

INTERIM JOINT OPINION ON THE DRAFT LAW OF THE KYRGYZ REPUBLIC ON THE MASS MEDIA (AS OF 13 MAY 2023)

Kyrgyz Republic

This legal analysis was prepared jointly by the Office of the OSCE Representative on Freedom of the Media and by the OSCE Office for Democratic Institutions and Human Rights. This Joint Opinion has benefited from contributions made by Dr. Kanstantsin Dzehtsiarou, Professor in Human Rights Law and Associate Dean for Research and Impact, School of Law and Social Justice, University of Liverpool; Ms. Nevena Krivokapić Martinović, Attorney at Law specialized on media, intellectual property and IT law; and Ms. Tamara Otiashvili, Senior Legal Expert in Human Rights and Democratic Governance.

Based on an unofficial English translation of the Draft Law commissioned by the OSCE Office for Democratic Institutions and Human Rights.



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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The right to freedom of expression and to receive and impart information is a key human right because of its fundamental role in underpinning democracy. It is enshrined in several key human rights documents including the International Covenant on Civil and Political Rights (ICCPR) and OSCE human dimension commitments. The full enjoyment of this right, from which freedom of the media is derived, is one of the foundations of a free, democratic, tolerant and pluralist society in which individuals and groups with different backgrounds and beliefs can voice their opinions, while bringing visibility to marginalized or underrepresented groups. Any restriction on this right must meet the strict test under Article 19(3) of the ICCPR, namely that it must be provided by law and be necessary for respect of the rights or reputations of others or for the protection of national security or of public order (*ordre public*), or of public health or morals. In addition, such restrictions must not be discriminatory.

ODIHR and the Office of the Representative on Freedom of the Media welcome the request from the Ombudsperson of the Kyrgyz Republic to review the Draft Law of the Kyrgyz Republic on the Mass Media (hereinafter “Draft Law”) and note a number of positive features of the Draft Law, particularly with respect to the prohibition of censorship and of media monopolization as well as guarantees of journalistic freedoms. On the other hand, while the Draft Law declares its adherence to the freedom of expression, a number of provisions raise serious concerns, as they may not correspond to internationally recognized freedom of expression standards and good practice in the OSCE region.

Most notably, the regulatory system contemplated by the Draft Law fails to take into account the differences between the print and broadcast sectors and the Internet, in line with international recommendations and good practices. In particular, the press and online media should be excluded from the scope of compulsory registration; a *voluntary* registration or notification procedure for press and online outlets could be proposed instead, which could provide for additional benefits for the registered media outlets. Moreover, certain content restrictions proposed in the Draft Law are problematic from the point of view of freedom of expression since they do not appear to pursue a legitimate aim and/or are not formulated in a clear and precise manner. In particular, the use of overbroad terms such as “extremism” or the prohibition of the promotion of “same-sex marriage” may undermine the exercise of the right to freedom of expression and to receive and impart information, as well as the principle of non-discrimination. Generally, states should refrain from imposing undue and excessive limitations on media content. Additionally, the Draft Law includes provisions that could restrict the media’s ability to operate independently and investigate important issues by imposing stringent registration requirements on all mass media outlets. The Draft Law also does not introduce an independent media regulatory body; instead media regulation is fully concentrated under government bodies. Lastly, the proposed system of sanctions, which may lead to suspension or termination imposed on the

basis of vague and broad grounds, is likely to produce a chilling effect on media freedom.

More specifically, ODIHR and the Office of the Representative on Freedom of the Media make the following recommendations to ensure the compliance of the Draft Law with international human rights standards and OSCE human dimension commitments:

- A. to more strictly circumscribe the scope of the Draft Law by more narrowly defining the key terms and ensuring that the law only regulates *professional* mass media outlets, thus excluding from its scope the likes of non-professional publications, personal blogs and personal social media pages; [para. 22]
- B. to reconsider Article 33 on journalists' duties entirely with a view to promote self-regulation of journalists and media while ensuring that the right not to disclose journalists' sources is framed as a positive right; [para. 25]
- C. to make the accreditation process for journalists simple, transparent and inclusive, while the rules should be publicly disclosed and the grounds for refusal clearly defined with a possibility of effective appeal; [para. 28]
- D. to narrow the scope of the content restrictions included in Article 5 of the Draft Law, including by:
 1. removing the reference "extremist materials" in Article 5(1)(3) and the prohibition of the promotion of "same-sex marriages" in Article 5(1)(4); [paras. 34 and 39]
 2. more clearly and narrowly circumscribing the definition of incitement to terrorism; [para. 35]
- E. to specify in Article 5(1)(6) that restrictions are only permissible if, in individual cases, the disclosure of certain data or information threatens to cause substantial harm to the protected interests, and if the harm outweighs the public interest in disclosure, while ensuring that any prohibition aimed at protecting honour or dignity does not apply to statements intended as part of a good faith discussion or public debate on a matter of religion, education, scientific research, politics or some other issues of public interest; [para. 44]
- F. to re-assess the restrictions in Article 23(5) concerning media ownership and to narrow the scope of the restriction of media ownership by foreign citizens to what is considered justified and proportionate, while reconsidering the blanket prohibition concerning media ownership by dual citizens (Article 23(5)) and the system of prior permission to import and distribute foreign periodicals (Article 49(4)); [paras. 50-51]
- G. Regarding registration:
 1. apart from the licensing or registration linked to the use of scarce infrastructure technologies, the registration requirement should be reconsidered to ensure that the contemplated procedure amounts to a mere notification and not a prior authorization; [paras. 57 and 62]

