The present review of the Montenegrin Electronic Media Law has been prepared for the OSCE at the request of the Montenegrin Ministry of Culture. The review is based also on analysis and comments on the Montenegrin Law on Electronic Media prepared by the OSCE in November 2012 (prof. Sandra Bašić Hrvatin).

This written expertise consists of the following parts:

1. An introduction outlining the relevant documents which should be taken into consideration when establishing the legal framework for the regulation of electronic media and audiovisual media services;

2. General assessment, containing general recommendations as regards the provisions in the Electronic Media Law;

3. Conclusions and recommendations.

All comments and remarks are based on the English translation of **The Electronic Media Law** (*Official Gazette* of Montenegro no. 046/10 of 6 August 2010, 040/11 of 8 August 2011, 053/11 of 11 November 2011, 006/13 of 31 January 2013, 055/16 of 17 August 2016).

Ljubljana, May 2019

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1. Introduction

As a member of the Council of Europe, Montenegro is a Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[1] This international treaty entered into force for Montenegro on the 6th of June 2006. Therefore, Montenegro has an obligation to actively promote the freedom of expression and the freedom of everyone (not just certain political, social or economic interest groups) under its jurisdiction to receive and impart information.

Recommendations by the Council of Europe (CoE) Committee of Ministers to the member States result from bench-marking exercises and the guidelines or proposed measures in these instruments therefore represent best practices. Recommendations are adopted by consensus. Consequently, the recommended guidelines or measures qualify as European standards.

The Declaration of the Committee of Ministers is a political declaration and, as such, it is not legally binding. Nevertheless, it contains important principles and, since it was adopted by consensus in the Committee of Ministers, all member States committed themselves to it.

As a country eligible for EU membership, Montenegro must consider also the relevant texts of Community Law (EU aquis – Directives, decisions, recommendations, resolutions and conclusions) in the audiovisual and electronic communications field. Seeing that the changes of the Electronic Media Law are being followed through simultaneously with the change of the Directive on audiovisual media services we recommend that the passing of the new legislation directly implements the requisites of the new Directive (Directive 2018/1808).[2] Additionally we recommend that the changes to the legislation include a thorough revision of the statutory provisions of the whole "package of media legislation" as well as all other legislation concerning the field of the media and audiovisual media services, and to harmonize any potential obstacles arising in this sphere.

At the OSCE level, there are political commitments in the area of freedom of expression and freedom of information that clearly refer to the international legal standards related to freedom of

1 http://conventions.coe.int/treaty/en/treaties/html/005.htm

2 DIRECTIVE (EU) 2018/1808 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCILof 14 November 2018 amending Directive 2010/13/EU 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) in view of changing market realities (Official Journal of the European Union, L 303/69, 28.11.2018)
https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018L1808&qid=1552493926580&from=en

expression and freedom of media. In particular, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE in 1990 proclaims the right to everyone to freedom of expression and states that:
This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.[3]

OSCE Ministerial Council Decision 3/2018 (*Safety of Journalists*), adopted by the Ministerial Council in Milan on 7 December 2018, establishes the following:

1. *Fully implement all OSCE commitments and their international obligations related to freedom of expression and media freedom, including by respecting, promoting and protecting the freedom to seek, receive and impart information regardless of frontiers;*
2. *Bring their laws, policies and practices, pertaining to media freedom, fully in compliance with their international obligations and commitments and to review and, where necessary, repeal or amend them so that they do not limit the ability of journalists to perform their work independently and without undue interference (...)*"[4]

Montenegro is also a party to the instruments mentioned and bound by these provisions, something reinforced by its role as a participating State of the OSCE. The participating States confirm that they will co-operate fully with the OSCE Representative on Freedom of the Media. He or she will assist the participating States, in a spirit of co-operation, in their continuing commitment to the furthering of free, independent and pluralistic media.[5]

When commenting on the Electronic Media Law we will not specifically quote the numerous international documents (some binding, others accepted as mere recommendations) since the Ministry for culture and the Directorate for the media, respectively, are familiar with them and mostly take them into consideration while preparing the legislation. As a source of support, the Ministry may use the commentaries that we have provided in the process of previous legislation changes.

