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LEGAL OPINION

On the Draft Law of Ukraine "On the Protection of Citizens' Rights to Reliable Information and Ensuring Information Security, Carried Out by the National Regulator"

Division for Co-operation on Freedom of Expression

The role and responsibility of the Council of Europe in protecting freedom of expression has been underlined in the "Reykjavik Principles for Democracy", the Reykjavík Declaration – United around our values.

Funded within the Council of Europe Action Plan for Ukraine "Resilience, Recovery and Reconstruction" 2023-2026, the Project "Safeguarding Freedom of Expression and Freedom of Media in Ukraine" aims to address urgent needs of major stakeholders and media players in the country. The Project's objective is "Enabling a pluralistic media environment in Ukraine through harmonisation of legal and policy frameworks in line with European standards" and it is built around three main components:

(1) Alignment of Ukraine's framework on media, freedom of expression and freedom of access to information with the European standards;
(2) Effective implementation of the legal framework governing the protection of journalists, public broadcasting and regulatory authority in line with European standards;
(3) Effective and efficient communication strategies governing a balanced media coverage and preventing information disorder.

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Contents

List of abbreviations

Draft Law "On the Protection of Citizens' Rights to Reliable Information and Ensuring Information Security, Carried Out by the National Regulator" (registered No.11321)	The Draft Law
Universal Declaration on Human Rights	UDHR
International Covenant on Civil and Political Rights	ICCPR
European Convention on Human Rights	ECHR
Charter of Fundamental Rights of the European Union	EU Charter
European Media Freedom Act	EMFA
Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, 19 July 2011, CCPR/C/GC/34	General Comment No. 34
Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add11	General Comment No. 29
UN Special Rapporteur Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Disinformation and freedom of opinion and expression, 13 April 2021, A/HRC/47/25	UNSR Report

1. Introduction

This Legal Opinion has been prepared by the Council of Europe's Division for Co-operation on Freedom of Expression, under the Project "Safeguarding Freedom of Expression and Freedom of the Media in Ukraine" ("the Project") at the request of the Parliamentary Committee on Humanitarian and Information Policy of Ukraine, sent on 13 January 2024. It assesses the compliance of the Draft Law of Ukraine "On the Protection of Citizens' Rights to Reliable Information and Ensuring Information Security, Carried Out by the National Regulator" (the "Draft Law") with international standards on freedom of expression, particularly Council of Europe standards and relevant provisions of the European Union's legislation in light of the country's pre-accession commitments. It refers to the following non-exhaustive list of relevant international law documents, including soft law and the case-law of the European Court of Human Rights:

- Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5);
- Recommendation CM/Rec(2024)2 of the Committee of Ministers to member States on countering the use of strategic lawsuits against public participation (SLAPPs);
- Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries;
- Council of Europe, Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership, 7 March 2018;
- Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom;
- Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media;
- Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act);
- Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation');
- Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act);
- Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC;
- Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

2. Executive Summary

The Draft Law appears to be a selection of norms taken from different domains of media regulation to target online platforms, at times failing to distinguish the nature of these two different subjects. The nature of these subjects and the nature of obligations which can be put on them in accordance with international law should be taken into account, giving due regard to the definitions established

in such acts as the EU Digital Services Act and the European Media Freedom Act, and their respective scopes of application.

The right to reliable information is not generally recognised in international law and raises significant issues relating to who will have the duty to provide such information, what they will be required to do, and who determines what is reliable. The duty on all persons to verify that information they disseminate is accurate runs counter to established freedom of expression law, as set out under Article 10 of the ECHR.

The proposal for designating legal representatives attempts to synchronise the regulation with the EU legal regime by excluding from the Draft Law's scope online platforms established or having designated a legal representative there. However, the additional requirement for such an exclusion, which obliges platforms to communicate with Ukrainian authorities, will likely expand the extraterritorial jurisdiction of Ukraine to platforms without any legal basis, such as an international agreement between Ukraine and the EU and/or its Member States.

It is recommended to revise the scope of legal obligations suggested for the online platforms. Currently, it reflects the provisions of the EU Audiovisual Media Services Directive as applied to video-sharing platforms. These norms are *lex specialis* to the more general norms contained in the EU Digital Services Act, which should be applied to all types of platforms. In particular, the authors of the Draft Law should take note that no international instrument requires platforms to delete or restrict access to a specific piece of content outside the areas of terrorist content and child pornography; the obligation is rather to react to such order. This design of the obligation is an important safeguard for the platforms from potentially abusive decisions by the national courts and independent administrative authorities.

The transparency obligations do not meet the minimum requirements for public disclosure as set out by EU and Council of Europe standards. Further, they improperly conflate transparency and ownership by persons or legal entities from aggressor states.

Platforms' blocking, as designed in the Draft Law, contradicts Article 10 of the ECHR. Even bearing in mind legitimate national security considerations in Ukraine's battle with Russia as an aggressor state, employing blocking for the non-removal of two pieces of content or for the fact that at least one Russian citizen is paying a subscription fee to finance such a platform is a disproportionate restriction.

The Draft Law fails to take into account the case-law of the European Court of Human Rights, which formulated important safeguards for applying blocking measures, and also confuses on the legality criterion by mixing up the responsibilities of the media regulator and electronic communications regulator in this field. It also grants the latter unfettered discretion to designate software related to the prohibited platforms, a step that may lead to disproportionate consequences regarding the use of devices for official purposes.

