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Protecting Freedom of Expression and of the Media

PROFLEX

LEX/FoE (2024)11

21 June 2024

**Review of the Draft Law for the Independent Media  
Commission of Kosovo\***  
addressing the extent to which the recommendations  
of the Legal Opinion on the Draft Law on the Independent Media  
Commission [LEX/FoE (2024)6] were taken into account

Division for Cooperation on Freedom of Expression

Council of Europe

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\* 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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## TABLE OF CONTENTS

List of Abbreviations .....	2
Introduction .....	3
Executive Summary .....	4
1. Overall assessment regarding previous recommendations.....	5
2. Recommendations from the previous Legal opinion.....	7
2.1. General principles related to the development of the law .....	7
2.2. Clarity and purpose of the Law .....	7
2.3. Placing obligations on the media services.....	8
2.4. Previous recommendations on definitions – ‘online audiovisual media service’ .....	8
2.5. Differentiating regulatory approaches.....	9
2.6. Obligations placed on online media, proportionality, and graduated approaches .....	9
2.7. Promoting self-regulation and co-regulation.....	10
2.8. Cooperation and exchange with self-regulatory bodies and empowerment of self-regulatory bodies .....	11
2.9. Clarifying licensing and registration requirements.....	11
2.10. Establishing proportional sanctions and fines .....	12
2.11. Conducting consultation and ensuring inclusivity .....	13
2.12. Clarifying competences and powers of the National Regulatory Authority (NRA) and strengthening its independence.....	13
2.13. Providing detailed provisions on media ownership and ownership transparency and retaining high standards preventing politicisation of the media.....	15
2.14. Including provisions that detail the purpose of a media support fund and the principles for its management.....	16
2.15. Addressing disinformation and promoting media literacy .....	17
3. New issues arising in the recent amendments to the Draft Law.....	17
3.1. Disinformation and provisions for a by-law prohibiting disinformation.....	17
3.2. IMC competences to oblige operators to interrupt local and foreign services .....	18
3.3. Conclusion on new amendments .....	19
References .....	20

## List of Abbreviations

ACC	Audiovisual Commercial Communication
AVMS	Audiovisual Media Services
AVMS Directive	Audiovisual Media Services Directive
DSA	Digital Services Act
EMFA	European Media Freedom Act
EPRA	European Platform of Regulatory Authorities
ERGA	European Regulators Group for Audiovisual Media
EUOK	European Union Office in Kosovo
IMC	Independent Media Commission
IPTV	Internet Protocol television
KMShK	Kosovo Print Media Council / Press Council
NRA	National Regulatory Authority (for audiovisual media)
OSCE	Organisation for Security and Cooperation in Europe
OTT	Over the top
VSPS	Video-Sharing Platform Services

## Introduction

The purpose of this Technical Paper is to provide a written assessment and a brief analysis of the updated Draft Law for the Independent Media Commission (IMC) and assess the extent to which the recommendations of the previous legal opinion (of 24.05.24) were taken into account.

Prior to the Legal Opinion (24.05.24), a previous Draft Law from October 2022 was also reviewed by this author and some comments from that review are included here. An earlier Draft Law of 2021 (2021 Draft Law amending the IMC Law 2012) also underwent several reviews and overall was considered to have many important elements of the revised Directive.

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

The author of this review and representatives of key institutions: the IMC, the EUOK, the OSCE Office and the Council of Europe Office joined a meeting of the Parliamentary Committee to discuss the Draft Law on 26 April, 2024.

The EUOK and the OSCE provided written comments in advance of the meeting. This review refers to unofficial minutes of the Parliamentary Committee meeting and to the final Draft amendments of the Committee from 04 June 2024.

This Paper does not repeat in detail the key standards referred to in the 'Legal Opinion on the Draft Law on the Independent Media Commission of Kosovo - LEX/FoE (2024)6' of May 2024, but instead focuses on the extent to which the recommendations therein have been taken into account. For a more detailed analysis, it is recommended to refer directly to the May 2024 Opinion.

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## Executive Summary

As noted in the previous Legal Opinion, the Draft Law overall aligns quite well with the Audiovisual Media Services Directive. There were, however, several issues in the changes to the Draft Law which raised concerns regarding the legal clarity, proportionality of measures, and the extent to which several provisions digressed from the EU acquis and European, particularly Council of Europe standards.

The previous Opinion provided an introduction covering key principles that should inform the drafting and implementation of the law: the importance of 'evidence-based and impact-oriented governance choice' and the need for a clearer concept document outlining the rationale for changes to the draft; the key principle of proportionality which should a regulatory burden placed on services and ensure fairness regarding sanctions placed on services, and the need to have a graduated approach to different services; the importance of legal certainty, legal clarity and foreseeability in the terms used and the provisions in the law; the importance of inclusive, transparent manner and meaningful consultations. In addition, with regard to the implementation of the Directive, the fundamental principles and conditions necessary for this are the independence of the national regulatory authority, the transparency of media ownership, the promotion of self and co-regulation, the cooperation between regulators, and the promotion of media literacy.