2. to adopt a graduated and differentiated approach to media governance depending on the type of media to be regulated while excluding the press and online media from the scope of compulsory registration and ensuring that the registration procedure only requires submission of strictly necessary and relevant information/documents; [paras. 63-64]
- H. to significantly extend, in Article 21, the period of inactivity which may trigger suspension or termination, for example to one year or more, while clarifying the grounds for termination listed in Article 29 and ensuring that suspension and termination of mass media is treated as a sanction of last resort and is proportionate to the violations that were committed by the said media; [paras. 65-70]
- I. to consider establishing a separate independent media regulatory body, which would be effective and independent both in law and in practice; [para. 76]
- J. to provide for an exemption of liability for a person disclosing classified information when public interest in knowing classified information outweighs possible harm resulting from its disclosure, unless they committed fraud or another crime to obtain the information; [para. 80] and
- K. to consider excluding references to the state media from the Draft Law, while considering the possibility of transformation of all state media into genuine public service media and developing and adopting specific legislation to this end. [para. 82]

These and additional recommendations are included throughout the text of this Opinion, highlighted in bold.

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I. INTRODUCTION

1. On 2 May 2023, the *Akyikatchy* (Ombudsperson of the Kyrgyz Republic), sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) a request for a legal review of the Draft Law of the Kyrgyz Republic on the Mass Media (hereinafter “the Draft Law”).
2. On 10 May 2023, ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of these draft amendments with international human rights standards and OSCE human dimension commitments. In light of the subject matter, ODIHR invited the OSCE Representative on Freedom of the Media (RFoM) to prepare this legal review jointly.
3. The Draft Law under review is the fifth version of the Draft Law as released by the Presidential Administration on 13 May 2023. Given that the Draft Law may be subject to further amendments in the weeks or months to come before adoption, ODIHR and the OSCE RFoM decided to prepare an Interim Joint Opinion and reserve themselves the possibility of preparing a Final Joint Opinion, possibly on a revised version of the Draft Law following public discussions. Thus, the content of this Interim Joint Opinion is without prejudice to any future written analysis and recommendations that ODIHR and the OSCE RFoM may prepare in the future.
4. This Interim Joint Opinion was prepared in response to the above request. ODIHR and RFoM conducted this assessment within their mandate to assist the OSCE participating States in the implementation of their OSCE commitments.

II. SCOPE OF THE INTERIM JOINT OPINION

5. The scope of this Interim Joint Opinion covers only the Draft Law submitted for review. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating freedom of expression, access to information and the media in the Kyrgyz Republic.
6. The Interim Joint Opinion raises key issues and provides indications on areas of concern. In the interest of conciseness, it focuses more on provisions that require amendments or improvements rather than on the positive aspects of the Draft Law. The ensuing legal analysis is based on international and regional human rights standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Interim Joint Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

7. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*¹ (hereinafter “CEDAW”) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*² and commitments to mainstream gender into OSCE activities, programmes and projects, the Joint Opinion integrates, as appropriate, a gender and diversity perspective.
8. This Interim Joint Opinion is based on an unofficial English translation of the Draft Law commissioned by ODIHR, which is annexed to this document. Errors from translation may result. A translation of the Opinion into Russian has been commissioned, but in case of discrepancies, the English version shall prevail.
9. In view of the above, ODIHR and the OSCE RFoM would like to stress that this Interim Joint Opinion does not prevent ODIHR and the OSCE RFoM from formulating additional written or oral recommendations or comments on respective subject matters to the Kyrgyz Republic in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

10. The right to freedom of expression and to receive and impart information is a human right crucial to the functioning of a democracy and is central to achieving other human rights and fundamental freedoms. The full enjoyment of this right is one of the foundations of a free, democratic, tolerant and pluralist society in which individuals and groups with different backgrounds and beliefs can voice their opinions, while bringing visibility to marginalized or underrepresented groups. While underlying the importance of protecting the right to free expression and access to information, it should also be balanced with the protection of reputation and legitimate public interest as stipulated by the international human rights treaties.
11. The right to freedom of expression and to receive and impart information is enshrined in Article 19 of the Universal Declaration of Human Rights (UDHR).³ Article 19 of the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR) also provides that “*everyone shall have the right to hold opinions without interference*” and that “*everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*”⁴ Article 19 of the ICCPR establishes the principle of neutrality by noting that these rights can be exercised regardless of the medium. In the General Comment No. 34 on Article 19 of the ICCPR, the UN Human Rights Committee further elaborates that “[f]reedom of expression is a necessary condition for the realization of

¹ [UN Convention on the Elimination of All Forms of Discrimination against Women](#) (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. The Kyrgyz Republic acceded to the Convention on 10 February 1997.