The amendment to the Law "On Media" to create a notice and takedown mechanism is overly complicated and, at the same time, lacks safeguards from abuse and basic fairness.

3. Legislative and Factual Background on Platform Regulation in Ukraine

Ukraine currently has a minimal level of regulation of online platforms. Its legislation merely covers video-sharing platforms after the implementation of the EU Audiovisual Media Services Directive and its Article 28b in late 2022, following the adoption of the Law "On Media". Due to the

jurisdictional rules employed by the Law, the scope of the regulatory reach is narrow. Thus, currently, there are no video-sharing platforms under Ukraine's jurisdiction for regulatory purposes.

The same Law introduced a new category of subjects, so-called information-sharing platforms. While the Law does not directly cover their obligations, the provisions of the latter provide for the National Council on Television and Radio Broadcasting, Ukraine's audiovisual regulator, with certain powers vis-à-vis platforms:

- to negotiate memoranda of understanding with the platform in the spheres of preventing the spread of illegal content, including during the referendum campaigns;
- to request the platforms to restrict the dissemination of certain pieces of user-generated content on the territory of Ukraine.

The Law does not provide any enforcement measures regarding information-sharing platforms. At this moment, the media regulator has not concluded any memoranda with foreign platforms. The regulator's representatives stated that the most used platforms (Meta and Alphabet) refer to their terms and conditions for the authorities and do not wish to engage in any form of co-regulation, de facto envisioned by the Law. Some platforms, such as Telegram, never responded to the National Council.[1]

In parallel, the Ministry of Digital Transformation of Ukraine is working on the implementation of the European Union Digital Services Act. In 2024, the draft law implementing this regulation was submitted for review to the EU Commission;[2] the Commission additionally suggested a roadmap for all the EU Candidate States to approach transposition. The draft is expected to be presented to the public after the comments are incorporated. There is also an effort to revise the current data protection legislation to harmonize it with the EU General Data Protection Regulation.

Against this backdrop, online platforms have become a primary source of information for an overwhelming majority of Ukrainians. According to the USAID/Internews annual media consumption survey results for 2024, the number of people using social media as a primary source of news is now 84%, compared to only 30% who mentioned online news sites and television. Telegram dominates this market, being the main source of news for 73% of Ukrainians and the main communication tool for 81%.[3] At the same time, there is considerable evidence linking Telegram's ties to Russia, including via ownership, personal data flows, and lack of content moderation favouring the aggressor states and terrorist organisations.[4] Telegram is not the sole culprit: other platforms have also been constantly criticised for inadequate efforts to moderate content about Russian aggression, leading to over blocking of legitimate content and inconsistent efforts to curb hate speech and propaganda for war.[5]

All these considerations led to the emerging discussion of introducing some form of regulation before the EU Digital Services Act implementation, which is a long process. Draft Law № 11115, submitted to the Verkhovna Rada of Ukraine in March 2024,[6] drew some inspiration from the EU Digital Services Act regarding the designation of a legal representative but predominantly mirrors the EU Audiovisual Media Services Directive obligations for video-sharing platforms. It is focused on Telegram (although presented as an initiative against non-transparent platforms) and the

[1] https://webportal.nrada.gov.ua/tsyfrovi-platformy-yak-z-nymy-komunikuvaty-i-spivpratsyuvaty-dosvid-ukrayiny/
[2] https://detector.media/infospace/article/230855/2024-08-14-kristina-gavrylyuk-mintsyfry-sered-usikh-krain-kandydatok-do-ies-my-nayblyzhchi-do-implementatsii-ievropeyskykh-aktiv-pro-tsyfrovi-poslugy-y-rynky/
[3] https://internews.in.ua/news/ukrainians-increasingly-identify-information-manipulation-as-an-urgent-problem-affecting-their-lives-while-their-exposure-to-russian-disinformation-narratives-intensifies-2/
[4] https://kremlingram.org/
[5] https://cedem.org.ua/library/rekomendatsiyi-sotsmerezhi/
[6] https://itd.rada.gov.ua/billInfo/Bills/Card/43884

prohibition of its use for specific categories of users. This draft did not yet advance in the parliament but became an inspiration for the initiative analysed in this legal opinion.

4. Analysis of the Draft Law's Key Provisions

a. General Comments

The text of the Draft Law seems to be prepared without any public consultation. In many places, it looks like an attempt to compile already existing norms of Ukrainian legislation from different areas (media regulation, copyright regulation, strategic documents on the governmental level devoted to information security, etc.) without any adaptation. For these reasons, it is marred by internal inconsistencies between its provisions, including the terminology, the functions of various regulatory authorities, as well as the references to certain documents never mentioned again in the Draft Law, such as the reference to "*Strategy*" in Article 6 and the member states to the European Convention on Transfrontier Television in Article 9.

In this regard, it is recommended that laws and policies relating to the Internet need to be developed by State authorities in an inclusive and transparent process which enables the participation of all stakeholders, including the private sector, civil society, academia, and the technical community.[7] This would prevent them from having technical and substantial flaws, described in more detail in the analysis below.