Some important and positive changes have been made in the Draft Law, for example: retaining the standards prohibiting ownership by political and religious groups of the media; providing some standards and definitions with regard to media ownership and media pluralism; and removing the arbitrary tool allowing the Parliament to dismiss the entire IMC as a body. At the same time, many of the recommendations in the previous Opinion have not been taken into account. These are addressed in more detail below.

In addition, there are some new additions to the amendments to the Draft Law which raise concerns – specifically with regard to the development of a by-law on 'prohibition of disinformation', and also with the introduction of a tool for blocking media or platforms with no clarity as to the meaning of 'harmful content' and without detail in the field of sanctions as to how such a power will be enforced.

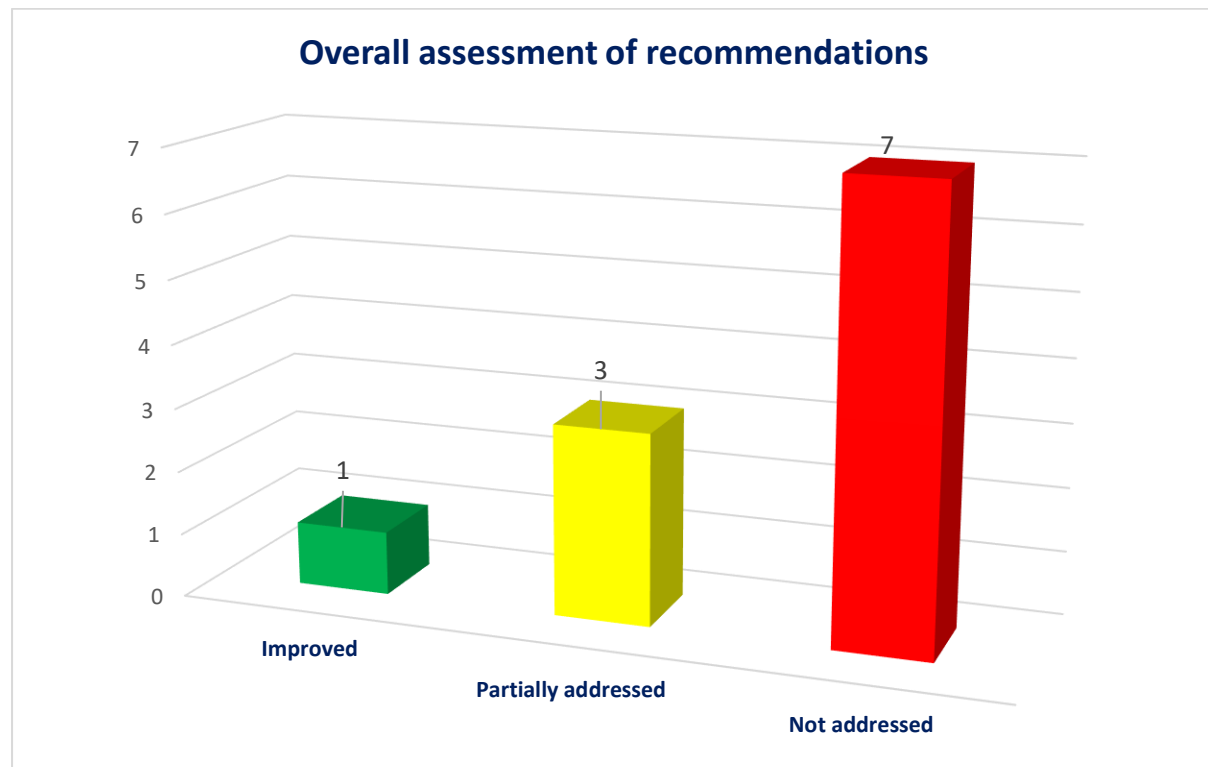
There remains a certain lack of clarity and several instances of inconsistency in the Draft Law as it currently stands, alongside these newly added provisions which introduce further concerns with regard to freedom of expression.

It is highly recommended that the Parliamentary Committee gather a working group of experts and stakeholders and discuss the outstanding recommendations of the CoE opinion (which is in line with the concerns of both the European Delegation and the OSCE). The working group could also advise on wording and definitions in relation to issues such as 'disinformation' and 'harmful content', which have been added to the latest version of the Draft Law without any definitions, explanations, or context. Such a working group could also support the Committee in ensuring consistency, legal clarity, and proportionality of the Draft Law. A collaborative approach also enhances the success of the implementation of the future Law.

## 1. Overall assessment regarding previous recommendations

Of the eleven recommendations submitted to the Parliamentary Assembly and the Independent Media Commission, five were not addressed, three were partially addressed, one saw no changes, one was improved, and one could have been improved further.

