilier v. France*, App No. 71343/01, 11 April 2006, para. 43)[17].

It is therefore recommended that the legitimate aim pursued by the registration requirement should be identified among those listed in Article 10 para. 2 ECHR, and the proportionality of any pecuniary sanction (whose administrative, as opposed as "criminal", nature should be clarified) should be carefully considered, taking also into account the practical difficulty in executing fines for unregistered entities. In any case, the amount of any sanction should be kept to a minimum.

2.2.3. Editorial policies

Article 39 requires that the statute of a media company defines its editorial policy. This provision is unusual from a comparative perspective and directly encroaches on editorial freedom, as such it is recommended it is expunged from the draft.

2.3. Transparency of the allocation of public funds to the media sector

2.3.1. Public funds

Articles 16-21 regulate the transparency of the allocation of public funds to the media sector. These provisions could be more clearly elaborated. For example Article 16 (paragraph 1) is not entirely clear. A direct reading implies that all media outlets can potentially be allocated funding to provide public services: "the media outlets, can be allocated financial resources from public revenues for funding public services and sponsoring media content, as well as for

[15] Available at https://hudoc.echr.coe.int/eng?i=001-60325.
[16] Available at https://hudoc.echr.coe.int/eng?i=001-88063.
[17] Available at https://hudoc.echr.coe.int/eng?i=001-73200.

advertising and the provision of other contracted services". An alternative could be the following:

> The allocation of public funds to the media sector shall be fully transparent, including the following:
> - Funding of public service broadcasters;
> - Support provided under media pluralism and diversity funding;
> - State advertising;
> - and any other contracted services.

The second paragraph provides a definition of public service "for the purpose of this law". While the intention may have been to explain that reference to public service in paragraph 1 concerned only public service broadcasters, this is still not clear. It could still be taken to mean that all media services could be funded to provide public service media. It is recommended to remove this. At the same time, the law would benefit from a definition of "public service" or "public service media". The law should also include a definition of "content of public interest", which is equivalent to the type of content outlined under Article 24.

Further clarity can be introduced from the third and fourth paragraphs onward. The third paragraph should more clearly state that access to any type of public funds is conditional on the publication by a media outlet of the imprint and of the data on media ownership.

The introduction of conditions and criteria for accessing public funding, including state advertising, is highly commendable. This is also an opportunity to introduce additional criteria related to all public funding – in particular state advertising. Such additional conditions exist only under Chapter V in relation to the "Fund for Encouraging Media Pluralism and Diversity" and such conditions should be applied to access to all types of public money. For example, as outlined under Article 25, additional qualifying criteria such as being in the register, meeting financial obligations, adhering to self-regulatory structures, no violations regarding incitement to hated, etc.

2.3.2. Misuse of funds under the Fund for Encouraging Media Pluralism and Diversity

Article 25 para. 2. 8 prevents media outlets that "misused" public funds in the previous two years from applying again. While the principle is in itself sensible, the wording lacks enough precision to guide decision-makers called to implement this provision. Drafters should offer a better indication into what is meant by "misuse" of funds, whether it implies economic malfeasance or if it could also refer to a lack of accomplishment of other standards. In this respect, drafters should also pay attention to the fact that the Ministry would be an ill-equipped body to assess the adequate use funds in respect of content-related standards and should limit its scrutiny to financial matters. Hence, the provision concerning the misuse of public funds should be clarified as to entail financial misuse of funds or failure to complete the production of content as previously agreed, not the quality and/or content of such productions.

2.1. Establishment of media funds by local Government

The Draft Law introduces an additional Article 31, which states that :

> A local self-government unit may establish a separate fund for encouraging media pluralism and diversity, which shall be financed from the budget of that local self-government unit.
>
> The criteria and method of allocation of funds from the fund referred to in paragraph 1 of this Article shall be determined by the founder of that fund.

This Article follows the very detailed provisions of Articles 22 to 30 relating to the national Fund for Encouraging Media Pluralism and Diversity. These provisions outline the purpose of the Fund, its management, governance, procedures, oversight etc.

A proposal to introduce the possibility for local government units to introduce their own funding supports for media pluralism (aside from the support to local and regional public service media), directly controlled by local authorities, may pose a risk of undue political influence on media. The Council of Europe has addressed the conditions for the provision of support to the media sector under Recommendation CM/Rec(2022)4:

> 1.3.2. Criteria for providing direct support: measures of direct support should necessarily pursue at least one legitimate objective of media policy, including but not limited to, the promotion of media pluralism and diversity, support for professional ethics, support for accurate and reliable journalism, the promotion of egalitarian and innovative journalistic practices, adaptation to the digital age, or media literacy. Any subsidies or other forms of financial support should be granted on the basis of objective, equitable and viewpoint-neutral legal criteria, within the framework of non-discriminatory and transparent procedures, and should be administered by a body enjoying functional and operational autonomy, such as an independent media regulatory authority.[18]

Hence, it is recommended to remove this provision as the law does not specify the way in which such funds should operate (in contrast to Articles 22 to 30 and leaves it to local Governments to decide on this. This does not provide the guarantee of support being granted "on the basis of objective, equitable and viewpoint-neutral legal criteria, within the framework of non-discriminatory and transparent procedures". In addition, the Council of Europe standards stress that such funds should be "administered by a body enjoying functional and operational autonomy, such as an independent media regulatory authority".

An alternative is to ensure that the current Fund for Encouraging Media Pluralism and Diversity also has a focus on local pluralism and support for quality local journalism.

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[18] 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. https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ddd0

2.2. Editorial responsibility and tort claims

2.2.1. Untrue information

Article 42 includes several distinct norms concerning the liability of a media outlet and its editorial staff for content published. The provision in paragraph 2 establishes a responsibility for any "untrue" content that caused damage. The European Court of Human Rights has emphasised that:

> Article 10 does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information may not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on freedom of expression (Salov v. Ukraine, App No. 65518/01, 6 September 2005, para. 113).[19]

The vague wording of Article 42 provision should be avoided, as it could in fact curtail journalistic freedom. Since this draft law already includes provisions concerning infringements of individual personality rights such as privacy (Article 47) and reputation (Article 49), these provisions should be expunged from the draft. Mistakenly inaccurate information that does not directly infringe personality rights should be dealt with as a matter of competence for the self-regulatory body or ombudsperson under Article 14, under the framework of professional codes mentioned in Article 15.