Moreover, the explanatory note to the Draft Law predominantly refers to the threats that Telegram poses to Ukraine's information security. It cites numerous reports of civil society organisations and measures already adopted to combat this platform's influence in Ukraine. At the same time, the Draft Law provisions encompass general platform regulation. It should be noted that any such type of regulation must correspond to the European Union standards by virtue of Ukraine's accession to the Union. While the martial law and ensuing threats to Ukraine's national security are the factors to be taken into consideration while designing such legislation, it should be narrowly targeted, avoiding collateral damage it can cause to users' rights to freedom of expression and platforms' freedom of conducting business activities, guaranteed by the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (the Charter).

b. Definition of "Information-Sharing Platform Through Which Mass Information Is Disseminated" and the Jurisdictional Provisions of the Draft Law (Articles 2 and 8)

The Draft Law suggests the introduction of a new category of subjects into Ukrainian legislation – **the information-sharing platform through which mass information is disseminated**. It is defined as "*an information-sharing platform on which user accounts (pages, channels, etc.) used to disseminate the mass information are created and operate*", therefore referring to the information-sharing platforms mentioned in the Law on Media. Article 1 (1) (39) of the Law "On Media" defines the latter as "*a service that provides its users, upon their request, with the possibility of storing and disseminating user information to an unlimited number of persons, if such storage and dissemination is not an insignificant and purely auxiliary function of another service and for objective and technical reasons cannot be used without such a service*".

Article 8 (1) sets out the scope of the Draft's application. It extends the applicability of its provisions to the providers of information-sharing platforms through which mass information is disseminated, which are legal persons incorporated in Ukraine, or to platforms which are being used by Ukrainian

[7] Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom, para 1.4

media to disseminate information, and this information is accessible on Ukrainian territory and targets Ukrainian users.

Reasons for separating "information-sharing platforms through which mass information is disseminated" into a separate subject under Ukrainian legislation are not clear. The current definition contained in the Law "On Media" corresponds to the definition of "online platform" contained in Article 3 (i) of the EU Digital Services Act (DSA).[8] Additionally, the European Media Freedom Act (EMFA) does not distinguish between the platforms used by the media for disseminating information and other platforms, succumbing to the possibility of using any type of platform as a tool for publishing public interest content. This approach is followed in Article 18 of the EMFA, providing certain obligations to very large online platforms vis-à-vis media service providers.[9]

The Draft Law's scope seems not to be entirely consistent with the DSA provisions, the leading set of rules on online platforms' regulation and subject to implementation by Ukraine as an EU Candidate State. It is logical to apply the Draft Law to the platforms incorporated under Ukrainian legislation. As to the other platforms, the formulation used in Article 2 (1) of the DSA extends the application of the Regulation to "*intermediary services offered to recipients of the service that have their place of establishment or are located in the Union*".[10] Recitals 7-8 to the DSA interpret this notion via substantial connection to the Union, defined as situations where "*the service provider has an establishment in the Union or, in the absence of such an establishment, where the number of recipients of the service in one or more Member States is significant in relation to the population thereof, or on the basis of the targeting of activities towards one or more Member States*". The targeting of activities of platforms to a certain state can be established by analysing the following factors:

- the use of a language or a currency generally used in the state;
- the possibility of ordering products or services;
- the use of a relevant top-level domain;
- the availability of an application in the relevant national application store;
- the provision of local advertising or advertising in a language used in the state;
- the provision of customer service in a language generally used in the state.[11]

To a certain extent, similar criteria are used by the Ukrainian legislator in Articles 2 (13) and Article 123 (5) of the Law "On Media" to determine the targeting of certain media service providers' activities on the territories of Ukraine and the aggressor state, respectively. Both require the adoption of a separate decision on the matter, unlike in this Draft Law. None of the international documents applicable to this type of regulation, however, apply the criteria of the mere accessibility of information published by their national media on the platform to assert their jurisdiction over such platforms.

c. The Right to Reliable and Verifiable Information (Articles 1 and 4)

One of the Draft Law's provisions, which may cause concerns, is about obligations regarding reliable and verifiable information. While these are included in the Draft Law to address problems

[8] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), art 18
[9] Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), art 3 (i)
[10] Digital Services Act, art 2 (1)
[11] Digital Services Act, rec 7-8

related to misinformation, disinformation, and propaganda, they fail to respect Ukraine's obligations under international law and its own Constitution to respect freedom of expression.

Article 1 (1) provides that citizens have a "*right to receive reliable, objective, timely and verified information*". Article 4 repeats the title of Article 1, and Article 4 (2) defines reliable information as "*fact-based information that can be verified*".

In international law, there is no general "*right to reliable information*" which imposes duties on all persons to provide it. The European Court of Human Rights has recognised obligations on states to provide accurate information to their citizens,[12] especially in cases where there are threats to health or life or issues of public interest.[13] Those obligations have not been extended generally to all persons unless another interest, such as the right to the truth or threats to health are in place. It is recommended to significantly clarify the rights and duties of this section to ensure that Article 10 rights of those who are required to provide "reliable information" are not impacted.

Article 4 (3) states that "*a person disseminating information shall verify its authenticity*". This provision is partially taken from the Civil Code of Ukraine, where it is used in relation to impacts on reputation, but this does not reduce the possible impact on freedom of expression. The Draft Law provision, as it stands, extends to all speeches of persons in all circumstances, both online and offline, regardless of jurisdiction and unlike the Civil Code provisions, even to dissemination of official publications. It does not have any harm or intent qualifications.