Enclosed is a comprehensive list of all recommendations aimed at better aligning with EU standards, particularly the Audiovisual Media Services Directive, presented to relevant stakeholders.



### Recommendations improved

1. Enhance media ownership transparency - Reintroduced prohibitions on political ownership. Minimum standards on media ownership improved

### Partially addressed

1. Define obligations of media services - Not addressed for disabilities; somewhat improved for protection of minors; not changed for VSPS obligations.
2. Clarify powers of NRA - Some power clarifications made, particularly deletion of parliament's dismissal power. Financial autonomy and independent nomination process for IMC chairperson not addressed.
3. Address disinformation and promote media literacy - Suggested to promote digital literacy to counter disinformation – however it was introduced a further problematic provision on disinformation. Further improvements in content moderation and fact-checking needed.

### Not addressed

1. Clarify the purpose of the Law - Aim to regulate audiovisual media sector. No changes made to state purpose explicitly.

2. Remove unnecessary definitions - Recommended to delete 'online audiovisual media services' definition to align with AVMS Directive. Not removed.
3. Conduct consultation and ensure inclusivity - Proposed to have meaningful consultations and include media operators and CSOs.
4. Establish a media support fund - Suggested to clearly outline the need for a transparent, non-discriminatory media support fund.
5. Promote self-regulation and co-regulation - Encouraged enhancing cooperation with the press council and self-regulation frameworks.
6. Establish proportional sanctions and fines - Proposed sanctions proportional to violations with a graduated system.
7. Differentiate regulatory approaches - Advised to remove problematic definitions to avoid one-size-fits-all approach.



## 2. Recommendations from the previous Legal opinion

### 2.1. General principles related to the development of the law

The previous Legal Review emphasised the need to ensure that the development of the Draft Law incorporated evidence-based regulation as an important concern for the European Commission, and also the fundamental issue of engaging in wide and meaningful consultations. It also cited the Council of Europe 2022 Recommendation on principles for media and communication governance and the importance of consultations. The CoE recommendation also highlighted key elements of the process of development of law and regulation in the media sphere: transparency and accountability: openness and inclusiveness: independence and impartiality: evidence-based and impact-oriented governance choice: media and communication governance should be based on evidence showing agility and flexibility.<sup>1</sup> The submission of the EU delegation on the previous draft emphasised the need for a concept document outlining clearly the reasoning for changes to the Law. It is not clear that any new concept document has been developed.

A further key principle is Proportionality, whereby laws and regulations implementing EU Law must be proportional. It was noted in the previous Legal Opinion that there was a lack of proportionality in relation to different services with regard to both the regulatory burden placed on services and also the sanctions placed on services. The AVMS Directive repeatedly refers to proportionality and proportionate measures. The regulation of all media outlets, and also online media requires a more complex and nuanced approach that sometimes requires a case-by-case examination of different services.

In addition, a strong emphasis was placed on the need for legal clarity and foreseeability of the provisions of the Draft Law. In discussions on the Draft Law with the Committee, several examples of provisions that lacked clarity were noted. These are addressed separately below including the provisions on permits and licences, which are unclear; several provisions which could lead to arbitrary decisions (the dismissal of the entire IMC Council); lack of clarity relating to the role of the IMC in relation to media ownership and media pluralism; a lack of clarity regarding sanctions and the need for a graduated approach to sanctions and fines.

### 2.2. Clarity and purpose of the Law

It was recommended that the Draft Law (under Article 1 -Purpose) clearly state that the purpose of the Law is to regulate the audiovisual media sector and elaborate on the rights and responsibilities of audiovisual media services and video-sharing platform services (VSPS). There has been no change in this regard.

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

[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a61712](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a61712)

### 2.3. Placing obligations on the media services

The elaboration of many provisions places obligations on the IMC but does not clearly place obligations on the media services. For example, under Article 49, the IMC shall ensure that services provided by media service providers under its jurisdiction are made continuously and progressively more accessible to persons with disabilities through proportionate measures. However, an obligation should be placed on audiovisual media services to provide such programming. The same applied to the provisions related to VSPS. Article 54 outlines the “Duties and responsibilities of IMC towards video distribution platform providers” where it should address the obligations and responsibilities of video-sharing platform providers.

The Law should explicitly include the obligations of audiovisual media services to provide accessible content for people with disabilities under Article 51. Also, the provisions related to VSPS to place obligations directly on VSPS rather than on the IMC. There has been no change in this regard and the recommendation was not taken into account.

It has been noted that additional mention has been made of the need for media services to use technical means to protect minors from harmful content (Amendment 86) and that reality and psEUOKo reality television shows are to be broadcast only after the watershed. These are both positive developments.