2.2.2. Compensation

Paragraph 3 (a new addition to this article) provides that compensation would be determined on the basis of the law governing contractual relationships; it does not appear immediately clear how contractual relationships would be relevant to the damage caused to third parties (typically not in a contractual relationship with the media outlet).

2.2.3. Vagueness of the notions of "obviously illegal content" and content "that violates rights protected by law"

The moderation and removal of third-party comments or comment rest on very vague definitions regarding problematic content. The Draft Law on Media provides no clear provision explaining what illegal content is. The same procedure is provided for "obviously illegal content, or that violates rights protected by law" (see also below), without either term being clarified and also without distinguishing between illegal and non-illegal content. Reference is made to Articles 44-49.

In regulating harmful content online, the Draft Online Safety Code being developed in Ireland (which will apply to Facebook, Instagram, TikTok, X among others) emphasises the need to distinguish between "illegal content that is harmful to children", "regulated content harmful to children", "illegal content harmful to the public", and "regulated content harmful to the public."

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[19] Available at https://hudoc.echr.coe.int/eng?i=001-70096.

Articles 44-49 of the Draft Law on Media mix all these types of content together. The Draft Law should contain a provision that states clearly what is prohibited or illegal content. Such provision should be aligned with the Draft Law on Audiovisual Media Services. For example, prohibited content should include content that which: incites or enables the incitement of violent endangerment or illegal changes to the constitutional order; may endanger public health or which poses a serious risk to public health; may endanger or call into question public safety or poses a serious risk to public safety, national security, and defence; publicly encourages the commission of the criminal act of terrorism in the sense of the Criminal Code of Montenegro; enables or carries out war propaganda.

Importantly, content must not incite violence, hatred, intolerance, or discrimination based on race, ethnicity, connection with a nation or national community, belonging to a group or the assumption of belonging to a group, skin colour, sex, gender, language, religion, political or other belief, national or social origin, property status, membership in a trade union organization, education, social position, marital or family status, age, health status, disability, genetic inheritance, gender identity, sexual orientation and/or intersex characteristics, as well as based on actual or assumed personal characteristics (already included under Article 46).

The publication of information that reveals the identity of a minor involved in cases of any form of violence, regardless of whether he is a witness, victim, or perpetrator, is prohibited, as is the presentation of details from the minor's family relationships and private life (already included under Article 47).

The Draft Law should also distinguish between prohibited / illegal advertising and advertising that is regulated. This is included under Article 48: "It shall be prohibited to advertise the sale and purchase of human organs, tissues, cells, and blood for transplantation or transfusion" and other types of advertising that is prohibited under national law for "weapons, narcotic drugs, tobacco products, electronic cigarettes, and refill containers, trade in goods and provision of services prohibited by law," and medicines and medical treatments available only under prescription. However, this article also includes a range of advertising that is not illegal but is regulated (alcohol etc).

Hence, the law needs to specify clearly what is illegal content and then provide for mechanisms for removal. Other content – that is regulated content – should be the subject of a complaints system. Priority should be given to issues such as the protection of minors, in particular with regard to protection from pornographic content, or protecting the dignity of victims of violence and hate speech.

Detailed recommendations in this respect had been provided in the Expert review of April 2022, in para. 4.1 and should be considered as an integral part of this opinion.

2.2.4. Responsibility and timeframe for the moderation of third-party content/comment

Article 41 requires media outlets to moderate third-party comments on both their own online spaces and official pages on social networks, actually making them "publishers" of comments

made by readers on their social media accounts. This is seemingly in line with the latest orientations of courts and legislatures both in Europe and beyond (see for instance High Court of Australia, *Australian News Channel Pty Ltd v Dylan Voller* [2021] HCA 27, 8 September 2021).

However, in assessing whether an Internet portal operator is required to remove comments posted by a third party, the Court has identified four criteria with a view to striking a fair balance between the right to freedom of expression and the right to reputation of the person or entity referred to in the comments (*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, App. No. 22947/13, para. 60 et seq.[20]; *Delfi AS v. Estonia [GC]*, App. No. 64569/09, para. 142 et seq.[21]), namely:

1. the context and contents of the comments,
2. the liability of the authors of the comments,
3. the measures taken by the applicants and the conduct of the aggrieved party,
4. the consequences for the aggrieved party and for the applicants.

In a recent decision, the Grand Chamber of the European Court noted that

> while professional entities which create social networks and make them available to other users necessarily have certain obligations, there should be a sharing of liability between all the actors involved, allowing if necessary for the degree of liability and the manner of its attribution to be graduated according to the objective situation of each one. (*Sanchez v. France* (GC), App. no. 45581/15, 15 May 2023, para. 185).[22]

In light of this principle, authorities should be cognizant that social networks also operate their own terms of use.

Article 41 para. 3 incorrectly assigns the responsibility to remove illegal content to the founder of an outlet: this provision should instead refer to the outlet as a legal person. The provision requires online media outlets to remove: "obviously illegal content, or that violates rights protected by law, including comments on the official pages of the online publication on social networks without delay and, at the latest, within 60 minutes of learning or receiving the report of another person". In the first Review of April 2021, it was emphasised that the requirement to remove manifestly/obviously unlawful content within 60 minutes was not a reasonable timeframe. This was adjusted to a removal time of 8 hours in the draft submitted for review in October 2022. The draft submitted for the present Opinion reverts back to the original timeframe.

In this respect, the recent Guidance Note on Content Moderation adopted by the Steering Committee for Media and Information Society indicates that:

[20] Available at https://hudoc.echr.coe.int/eng?i=001-160314.
[21] Available at https://hudoc.echr.coe.int/eng?i=001-155105.
[22] Available at https://hudoc.echr.coe.int/fre?i=001-211777.