The provision seems to be disproportionate and in violation of international law. It could have a serious chilling effect to force all persons to not speak until they fully check what is truthful and accurate. It could further seriously undermine speech protected as opinion and satire, as well as inadvertent or unknown inaccuracies. The Joint Declaration of the Special Rapporteurs on Freedom of Expression from the UN, OSCE, OAS and AU noted that "*[g]eneral prohibitions on the dissemination of information based on vague and ambiguous*[14] *ideas, including "false news" or "non-objective information", are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished*".[15]

It is also contradictory to Article 10 of the ECHR, which protects the dissemination of a wide range of information, including information that is incorrect.[16] Article 10 also applies to unpopular and disputed statements.[17] Further, information that is considered to be value judgements do not need to be proved to be correct[18] and laws which do not distinguish between the two are per se invalid.[19] The European Court of Human Rights has generally limited the obligation to verify information to broadcasters and the ethical obligations of journalists to verify information when balancing freedom of expression rights with other rights, such as the privacy or reputation rights of an individual.[20] There are also important obligations relating to historical speech and holocaust denial.[21] None of these place a general duty on all individuals, applying to all types of speech, without exemption.

[12] Association Burestop 55 and Others v. France, nos. 56176/18 (ECtHR, 2021)
[13] Magyar Helsinki Bizottság v. Hungary [GC], no. 18030/11 (ECtHR, 2016)
[14] One of the few places it is found is in the non-binding European Declaration on Digital Rights and Principles for the Digital Decade (2023/C 23/01), article 10 relating to consumer choice of platforms rather than access to information from media actors and others.
[15] UN Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression, African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 'Joint Declaration on "Fake News", Disinformation and Propaganda' (3 March 2017)
[16] Salov v. Ukraine, no. 65518/01 (ECtHR, 2005), para 113
[17] Perinçek v Switzerland, no. 27510/08 (ECtHR, 2015)
[18] Lingens v. Austria, no. 9815/82 (ECtHR. 1986)
[19] Zakharov v. Russia, no. 14881/03,(ECtHR, 2006), para 30
[20] Azadliq and Zayidov v. Azerbaijan, no. 20755/08 (ECtHR, 2022)
[21] Garaudi v France, no. 65831/01 (ECtHR, 2003)

d. Designation of Legal Representatives (Article 9)

To ensure that the platforms outside Ukraine covered by the Draft Law comply with its provisions, the designation of the legal representative is a necessary precondition, underlined in Article 9. The norm distinguishes between the platforms registered in the EU or having designated their legal representative there and the other platforms. The former might be exempt from the designation requirements if their EU legal representative communicates with the Ukrainian authorities. The National Commission for the State Regulation of Electronic Communications, Radio Frequency Spectrum and the Provision of Postal Services (NCEC), as the national regulator under the Draft Law, shall publish the information about all such platforms' legal representatives on its website. The latter shall designate their legal representatives to communicate with the Ukrainian authorities. The provider belonging to this category of platforms shall notify the NCEC about the legal representative and shall ensure the validity of its powers.

This norm is intended to facilitate communication between platforms and Ukrainian authorities. To do so, it tries to incorporate two provisions of the DSA – Article 11 on the point of contact for authorities and Article 13 on legal representatives of platforms for the purposes of the DSA enforcement.[22] In principle, recital 44 to the DSA allows the legal representative to perform the functions of the point of contact.[23] At the same time, recital 42 to the DSA underlines that "*in contrast to the legal representative, the electronic point of contact should serve operational purposes and should not be required to have a physical location*".[24] Therefore, it is recommended to provide clearer distinction between the two functions.

The more problematic aspect, connected with further obligations laid down in the Draft Law, is the exclusion from the scope of the Draft Law of certain platforms depending on whether or not they will ensure the communication of their EU representatives/points of contact with the Ukrainian authorities. All the platforms with a significant user base in Ukraine have either been incorporated in the EU or designated their legal representatives there. On the other hand, their entities do not have any obligation to respond to Ukraine's authorities' requests by virtue of the national legal regimes they are governed. Therefore, it is unlikely that the Ukrainian legislator can single handedly expand its legislation to the respective subjects, especially given that most of these platforms will likely be unaware of the Ukrainian legislative developments until they receive any request from its authorities. Some companies have already specified that they will not be engaging in any communication from outside the EU, such as Meta,[25] Telegram,[26] and Google.[27] Therefore, any similar provision would require an international agreement with the EU to be effectively applied, of which none currently exists.

e. The Scope of the Obligations Imposed on the Platforms (Article 10)

Article 10 of the Draft Law suggests the imposition of several due diligence obligations on platforms. They vary from the publication of the terms and conditions and inclusion of certain requirements on prohibited content to the establishment of notice-and-action mechanisms to the transparency of advertising to media literacy to the processing of minors' personal data for commercial purposes. These are almost verbatim copied from Article 23 of the Law "On Media", designed to apply to video-sharing platforms under Ukraine's jurisdiction and aimed at implementing Article 28b of the revised