² See [OSCE Action Plan for the Promotion of Gender Equality](#), adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

³ See the [Universal Declaration of Human Rights \(UDHR\)](#).

⁴ See the [UN International Covenant on Civil and Political Rights](#) (ICCPR), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Kyrgyz Republic acceded to the Convention on 7 October 1994.

the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.” The scope of Article 19 of the ICCPR embraces even expression that “*may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20*”.⁵ The right to freedom of expression is not absolute and it can be limited under specific circumstances. Restrictions on the right to freedom of expression must be compatible with the requirements set out in Article 19(3) of the ICCPR, that is, they must be provided by law (test of legality), pursue one of the legitimate aims listed exhaustively in the text of Article 19(3)⁶ (test of legitimacy), be necessary and proportionate, and constitute the least intrusive measure among those effective enough to reach the designated objective (test of necessity and proportionality). In addition, pursuant to Article 26 of the ICCPR, they must be non-discriminatory. The requirement of legality of restrictions to freedom of expression means that the law concerned must be precise, certain and foreseeable, and must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.⁷ Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need(s) on which they are predicated.

12. While the Kyrgyz Republic is not a Member State of the Council of Europe (CoE), it is a member of the European Commission for Democracy through Law of the CoE (Venice Commission), and hence, Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR),⁸ the case law of the European Court of Human Rights in the field of freedom of expression and freedom of the media, and other CoE instruments are also of relevance for the preparation of this Joint Opinion and may serve as useful reference documents from a comparative perspective.⁹ In particular, for the purposes of media regulation, a number of CoE Recommendations are highly relevant, especially the *Recommendation on a New Notion of Media*¹⁰ and *Recommendation on Principles for Media and Communication Governance*.¹¹
13. At the OSCE level, there are a number of commitments in the area of freedom of expression, access to information and freedom of the media. In particular, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE in 1990 (1990 Copenhagen Document) proclaims the right to everyone to freedom of expression and states that “[t]his 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.”¹² OSCE

⁵ See the UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 11.

⁶ i.e., (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.

⁷ See the UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 25, which states: “a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.” See also, e.g., Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, para. 58. In addition, see European Court of Human Rights, *The Sunday Times v. the United Kingdom (No. 1)*, no. 6538/74, where the Court ruled that “the law must be formulated with sufficient precision to enable the citizen to regulate his conduct, by being able to foresee what is reasonable and what type of consequences an action may cause.”

⁸ See https://www.echr.coe.int/Documents/Convention_ENG.pdf (ECHR) entered into force on 3 September 1953.

⁹ See <Media - Freedom of Expression (coe.int)>.

¹⁰ See CoE *Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media* (adopted by the Committee of Ministers on 21 September 2011 at the 1121st meeting of the Ministers’ Deputies).

¹¹ See CoE *Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance* (adopted by the Committee of Ministers on 6 April 2022 at the 1431st meeting of the Ministers’ Deputies).

¹² See CSCE/OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (Copenhagen, -29 June 1990).

participating States also reaffirmed “*the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinion*” in paragraph 24 of the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991 Moscow Document).¹³ Moreover, in 1994, OSCE participating States reaffirmed that “*freedom of expression is a fundamental human right and a basic component of a democratic society*” committing to “take as their guiding principle that they will safeguard this right” and emphasizing in this respect, that “independent and pluralistic media are essential to a free and open society and accountable systems of government”.¹⁴

14. In its Decision 3/18, adopted on 7 December 2018, the OSCE Ministerial Council called upon OSCE participating States to “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 (...).”¹⁵
15. The OSCE RFoM is also specifically mandated to observe relevant media developments in all OSCE participating States and to advocate and promote full compliance with OSCE principles and commitments regarding freedom of expression and free media. The OSCE RFoM together with the freedom of expression mandate-holders from the UN, the African Commission on Human and Peoples’ Rights (African Union) and the Organization of American States (together jointly referred to as “the International Mandate-Holders on Freedom of Expression”), have adopted a series of Joint Declarations, which offer practical guidance covering current universal challenges to freedom of expression and freedom of the media.¹⁶ Importantly, the *2023 Declaration on Media Freedom and Democracy* outlines the broader legal and practical framework necessary to ensure that media can perform their crucial watchdog function in a democratic society.¹⁷ A number of reports and guidance documents published by the OSCE RFoM, including the [Special report on legal harassment and abuse of the judicial system against the media](#) (2021), [Safety of Journalists Guidebook](#) (3rd ed., 2020) and [Resource Guide on the Safety of Female Journalists Online](#) (2020), are also of relevance for the present Joint Opinion.

2. BACKGROUND

16. The development of the Draft Law was initiated by the Presidential Administration of the Kyrgyz Republic in September 2022 with a view to replace the existing 1992 Law on Mass Media. On 28 September 2022, the first Draft was posted on the website of the Cabinet Ministers for public consultations. On 7 December 2022, the Presidential

¹³ See CSCE/OSCE, [Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE](#), (Moscow, 3 October, 1991).

¹⁴ See CSCE/OSCE, [CSCE Budapest Document 1994, Towards a Genuine Partnership in Era](#) (Budapest, 21 December 1994), Chapter VIII, para. 36.