> [c]ontent should not be taken offline immediately, if it is not urgent that this be done. Instead, the individual who uploaded the content should be given clear information about why their content may have breached terms of service or the law, have the right to defend their upload within a set timeframe and, in any case, the right to a meaningful appeal. Certain content does need to be taken offline as quickly as possible, due to the nature of the content or its impact on victims. Such content needs to be well defined and the process for reviewing it, deleting it and, as necessary, putting it back online, needs to be predictable, accountable and proportionate.[23]

Considering this principle, the provision of Article 41 appears severely unnecessary and disproportionate. The nature of the content that media outlets are called to assess (even including non-obviously illegal content, which would necessarily require a thorough legal scrutiny) and the scope of this obligation (not only including the website(s) directly managed by the outlet, but also any presence on social media networks) make it extremely burdensome and even unrealistic that any media company could scrupulously comply with the expectation of removing illegal content within 60 minutes without inevitably err on the side of caution and remove lawful content, thus infringing on users' rights to impart and receive information.

Furthermore, the broad reference to content that violates any "rights protected by law" provides no indication as to whether and how media outlets could distinguish between urgent and non-urgent needs for removals as advised in the CoE guidance note.

In respect of the requirement that media outlets remove illegal content "without delay", it is important to note that the EU Code of conduct on countering illegal hate speech online[24] addresses the challenge of defining what "without delay" means practically. Addressed to big online service providers it stipulates that they ought to "review the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary". It is important to note that the specific focus of this obligation lies in assessing whether content requires removal, rather than removal itself. This indicates that when companies decide not to remove a specific comment after proper evaluation, they have fulfilled their legal obligation. Therefore, any monitoring of compliance with relevant legal provisions should not solely rely on the rate of removals as the sole indicator of compliance.

In regard to the scope of the obligation, the provision in this draft law requires media outlets to assess both obviously illegal content and content that infringes on third-party rights (see also above 2.2.4). Such content might be more complex to analyse in view of its possible

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[23] Council of Europe - Steering Committee for Media and Information Society (2021): 'Content Moderation. Best practices towards effective legal and procedural frameworks for self-regulatory and co-regulatory mechanisms of content moderation', 2021, p. 48 https://edoc.coe.int/en/module/ec_addformat/download?cle=ebc52c59616af7800f2beee546111646&k=0ae208e45ce743ba2f69db1dfbc9edb7

[24] Available at https://commission.europa.eu/document/download/551c44da-baae-4692-9e7d-52d20c04e0e2_en.

removal, and outlets should, therefore, be given more time to conduct a proper and scrupulous assessment. The European Commission for Democracy Through Law (Venice Commission) addressed a similar concern in its opinion on the Draft Amendments to Law No. 97/2013 on the Audiovisual Media Service of the Republic of Albania in 2020. In the draft law examined by the Commission, a timeframe of 72 hours to assess the illegality of content following individual complaints was deemed too short, even for a specialised body like the complaint committee of the national regulator. The Venice Commission noted in this respect that the

> assessment of content requires legal expertise and a complex balancing exercise between competing interests at stake [which in turn] raises issues of due process and puts an excessive burden on small [electronic publications service providers] lacking the means and capacity to respond in such a short period of time to complaints (Opinion No. 980 / 2020, 19 June 2020, para. 58).[25]

Therefore, it is recommended that the draft law be modified to grant media outlets at least 24 hours to assess and, if necessary, remove obviously illegal content. At the same time, the definition of what constitutes "obviously illegal content" should be more clearly defined in line with the recommendations set out above and in para. 4.1 of the 2022 Legal Review.

2.2.5. Restrictions to dissemination

Article 51 grants courts the power to prohibit the dissemination of media on various grounds, including content that incites criminal acts "against the constitutional and security order of Montenegro." This refers to a vague and potentially overbroad concept that could be easily abused. Restrictions to the circulation of media content should be based on the sole basis provided for in Article 10 ECHR such as "national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

2.2.6. Temporary restrictions

Article 53 provides that courts might temporarily restrict the dissemination of media content until a permanent decision becomes legally binding. The law should be amended to include an indication of the maximum length of such temporary restrictions so as to avoid them being protracted indefinitely.

2.2.7. Balance of interests

Article 57 mandates courts to weigh the protection of legitimate interests against freedom of expression when determining restrictions. It is important to note that in achieving this balance, decision-makers should be mindful of freedom of expression as a fundamental right, which

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[25] CDL-AD(2020)013-e- Opinion on draft amendments to the Law n° 97/2013 on the Audiovisual Media Service, adopted by the Venice Commission on 19 June. https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)013-e

should only be restricted in pursuit of another fundamental right of equal importance, rather than any third-party interest.

2.3. Competences of the Ministry and the regulatory authority

2.3.1. General notes on self-regulation

On numerous occasions, the Council of Europe has invited state authorities to encourage media self-regulation. As a way of example, the resolution on Rethinking the regulatory framework for the media of 1997 "calls on the participating states [...] to encourage self-regulation by providers and operators of the new technologies and new communications and information services at national [level] (via codes of conduct, technical procedures for controlling access to content or services, etc.)", while the Resolution Towards a new notion of media of 2009 recommends that "as for traditional media, self-regulation should be a key element for ensuring compliance with standards while respecting editorial independence; where necessary, self-regulation can be supported or underpinned by co-regulation."

Most recently, 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 indicates 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).

In light of this, the provisions in Articles 14 and 15 can be certainly welcome; however, in line with the definition of the Recommendation, an internal self-regulatory body is most commonly referred to as an ombudsperson. If a number of companies decide to set-up an industry-wide regulatory body, this could be given the authority to handle third-party complaints and make determinations on the ethical conduct of media workforce.

2.3.2. Inspections

Article 67 provides that the Ministry and the regulatory authority will share competence for the implementation of this law, with the latter supervising linear broadcasters. Article 68 gives to both entities the power to perform inspections: the Ministry for matters relating to financial records and public funds, the agency for matters relating to the provision of information concerning ownership structure. The provision concerning the ministerial power to carry out inspections, although limited in scope, raises concerns for its possible encroaching on freedom of the media. In this sense, it is worth recalling that the Parliamentary Assembly of the Council

of Europe has expressly considered tax inspections "and other kinds of economic pressure" as a possible form of intimidation on the media (Recommendation 1589 (2003), para. 5). It would thus be preferable to limit the power to perform inspections to the regulatory authority alone.