### 2.4. Previous recommendations on definitions – ‘online audiovisual media service’

A key problematic issue raised in the previous legal opinion and in discussions with the Parliamentary Committee is the definition of ‘online audiovisual media services.’ This was also a focus of the submissions of the OECD and the EU Delegation. This very strong Recommendation to remove this definition - reflected the opinion of the CoE Consultant and also the opinions of the EUOK and the OSCE and has not been taken into consideration.

The Audiovisual Media Services Directive provides for a specific regulatory regime for audiovisual media services - linear broadcast services and non-linear video on demand services. It allows for some differences given the different nature of content delivery (one via a time schedule and the other via a catalogue).

The law introduces a definition of ‘online audiovisual media services’, which as emphasised in the Comments to the Draft Law provided by the EUOK, does not exist under European Law.<sup>2</sup> The Draft Law changes the meaning of ‘audiovisual media service’ under EU Law and introduces additional types of media. It has been highly recommended that key terms in the Directive be reflected accurately.

Such as definition is largely unnecessary as there already exist definitions for ‘on-demand audiovisual media service’ and for ‘video-sharing platform services’ (which are not audiovisual media services but an information society service). The AVMS Directive provides a different and separate regulatory regime for video sharing platform services (VSPS) with the fundamental recognition that VSPS do not have editorial responsibility for the content – which is user-generated content (UGC). However,

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<sup>2</sup> Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUD Kosovo.

as VSPS have an impact on the content in terms of its organisation and distribution, a new and different set of rules have been introduced for VSPS via the Directive.

As outlined in the previous Opinion, this definition of 'online audiovisual media services' mixes these two different concepts without reflecting any understanding of the very different nature of the types of services, and as noted above the definition is superfluous. The definition is contradictory as Article '1.1 Audiovisual Media Service means...' correctly refers to editorial control (1.1.1) but at the same time introduces user-generated content (1.1.3).

In order to align with the Directive, Article 1.1 requires the phrase 'where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes'. This should be fully integrated into Article 1.1 as it provides the basis for assessing whether a service is an audiovisual media service. Guidelines of the European Commission and case-law can provide the IMC with enough guidance to decide on whether a service qualifies as an audiovisual media service on a 'case-by-case' basis. It is worth reiterating here the comments of the EUOK, which also strongly advised that this definition be removed to align as closely as possible with the definitions of the Directive and avoid any possible legal uncertainty and unintended misalignment with AVMS Directive.<sup>3</sup> However, the definition remains in the Draft Law and this Recommendation has not been taken into account.

## **2.5. Differentiating regulatory approaches**

It was already emphasised above that the definition of 'online audiovisual media services' which includes VSPS and UGC (see above). As there is added reference to VSPS and UGC under the definition for 'audiovisual media services', this can cause confusion. There is a need to clearly distinguish between the regulatory regimes for on-demand audiovisual media services and video-sharing platform services to align with the Audiovisual Media Services Directive and good practice.

The most straightforward way to adjust this is to remove the definition of "online audiovisual media services" as explained above. In the case of platforms providing access to user-generated content, which as explained above, may qualify them as video-sharing platform services, these then fall under a different regulatory regime as outlined under 'Chapter VI - Provisions applicable to video distribution platform services'.

## **2.6. Obligations placed on online media, proportionality, and graduated approaches**

Linked to the above, is the need to ensure proportionality in the regulation of media services. It was recommended that the focus should be on registration with the NRA; identification of the service, address, and contact information and transparency of ownership; prohibition of illegal content; protection of minors in content and in audiovisual commercial communications; right of reply; and rules on prohibited advertising. In this context, it is important to take note of the 2022 Council of Europe Recommendation on principles for media and communication governance that emphasises (among others) that:

media and communication governance should be based on evidence showing the need for intervention and take account of its regulatory and human rights impact in order to

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<sup>3</sup> Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUD Kosovo.

allow for a graduated and differentiated response respecting the roles played by different actors in the production, dissemination, and use of content.<sup>4</sup>

Article 6 of the European Media Freedom Act (EMFA) introduces obligations on all media that provide news and current affairs whether online or offline. These obligations concern transparency of ownership and editorial independence.<sup>5</sup>

## 2.7. Promoting self-regulation and co-regulation

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

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

It further discusses Co-regulation, which 'provides, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. In co-regulation, the regulatory role is shared between stakeholders and the government or the national regulatory authorities or bodies. Co-regulation allows for a back-stop for the NRA to step in where the codes are not having the desired effect.

There are several places in the Draft Law where reference is made to Codes of Ethics (a main example is Article 51), where reference should be to Codes of Conduct. A Code of Ethics is an internal document of the media outlet and is not regulated by the national regulator. In addition, a common code of ethics can be established via the self-regulatory body. The expression 'Code of Ethics' should be replaced with the terms self-regulatory codes or co-regulatory codes – specifically in relation to advertising, protecting children from advertising of unhealthy snack foods, etc, and other rules on the protection of minors (as clearly outlined in the Directive).