¹⁵ See [OSCE Ministerial Council Decision No 3, Safety of Journalists](#), 12 December 2018, p. 3.

¹⁶ See UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur and the African Commission Special Rapporteur on Freedom of Expression and Access to Information (hereinafter “International Mandate-Holders on Freedom of Expression”), [Joint Declarations](#).

¹⁷ See International Mandate-Holders on Freedom of Expression, *2023 Joint Declaration on Media Freedom and Democracy*.

Administration created a working group with the participation of representatives of the state, civil society and the media. From the information made available to ODIHR and OSCE RFoM, there appears that the comments/contributions received on the Draft Law are not publicly available and there is no clear indication to which extent such input received from the media community, civil society organizations, lawyers and others have been taken into consideration and have been reflected in the revised Draft Law. In this respect, as a good practice to ensure an open, transparent, inclusive and participatory law-making process, the authorities responsible for organizing consultations should provide meaningful and qualitative feedback in due time on the outcome of every public consultation, including clear justifications for including or not including certain proposals.¹⁸ On 15 May 2023, a new (fifth) version of the Draft Law was posted for further consultations with feedback to be received until 15 June 2023.

17. In September 2020, after the third Universal Periodic Review (UPR) cycle, the Kyrgyz authorities supported the earlier UPR recommendation to “*strengthen democratic institutions by protecting freedom of expression and media freedom, both online and offline*” and to “*create an enabling environment for media freedom and freedom of opinion and expression, both online and offline, including by bringing the appropriate national laws into full compliance with the [ICCPR] and international human rights obligations*”.¹⁹ In its latest Concluding Observations on the third periodic report of Kyrgyzstan, the UN Human Rights Committee specifically recommends to “[r]eview the national legal and institutional framework that may unduly restrict media freedom, including the Law on the National Television and Radio Broadcasting Corporation of the Kyrgyz Republic, and the bill on the media, to ensure their compliance with the provisions of article 19 of the Covenant as expounded by the Committee in its general comment No. 34 (2011) on the freedoms of opinion and expression”.²⁰ Finally, it is worth emphasizing that on 20 June 2023, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression issued a letter expressing a number of concerns regarding the Draft Law, including with respect to the scope of application of the Draft Law, the mandatory registration of all forms of mass media, restrictions on foreign media and of media ownership, and the accreditation and regulation of journalists’ work.²¹

3. SCOPE OF THE DRAFT LAW AND DEFINITIONS

18. At the outset, it should be noted that the Draft Law includes a number of provisions that are in principle positive. This includes the prohibition of censorship (Articles 1, 8 and 53) and of media monopolization (Article 14); the prohibition of unlawful hindrance or interference with media/journalistic activity, including by a media founder(s) (Article 4); the prohibition of unlawful obstruction to the dissemination of media materials (Article 1(3)); the state’s commitment to protect journalists’ honour, dignity, health, life, and property (Article 33(4)); as well as special provisions on access to information

¹⁸ See e.g., ODIHR and Venice Commission, *Joint Guidelines on Freedom of Association*, CDL-AD(2014)046, para. 22. See also Venice Commission, *Rule of Law Checklist*, [CDL-AD\(2016\)007](#), section II.A.5, as well as paragraph 5.8 of the 1990 OSCE Copenhagen Document and para. 18.1 of the 1991 OSCE Moscow Document. See also *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (2015) prepared by civil society experts with the support of the OSCE Office for Democratic Institutions and Human Rights, para. 16.

¹⁹ In 2023, the Kyrgyz Republic was encouraged to submit a voluntary mid-term report on the implementation of the 2020 recommendations. The next UPR review cycle is due in 2025.

²⁰ See UN Human Rights Committee, Concluding Observations on the third periodic report of Kyrgyzstan, CCPR/C/KGZ/CO/3, 9 December 2022, para. 46 (d).

²¹ See UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, [Letter OL KGZ 3/2023](#), 20 June 2023.

by journalists and the media (Article 31). However, although the Draft Law declares its adherence to freedom of expression standards, there are a number of provisions that raise serious concerns, as further discussed in more detail below.