[22] Digital Services Act, arts 11, 13
[23] Digital Services Act, rec 44
[24] Digital Services Act, rec 42
[25] https://www.meta.com/help/quest/2844070439068158/
[26] https://telegram.org/tos/eu-dsa
[27] https://support.google.com/legal/troubleshooter/13966113?hl=en#ts=13966824

EU Audiovisual Media Service Directive (AVMSD).[28] The new additions to this group of obligations are contained in Articles 10 (1) (2) and 10 (1) (4) of the Draft:

- to publish in a place accessible to users, directly on the information-sharing platform and in all platform-related services, the information about their contact details that the users can use to send complaints about mass information disseminated via the platform, which is inconsistent with the laws of Ukraine;
- to restrict, on the request of the NCEC, the distribution in Ukraine of software and/or user-generated information, including user-generated videos, that violate Articles 36, 42, 119 of the Law on Media, as well as restrict the dissemination of information in cases established by Article 43-1 of the Law on Media.

While some of the suggested obligations are broadly in line with the DSA and its provisions, in particular, Article 14 on terms and conditions, Article 16 on notice and action mechanisms, Article 20 on internal complaint-handling systems, and Article 26 on advertising on online platforms,[29] they are less detailed and require further elaboration to establish a comprehensive regulatory framework. Other obligations, such as implementing efficient media literacy measures and tools and provisions on the right to reply on online platforms, are not contained in the DSA and may put an excessive burden on platforms subject to this regulation. Therefore, it is recommended that the scope of obligations under the DSA and the AVMSD be clearly distinguished and applied to different types of platforms, bearing in mind that the AVMSD is a *lex specialis* for video-sharing platforms, setting up a more detailed set of obligations to that specific category of subjects.

Special emphasis should be placed on the provisions that provide the NCEC with the power to issue what essentially is, in the DSA terms, an order to act against illegal content. In principle, both the DSA[30] and the Council of Europe documents[31] allow for the issue of such orders by independent administrative authorities, referring to the necessity and proportionality of the adopted measures and their compliance with the provisions of the ECHR and the Charter. Thus, the NCEC can potentially be a relevant authority to issue such orders, even though certain content restrictions under the Law "On Media" require further scrutiny of their compliance with Article 10 of the ECHR.

However, the platforms do not possess the obligation to restrict the information but the obligation to react to the respective order. In the words of Article 9 (1) of the DSA, "*providers of intermediary services shall inform the authority issuing the order, or any other authority specified in the order, of any effect given to the order without undue delay, specifying if and when effect was given to the order*".[32] There might be cases where, for instance, the platform considers that its assessment of the content in question differs from the one made by the judicial or administrative authority and decides to keep it on the platform; this serves as an essential safeguard from abuse or inadequate reasoning by the issuing authority and allows the provider to conduct its analysis of whether certain piece of content complies with the international standards on freedom of expression. The necessity for such safeguards is additionally recognized by the DSA[33] and the Council of Europe documents.[34]

[28] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), art 28b
[29] Digital Services Act, arts 14, 16, 20, 26
[30] Digital Services Act, art 9
[31] Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, para 1.3.2
[32] Digital Services Act, art 9 (1)
[33] Digital Services Act, art 9 (2)
[34] Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, para 1.3.3

f. Transparency of Platforms' Ownership (Article 11)

Transparency is a well-recognised mechanism for bringing oversight and accountability to powerful entities, including government bodies. Transparency of media ownership has been promoted by the Council of Europe since the 1990s and there are mandatory obligations in the revised AVMSD[35] and the EMFA.[36] The EU Commission and Council of Europe have both issued detailed recommendations in recent years.[37] The Commission also sponsored the creation of the Euromedia Ownership Monitor (EurOMo) to promote transparency and research.

Article 11 of the Draft Law creates the obligation that the ownership structure of a platform that falls under Ukrainian jurisdiction is transparent and requires the disclosure of the ownership structure and sources of funding. Ownership by trusts and offshore entities is limited. If the body does not designate a national representative or one in an EU-Member State or to provide all of the information within the deadlines set by the regulator, it can be deemed "non-transparent" under Article 11 (5) of the Draft Law.

Significantly, the information is generally only provided "*at request*" of the NCEC and public transparency provisions such as those required in the Law on Media, EMFA, Council of Europe Recommendation, and in the Euromedia Ownership Monitor are missing.

The enforcement mechanisms proposed in the Draft Law could raise concerns too. If the platform fails to provide the information to the NCEC or is not registered in an EU Member State and fails to designate its legal representative in Ukraine, it can be considered non-transparent, and actions can be taken to suspend its activities. This is disproportionate under Article 10 of the ECHR.

The Draft Law significantly moves away from European standards in Article 11 (5) (2) when it refers to Article 12 (1) and seems to inappropriately include in the scope of non-transparent owners those who are citizens, legal entities, or financed by an aggressor state. This provision seems inconsistent with European and international law. Firstly, it has nothing to do with any common definition of transparency and appears to be hijacking the concept of transparency to impose sanctions in a way that limits criticism since transparency is generally considered a public good. The misuse of the non-transparency designation is amplified in other sections of the Draft Law where non-transparency can be used to justify banning its use for official purposes or access to the financial system. If there is an intent to limit or ban the use of platforms based on ownership, it should be directly spelled out and justified.