On numerous occasions, the Council of Europe has invited state authorities to encourage media self-regulation.<sup>6</sup> In line with the comments of the EUOK and OSCE with regard to the Law, it is also recommended here that self and co-regulation be strongly supported in relation to the regulation of online media.

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

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<sup>4</sup> Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance

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<sup>5</sup> 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>

<sup>6</sup> 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.

regulation and/or co-regulation, in line with the AVMS Directive, Venice Commission and relevant legislation.<sup>7</sup>

Hence, while there is some encouragement of self and co-regulation under Article 51, this is falsely labeled as a 'code of ethics'. The use of self and co-regulation for online media has not been encouraged by the Draft Law as recommended.

## **2.8. Cooperation and exchange with self-regulatory bodies and empowerment of self-regulatory bodies**

Linked to the above, the previous Opinion emphasised the importance of cooperation and exchange with self-regulatory bodies, particularly in the online sphere. Examples of approaches from North Macedonia and from Croatia were provided with regard to dealing with online media. The Kosovo Print Media Council (KMSHK) was formed in 2005, with the support of the Organization for Security and Cooperation in Europe (OSCE), and it bases its work on the Code of Ethics that the members of the Council have approved, regularly update and undertake to respect.<sup>8</sup> The OSCE noted in their comments on the Draft Law that 'The Press Council of Kosovo (PCK), which serves as the self-regulatory body for print and online media, including the Association of Journalists of Kosovo, have expressed their opposition to any form of regulation on online media/news portals.'<sup>9</sup>

The OSCE document also cited the European Commission (TALEX) report which 'recommended that the IMC supports elements of self-regulation of news portals in collaboration with journalist organizations and the PCK, utilizing different types of self-regulatory mechanisms, such as a code of conduct and strict moderation, to ensure that the right to reply and correction are available for readers of new portals as they are for the listeners and viewers of traditional media (radio and television).'

To this end the Opinion recommended that the Draft Law should recognise, support and promote the enhancement of the self-regulatory body, ensuring cooperation and exchange between the IMC and the Press Council to maintain high standards of journalism and media ethics. Unfortunately, this recognition is not included in the latest amendments. The Draft Law also makes no reference to the development of self-regulation frameworks that include professional and ethical standards, particularly in the coverage of election campaigns and handling of disinformation.

## **2.9. Clarifying licensing and registration requirements**

It was noted in the previous Opinion that there was a lack of clarity with regard to licences, permits and registrations and the Draft Law needed clear definitions and procedures for the issuance of licenses, permits, and registrations in line with European practices.

In addition, both the Comments on the draft Law from the EUOK<sup>10</sup>, and the Comments of the OSCE Mission in Kosovo<sup>11</sup> recommended providing clarity in the law on these issues and aligning these terms and the Draft Law with the Law on Permit and License System. The CoE Opinion

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<sup>7</sup> Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUD Kosovo.

<sup>8</sup> <https://sbunker-org.translate.goog/en/analize/tentimdisiplinimi-i-mediave-online-nga-shteti/? x tr sl=sq& x tr tl=en& x tr hl=en& x tr pto=wapp>

<sup>9</sup> Citing : See <http://presscouncil-ks.org/kmshk-dhe-agk-kundershtojne-rregullimin-e-mediave-online/>

<sup>10</sup> Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUD Kosovo.

<sup>11</sup> OSCE Mission in Kosovo Comments on the Draft Law on the Independent Media Commission, March 2024.

recommended introducing a notification or registration system for on-demand audiovisual media services and video-sharing platform services, rather than requiring permits.

Examples were provided from a Pan-European study on licensing and a study on the regulation of VSPS, both carried out by the European Audiovisual Observatory. These studies served to indicate that indicates that 21 countries operate what is known as an 'open system', with no requirements to notify, or register for on-demand services, while others require notification or registration.<sup>12</sup> Regarding OTT services (those distributed online but not within an IPTV service), individual licences are issued in 9 countries, and what is termed a formal licence (but is actually a stronger type of notification system) are required in six countries, while notifications are required in sixteen jurisdictions. In the case of VSPS, the Directive does not require a procedure for authorisation or licensing of video-sharing platforms. A recent comparative overview indicates that there are notification/information-request procedures in 29 cases.<sup>13</sup>

Some changes were introduced to the Draft Law. Article 2 now makes reference to services that are 'licensed' and 'registered'. Article 3 now includes a definition of 'permit.' 'Registration' is defined as being applied to online audio and audiovisual media. At the same time, a range of inconsistencies remain in the Draft Law. Under Article 4, the powers of the IMC include:

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

Under Article 27 - Types of transmission permits – the word permit is used with reference to all types of services, including VSPS (Article 27 (1.8). Article 30 still addresses permits for on-demand services, while Article 33 is entitled 'Licence for video-sharing platforms.'