2.3.3. Access to data

Article 69 provides for sanctions (which are understood to be of a non-criminal nature) in case a media outlet fails to provide "immediate and constant access to data about legal and natural persons who directly or indirectly have more than 5% share in its founding capital", or related persons, its owners' participation in the audiovisual media industry. The requirement to generically provide "data" is too broad and vague and could encroach on the privacy of aforementioned natural persons, or else the directors and/or shareholders of the relevant legal persons. The law should clearly define the nature and kind of data that media outlets bear a duty to provide; in determining this, authorities could take in consideration the principle of data minimisation established in Article 5(1)(c) of the EU General Data Protection Regulation (Regulation (EU) 2016/679), i.e. the principle requiring the collection of personal information to be limited "to what is directly relevant and necessary to accomplish a specified purpose [and] only for as long as is necessary to fulfil that purpose."

2.4. Transparency of media ownership, data gathering and storage

The Draft Law on Media contains provisions on transparency on media ownership for both audiovisual media services and video-sharing platforms, and for other types of media. The AEM requested that the division of responsibilities be more clearly elaborated so that it was clear that the Agency have responsibility for audiovisual media services only (under Article 16 paragraph 7, Article 23 paragraph 5, Article 68, Article 13). On the other hand, the Ministry would have responsibility for printed media and internet publications (under Article 16 paragraph 7, Article 23 paragraph 5, Article 68, Article 13).

In addition, keeping record and submitting of data related to the financing of media by the public sector (Articles 17-20) is under the jurisdiction of the Ministry for all media and for all authorities from the public sector.

Key standards in the area of media ownership include the Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content and the 2018 Recommendation of the Committee of Ministers to member States on media pluralism and transparency of media ownership.[26] The Recommendation emphasises that national legislation should also provide for the independent national media regulatory authority or other designated body to ensure public access to data about media ownership and control arrangements in the State, including disaggregated data about different types of media (markets/sectors) and regional and/or local levels, as relevant. States should also

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[26] Recommendation CM/Rec(2018)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

encourage the independent national media regulatory body or other designated body or institution (academic institution, civil society organisation) to publish regular reports on media ownership and pluralism.

It is worth noting that forthcoming European Media Freedom Act (EMFA)[27], under Article 6 (1a) states that Member States shall entrust national regulatory authorities or bodies or other competent authorities or bodies to develop national media ownership databases. For this purpose, the Member States shall ensure that the national regulatory authorities or bodies have adequate financial, human and technical resources to carry out their tasks under this Regulation Article 7 (3).

It is common in many countries including in the region (see Slovenia for example) that the Ministry hosts a general registry of all media. However, regardless of where the specific competences for collection of data lies, it is important that there is cooperation and coordination between both the Ministry, the regulator and other relevant entities in order to establish a comprehensive database on transparency of media ownership including all types of media. This would imply agreeing on common standards (formats etc) for the collection of data. This approach is necessary to fulfil the standards required by both Council of Europe recommendations and forthcoming EU Regulations (such as the European Media Freedom Act). The EMFA also emphasises that the relevant national regulatory authorities or bodies have adequate financial, human and technical resources to carry out their tasks related to this.

The CoE 2018 Recommendation also emphasises the importance of cooperation between authorities. States should also facilitate inter-agency co-operation and co-ordination, including the relevant exchange of information about media ownership held by different national authorities (such as media regulatory authorities, competition authorities, data protection authorities, company registers and financial supervisory authorities).

Hence, such a database should allow for access to other information registers/databases for the relevant authorities/ bodies to access full information. In line with any relevant data protection regulation, it is possible to have a version of the database completely open to the public, and a more detailed version available to the authorities only. Clear transparency of ownership is an important tool in the assessment of market pluralism and media ownership concentration.

As a final recommendation in this area, the Draft Law could distinguish between the responsibilities of the regulator (regarding audiovisual media services and video-sharing platforms) and the Ministry (regarding the printed press). However, an additional provision / article should be introduced regarding the establishment of a media ownership transparency database. This could be outsourced to an academic institution (as is the case in Ireland).[28] It

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[27] 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). https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0457

[28] http://www.mediaownership.ie/

could be managed by the Ministry, as proposed in the 2023 Draft Media Law in Slovenia.[29] A new media register will provide current data on formal and actual media owners, data on state advertising and received state aid, and other data that is necessary for an understanding of the media landscape. This register will be managed by the relevant Ministry. The Law indicates that the Register will be supplemented via updates from a range of other official databases (such as Public Law records, Ministry of Finance, etc.), and the media regulatory authority will have direct access to the relevant register.

It is highly recommended that the AEM and Ministry agree on wording regarding the development of such a media ownership transparency database, its management, sources, resources etc. This could be placed under Article 21 or an Article 21a.

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[29] In Slovenian only: https://e-uprava.gov.si/si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=16268

3. Review of the Draft Law on Radio-Television of Montenegro (RTCG)

3.1. General comments on the structure and content of the Draft Law

3.1.1. Subject matter of the Law

It is recommended (see rationale under 3.2 below) that Article 1 - Scope of the Law - be adjusted as follows (changes in bold italic):

> This Law shall govern the establishment, ***independence, autonomy, transparency, accountability,*** activity, financing, and other issues of importance for the work of the national public broadcaster - Public Media Service of Montenegro (hereinafter: Public Media Service).

3.2. Independence and autonomy of public service media

With regard to the independence and autonomy of public service broadcasters and public service media, this should be enshrined in the relevant legislation with a specific provision. In addition, the independence as outlined in the law should include provisions that support independence in practice. Independence and autonomy should be balanced with requirements on accountability and transparency. The Committee of Ministers 1996 Recommendation on the guarantee of the independence of public service broadcasting emphasised that:

> The legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy, including as regards recruitment, employment and staff management, the management of financial resources or the execution of the budget.[30]

In 2012, a further Committee of Ministers Recommendation on public service media governance outlined Guiding Principles for governance of Public Service Broadcasters including that "(2) the first priority for public service media must be to ensure that their culture, policies, processes and programming reflect and ensure editorial and operational independence".[31]. In addition, the Recommendation stressed that "the involvement of the state in appointments should not go beyond the highest ranks at either supervisory or executive levels."