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3 https://www.osce.org/odihr/elections/14304

4 https://www.osce.org/chairmanship/406538?download=true

5 Decision No. 193 Mandate of the OSCE Representative of the Media https://www.osce.org/pc/40131

Article 4 of the new Draft Media Law obliges the Republic of Montenegro to abide, when carrying through its media policies, by the fundamental international legal documents, thus ensuring the highest standards in protecting the freedom of expression and freedom of media. Accordingly, the Constitution of Montenegro regulates in various articles this legal matter in a manner that obliges the legislator to implement the international legal practice and standards when creating national legislation.

2. General assessment, containing general recommendations as regards the provisions in the Electronic Media Law

The implementation of the Directive (EU) 2018/1808 in the national media legislation

Given the concurrency of the changes in legislation and the implementation of a new directive at the EU level, we suggest the requisites of the directive to be considered in the highest possible degree while preparing the new legislation. Special attention should be given to the definitions that set clear criteria concerning what is (and to what extent) the subject of regulation of the given legislation. In the Draft Media Law, (sent to public discussion in 2019) the definition of electronic publications should be rethought and harmonized with the definitions in the new Directive. The articles of the current Electronic Media Law that require the implementation of the EU Directive are the following: 4, 6-8, 46, 53, 60-69, 74a, 82, 84-9, which represents about a third of the law.

Agency of electronic media (AEM)

Although the Electronic Media Law has implemented most of the requirements laid out in the Audiovisual Media Services Directive, several issues still need to be resolved in order to provide for the required legislative framework.

The autonomy of the regulatory body is adequately provided for. The Law contains mechanisms that prevent conflict of interest among the AEM Council members, those that restrict the direct influence of politics on the nomination and dismissal of AEM Council members, and mechanisms that ensure its financial autonomy.

The passing of the new Law on Public Administration represents a serious step backwards.

The basic principle when passing the Law on Public Administration is understandable and necessary, however what will represent serious consequences regarding the diminishing of the autonomy of AEM is the direct link to the executive branch of power (the Government) concerning the appointment, regulation and determination of jurisdiction of the AEM. Regardless of the numerous arguments stemming from the national and international professional public, the disputable statutory provisions of the Law on Public Administration have not been modified.

We would like to bring to the Ministry's attention that the Directive AVMS (Recital 53) stipulates (see also Article 30):

> *"Member States should ensure that their national regulatory authorities or bodies are legally distinct from the government. However, this should not preclude Member States from exercising supervision in accordance with their national constitutional law. National regulatory authorities or bodies should be considered to have achieved the requisite degree of independence if those authorities or bodies, including those that are constituted as public authorities or bodies, are functionally and effectively independent of their respective governments and of any other public or private body. That is considered essential to ensure the impartiality of decisions taken by a national regulatory authority or body. The requirement of independence should be without prejudice to the possibility for Member States to establish regulatory authorities that have oversight over different sectors, such as the audiovisual and telecommunications sectors. National regulatory authorities or bodies should have the enforcement powers and resources necessary for the fulfilment of their tasks, in terms of staffing, expertise and financial means. The activities of national regulatory authorities or bodies established under Directive 2010/13/EU should ensure respect for the objectives of media pluralism, cultural diversity, consumer protection, the proper functioning of the internal market and the promotion of fair competition*".

However, we would like to point out that the provision stipulating that the Assembly nominates the AEM Council members should be revised. The members are nominated by appointed nominators, while the Assembly should only give approval to their nomination, but should not have the option of rejecting the nominees (except for formal reasons). The provision stating that the entire Council can be dismissed (Article 38) is not in harmony with the standards valid within this area. A Council member may be dismissed only if they no longer meet the membership requirements.

The key component to achieve efficient regulation is a clear definition of the regulatory body's obligations and scope. This primarily involves the harmonization of various laws that directly or

indirectly regulate the electronic media and audiovisual services. The Electronic Media Law and the Electronic Communications Law establish two regulatory bodies that should achieve an efficient co-operation. If the two Laws are not harmonized or should the powers of the two bodies be vaguely defined, the regulation in practice could be harmful and lead to a situation in which neither of the two bodies will be able to undertake the necessary steps. The powers of the two bodies should be harmonized in every detail. The Law should avoid references to specific powers if it is unclear who is responsible for the practical implementation of tasks. Article 12 stipulates that AEM, within the scope of its authority shall "draft the AVM service Development Program" (paragraph 1) but it is not clear who is responsible for the adoption of the final text. AEM co-operates with the regulatory body responsible for electronic communications in the drafting of the background paper for developing the plan for the use of the radio-frequency band, in the section designated for terrestrial broadcasting (paragraph 2) or gives an opinion (which is not binding) to the regulatory body for electronic communication on the need to designate an operator with significant market power if the analysis determines that relevant electronic communication services market, which constitutes grounds for the provision of and/or access to the AVM services, is not competitive enough (paragraph 4).