3.1. Definition of Mass Media Outlets

19. The Draft Law aims at establishing certain overarching regulatory structures that would apply to all types of mass media, from broadcasting to online outlets. More specifically, Article 2(2) notes that the law would apply to “*the mass media established within the Kyrgyz Republic and to those established outside the Kyrgyz Republic only to the extent that it pertains to the distribution of their products within the territory of the Kyrgyz Republic*”. The wording of this provision is vague with no other indication of connecting factors than the mere accessibility of foreign mass media outlets. Such an approach is considered to run against good practice of jurisdictional self-restraint and can easily either prove ineffective (when the country of receipt lacks the means to effectively exercise jurisdiction) or push international media outlets to comply with the most restrictive set of national rules (the so-called race to the bottom effect), to the detriment of the freedom to impart and receive information. In the OSCE Charter for European Security (Istanbul, 1999), OSCE participating States reaffirmed “*the importance of (...) the free flow of information as well as the public’s access to information [and] commit ourselves to take all necessary steps to ensure the basic conditions for (...) unimpeded transborder and intra-State flow of information*”.²² The CoE recommends that, in principle, states should “*only exercise jurisdiction over foreign materials that are not illegal under international law in limited circumstances, notably when there is a clear and close nexus between the materials or the disseminator and the state taking action.*”²³ **It is recommended that the Draft Law be amended to specify and limit the jurisdictional coverage of the law, clarifying that it only applies to mass media outlets established in the Kyrgyz Republic, while at the same time ensuring that the distribution or accessibility of foreign materials distributed that are illegal under international law can be halted** (see paragraph 32 *infra*).
20. Article 3(2) defines a “mass media outlet” as “*a periodical printed publication, news agency, television channel, radio channel, television program, radio program, video program, newsreel program, other form of periodical distribution of mass information under a permanent name (title), including websites on the Internet telecommunications network.*” According to Article 3(14), an “online mass media outlet” is defined as “*an electronic publication created with the use of specialized hardware and software tools and intended for distribution of mass information in electronic digital form through publicly accessible telecommunications networks, which has a permanent name, current number, and is updated at least once every six months.*” A “website” is defined in Article 3(19) as “*an electronic platform created using specialized technical and software tools, representing an individual or a legal entity in the Kyrgyz Republic, where the owner can publish information with the intention of reaching a wide audience.*” Article 3(21) defines the Internet as “*a global information and telecommunication network that connects information systems and telecommunication networks of different countries through a global address space based on the use of the Internet protocol and a data transfer protocol.*” It is not clear why the Draft Law, which focuses on media governance, attempts at defining such general terms as Internet or

²² See OSCE, *Istanbul Document 1999* (Charter for European Security: III. Our Common Response), para. 26.

²³ See *the rule of law on the Internet and in the wider digital world*, Issue paper published by the Council of Europe Commissioner for Human Rights, 2014, page 11.

website. Furthermore, from the text of the Draft Law, it is equally unclear whether the government intends to consider every website on the Internet as mass media, which is likely to be not only ineffective but manifestly inconsistent with media freedom standards. **These definitions are also quite broad and may create legal uncertainty. Thus, it is recommended that the definitions in Articles 3(19) and 3(21) be removed.**

21. Article 9 of the Draft Law provides some clarity regarding the scope of the law by stating that “[t]he mass media encompass periodical printed publications, television and radio broadcasts, websites on the Internet telecommunications network and other electronic media, as well as news agencies that are registered as mass media and engage in the collection, processing, and distribution of information-based communications and materials.” However, the reference to “collection, processing, and distribution of information-based communications and materials” does not sufficiently narrow down the definition and any post on social media can be considered as a part of the “distribution of information-based communications and materials”. Overall, **these definitions are broad, do not narrow down the types of media falling under the scope of the law, and give almost unlimited discretion to the administrative bodies entrusted with state registration and regulation of media to decide on the extent of application of the law.**²⁴ In addition, **if read in conjunction with the registration requirements for mass media outlets and related sanctions in case of non-compliance** (see Section 5 *infra*), **the lack of legal certainty may potentially result in arbitrary interpretation and inconsistent application.**
22. While the requirement to register media can be justified in some cases, it should not be required for example for personal blogs as it would limit the right of freedom of expression, as provided by international instruments. Online content is subject to the same human rights regime as traditional media.²⁵ As such, all forms of audio-visual material, as well as electronic and Internet-based modes of expression are protected by the right to freedom of expression.²⁶ Any regulation responding to the exigencies of contemporary media realities need to continuously guarantee freedom of expression and protect it at the highest possible level with only narrowly defined, necessary and proportionate restrictions permitted. The UN Human Rights Committee affirmed “*that the same rights [...] offline must also be protected online, in particular freedom of expression*” and call for “*adopting national Internet-related public policies that have the objective of universal access and enjoyment of human rights*”.²⁷ Explicitly limiting the scope of the law to professional mass media outlets would help ensure better safeguards for Internet users’ freedom of expression and would ensure that the Draft Law does not impose undue restrictions and burden, in line with the general principle that fundamental rights apply equally offline and online. **The Draft Law should specify that it aims to only regulate professional mass media outlets, by excluding from its scope the likes of non-professional publications, personal blogs and personal social media pages.**
23. Moreover, the scope of the Draft Law and definitions referred to above create a situation of legal uncertainty, which may lead to an inconsistent application of the law. In this

²⁴ See the [Venice Commission Rule of Law Checklist](#), p. 17.

²⁵ See UN Human Rights Council, [2012 Resolution 20/8 on the Promotion, Protection and Enjoyment of Human Rights on the Internet](#), A/HRC/RES/20/8, 16 July 2012, para. 1, which states that the “*same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice.*”

²⁶ See the UN Human Rights Committee, [General Comment No. 34](#) on Article 19 of the ICCPR, CCPR/C/GC/34, para. 12.