Further, as discussed below, limitations on ownership by themselves are considered problematic. The Council of Europe Guidelines on media pluralism and transparency of media ownership state that "*restrictions on the extent of foreign ownership of media should be implemented in a non-arbitrary manner*".[38]

g. Restriction of Platforms' Activities, Including Their Blocking (Articles 12-13)

Apart from the restrictions on platforms whose ownership structure is deemed non-transparent, a separate legal regime exists for platforms against which a decision on their restriction of activities

[35] Audiovisual Media Services Directive, art 5 (2)
[36] European Media Freedom Act, art 6
[37] Council of Europe, Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership, 7 March 2018, Appendix §4. EU, Commission Recommendation (EU) 2022/1634 of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector, OJ L 245, 22.9.2022, p. 56–65, Section III.
[38] CoE Recommendation CM/Rec(2018)1, §3.7.

in Ukraine is adopted by the NCEC ("**restricted platforms**"). Article 12 (3) establishes two grounds for designating the platform as restricted:

- it has a legal or natural person from the aggressor state in its ownership structure or an entity where the ultimate beneficial owner, key participant or the owner of the significant stake at any level of the chain of ownership of corporate rights or is financed by individuals from the aggressor state;
- the content prohibited by the Ukrainian media (Articles 36, 42, and 119 of the Law on Media) or copyright legislation is disseminated on the platform.

The first ground is taken verbatim from Article 120 (1) of the Law "On Media", which is limited in time by military aggression and prohibits the respective subjects from being media service providers in Ukraine during this period. It contains a rather broad definition of financing, covering credits, loans, borrowings, investments, contributions from sponsors, charitable donations or other financial assistance. The NCEC is solely responsible for establishing the respective circumstances while assessing the platform's ownership structure.

The second ground, if interpreted systemically with Article 13 (6) of the Draft Law and the proposed Article 115-3 (3) of the Law "On Electronic Communications", allows the NCEC to designate the platform as restricted if it commits repetitive violations of Article 9 of the Draft Law, including the non-designation of its legal representative and non-removal of pieces of content. Article 12 (4) of the Draft Law prescribes that the NCEC shall adopt this decision on the basis of the decision of the media regulator, the National Council on Television and Radio Broadcasting of Ukraine (the National Council). The National Council, in turn, can adopt the decision on the platform's non-compliance with the Law when such a platform:

- does not restrict access to illegal information promptly;
- does not comply with the requirements regarding the communication between the platform under Ukrainian jurisdiction and Ukraine's national authorities (if interpreted in line with Article 13 (6) of the Draft Law, this means that the platform does not designate its legal representative or does not provide up-to-date information about it).

The legal consequences of such designation are threefold. Firstly, after the designation decision is adopted by the NCEC, a restricted platform shall be blocked by the Internet service providers within 3 days after the receipt of the NCEC's message on this measure's adoption. Secondly, state and local authorities, their officials, as well as banks, other providers of financial services, and operators of payment infrastructure services, shall not use restricted platforms for the dissemination of information. Thirdly, software or services related to restricted platforms shall not be stored and used on any hardware or electronic communications devices which are wholly or partially used for official purposes (that is, for correspondence, oral negotiations, the use of public electronic registers, the storage of classified data); the use of cloud services related to such platforms shall also be prohibited. The NCEC shall publish the list of such software or services after consultation with the Ministry for Digital Transformation. The second and third restrictions also apply to non-transparent platforms as designated under Article 11 of the Draft Law.

It is recommended that any such restriction meets the standard of legality, legitimacy, and necessity in a democratic society under Article 10 of the ECHR. The first aspect is the legality of restrictions. For example, Article 10 (1) (4) of the Draft Law obliges the platforms to comply with the NCEC orders to remove illegal content, whereas Article 12 essentially refers to the same type of orders by the National Council. Article 43-1 (7) of the Law "On Media", proposed by the Draft Law, adds an additional ground for the NCEC to designate the platform as restricted, not mentioned in

Article 12. Moreover, Article 12 refers to all information-sharing platforms, whereas the rest of the Draft is narrowed down to information-sharing platforms through which mass information is disseminated. Therefore, this restriction does not meet the legality test, as it is not "*formulated with sufficient precision to enable the citizen to regulate his conduct*".[39] The Draft Law also grants the NCEC unfettered discretion in establishing the list of software or services related to restricted platforms.

Turning to the necessity of this restriction in a democratic society, the analysis of the blocking and other restrictions should be performed separately. Website blocking is only allowed when it complies with the proportionality test and the state authorities carefully evaluate the possible impact, including unintended, of any restrictions before and after applying them, while seeking to apply the least intrusive measure necessary to meet the policy objective.[40] The European Court of Human Rights confirmed these elements of proportionality analysis, additionally underlining that "*even if there were exceptional circumstances justifying the blocking of illegal content, a measure blocking access to an entire website has to be justified on its own, separately and distinctly from the justification underlying the initial order targeting illegal content, and by reference to the criteria established and applied by the Court under Article 10 of the Convention*".[41]

The national security considerations that play a massive role in the present Ukrainian context of combatting Russian aggression, including in the information sphere, which called for such proposals, are understandable. However, the norms of the Draft Law allow for the blocking of any platform which gets subscription payment from just a single user with Russian citizenship and is not time-limited, contrary to the similar norms in the Law "On Media", which apply solely to the media service providers under Ukrainian jurisdiction, prohibiting them to have Russian citizens in the structure of ownership, and is also temporally restricted for the time of military aggression, with the jurisdictional provisions formulated much narrower than in the reviewed piece of legislation. Any origin-based restrictions shall be formulated narrowly, be temporal in scope and subject to periodic review by an independent administrative authority or judiciary.