AEM co-operates with the regulatory body responsible for electronic communications in the drafting of the background paper for developing the plan for the use of the radio-frequency band, in the section designated for terrestrial broadcasting (paragraph 2). It can also give an opinion (which is not binding) to the regulatory body for electronic communication on the need to designate an operator with significant market power if the analysis determines that relevant electronic communication services market, which constitutes grounds for the provision of and/or access to the AVM services, is not competitive enough (paragraph 4).

The New Electronic Media Law should also include new obligation of AEM established in the proposed Law on Public Service Media RTV Montenegro.

Activities of AEM and the Agency for Electronic Communication and postal services calls for the harmonization of their operation, i.e. the tasks ranging from the adoption of the radio-frequency band plan, the administering of the calls for applications/tenders and the granting of broadcasting licenses, to the definition and implementation of technical standards for program production and broadcasting. The co-operation of the two regulatory bodies enables harmonized shaping and development of the media and audiovisual spheres. Any inconsistency in this chain of responsibilities creates the likelihood that the legislation will harm both the broadcasters and the consumers of audiovisual media services.

Public Broadcaster(s)

The Electronic Media Law should pay specific attention to the regulation of the position of local public media that are currently in a non-sustainable financial situation and under direct (overt or hidden) pressure of the local authorities. The local public broadcasters are performing a great deal of public service, particularly at the local level, which brings forth the need to ensure their organizational, editorial and financial independence within the legislation itself.

The operation of public services primarily at the local level remains ambiguous. To function as an effective public broadcaster, public broadcasting services in Montenegro need both structural independence and editorial independence from State (or local authorities) and political interference. Our recommendation is that the establishment of local public broadcasting services should be the responsibility of the AEM. Municipalities can play an advisory role. Funding can all too easily be used as a means to exert political pressure on a public broadcaster. This is particularly the case where all or a substantial portion of the funding is derived from the State (municipal) budget, and the funding settlement is made on an annual basis. This also creates operational problems for the broadcaster, who may be limited in what it can program, given that the commissioning timetable and acquisition opportunities may well stretch over a one-year cycle.

The regulatory context on the program output of the public broadcasters needs to be in line with Council of Europe recommendations and international best practices. Obligations need to be transparent and should not be used to limit or influence the editorial independence of the public broadcasters. Obligations regarding the modus operandi of the public broadcaster need to be in line with generally expected journalistic standards.

The provisions relating to the public services funding method (Article 76) should be reconsidered. It is necessary to prevent local authorities' arbitrary decision when setting aside the budget funds for a public service. The law should stipulate the minimal amount required for the fulfillment of the public service remit. Paragraph 7 should be brought in line with the standards applicable to the granting of state aid to public services. Since public services are funded from the local budget, these provisions should be harmonized with the Law on the Supervision of State Aid.
The Electronic Media Law should devote attention to the issue of regulating and granting state subsidies, the prevention of abuse of dominant market positions, the protection of competition, consumer protection and requirements relating to the transparent operation of the institutions that fulfill the tasks of the public service broadcaster.

The Communiqué from the Commission on the application of state aid rules to public service broadcasting from July 2009[6] considers that financial transparency can be further enhanced by an adequate separation between public service and non-public service activities at the organizational level of the public service broadcaster. Functional or structural separation normally makes it easier to avoid cross-subsidization of commercial activities from the outset, and to ensure transfer pricing and the respect of the arm's length principle. Therefore, the Commission invites Member States to consider functional or structural separation of significant commercial activities, as a form of best practice.[7]

The Communiqué stresses that public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.[8] Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a substantial proportion of the population, the main source of information. It thus enriches public debate and ultimately can ensure that all citizens participate to a fair degree in public life. In this regard, safeguards for the independence of broadcasting are of key importance, in line with the general principle of freedom of expression as embodied in Article 11 of the Charter of Fundamental Rights of the European Union[9] and Article 10 of the European Convention of Human Rights, a general principle of law whose respect is ensured by the European Courts.[10]