Hence, the Draft Law still lacks clarity regarding what type of permit is required by each type of service. This is also relevant with regard to sanctions. Article 56 makes reference to permits, and in the case of on-demand services, to authorisations. This may be partly due to the efforts to expedite the Draft Law, whereby the consistency and clarity of the Draft Law has not been ensured. Ensuring consistency in the Draft Law is one of the major potential outcomes of having consultations through a Working Group consisting of a range of experts and stakeholders (see 1.11).

## **2.10. Establishing proportional sanctions and fines**

The previous Opinion recommended that the sanctions and fines be clearly proportional to the severity of the violations, with clear definitions of the types of violations and corresponding penalties. It also recommended the introduction of a graduated system of sanctions that accounts for the economic capacity of media outlets to ensure fairness. No particular changes were made to this section of the Draft Law. The lack of clarity regarding the system of sanctions is further exacerbated by the introduction of a new power of the IMC to block local and foreign services without clarity as to how and for which reasons (see below).

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<sup>12</sup> Mapping of licensing systems for audiovisual media services in EU-28, European Audiovisual Observatory, Strasbourg, 2018. <https://rm.coe.int/licensing-mapping-final-report/16808d3c6f>

<sup>13</sup> Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online - 2022 update, European Audiovisual Observatory, Strasbourg, 2022. <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

### **2.11. Conducting consultation and ensuring inclusivity**

It was highly recommended that the Committee conduct meaningful consultations with the key stakeholders, including media operators, civil society, and regulatory bodies, ensuring transparency and inclusivity in the legislative process. As emphasised in the Council of Europe 2022 Recommendation on principles for media and communication governance, States and public authorities should:

‘...invite and listen to all stakeholders affected or likely to be affected to participate in hearings and consultations, to allow sufficient time to respond to consultations, to inform publicly about the results and impact of such hearings and consultations, and to explain the reasoning behind considering or not considering submissions made.’<sup>14</sup>

According to information received in the context of drafting this Opinion, it is understood that no further consultative meeting was held following the first Opinion provided for the Council of Europe. Ensuring consistency in the Draft Law is one of the major potential outcomes of having consultations through a Working Group consisting of a range of experts and stakeholders. A collaborative approach also enhances the success of the implementation of the future Law.

### **2.12. Clarifying competences and powers of the National Regulatory Authority (NRA) and strengthening its independence**

With regard to the issue of Independence of the IMC in line with Article 30 of the AVMS Directive and with Council of Europe (CoE)<sup>15</sup> standards, several recommendations were made in the previous Opinion which also reflected the comments of the EUOK, OSCE, and others.

On a positive note, the following adjustments to the Draft Law have been noted. One provision (Article 17 (3.6)) of particular concern was that which allowed for the dismissal of the entire IMC in the case where the Parliament does not approve the annual report of the IMC. This was recognised as being highly and introduced an arbitrary tool by which the Parliament can remove and replace the entire IMC on the basis of a vague and non-defined criteria, which is not in line with European standards. This provision has now been deleted from the Draft Law, which represents a very positive move. Other recommendations from the Opinion regarding the independence of the IMC are discussed further below.

CoE standards address the general legislative framework; the appointment, composition and functioning of regulatory authorities; financial independence; powers and competence; and accountability. These are now reflected in the AVMS Directive. Article 30 (3) requires that ‘Member States shall ensure that the competences and powers of the national regulatory authorities or bodies, as well as the ways of making them accountable are clearly defined in law’. As noted above, the lack of clarity regarding permits, licences etc. (see 2.2) implies that the powers are not clearly defined in this instance. As emphasised in the Comments from the EUOK, the Drafters of the Law should

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<sup>14</sup> Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance

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<sup>15</sup> For example: Committee of Ministers Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector, and 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.

'consider presenting such conditions in a separate provision under CHAPTER IV-LICENSING, of the Draft Law'.<sup>16</sup> The Comments from the OSCE Office also stress the need for the powers and competencies of the regulator 'to be clearly and exhaustively defined in the law itself, without recourse to sub-laws.'

A further key element of independence requires that regulatory authorities have adequate financial and human resources and enforcement powers to carry out their functions effectively. The EUOK called on the drafters of the Law to among others 'to enhance budget/financial guarantees to ensure its institutional independence. Further, in line with the AVMS Directive the authorities need to ensure that the financial and human resources are appropriate for the IMC to implement its powers.'<sup>17</sup>

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

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

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

Regarding the election and dismissal of the management and members of the IMC, the Draft Law foresees the IMC Chairperson be elected by the Assembly through a simple majority vote, which departs from the current regulation where the Chairperson is elected by the IMC itself. The OSCE expressed concern that this could increase the political influence on the IMC, particularly as all appointments to the IMC are from parliament. This is not in line with European standards and particularly the standards in the region where civil society plays an important role in the nomination of a fixed proportion (meaning they directly nominate members to fill specific seats) of the membership of the governing boards of regulators. The OSCE document further emphasises that according to international/European standards/good practices, as a priority there should be an independent nomination process for selecting the chairperson of the Independent Media Commission.