Moreover, when blocking is implemented not on origin-based but on content-based grounds under the provisions of the Draft Law, non-deletion of only two pieces of illegal content can be sufficient for the NCEC or the National Council to commence the blocking procedure without adequately analysing the impact of such blocking and separate justification for such blocking. This would be contrary to the requirements of Article 10 of the ECHR and restrict access to significant amounts of legitimate content. While the DSA allows for the restriction of service, it should be temporary and is only permitted in exceptional circumstances when the intermediaries systematically infringe their obligations under the respective Regulation.[42] As underlined above, this set of obligations does not include the obligation to remove illegal content but instead covers the responsibility to act against it.

As to the other restrictions, the limitations on using certain platforms by specific users may be a less restrictive and permissible alternative to blocking. However, in the presented Draft Law, it is proposed that they be applied as a follow-up measure to blocking. Moreover, given the broad scope of the software related to restricted platforms and the monopoly of certain tech companies, this third consequence of the designation as a restricted platform may lead to disproportionate harm. In a hypothetical scenario of YouTube's designation as a restricted platform for not deleting two pieces of illegal content, all Alphabet/Google services might be banned from the smartphones of

[39] *Sunday Times v the United Kingdom (No 1)*, para 49*; Ahmet Yildirim v Turkey*, para 57
[40] Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom, para 2.4.1; Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, para 1.3.1
[41] *OOO Flavus and Others v Russia,* para 38
[42] Digital Services Act, art 51 (3) (b)

civil servants by virtue of the discretionary decision of the NCEC; even the use of Android devices might be questioned as Alphabet engineers developed this operation system.

h. Notice-and-Takedown Procedure (New Article 43-1 of the Law on Media)

Section III (2) of the Draft Law amends the Law "On Media" to create a new Article 43-1, putting in place a new notice and takedown mechanism for "media actors". The new mechanism seems to be overcomplicated and confusing and potentially applies to a broad swatch of actors. This section will only highlight some of the more problematic sections rather than exhaustively review all aspects.

Media actors are redefined and expanded from the existing Law's definition to apply to "*a person who regularly disseminates mass information under his/her editorial control through his/her own accounts on information-sharing platforms, regardless of whether he/she is registered as a media actor…*" As an initial point, the application to all media actors including those that are unregistered and merely popular, and, possibly, all platforms' users as it follows from the provision's wording, seems disproportionate. The Council of Europe standards require a more detailed analysis on who should qualify as new media and a "*graduated and differentiated response*" to their duties and obligations.[43]

The procedure for actors seems burdensome, requiring prompt responses to the initial complaint and to the platform, with the failure to respond resulting in the platform disabling the information, which many actors are not going to be able to do and will thus be forced to take down materials even if there is no merit or face sanctions.

Many of the processes themselves could seem as biased against media actors – for instance, the restoration process under Article 43-1 (8) does not require restoration for 10 days in comparison to 24 hours for responding for takedown under Article 43-1 (6).

Further, in responding to the initial request for a takedown, the media actor is required to provide detailed personal information, including their physical address, if they decline to remove the information. This also raises concern that the mechanism will be abused as a means to identify (and later target) individuals who are not media but simply have some level of popularity.

The standard for complaints and demanding removal of content seems to be too low. Under Article 43-1 (1), any person who "believes" that any right has been violated is entitled to request a media actor to cease and desist publishing the information. There is no clarity of the types of offenses this could entail (violating ECHR requirements of "foreseeability") or level of harm required and could even be for violating the "right to reliable information" created in Article 1 (1) of the Draft Law. The complaint mechanism to platforms does not create any higher standards. In contrast, the DSA requires that the content be illegal.[44]

To compound the above standards, the requirement for proof of violations is also set too low. Under Article 43-1(2) of the Draft Law, the cease-and-desist notice only needs to include a mere statement of reasons for both the actor and the platform. This low threshold could result in the mechanism being used as a means of harassment. In comparison, the DSA requires the mechanism collect a "*sufficiently substantiated explanation of the reasons*" relating to illegal content[45] and must also include "*a statement confirming the bona fide belief of the individual or entity submitting the notice*

[43] Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, appendix "Criteria for identifying media and guidance for a graduated and differentiated response"
[44] Digital Services Act, art 16
[45] Digital Services Act, art 16 (2)

that the information and allegations contained therein are accurate and complete". The EU Copyright Directive requires that the complaint is a "*sufficiently substantiated notice*".[46] Article 56 (2) (7) of the Law on Copyright and Related Rights from which this section appears to be inspired requires that the claim of violation is checked by an attorney and can be held liable for submitting inaccurate information. The EU Anti-SLAPP Directive requires that court complaints are well-founded.[47] The DSA provides for the suspension of processing complaints from persons who frequently submit manifestly unfounded complaints.[48]

Finally, the provision also gives strong powers to the NCEC to suspend platforms under Article 43-1 (7) when they fail to respond or refuse to take down information which could be completely legal and legitimate.

i. Other Issues

This section briefly reviews several other issues raised by the Draft Law that are not central to its purposes but could have significant consequences.