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[30] Recommendation No. R (96) 10 of the Committee of Ministers to member states on the guarantee of the independence of public service broadcasting.
https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168050c770

[31] Recommendation CM/Rec(2012)1 of the Committee of Ministers to member States on public service media governance. (Adopted by the Committee of Ministers on 15 February 2012). https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cb4b4

The following outlines several examples of relevant provisions that enshrine independence and institutional autonomy of PSBs in various European Laws. In the Croatian Law on HRT under Article 17, it is stated that:

> 1) HRT is independent in its operation; 2) The independence of HRT is achieved through the independent performance of activities and through programme and editorial independence of HRT, especially in the planning and production of programmes and determining the programme scheme; 3) The independence of HRT is achieved through independent and stable financing of the activity of providing public services; 4) The independence of HRT is also reflected in the right to: - according to the competence of its bodies - regulate, in accordance with the provisions of this Act, its internal organisation and way of working, general acts govern the employment of workers and their rights and duties in accordance with the law and the collective agreement.

In the Slovenian law on public service broadcasting, Article 2 enshrines the duty of the state to ensure institutional autonomy:

> Article 2 (1) The founder of the public institution of the Radio and Television Corporation of Slovenia is the Republic of Slovenia. The duty of the founder shall be to ensure the institutional autonomy and editorial independence of RTV Slovenia, and to ensure appropriate financing for the provision of public service.

The Serbian Law on the PSB has a specific article: Article 5 ‑ Institutional Autonomy:

> In carrying out its basic activity, the public media service has institutional autonomy and editorial independence, especially in terms of:
>
> 1) establishing the concept and determining the programme contents, in accordance with the law; 2) editing the programme scheme; 3) organisation of activities; 4) selection of managers, editors-in-chief and responsible editors and employment; 5) procurement and sale of goods and services; 6) management of financial resources, in accordance with the law; 7) preparation and execution of the financial plan; 8) negotiations, i.e. preparation and signing of legal acts related to the operations of institutions; 9) selection of a representative in legal affairs and in other legal matters.

It is recommended that Article 1 - Scope of the Law - be adjusted as follows (changes in bold italic):

> This Law shall govern the establishment, ***independence, autonomy, transparency, accountability,*** activity, financing, and other issues of importance for the work of the national public broadcaster - Public Media Service of Montenegro (hereinafter: Public Media Service).

It is recommended that Article 5 – Establishment – is adjusted as follows in line with European practice and standards (changes in bold italic):

> The founder of the Public Media Service is the state.
>
> The rights of the founder shall be exercised on behalf of the state by the Public Media Service Council (hereinafter: the Council), in accordance with the law.

> ***The duty of the founder shall be to ensure the institutional autonomy and editorial independence of Radio and Television of Montenegro (RTCG), and to ensure appropriate financing for the provision of public service.***

It is recommended that a new article is introduced under chapter 'III. INDEPENDENCE OF PUBLIC MEDIA SERVICE'. Here the editorial independence of RTCG and independence of journalists are addressed but this section makes no reference to the institutional independence of the Public service Media. This should be introduced as **Institutional Independence** – under a new Article 10a (for example) to introduce a new paragraph (changes in bold italic):

> ***In carrying out its basic activity, the public service media has institutional autonomy and editorial independence, especially in terms of:***
>
> ***1) establishing the concept and determining the programme contents, in accordance with the law; 2) editing the programme scheme; 3) organisation of activities; 4) selection of managers, editors-in-chief and responsible editors and employment; 5) procurement and sale of goods and services; 6) management of financial resources, in accordance with the law; 7) preparation and execution of the financial plan; 8) negotiations, i.e. preparation and signing of legal acts related to the operations of institutions; 9) selection of a representative in legal affairs and in other legal matters.***

As noted above (see also 1.9 above), it was emphasised by the Agency for Electronic Media that:

> The application of the Law on salaries in the public sector to the work of Agency and the public broadcasters, as well as the Law on Public Administration, and Law on Budget and fiscal responsibility provide inappropriate interference with the work of these authorities, and question their operational and functional independence.

They recommend that Article 198 of the Law on Audiovisual Media be adjusted as follows:

> On the day of entering to force of this Law, the following laws cease to exist: The Law on Electronic Media, the dispositions of the Law on Salaries in the Public Sector, its part referring to the Agency for Electronic Media and Public Broadcasters, as well as dispositions pf the Law on Public Administration, and the Law on the Budget and fiscal Responsibility, their parts that refer to the Agency for Electronic Media.

With reference to the Council of Europe standards in this area, outlined above, it is recommended that any laws or procedures that impede on the actual practice of institutional independence and autonomy of the Public Service Broadcaster be revised.

3.3. Provision of commercial services – lack of clarity regarding the purpose of the Article and regarding EU acquis on State Aid Rules for PSM

Article 8 adjusts the elaboration in the previous Draft Law under Article 5. This change would indicate a misunderstanding of the meaning of "provision of commercial services" as this relates to public service media. The wording in the previous draft law is correct as it notes that public service media may also "provide commercial services". However, the new version of this

article refers to providing "commercial audiovisual communications" and references the Law on Audiovisual Media Services.

This is clearly not a translation issue as the same expression "komercijalne audiovizuelne komunikacije" exists in the original. In addition, the initial list under Article 5 referring to "commercial audiovisual communications" includes the following (none of which are audiovisual commercial communications): "5) AVM services on demand, which are not part of public services; 6) retransmission of programs; 7) assignment or sale of rights to broadcast program content."

The Article does, however, go on to list other relevant commercial services, and also importantly states that "Provision of services from para. 1 and 2 of this Article must not affect the performance of the main activity of the Public Media Service, nor its independence".

The purpose of legal provisions related to providing "commercial services" is to align with European Union State Aid Rules in relation to Public Service Broadcasting/ Public Service Media. With regard to State Aid rules, the 2001 Communication from the Commission laid out the rules that oblige PSM organisations to have separate accounts for their public and commercial activities. In summary, the relevant legislative framework should:

- Define a clear public service remit and outline in detail the activities to be carried out by the PSB/PSM in order to fulfil this remit.
- Clearly outline the potential commercial activities that the PSB/PSM is allowed to carry out.
- Require a separation of accounts between public and commercial activities in order to ensure transparency. Commercial revenues may be used to subsidise a public broadcaster"s public activities, but public funding cannot be used to subsidise commercial activities. However, there are certain nuances regarding this issue whereby programmes produced from public funds to implement the public service remit, may at the same time have an additional commercial value (sale to other broadcasters or operators or markets), and can be sold.
- Clarify that PSB/PSM organisations may introduce significant new audiovisual services on new distribution platforms intended to the general public, provided that they meet the democratic, social and cultural needs of the society and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit. Proposals should be reviewed in order to assess their potential impact on the market.[32] New services must meet the democratic, social and cultural needs of the society and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.