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<sup>16</sup> Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUD Kosovo.

<sup>17</sup> Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUD Kosovo.



During the meeting with the Parliamentary Committee, there was a lack of clarity as to whether they now consider the appeals Board to be a complaints body (from the public) or an Appeals body (for the audiovisual media service providers to appeal decisions).

This has been clarified somewhat as a 'Complaints body' to deal with complaints from the media sector being regulated. This provision should still indicate that the services have the right to challenge all decisions of the IMC at the relevant Court and have effective judicial review. There is mention of the possibility to lodge a complaint with the appropriate court in the event of non-concurrence with the prescribed sanctions under Article 57 but not under Article 56.

### **2.13. Providing detailed provisions on media ownership and ownership transparency and retaining high standards preventing politicisation of the media**

It has also been noted that the latest version of the Draft Law reintroduced (under Article 26) the prohibition on political ownership of the media to prevent politicisation and ensure media independence. This is strongly commended as a positive response to the Legal Opinion and discussions with the Parliamentary Committee and ensures that in this area the current standards regarding politicisation of the media are not reversed. This also aligns with the 2018 Recommendation of the Committee of Ministers on media pluralism and transparency of media ownership, which outlined measures to be taken to ensure 'a favourable environment for freedom of expression and media freedom', including policy frameworks :

- 1.3. ... designed and implemented in a manner which prevents States, or any powerful political, economic, religious or other groups from acquiring dominance over and exerting pressure on the media.<sup>18</sup>

In the previous Legal Opinion, it was emphasised that there was a need to Include minimum standards on media ownership and definitions of media concentration in the law, and to outline criteria such as threats to media pluralism and risks of media concentration. This would serve to inform rules developed by the IMC in this area and ensure that future rules could not diverge from minimum standards. In September 2022, a review was provided by this author, via the JUFREX project, of a draft 'Regulation on Ownership and Concentration of Audiovisual Media Service Providers of Kosovo'.<sup>19</sup> It was recommended that the minimum standards on media ownership and definitions of media concentration from the regulation be included here, for example, the meaning of ownership, and the threshold for a dominant position. As highlighted by the EUOK:

For the IMC, to continue regulation of media ownership and the concentration, the Draft Law should have a concrete provision(s) regulating the latter as rights and responsibilities are constitutional and legal category. Through by-law, rights and responsibilities are only explained in details. Thus, it is essential that the rights and responsibilities concerning media ownership and concentration are provided in the Draft Law.<sup>20</sup>

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<sup>18</sup> Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member States on media pluralism and transparency of media ownership.

[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680790e13](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13)

<sup>19</sup> TECHNICAL PAPER - Review of Updated Draft Regulation on "Ownership and Concentration of Audiovisual Media Service Providers of Kosovo."\* Jean-François Furnémont and Deirdre Kevin for the Council of Europe.

<sup>20</sup> Comments to the Draft Law on the Independent Media Commission, 22 March 2024, EUD Kosovo.

New definitions have been introduced (under Article 3) for: media pluralism, ownership, direct ownership, indirect ownership, beneficial owner, and concentration of media ownership (although without a threshold). It is not entirely clear why Article 4 (2.8) has been amended with required to the role of the IMC to review and approve the change of ownership by 10% - to a review and approval of any change of ownership. Overall, there is some improvement of the Draft Law in this area and the recommendations here have been partly taken into account.

#### **2.14. Including provisions that detail the purpose of a media support fund and the principles for its management**

Despite previous recommendations and the provision of examples of good practice from Croatia, Ireland and Slovenia, Article 8 of the Draft Law regarding a fund to support media pluralism has not introduced important changes. These changes were recommended in order to align with EU standards (for example regarding state aid) and Council of Europe standards. Namely the recommendations to indicate the purpose of such a fund, to define what the 'public interest' aims of such a fund would be, and to provide a guarantee that the fund will be administered in a non-discriminatory and transparent manner by a body enjoying functional and operational autonomy, have not been taken into account.

Although, article 8 mentions 'the areas of education, democracy, arts, sports, and the economy' but requires a much more detailed outline of the concept of public interest content. It is important to reiterate that the 2018 Council of Europe Recommendation on media pluralism and transparency of media ownership recommends among others that:

2.14. Support measures should have clearly defined purposes and should be based on predetermined, clear, precise, equitable, objective and transparent criteria. They should be implemented in full respect of the editorial and operational autonomy of the media. These support measures could include positive measures to enhance the quantity and quality of media coverage of issues that are of interest and relevance to groups which are underrepresented in the media..<sup>21</sup>

The 2018 Council of Europe Recommendation also states that:

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

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

Unfortunately, none of these changes have been introduced in the current Draft Law in order to ensure a high standard of transparency and fairness in relation to how public money is distributed among media outlets via any future fund.