The importance of public service broadcasting for social, democratic and cultural life in the Union was reaffirmed in the Council Resolution concerning public service broadcasting. As underlined by the Resolution: "Broad public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting". Moreover, public service broadcasting needs to "benefit from technological progress", bring "the public the benefits of the new audiovisual and information services and the new technologies" and to undertake "the development and diversification of activities in the digital age". Finally, "public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States

6 *Communication from the Commission on the application of state aid rules to public service broadcasting (text with EEA relevance)*. OJ C 257. 27.10.2009 (hereinafter Communication) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:257:0001:0014:EN:PDF

7 Ibid, para 69.

8 Ibid. para 9

9 OJ C 364, 2000, p. 1.

10 Judgement in the case C-260/89, ERT, Recueil 1991, pp. I-2925;Communication, para, 10.

in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences"[11]

Licensing Process

One of the major ways in which audiovisual media services can be influenced is in the award of licenses. In fact, this is why it is important to ensure that the licensing process and the licensing criteria should be set out clearly in the law. The licensing instrument should only be used as an exception; where an appropriate system of general licensing should be put into place. This not only provides the regulator with clear and transparent guidance, but also with license applicants. A clear framework to follow makes it simple for the regulator to make licensing decisions and to formulate reasons for the award. A well-reasoned decision is less likely to face legal appeal, and makes it easier for a court to consider an appeal should there be one.

The existing law includes a whole series of license-granting procedures.

- Broadcasting license – Granting broadcasting license (Article 97), Public competition for granting broadcasting license (Article 99), Contents of the public competition for granting broadcasting rights (Article 100), Requirements for granting broadcasting license (Article 103 – more detailed requirements for granting broadcasting licenses shall be set by Council).
- License for on-demand service – Granting license for on-demand service (Article 102).
- License for provisions of on-demand AVM services – Granting license for provision of on-demand services (Article 116). Para 2 of the Article 116 opens up a serious problem in the granting license procedure if there is no cooperation between two regulatory authorities (AEM and authority established by Law on electronic communication – Agency for electronic communication and postal services).

A license system is appropriate in the case of the allocation of scarce resources (frequencies), or in a situation where special rights are granted (i.e. concerning public broadcasting). A general licensing scheme, possibly in combination with a registration system, might suffice in order to regulate services such as non-linear media services. Licensing of networks that do not depend on scarce resources, such as cable networks, should not be introduced or terminated ().
Directive 2002/20/EC on the authorisation of electronic communication networks and services

11 *Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999*, OJ C 30, 5.2.1999, p. 1.

(Authorisation Directive clearly stipulates that:[12]

This Directive covers authorisation of all electronic communications networks and services whether they are provided to the public or not. This is important to ensure that both categories of providers may benefit from objective, transparent, non-discriminatory and proportionate rights, conditions and procedures (Recital 4) , and

Those aims can be best achieved by general authorisation of all electronic communications networks and services without requiring any explicit decision or administrative act by the national regulatory authority and by limiting any procedural requirements to notification only. Where Member States require notification by providers of electronic communication networks or services when they start their activities, they may also require proof of such notification having been made by means of any legally recognised postal or electronic acknowledgement of receipt of the notification. Such acknowledgement should in any case not consist of or require an administrative act by the national regulatory authority to which the notification must be made. (Recital 8).

Article 3 (para 3) of the Directive explains notification procedure:

The notification shall not entail more than a declaration by a legal or natural person to the national regulatory authority of the intention to commence the provision of electronic communication networks or services and the submission of the minimal information which is required to allow the national regulatory authority to keep a register or list of providers of electronic communications networks and services. This information must be limited to what is necessary for the identification of the provider, such as company registration numbers, and the provider's contact persons, the provider's address, a short description of the network or service, and an estimated date for starting the activity.