[32] 2001 Communication from the Commission on the application of State aid rules to public service broadcasting (Text with EEA relevance). Official Journal C 320. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997D%2FPRO%2F09

Regarding new services, the 2009 Communication from the Commission reiterated these rules and also recognised the need for public service broadcasting to "benefit from technological progress", bring "the public the benefits of the new audiovisual and information services and the new technologies" and to undertake "the development and diversification of activities in the digital age".[33]

The previous draft of the Law on RTCG included a process for assessing the impact of new services on the market under Article 10, which has now been removed and left in the Draft Law on Audiovisual Media Services, which as noted above (see above under 1.1.4) is not the appropriate place for this provision as it does not apply to new services introduced by non-public audiovisual media services.

The order of articles should more appropriately (ideally) follow this logic:

- An Article outlining specifically the activities of the PSB/PSM directly related to the public service remit (currently Draft Article 12 "Public services" does this, although it would be useful if it was entitled "public service remit");
- An article outlining specifically the types of commercial activities permitted (Draft Article 8, although currently with errors as noted above);
- An Article prescribing the need for the separation of accounts between public and commercial services. The Provisions on financial reporting should also reflect this. The limitations regarding cross-subsidisation need to be clarified in the Law. This does not prevent the PSB/PSM from generating additional income from the sale of programming etc (this is lacking in the Draft Law on RTCG);
- An Article regarding the introduction of new services by PSB/PSM and the review process required (the previous Draft Law Article 10 which has been removed).

The changes suggested above are important as the "Scope of the Law" under Article 1 includes the financing of the national public service broadcaster.

3.4. Dismissal of the Director General, Director of Radio, Director of Television and Director of Internet Publication

Article 39 details reasons for dismissal of the Recall of the Director General, Director of Radio, Director of Television and Director of Internet Publication. Paragraph 2 has been adjusted as follows (bold italic) with regard to instances where these people may be dismissed before the expiry of their terms: "2) if they fail to act according to the law, general acts of the Public Media Service ***and decisions of superior authorities***" .

The expression "decisions of superior authorities" is vague in this instance and it is not clear who the "superior authorities" should be or whether they are internal or external. For example,

[33] 2009 Communication from the Commission on the Application of the State Aid Rules to Public Service Broadcasting, 2009 (Text with EEA relevance). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009XC1027%2801%29

for the Director General this could imply the decisions of the Council or government agencies. For the other staff members does this could refer to the decisions of the Director General and/or the Council, or external authorities.

It should be clear for the sake of autonomy and independence of the RTCG that such "superior authorities" do not refer to any external authorities including government.

In addition, the language is vague and introduces considerable uncertainty for these members of staff as "failure to act on decisions of superior authorities" would require a much greater nuance and set of rules related to this in order to avoid the arbitrary dismissal of staff including the Director General. It would appear sufficient that such rules be outlined in the relevant RTCG General Acts. The Draft Article from the 2022 version makes reference to the Law and to the RTCG Acts which would appear to be sufficient. Hence, it is recommended to remove the phrase "and decisions of superior authorities".

3.5. Main activities and archiving of programmes

Article 7 Performing the main activity now includes a new task "8) archiving AVM works broadcast in Public Media Service programs in accordance with the law". This is an important action for the public service broadcaster and the digitisation of such an archive is of key importance for the national cultural heritage. However, this process is very expensive, and the Draft Law should also include provision for specific funding.

The EBU experts in the EU funded "Empowering Society" project emphasised that: "The digitisation of archives is of utmost importance for the preservation of the country's audio and audiovisual heritage". The experts recommended that laws address digitisation and ensure adequate financial support from the state for the digitisation of archives.[34]

[34] "Empowering Society – Technical Assistance to Public Service Media in the Western Balkans". Funded by the European Union. See also: https://www.ebu.ch/news/2018/09/psm-in-western-balkans-discuss-importance-of-archives

4. Summary of all Recommendations

4.1. Draft Law on Audiovisual Media Services

- Include reference to the Agency for Media in the Scope of the Law under Article 1.
- For the sake of clarity and alignment with standard practice in Europe, it is recommended that all key definitions are included in full at the beginning of the Law and that they fully align with the AVMS Directive. Ensure that key definitions such as audiovisual media service and audiovisual commercial communication and properly are completely defined. It is recommended to reintroduce the set of definitions under Article 6 as they were elaborated under the 2022 Draft.
- Under Article 18, the terminology should be adjusted to reflect the AVMS Directive. The terms "progressive" and "gradual" are not synonymous. The language under Article 141 (point 15) with regard to the "Jurisdiction of the Agency" should be adjusted as the AVMS Directive no longer speaks about "encouraging" services to improve the accessibility of audiovisual media services. In general, check terminology for alignment with the AVMS Directive and other language issues (see also additional Annex provided).
- In addition, given that Article 18 states that the Agency is obliged to "(1)by using proportional measures, ensure that AVM service providers constantly and gradually make their services more accessible to persons with disabilities", it is recommended that Article 18 include the additional clause: "The Council of the Agency shall, in consultation with all stakeholders, outline the proportionate measures required to implement this Article".
- Adjust Articles 10 and 11 regarding limits to freedom of reception as recommended .
- Place all relevant provisions (some of which are in the Draft Law on Audiovisual Media, Article 50) on the financing of the RTCG under the Draft Law on RTCG, in particular as regards the provisions that align with EU rules on State Aid and financing of PSM (as indicated above).
- Reduce the obligations on webcasting platforms under Article 85 (3) as recommended.
- Adjust the requirement for licensing of VSPs to a requirement of registration (Articles 125 and 126).
- Align Articles 68 (10 and 11), Article 80 (2), Article 78, Article 187 (95), (96), (143) and (137) with the AVMS Directive regarding medicinal products and treatments (as indicated).
- Revert to the previous provisions on political advertising (Article 82) and separately work towards revising the complete legislative framework for elections and media coverage of elections in line with European standards and EU Regulations.
- Under Article 23 remove the paragraph 10 which addresses content that should appropriately be dealt with under self-regulatory and code of ethics of the media services and not media regulation. These issues could be included as "principles" that should be respected in the work of the media, but cannot be monitored, adjudicated or sanctioned by the regulator.
- Article 166 proposes to introduce a privilege for one type of regulated entity and discriminates against all others as regards having a special right of attendance at Agency

meetings. In addition, given the transparency provisions already present and other mechanisms of inclusion, this additional provision is not necessary. It is recommended to remove Article 166 (paragraph 7).