1. *Children's Privacy*. Article 10 (2) of the Draft Law prohibits the processing of any children's data for commercial purposes. This is significantly broader than establishing child protection provisions and could result in preventing children from being able to use the Internet at all, as commercial purposes would include holding data about registration and login information. This could be considered as violation of children's rights to access information and freedom of expression under the UN Convention on the Rights of the Child.[49] It is recommended to reconsider, taking into account the current efforts to harmonise the Law on Data Protection with the GDPR.
2. *Media Literacy*. Article 10 (1) (8) of the Draft Law requires platforms to "*implement efficient media literacy measures and tools*". Media literacy is widely considered to be an effective measure against disinformation and misinformation. However, to be effective, it needs to be widely adopted across society. A provision that places a vague obligation on platforms without a wider connection to government efforts is not likely to have any use.
3. *Surveillance*. Article 6 (6) authorised the Security Service to use "specific techniques" to "identify threats". It should be reminded that there are strong obligations on states under Article 8 of the ECHR to ensure that any surveillance system used meets specific obligations on legality, necessity and proportionality, including having adequate oversight and authorisation mechanisms.[50]
4. *Defining freedom of expression rights*. It should be noted that in Article 4 of the Draft Law, missing is a key provision found in both the ECHR and ICCPR that all persons have a right to freedom of expression "*regardless of frontiers*", meaning that geographic borders should not be used as a justification for limiting the rights to seek and receive information.

5. Recommendations

[46] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, art 17 (4)
[47] Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), art 12. See also Recommendation CM/Rec(2024)2 of the Committee of Ministers to member States on countering the use of strategic lawsuits against public participation (SLAPPs)
[48] Digital Services Act, art 23 (2)
[49] Article 13; UN Committee on the Rights of the Child, General comment No. 25 (2021) on children's rights in relation to the digital environment CRC/C/GC/25
[50] See e.g. Big Brother Watch and 15 Others v. UK, nos 58170/13, 62322/14 and 24960/15 (ECtHR GC, 2021)

If the real aim of the Draft Law is to target Telegram as a platform connected with the aggressor state, it is advisable that the Parliament chooses other regulatory options. One such option might be the imposition of sanctions on the entity which owns the platform pursuant to the Law "On Sanctions" and its respective provisions. While this option is far from perfect, it will be the measure which provides the most targeted approach to combating the platform which declines to cooperate with the authorities; this approach would help eliminate collateral effects caused by the provisions contained in the Draft Law. If this regulatory approach is selected, the Law "On Sanctions" should be amended to:

- Introduce such type of sanction as website/platform blocking outside the context of dissemination of terrorist organisation's insignia and propaganda of these organisations' ideas as provided by Article 4 (1) (24-5) of the Law "On Sanctions";
- Provide the reasoning for the sanctions' imposition in the respective order and the State Registry of Sanctions;
- Take into account any potential findings of the European Court of Human Rights in its pending application in *Boyarov and Others v Ukraine*, communicated to the government in 2024 and concerning the blocking of Vkontakte and Odnoklassniki, other Russian platforms, in 2017.

In case this Draft Law is intended to cover the entirety of platforms functioning on the Ukrainian market, it is recommended to significantly modify it to correspond to the DSA as the key legal document for the implementation under Ukraine's EU accession obligations to transpose *acquis communutaire*. In particular, it is recommended:

- To revise the wording of the Draft Law to ensure its internal consistency;
- To avoid the introduction of new categories of subjects into legislation and mixing up the legal regimes applicable to media and online platforms;
- To clarify the scope of the Draft Law's application to online platforms, including the requirement to designate their legal representatives, to eliminate the risks of applying restrictive measures to the platforms registered in the EU in case they do not respond to the NCEC requests by giving them a chance to designate their legal representative in Ukraine;
- To eliminate the requirement in Article 4 (3) of the Draft Law that all persons must verify all information before disseminating;
- To ensure that any national regulator is fully independent as required by the EU and Council of Europe standards, bearing in mind the constitutional foundations for creating such independent regulators and the necessity to amend it after the martial law is revoked;
- To harmonise transparency requirements in Article 11 with the EU and Council of Europe standards; Ensure that ownership data is made public in open data format and license;
- To disengage transparency of ownership and aggressor state issues and move sections on aggressor state ownership to a new provision, simultaneously ensuring that this provision is compatible with the international standards, including limiting the notion of financing to eliminate the risk of applying extreme sanctions to platforms for allowing aggressor state citizens to make any payments on such platforms;
- To align platforms' blocking procedure with the ECtHR case-law, ensuring the necessary safeguards;
- To ensure that the notice and takedown procedure amendment to the Law "On Media" places sufficient safeguards against abuse to be compatible with the DSA, EU Copyright Directive, EU SLAPPs Directive and Council of Europe Recommendation CM/Rec(2024)2, and that the personal information of media actors is protected from disclosure except in cases when necessary and proportionate;

- To drop the provision in Article 10 (2) on children's privacy; to revise and hold further discussions on the new Law "On Personal Data Protection";
- To ensure that any use of "specific techniques and means" in Article 6 (6) is compatible with the ECtHR case-law governing the surveillance of communications.