²⁷ See the [UN Human Rights Committee Resolution](#) on the promotion, protection and enjoyment of human rights on the Internet, A/HRC/47/L.22, para. 15.

respect, the CoE recommendation on a new notion of media and recommendation on principles for media and communication governance may offer useful guidance as they provide indicators to capture the multiform reality of the media industry and develop a regulatory framework with different levels of duties and responsibilities, proportionate to the size and power of the different outlets.²⁸

RECOMMENDATION A.

To more strictly circumscribe the scope of the Draft Law by more narrowly defining the key terms and ensuring that the law only regulates *professional* mass media outlets, by excluding from its scope the likes of non-professional publications, personal blogs and personal social media pages.

3.2. Status and Duties of a Journalist

24. Article 3(9) of the Draft Law defines a journalist as “*a person who edits, creates, collects, or prepares communications and materials for the editorial office of a registered mass media outlet and is associated with it through employment or other contractual relations or is engaged in such activities upon its authorization.*” Article 30 further defines the status of a journalist as “*full-time employees of editorial offices*” and “*authors who are not connected with the editorial office by employment or other contractual relations, but are recognized by it as its freelance authors or correspondents in performing assignments of the editorial office.*”
25. Article 33 of the Draft Law lists a number of duties of a journalist, among others, adhering to the charter, verifying accuracy of information, seeking and maintaining the confidentiality of information, as well as declining or accepting an assignment. **All journalistic duties mentioned in this article should be subject to self-regulation and/or contractual relations between journalists and media outlets rather than subject to legal regulation.** Attempting at regulating this broad spectrum of duties or professional standards may also turn out to be ineffective in practice since it is unlikely that state apparatus will be able to secure sufficient capacity to monitor and ensure compliance. In this respect, it is important to underline that the OSCE participating States encourage “*the adoption of voluntary professional standards by journalists, media self-regulation and other appropriate mechanisms for ensuring increased professionalism, accuracy and adherence to ethical standards among journalists.*”²⁹ It is generally recognized that by promoting self-regulation and professional standards, editorial freedom and media independence can be enhanced, while also enhancing the plurality of the media and diversity of voices, issues and opinions.³⁰ Of note, the protection of journalistic sources of information mentioned in Article 33, should be formulated as a positive right rather than as a negative duty. Indeed, journalists’ right not to disclose their sources is an essential pillar of press freedom and should be strictly protected.³¹ **It is recommended that Article 33 is reconsidered entirely while seeking to promote self-regulation of journalists and media, while ensuring that the right**

²⁸ See [Council of Europe Committee of Ministers, ‘Recommendation CM/Rec\(2011\)7 on a new notion of media’](#), adopted on 21 September 2011 and CoE Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance (adopted by the Committee of Ministers on 6 April 2022 at the 1431st meeting of the Ministers’ Deputies).

²⁹ See e.g., OSCE, [MC Decision No. 13/06 on Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding](#); and [MC Decision No. 10/07 on Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding](#).

³⁰ See e.g., OSCE RFoM, [Safety of Journalists Guidebook](#) (3rd ed., 2020), p. 65.

³¹ See e.g., OSCE RFoM, [Safety of Journalists Guidebook](#) (3rd ed., 2020), p. 65. See also e.g., as a comparison, European Court of Human Rights, [Goodwin v. United Kingdom \[GC\]](#), no. 17488/90, 27 March 1996, para. 39.

not to disclose journalists' sources is framed as a positive right (see also Sub-Section 6 below on self-regulation of the mass media more generally).

26. It is also important to emphasize that the rights of journalists, and protection afforded by international human rights standards to journalists, should not be applicable only to journalists affiliated with mass media outlets, either through employment or other contractual relationship (or who are recognized by the editorial office as its freelance authors or correspondents in performing assignments of the editorial office). In this respect, such protection should also apply to other actors who carry out “journalistic function”. This could be a variety of other entities or individuals deserving protection, including non-governmental organizations, human rights defenders but also bloggers and popular users of the social media, who may be also assimilated to “public watchdogs” insofar as the protection afforded by the right to freedom of expression is concerned.³² The UN Human Rights Committee makes clear that states’ responsibilities to protect journalists, and those who perform the function of journalism are not restricted to full-time professional journalists or to those to whom officials have granted recognition or favour, but also to bloggers and others who produce and publish information in public interest in print, online, or elsewhere.³³ Similarly, at the CoE level, the term “journalist” is understood as any natural or legal person who is regularly or professionally engaged in collecting and disseminating information to the public via any means of mass communication.³⁴ This allows for a broader understanding of persons who engage in journalistic work for the purpose of protecting them against infringement of their freedom of opinion and expression as enshrined in Article 19 of the ICCPR.

RECOMMENDATION B.

To reconsider Article 33 on journalists’ duties entirely with a view to promote self-regulation of journalists and media while ensuring that the right not to disclose journalists’ sources is framed as a positive right.