- In order to align with Council of Europe standards in this area, it is recommended that any laws or procedures that impede on the institutional independence and autonomy of the independent regulator and the PSB in actual practice, it is recommended that Article 198 of the Law on Audiovisual Media be adjusted as follows:

> "On the day of entering to force of this Law, the following laws cease to exist: The Law on Electronic Media, the dispositions of the Law on Salaries in the Public Sector, its part referring to the Agency for Electronic Media and Public Broadcasters, as well as dispositions pf the Law on Public Administration, and the Law on the Budget and fiscal Responsibility, their parts that refer to the Agency for Electronic Media."

4.2. Draft Law on Media

- Throughout the text of the law (with specific reference to Articles 10, 11, 14, 19, 21, 22, 24, 25, 29, 30, 32, 39, 66, 70 ,71 and 72) clearly distinguish between the founder of a media company as a natural person and the media company itself as a legal person.
- The definition of "media" under Article 3 should define "media" as "service providers" (instead of actors) and includes further criteria such as adherence to professional and ethical standards, adequate outreach and expectations from the public, in line with Recommendation CM/Rec(2011)7 on a new notion of media.
- Do not include news agencies in the category of "media" under Article 10.
- Adjust Article 8, para. 4, to properly reflect the relevant definition of an audiovisual media service according to the AVMS Directive (as indicated).
- The necessity and proportionality of pecuniary sanctions for outlets that fail to register should be re-considered. Any pecuniary sanction should clearly be of a civil or administrative nature and be kept to a minimum (Articles 10 and 70) in order to avoid a "chilling effect".
- Expunge the requirement that media companies' statutes must specify the outlet's editorial policy (Article 39).
- Transparency requirements should be separated from the definition of "public service" (Article 25).
- The purpose of Article 25 and the different types of public funds that may be allocated to the media should be more clearly elaborated (as indicated above)
- The provision concerning the misuse of public funds should be clarified as to entail financial misuse of funds (Article 25) or failure to complete the production of content as previously agreed, not the quality and/or content of such productions.

- Regarding transparency of ownership and the discussions clear divisions of responsibility between the AEM and the Ministry, it is highly recommended that provisions be included in the Law that foresee a joint comprehensive Media Ownership Transparency database, requiring some coordination, consistency with regard to data to be collected, forms to be elaborated, and that indicate who will manage such a database and ensure that there are adequate financial, human and technical resources for achieving this (see section 2.4 above).
- The possibility of holding media outlets liable for publishing inaccurate information should be limited that what is already provided in Articles 47 and 49; Article 42 should be thus modified to indicate that fairness standards will be dealt with on a self-regulatory, rather than statutory, basis.
- Provisions dealing with the "protection of special rights" (Articles 44-49) should indicate more clearly what constitutes "illegal content" (as opposed to regulated and/or harmful content) and should be also harmonised with the provisions on illegal content of the Draft Law on AVMS Directive. Detailed recommendations in this respect had been provided in the Expert review of April 2022 (para. 4.1) and should be considered as an integral part of this Opinion.
- The responsibility of media outlets in respect of third-party comments/content should be framed in terms of assessment rather than removal. Content other than illegal – that is regulated content – should be the subject of a complaints system. The notion of "obviously legal content" should not be defined merely by reference to provisions on the "protection of special rights". Media outlets should be given at least 24 hours to assess and, if necessary, remove obviously illegal content.
- The reference to the constitutional and security order of Montenegro should be expunged from Article 51.
- Article 53 should indicate a maximum limit to temporary restrictions.
- Articles 67 and 68 should task the regulatory Agency for carrying out both financial and ownership inspections.
- Article 69 should clearly indicate the nature of the data that media outlets could be required to provide rather than being an open-ended provision.

4.3. Draft Law on Radio-Television of Montenegro (RTCG)

- It is recommended (see further below) that Article 1 - Scope of the Law - be adjusted to include the terms "independence, autonomy, transparency, accountability" of the Public Service Media.
- In line with Council of Europe standards that emphasise that:

> the legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy, including as regards

> recruitment, employment and staff management, the management of financial resources or the execution of the budget",

an additional paragraph should be introduced under Article 5:

> The duty of the founder shall be to ensure the institutional autonomy and editorial independence of Radio and Television of Montenegro (RTCG), and to ensure appropriate financing for the provision of public service.

- In addition, (in line with the above standards, and with practice in the region) it is recommended that a new article is introduced under Chapter III Independence of Public Service Media, for example as a new Article 10(a) Institutional Independence:

> In carrying out its basic activity, the public service media has institutional autonomy and editorial independence, especially in terms of: 1) establishing the concept and determining the programme contents, in accordance with the law; 2) editing the programme scheme; 3) organisation of activities; 4) selection of managers, editors-in-chief and responsible editors and employment; 5) procurement and sale of goods and services; 6) management of financial resources, in accordance with the law; 7) preparation and execution of the financial plan; 8) negotiations, i.e. preparation and signing of legal acts related to the operations of institutions; 9) selection of a representative in legal affairs and in other legal matters.

- As already noted above, in order to align with Council of Europe standards in this area, it is recommended that any laws or procedures that impede on the institutional independence and autonomy of the independent regulator and the PSB in actual practice, it is recommended that Article 198 of the Law on Audiovisual Media be adjusted as follows:

> On the day of entering to force of this Law, the following laws cease to exist: The Law on Electronic Media, the dispositions of the Law on Salaries in the Public Sector, its part referring to the Agency for Electronic Media and Public Broadcasters, as well as dispositions pf the Law on Public Administration, and the Law on the Budget and fiscal Responsibility, their parts that refer to the Agency for Electronic Media.