Also, Directive (EU) 2018/1808 stipulates that: T*he procedures and conditions for restricting freedom to provide and receive services should be the same for linear and non-linear services.* (Recital 9)

Licenses should be eligible for renewal if there have been no major compliance problems during the license period. They should not automatically have to be re-tendered, as this undermines business continuity, commercial viability and the reasonable expectations of viewers and listeners. Requiring a new tender process, in the absence of major compliance problems, is a possible means of exerting

12 **Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)** *Official Journal L 108 , 24/04/2002 P. 0021 - 0032* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002L0020&from=EN

unacceptable political pressure on licensees during the license period. A tender can only be taken into consideration if the tender process is fully transparent (e.g. an auction based on financial criteria)

License for AVM Service provision – The imposition of the license to provide on demand audiovisual media services is not in accordance with Article 4 of the Directive on electronic commerce,[13] which excludes prior authorization or any other requirement having equivalent effect for the taking up and the pursuit of the activity of information society providers.
Directive on electronic commerce (Article 4)

Principle excluding prior authorization
1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorization or any other requirement having equivalent effect.
2. Paragraph 1 shall be without prejudice to authorization schemes which are not specifically and exclusively targeted at information society services, or which are covered by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licenses in the field of telecommunications services.
The scope of the chapter IV should be limited to those audiovisual media services providers performing television broadcasting services and in accordance with Recital 18 of the Directive on electronic commerce which are transmitted point to point such as video on demand accessible through internet. We propose a general licensing scheme (such as cable networks).

Directive on electronic commerce (Recital 18)

Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include

13 *Directive 2000/31/EC* of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (**Directive on electronic commerce**)

services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.

The Electronic Media Law regulates the license granting procedure for the electronic media (broadcasting license) and for on-demand AVM service providers (the license for cable/IPTV/DTH/MMDS operators to provide on-demand AVM services). We would like to point out again that the provisions in the Electronic Media Law should be brought in line with those in the Digital Broadcasting Law. It is necessary to precisely define *who* is responsible for the granting of broadcasting licenses for digital broadcasting. Article 75 (paragraph 6,7), Article 87 (paragraph 2), Article 91 (paragraph 1, item 5) and Article 93 (paragraph 1, item 5) continue to be the source of ambiguities as to who is responsible for the granting, revocation or termination of a digital broadcasting license.

Comments on Articles 81 – 84

The service provider (the operator) has certain editorial responsibilities in selecting the programs that it offers (program catalog). The duty of the operator is to ensure that the programming standards in Montenegro are respected (Directive 2018/1808, definitions).

We would like to draw attention to the growing trend among the broadcasters in the region to opt for “non-terrestrial” platforms in an attempt to avoid strict regulations.

Additional comments

Article 40 paragraph 3 (10)
It is not clear if this is an independent decision of the Director or the responsibility of the Council with the Director only implementing its decision.

Article 56 (paragraph 4)
What is involved here is a professional standard in media-reporting that should be governed by internal self-regulating acts. It is not clear what responsibilities the Agency might have in this area.

Article 58
It should be reconsidered whether this provision is justifiable with regard to program providers that do not use the frequency band (e.g. those broadcasting only by cable). We propose that this provision should stipulate only an approval of the change rather than prior consent.

Article 59
The provision stipulating the obligatory programming quotas for commercial broadcasters should be reconsidered. Such programming requirements can be applicable to public services only.

Directive 2010/13 EU should remain applicable only to those services the principal purpose of which is the provision of programs in order to inform, entertain or educate. The principal purpose requirement should be also considered to be met if the service has audiovisual content and form which is dissociated from the main activity of the service provider, such as stand-alone parts of online newspapers featuring audiovisual programs or user-generated videos where those parts can be considered dissociated from their main activity. Social media services are not included, except if they provide a service that falls under the definition of a video-sharing platform. A service should be considered to be merely a non-dissociated complement to the main activity as a result of the links between the audiovisual offer and the main activity. As such, channels or any other audiovisual services under the editorial responsibility of a provider may constitute audiovisual media services in themselves, even if they are offered in the framework of a video-sharing platform which is characterized by the absence of editorial responsibility. In such cases, it will be up to the providers with editorial responsibility to abide by the provisions of this Directive (Recital 3).

Article 71

The definitions of the local, regional and national broadcasters should be reconsidered. Owing to the convergence of platforms, certain broadcasters use a combination of platforms (i.e. terrestrial and cable). Consequently, what should be the status of a broadcaster of a regional program that broadcasts only by cable and can theoretically broadcast nationally in terms of the audience reach? The criteria used in defining statuses should be adjusted to take into account the current technical capacity and the coverage zones.

Article 72

The solution according to which the status of a non-profit broadcaster is acquired at the frequency allocation tender should be reconsidered, particularly when the broadcaster in question uses only a cable network or conditional access platforms. We propose that this status should be granted on request with conditions being set out in detail.