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<sup>21</sup> Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member States on media pluralism and transparency of media ownership

## 2.15. Addressing disinformation and promoting media literacy

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

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

The previous Opinion recommended that the Draft Law promote media education and digital literacy skills to counter disinformation and enhance public awareness. This has been largely addressed with the introduction of a new provision on media education. This should also emphasise the role of VSPS.

With regard to encouraging collaborative fact-checking initiatives and improvements in content moderation systems to maintain the integrity of information, this may be addressed in future work of the IMC. See also 2.1 below regarding the concerns on the new provision on disinformation.

## 3. New issues arising in the recent amendments to the Draft Law

### 3.1. Disinformation and provisions for a by-law prohibiting disinformation

A new amendment to the Draft Law was introduced where under Article 41, after paragraph 4, a new paragraph 5 is added with the following text:

41.5 IMC drafts regulations for the prohibition of disinformation. The regulation includes European Union standards and international norms against disinformation.

With regard to disinformation, the previous Opinion highlighted the problematic issue of attempting to regulate or legislate vague notions such as “disinformation” or “false news”. Reference was made to a growing number of examples of national legislation that have attempted to do this and in all cases, the threats to freedom of expression have been emphasised in legal reviews by the Council of Europe and by the Venice Commission.<sup>22</sup> In addition, the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, was cited:

“general prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information’, are incompatible with international standards for restrictions on freedom of expression (...) and should be abolished.”<sup>23</sup>

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<sup>22</sup> See for example the Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe - On the draft amendments to the Penal Code regarding the provision on “false or misleading information” in Türkiye.

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

<sup>23</sup> Joint Declaration adopted by The United Nations, Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on

The introduction of Article 41 (5) mandating the regulator to adopt a regulation prohibiting disinformation is therefore not in line with international standards. It is noted in this provision that the regulation should incorporate EU standards and international norms. This is a positive element. As noted in the previous Opinion, the fight against disinformation needs a concerted effort by a range of national institutions and should follow the Guidelines and Recommendations of the EU and the Council of Europe.<sup>24</sup>

However, the use of the phrase 'prohibition of disinformation' and the lack of a definition of disinformation in the law present a threat to freedom of expression. These issues should be clarified, while the IMC should work also with all other relevant authorities and the Government to build a comprehensive strategy to combat disinformation.

### **3.2. IMC competences to oblige operators to interrupt local and foreign services**

Amendment 35 introduces a new power of the IMC:

2.11. IMC obliges operators (internet service providers) to undertake all technical measures for the interruption of platforms, channels, or harmful local or foreign contents that violate public security and constitutional order in the Republic of Kosovo.

This power is vaguely expressed in the sense that it refers to 'harmful local or foreign contents' without the Draft Law providing any clarity as to the nature of 'harmful content'.

It can partly be linked to Article 12 with regard to derogations from freedom of reception and retransmission of foreign services – which should focus on the provisions of the Directive and ensure that the procedure outlined is followed. Relevant 'harmful content' is that which manifestly, seriously and gravely infringes: the prohibition of incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter; or the rules on preventing the impairment of the physical, mental or moral development of minors; or violates the prohibition on public provocation to commit a terrorist offence; or presents a serious and grave risk of prejudice to public security, including the safeguarding of national security and defence; or prejudices or presents a serious and grave risk of prejudice to public health. Hence, this should be clarified.

With regard to local services, it should be clarified what is the meaning of 'harmful content.' The section of the Draft Law dealing with sanctions makes no reference to the blocking or suspension of any services whether broadcast or online. The Draft Law therefore introduces a tool for blocking of media or platforms with no clarity as to the meaning of 'harmful content' and without detail in the field of sanctions as to how such a power will be enforced.

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Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information. <https://www.osce.org/files/f/documents/6/8/302796.pdf>

<sup>24</sup> For example, the EU 'Strengthened Code of Practice on Disinformation 2022'. <https://ec.europa.eu/newsroom/dae/redirection/document/87585>

For example, the Council of Europe 'Guidance Note on countering the spread of online mis- and disinformation through fact-checking and platform design solutions in a human rights compliant manner: <https://rm.coe.int/cdmsi-2023-015-msi-inf-guidance-note/1680add25e>

### **3.3. Conclusion on new amendments**

Both of the above provisions introduce new powers to the IMC with regard to – on the one hand - the very complex area of combatting disinformation (not defined) , and with regard to – on the other hand - the possibility of blocking undefined 'harmful content' without any detail of how this power will be enforced.

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