3.3. Accreditation of Journalists

27. According to Article 32 of the Draft Law, only journalists working for those mass media outlets, which are registered in accordance with the procedure established by the law, shall be subject to accreditation (Article 32(1)), and the state and local self-government bodies shall accredit the designated journalists in accordance with the “*accreditation rules established by these bodies*” (Article 32(2)). This Article neither imposes any standards upon which the accreditation bodies should establish their accreditation rules, nor contains any mention of legal remedy in case of refusal of accreditation.
28. In principle, accreditation should not be used as an instrument to limit the media’s right to access information, its key purpose is rather technical – to ensure that there is enough space at a given venue for the media wishing to attend a press-conference or similar

³² See e.g., the [Inter-American Declaration of Principles on Freedom of Expression](#), approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000; and the European Court of Human Rights, [Magyar Helsinki Bizottság v. Hungary](#), App. no. 18030/11, 8 November 2016, para. 166. See also e.g., ODIHR, [Urgent Comments on the Draft Criminal Offences against Honour and Reputation in the Republika Srpska](#) (11 May 2023), para. 55.

³³ See the UN Human Rights Committee, [General Comment No. 34](#) on Article 19 of the ICCPR, CCPR/C/GC/34, para. 44.

³⁴ See e.g., the [Council of Europe, Recommendation No. R \(2000\) 7](#), 8 March 2000, under “definitions”.

considerations.³⁵ In this regard, it is concerning that public bodies or institutions can enforce their own accreditation rules without providing for necessary safeguards against the possible abuse aiming to limiting media’s access to information. As emphasized by the OSCE, “[t]he guidelines for issuing accreditation should be drawn up with the aim to promote pluralism, should be transparent and available to the public, should be applied impartially and without arbitrary exceptions. Refusal of accreditation should be accompanied by the right on the part of the applicant to dispute the reasons for the refusal.”³⁶ **While the Draft Law should not in itself regulate the accreditation procedure, it should require the accreditation process to be simple, transparent and inclusive, while the rules should be publicly disclosed and the grounds for refusal should be clearly defined with a possibility of effective appeal.**

29. Article 3(17) defines the accreditation authority as “a state body, local government body, public association, organization, or institution.” Respectively, Article 32 excludes third-party organizations from its guidance on the accreditation process. **It is recommended to eliminate the inconsistency between Article 3(17) and Article 32 of the Draft Law on the accrediting authorities.**
30. Lastly, from the text of the Draft Law, it remains somewhat unclear whether 1) only a journalist of a registered mass media outlet could be accredited and thus, receive access to an event, or 2) accreditation is meant not to regulate access but to provide additional benefits to the accredited journalists (like receiving early notifications about upcoming events or transcripts of meetings) while other (unaffiliated) journalists can still access events without accreditation. In the first case scenario, any unaffiliated journalists will be unduly impacted in their ability to carry out their professional activities and to access information. Then, this provision, coupled with the registration requirements (see Sub-Section 5 *infra*), which gives certain discretionary powers to the state authorities, could lead to an arbitrary approval of accreditation. This goes against the principles of media diversity, and the OSCE recommendation, which states that “[a]ccreditation should not be the basis on which governmental bodies decide whether to allow a particular journalist to attend and cover a public event.”³⁷ **It is recommended that unaffiliated journalists should also have the right to be accredited.**

RECOMMENDATION C.

To make the accreditation process for journalists to be accessible, transparent and inclusive, while the rules should be publicly disclosed and the grounds for refusal clearly defined with a possibility of effective appeal, while ensuring that unaffiliated journalists also have the right to be accredited.

4. LIMITATIONS TO FREEDOM OF EXPRESSION

31. The Draft Law provides for an extensive range of content restrictions, some of which *prima facie* do not meet the requirements of Article 19 of the ICCPR and Article 10 of

³⁵ See the UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 44, which states that “Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events”.

³⁶ OSCE, *Special Report: Accreditation of Journalists in the OSCE area - Observations and Recommendations*, 26 October, 2006, p. 5.

³⁷ *Ibid.* (Special Report: Accreditation of Journalists in the OSCE area - Observations and Recommendations.), page 7.

the ECHR, especially those formulated in extremely vague and overbroad terms. Among the most concerning are certain restrictions included in Article 5 on the “*Inadmissibility of abusing the freedom of expression, freedom of speech and press, and the right to receive and disseminate information*”, which contains a number of limitations on the freedom of expression of mass media.

32. These limitations trigger concerns with regards to freedom of expression. The overall goal of democratic media laws should be to establish proper guarantees of media freedom and safeguards against possible violations of this freedom by the state and/or private persons. Restrictions of freedom of expression applicable to the media shall be compliant with international standards and should not be broader in scope than those of a general nature, applicable to everyone. At the same time, acknowledging that Article 24(3) of the Criminal Code of the Kyrgyz Republic³⁸ excludes the possibility for legal entities to be subject to criminal liability, to prevent a legal gap, it is important for the media law to include an exhaustive list of grounds for potential media liability and related sanctions, providing that they are in line with international human rights standards. In this respect, it should be underlined that international human rights law recognizes a limited number of types of expression which States must prohibit or render punishable (by law),³⁹ providing that the legal provisions are strictly interpreted in accordance with international freedom of expression standards, especially when dealing with “incitement”.⁴⁰ Outside of these very limited and narrowly defined exceptions, states should as a default refrain from prohibiting expression.