- Article 7 introduces a very important task related to the archiving of works broadcast in Public Media Service programs, and the digitisation of such an archive is of key importance for the national cultural heritage. However, it is commonly agreed that this process is very expensive, and the Draft Law should also include provision for specific additional funding for this work.
- Under Article 39 (paragraph 2) due to the vagueness of the language "failure to act on decisions of superior authorities" and the fact that referral to the Law and the relevant RTCG General Acts is sufficient regarding the obligations of key staff, it is highly recommended to remove the phrase " and decisions of superior authorities".
- With regard to correctly and clearly consolidating and elaborating the relevant rules on State Aid as they apply to Public Service Media, and ensuring the inclusion of such provisions on financing (as indicated under the "Scope of the Law" under Article 1) are included in the Draft Law on RTCG, the following was recommended above: The order of and articles should more appropriately (ideally) follow this logic:

- An article outlining specifically the activities of the PSB/PSM directly related to the public service remit (currently Draft Article 12 "Public services" does this, although it would be useful if it was entitled public service remit);
- An article outlining specifically the types of commercial activities permitted (Draft Article 8, although currently with errors as noted above);
- An article prescribing the need for the separation of accounts between public and commercial services. The Provisions on financial reporting should also reflect this. The limitations regarding cross-subsidisation need to be clarified in the Law. This does not prevent the PSB/PSM from generating additional income from the sale of programming etc (this is lacking in the Draft Law on RTCG);
- An article regarding the introduction of new services by PSB/PSM and the review process required (the previous Draft Law Article 10 which has been removed).

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Annex I: Commentary on language and terminology

Draft Law on Audiovisual Media Services

It is recommended to change in the English version of the law "video content exchange platform service" to 'video-sharing platform service' in line with the established legal term. Under Article 12 and throughout it is recommended to use the terms "on-demand audiovisual media service" and "audiovisual commercial communication", and "user-generated video".

Under Article 143, which replaces Article 13 in the Draft Law on Audiovisual Media Services from 2022, all references to "terrestrial broadcasting" have been replaced by "terrestrial radio broadcasting" (under Article 143 (2) and 93)). This may be an issue of translation. The change in these articles has inadvertently removed the competence of the Agency with regard to giving "consent to radio-frequency distribution plans" or announcing "a public competition for the allocation of the right to broadcast" over frequencies – in both cases as they relate to digital terrestrial television broadcasting. In English, these articles no longer include television broadcasting and should be reverted to the language of the 2022 Draft Law. The term 'radio-difuznoj' means 'broadcasting' but this has been translated by a person (or machine) as 'radio broadcasting'. The inclusion in the table of changes may also be an error. The same problem arises under Article 43, (final paragraph related to public service broadcasters).

The language of Article 85 is unclear. In English, it reads as follows:

> Exception to the issuance of a broadcast license - Article 85
>
> Broadcasting of a television program via a global information network (Internet webcasting) is not authorized.

This reads as though it is prohibited to broadcast television programmes via the Internet, whereas it can be assumed that the intention was to say that such broadcasting 'does not require authorization'.

Some of the terminology in the section on video-sharing platforms needs correction. For example, Article 128 refers in several places to "video content created by users of commercial audiovisual communications", which should simply say "user-generated programme and video content":

> The video-sharing platform service provider shall be obliged to take appropriate measures in order to protect:
>
> minors from program and video content created by users of commercial audiovisual communications that could damage their physical, psychological, or moral development so that they are only available in a way that is least likely to be heard or seen by minors under normal circumstances;

The same can be said for the section of violations by video-sharing platforms. See for example Article 187 (171) (and 172) and (173)):

> 171) as a service provider of a video-sharing platform, fails to take appropriate measures to protect minors from program and video content created by users of commercial audiovisual communications that could impair their physical, psychological, or moral development so that they are only accessible in a way which is least likely to be heard or seen by minors under normal circumstances (Article 128, paragraph 1, point 1);

Regarding violations in relation to accessibility of audiovisual media services, the relevant provision under Article 187 is incorrectly elaborated as it currently states: "7) constantly and gradually fails to make its services more accessible to persons with disabilities (Article 18, paragraph 1)". It should state something along the lines of "fails to continuously and progressively make its services more accessible".

Draft Law on Media

Section IX of the Draft Law (corresponding to Article 69-72) makes explicit reference to "penal" sanctions. During a preliminary meeting with representatives from the Ministry, the experts were advised that this in fact a misguided translation and the sanctions provided in such articles are not of a criminal nature. On the basis of such explanation, the experts feel no further need to recommend that any sanctions provided for the misdemeanours listed in such articles are instead of civil and administrative nature. It is also understood that reference to "penal" sanctions in the translations of the Draft laws on Audiovisual media Services and Radio Television of Montenegro (RTGC) should equally be understood of being administrative or civil in nature.

Draft Law on Radio-Television of Montenegro (RTCG)

Under Draft Article 22 (replacing Draft Article 29) there is a difference between the two versions which may relate to translation issues. Article 22 states that:

> The following persons may not be Council members:
>
> 2) persons who elect or appoint President, the Parliament of Montenegro (hereinafter: the Parliament), and the Government during the term of office and at least three years after the termination of office;

The previous Draft Article 29 stated that

> The following persons may not be Council members: 3) persons elected, appointed or appointed by the President of Montenegro (hereinafter: the President, the Parliament of Montenegro (hereinafter: the Parliament) and the Government (hereinafter: the Government);

It can be assumed that the phrase "persons elected or appointed by" should be used in both cases.

The joint European Union and Council of Europe programme "Horizontal Facility for the Western Balkans and Türkiye" (Horizontal Facility III) is a co-operation initiative, running from 2023 until 2026. The programme covers actions in Albania, Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia, Serbia and Türkiye. It enables the Beneficiaries to meet their reform agendas in the fields of human rights, rule of law and democracy and to comply with European standards, which is also a priority for the EU enlargement process.

The action "Protecting freedom of expression and of the media in Montenegro (PROFREX)", implemented under the Horizontal Facility III, enables the beneficiary institutions and civil society organisations in North Macedonia to progress towards meeting their reform agendas in the field of freedom of expression and freedom of media, in line with the European standards. It aims at strengthening the exercise, in particular by journalists and media actors, of the rights of freedom of expression, in a more pluralistic and safer media environment, in line with the standards set by Article 10 of the European Convention of Human Rights.

* 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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