Article 73

It is necessary to define in detail the terms of broadcasting for broadcasters that do not broadcast only within their founding municipality but also on a cable network that covers a wider area. In such cases, it is necessary to determine the fee that is paid to AEM.

Article 79

This Article should clearly stipulate that the broadcaster is exempt from fees only for the coverage zone within its founding municipality.

Article 84 (paragraphs 4 and 5)

The appropriateness of these provisions with regard to the right to economic initiative should be reconsidered. What should be done if a broadcaster / program-provider does not pay the fee to the MUX operator?

The redefinition of the must carry and must offer obligations of public service broadcasters and national commercial broadcasters should be considered.

Article 89

This article should be brought in line with the Amending Directive.

Article 107

The Article should clearly demarcate the duration of the right to use a broadcasting frequency from the duration of a broadcasting license.

Articles 131-135

The efficiency and appropriateness of the provisions regulating the prevention and prohibition of media concentration should be reconsidered.

Articles 136-137

Restrictions on media concentration should be harmonized with the measures taken to ensure and protect media pluralism. It is necessary to ensure the adequate models of funding, while the responsibilities relating to the planning, granting and supervision of the use of state aid should be transferred to AEM.

Media freedoms and pluralism

Media freedoms and pluralism are vital for democracy, given their essential role in guaranteeing the freedom of expression of opinions and ideas and in contributing to peoples' effective participation in democratic processes. In the context of democratic processes, there is a need for diverse views to be expressed and presented to the public and for genuine and lively political debate on matters of general interest, helping people to be better or more fully informed in the context of their democratic participation, as well as the crucial role of the media in achieving these aims and in the functioning of a democratic and participatory public life.[14]

On 31 January 2007, the Committee of Ministers adopted a political declaration on protecting the role of the media in democracy in the context of media concentration.[15]

The Declaration alerts the Member States to the potential risk of abuse of the power of the media in a situation of strong media concentration and its potential consequences for political pluralism and for democratic processes.

14 *Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration*, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies. https://wcd.coe.int/ViewDoc.jsp id=1089615&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

15 *Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration*, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies. *See*: https://wcd.coe.int/ViewDoc.jsp?id=1089615&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

Also Directive EU 2018/1808 in Recital 25 gives Member States the power to impose some rules regarding protection of public interest on the media market.

This Directive 2010/13/EU is without prejudice to the ability of Member States to impose obligations to ensure the appropriate prominence of content of general interest under defined general interest objectives such as media pluralism, freedom of speech and cultural diversity. Such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in accordance with Union law. Where Member States decide to impose discover-ability rules, they should only impose proportionate obligations on undertakings, in the interest of legitimate public policy considerations.

Recommendation N° R (99) 1 of the Committee of Ministers to Member States on measures to promote media pluralism[16] recommends that Member States adopt legislation designed to prevent media concentration that might endanger media pluralism on the national, regional or local level. According to said Recommendation, Member States should define thresholds to limit the influence of any individual media corporation or a group within one or more media sectors. These thresholds may be based on the maximal audience share, or the revenue of a company or capital share. Those corporations that reach such thresholds (and broadcasting companies in particular) should, according to the Recommendation, not be granted additional broadcasting licenses on that market.

The regulation of media concentrations presupposes that the competent services or authorities have information which enables them to know the reality of media ownership structures and in addition, to identify third parties which might exercise an influence on their independence and furthermore that the media transparency is necessary to enable members of the public to form an opinion on the value which they should give to the information, ideas and opinions disseminated by the Media.

The Explanatory Report to said Recommendation stipulates that “media transparency is a major condition for safeguarding and strengthening pluralism” and therefore, measures to promote media transparency are a precondition for the implementation of rules and policies aimed at safeguarding and strengthening pluralism in the media sector.

16 *Recommendation No. R(99)1 of the Committee of Ministers to Member States on Measures to promote Media Pluralism 19. 1. 1999* (http://cm.coe.int/ta/rec/1999/99r1.htm)

According to the Explanatory Report, measures to promote media transparency can be justified for the following reasons:

"The current development of media concentration is likely to create difficulties for media transparency. The growing internationalization of the capital and activities of firms in the media sector, the development of multimedia groups and the appearance in the media sector of new actors from other branches of economic activity, and the gradual integration of the media into much bigger entities covering the whole of the media production and distribution process from beginning to end, have a dual impact on media transparency. In the first instance, the ownership structures of the media and the indirect control/dependency relationship maintained through the capital of these media are becoming more complex. Furthermore, they open the way to situations of media dependency in relation to bodies which, while they are neither owners nor even shareholders in these media, are capable of exercising a significant and long-lasting influence over their activities, and possibly over the content of the information which they broadcast or disseminate, given that they supply them with financial resources, equipment or non-material resources (programs) which are important, sometimes vital, to their activities."
"This phenomenon, which is already noticeable in numerous European countries, is likely to gain momentum in the years to come with the development of new communications technologies which could encourage the trend towards integration (for example, digital technology) and the appearance in the media sector of new types of operators who command considerable financial resources (for example, telecommunications firms and the producers of electronic or data-processing equipment). Moreover, this phenomenon is likely to assume an increasingly pan-European dimension as the media sector opens up to the market economy in the central and eastern European countries."
The appendix to Recommendation No. R(99)1 of the Committee of Ministers to Member States on measures to promote media pluralism[17] commences with the words:

"Member States should consider the introduction of legislation designed to prevent or counteract concentrations that might endanger media pluralism at the national, regional or local levels. Member States should examine the possibility of defining thresholds – in their law or authorization, licensing or similar procedures – to limit the influence which a single commercial company or group may have in one or more media sectors. Such thresholds may for example take the form of a maximum audience share or be based on the revenue/turnover of commercial media companies. Capital share limits in commercial media enterprises may also be considered. If thresholds are

17 http://www.coe.int/t/e/human_rights/media/4_documentary_resources/CM/Rec(1999)001

introduced, Member States should take into consideration the size of the media market and the level of resources available in it. Companies which have reached the permissible thresholds in a relevant market should not be awarded additional broadcasting licenses for that market."

The Recommendation on measures to promote media pluralism and the Recommendation on media pluralism and diversity of media content contain the best practices in Europe, which the legislator can safely use as a basis for imposing measures. Imposing the measures suggested in the above Recommendations, and justifying the measures along the lines as suggested by said Recommendations, will almost certainly avoid the risk of violation of Article 10 of the ECHR.

In its 1999 Recommendation on measures to promote media pluralism, the Committee of Ministers listed a number of measures and recommended that the governments of the Member States consider the inclusion of these in their domestic law or practice. The proposed measures in regard to the regulation of ownership of the broadcast and press media include:

- the introduction of legislation designed to prevent or counteract concentrations that might endanger media pluralism at the national, regional or local levels;
- defining thresholds — in the national law or authorization, licensing or similar procedures — to limit the influence which a single commercial company or group may have in one or more media sectors, in the form of, for example, a maximum audience share or based on the revenue/turnover of commercial media companies. Capital share limits in commercial media enterprises may also be considered. If thresholds are introduced, member States should take into consideration the size of the media market and the level of resources available in it. Companies which have reached the permissible thresholds in a relevant market should not be awarded additional broadcasting licenses for that market;
- national bodies responsible for awarding licenses to private broadcasters should pay particular attention to the promotion of media pluralism in the discharge of their mission;
- create specific media authorities invested with powers to act against mergers or other concentration operations that threaten media pluralism or investing existing regulatory bodies for the broadcasting sector with such powers. In the event member States would not consider this appropriate, the general competition authorities should pay particular attention to media pluralism when reviewing mergers or other concentration operations in the media sector;

- specific measures where vertical integration - that is, the control of key elements of production, broadcasting, distribution and related activities by a single company or group - may be detrimental to pluralism.

The exact form regulation takes depends on the size of the level of development of the national, regional or local media market to which they apply.

Moreover, the law should have teeth. The authorities responsible for implementing laws must be vested with sufficient powers to accomplish their role, be independent and operate free from political pressure. In particular, they must have the power to divest media operations where plurality is threatened or unacceptable levels of concentration are reached, and to impose sanctions where required. There should be evidence of these powers being appropriately exercised (i.e. in the case of this Law, Ministry in charge should publish an annual report regarding the efficiency of measures taken to prevent unlawful concentration).[18]

Despite the underpinnings of the ideal of media pluralism having equal application across Europe, national approaches to media concentration differ significantly. Although most European countries have some form of provisions to ensure plural media markets, the methods used as well as the frameworks within which media concentration is regulated vary considerably.[19]

Ensuring ownership transparency and limiting concentration must not limit the freedom of media operations (i.e. editorial independence), free market initiative (the media are at the same time business companies in the market) and the equal and non-discriminatory position of all actors in the market.
Media pluralism is defined by the Media Law as public interest. It is for this purpose that a thorough analysis of current practices of public funds allocation is necessary. It is not sensible that the resources aimed at the printed media should be allocated to the AEM. The preparation of the Strategy of media sector development should clearly determine which content (not publishers) should receive public subsidies, as well as establish an effective supervision of the usage of these funds.

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18 UNESCO, *Media Development Indicators: A Framework for Assesing Media Development*, Intergovernmental Council of the IPDC, Twenty-sixth session, Paris, 26-28 March 2008 (p. 21)

19 David Ward, *Media Concentration and Pluralism: Regulation, Realities and the Council of Europe's Standards in the Television Sector*. (European Commission for Democracy through Law – Venice Commission), Strasbourg, 24.January 2005 (CDL-UDT (2005)004)

Effective implementation of the Law

Given the complexity of supervision in this field, we believe that the supervisory role regarding the Electronic Media Law should rest exclusively with the AEM. In our opinion this would ensure more efficient and more rational supervision over the implementation of the law.
The last decade has seen the AEM build an effective professional and technical base for enforcing supervision over the legislation implementation. Instead of state support of the independence and efficiency of AEM, it has taken a step backwards with the passing of the Law on Public Administration – it has pushed the regulatory body further under the influence of politics. Passing of the new legislation should entail the establishment of a dialogue between the legislator and the regulator and the highest possible degree of consideration for their experiences and suggestions for the improvement of the existent regulatory framework.

Directive EU 2018/1808 (Article 30)

1.Each Member State shall designate one or more independent national regulatory authorities, bodies or both.
2.Member States shall ensure that national regulatory authorities or bodies exercise their powers impartially and transparently and in accordance with objectives of this Directive, in particular media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition. National regulatory authorities or bodies shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law. This shall not prevent supervision in accordance with national constitutional law.
3.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.

Additional comments

Article 138
The powers of AEM in performing supervision should be defined in detail.

Article 139
The option of AEM imposing fines, particularly for the violation of programming standards, should be considered (at the moment, the penalty can be a warning, suspension or revocation of the license).

Article 143 para 1
In case of a complaint over the AEM decision taken as part of the supervision process, the provision that now allows the postponement of the decision should be amended.

Media literacy

An ever greater public's dependence on the sources of information that the abiding legislation does not recognize as media requires special measures for efficient enforcing of media literacy. These measures must be co-ordinated among different ministries, they must include all stakeholders in media production, distribution and consumption, and they must take into consideration the importance of the profession in the field as well as the importance of professionals' associations. We stress specifically that the AEM has performed one of the rare researches in the region on the topic of the situation of media consumption and literacy, which can be the basis for the passing of adequate legal standing.

Encouragement of co-regulation and self-regulation

The well proposed starting point can be found in the new Draft Media Law.

3. Conclusions and general recommendations

The Electronic Media Law should provide adequate solutions that would ensure financial and editorial independence of local public service broadcasters (local public services). The electronic media and AVMS are subject to special regulation, where the important role is played by an independent and professionally trained regulatory body which has the full powers to supervise the implementation of the law. The existing legislative solutions do not eliminate all incongruities with the Electronic Media Law potentially leading to the ineffective implementation of the provisions, encroachment on the rights and interests of users as well as publishers/broadcasters.

Relevant bodies in Montenegro should:

1. Implement the provisions of the Directive EU 2018/1808 in an appropriate manner.
2. Ensure all mechanisms (general legislative framework, appointment, composition and functioning, financial independence, granting of licenses and accountability) needed for the independent operation of the Agency for Electronic Media.
3. Ensure all mechanisms needed for the independent operation of public broadcasting services.
4. Ensure all mechanisms for effective implementation of the law.
5. Ensure all mechanisms for sustainable growth of media and AVMS sector.
6. Ensure effective protection of freedom of expression, freedom of media, consumer's rights and public interest.
7. Ensure that the provisions in the Electronic Media Law are harmonized with those in the Media Law (draft version of the new Law is already prepared), Digital Broadcasting Law, Law on public broadcasting services of Montenegro (draft version of the Law is in public discussion) and Law on Electronic Communication.
8. Prepare a Strategy of media and AVMS sector in Montenegro.