³⁸ See <[Уголовный Кодекс Кыргызской Республики от 28 октября 2021 года № 127 \(с изменениями и дополнениями по состоянию на 22.06.2023 г.\)](#), [Уголовный Кодекс Кыргызской Республики от 28 октября 2021 года № 127 \(с изменениями и дополнениями по состоянию на 22.06.2023 г.\) - ПАРАГРАФ-WWW \(zakon.kz\)](#)>.

³⁹ These include: “*direct and public incitement to commit genocide*”, which should be punishable as per Article III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide to which the Kyrgyz Republic acceded on 5 September 1997; the “*propaganda for war*” and the “*advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*”, which should be prohibited as per Article 20 (1) and (2) of the ICCPR (see also OSCE RFoM, [Non-Paper on Propaganda and Freedom of the Media](#) (2015), especially with reference to propaganda for war and hatred that leads to violence and discrimination); “*all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as [...] incitement to [acts of violence] against any race or group of persons of another colour or ethnic origin*”, which should be an offence punishable by law according to Article 4 (a) of the ICERD; “*public provocation to commit acts of terrorism*”, when committed unlawfully and intentionally which should be criminalized (see UN Security Council [Resolution 1624 \(2005\)](#)); “*child sexual exploitation material*” which shall be criminalized as per Articles 2 (c) and 3 (1) (c) of the [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#)”, to which the Kyrgyz Republic accessed 12 February 2003. International recommendations also call upon States to enact laws and measures, as appropriate, “*to clearly prohibit and criminalize online violence against women, in particular the non-consensual distribution of intimate images, online harassment and stalking*”, including “[t]he threat to disseminate non-consensual images or content”, which must be made illegal; see UN Special Rapporteur on violence against women, its causes and consequences, [Report on online violence against women and girls from a human rights perspective](#) (18 June 2018), A/HRC/38/47, paras. 100-101. [General Policy Recommendation No. 7](#) of the European Commission against Racism and Intolerance (ECRI) recommends to make it a criminal offence to publicly incite to violence, hatred or discrimination, or to threaten an individual or group of persons, for reasons of race, colour, language, religion, nationality or national or ethnic origin where those acts are deliberate. See also Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2022\)16 on combating hate speech](#), adopted by the Committee of Ministers on 20 May 2022, para. 11.

⁴⁰ Regarding the prohibition of incitement to discrimination, hostility or violence (Article 20 of the ICCPR and Article 4 of the ICERD), it is also subject to the strict conditions of Article 19 of the ICCPR, see UN Human Rights Committee (CCPR), [General Comment no. 34 on Article 19: Freedoms of opinion and expression](#), 12 September 2011, para. 11 and CERD, [General recommendation No. 35](#) (2013), paras. 19-20. Such forms of expression would only be prohibited and punishable by law when: (1) the expression is intended to incite imminent violence; and (2) it is likely to incite such violence; and (3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence; taking into account a number of factors to determine whether the expression is serious enough to warrant restrictive legal measures including the context, speaker (including the individual’s or organization’s standing), intent, content or form, extent of the speech, and likelihood of harm occurring (including imminence); see CERD, [General recommendation No. 35](#) (2013), paras. 13-16; see also the [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#), in the Report of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred, United Nations General Assembly, 11 January 2013, Appendix, para. 29; and International Mandate-holders on Freedom of Expression, [Joint Declaration on Freedom of Expression and Countering Violent Extremism](#) (2016), para. 2(d).

4.1. Limitations Based on the Definition of “Extremism”

33. Article 5(1)(3) of the Draft Law prohibits the distribution of “*materials that publicly incite terrorist activity or publicly justify terrorism, as well as other extremist materials.*” Certain of the terms used in this provision, such as “extremist” or public incitement to or justification of terrorist activity, could make the application of this provision unpredictable and potentially subject to arbitrary interpretation. Limitations formulated in vague and overbroad terms will not satisfy the ICCPR requirement “prescribed by law”, since laws need to be formulated with sufficient precision and foreseeability, and limitations must be regarded as “necessary in a democratic society”.⁴¹
34. Regarding the reference to “*other extremist materials*” specifically, it must be emphasized that there is no consensus at the international level on a normative definition of “*extremism*”/“*extremist*” or “*violent extremism*”.⁴² ODIHR, the Venice Commission and other international bodies have raised concerns pertaining to “*extremism*” as legal concept and the vague and imprecise nature of such terms.⁴³ As noted by ODIHR, “*the vagueness of such terms may allow States to adopt highly intrusive, disproportionate and discriminatory measures, as demonstrated by the findings of international human rights monitoring mechanisms, which point to persistent problems, in particular, with so-called “extremism” charges and the implications on the rights to freedom of religion or belief, expression, association, and peaceful assembly as well as the occurrence of unlawful arrests, detention, torture and other ill-treatment [...].*”⁴⁴ In this respect, the UN Human Rights Committee specifically raised concerns in its 2022 Concluding Observations on the third report of the Kyrgyz Republic regarding “*the overly broad and vague definitions contained in the national counter-terrorism legislation, in particular those of ‘extremism’, and the lack of sufficient safeguards to prevent the arbitrary use of counter-terrorism measures to restrict the legitimate exercise of rights and freedoms guaranteed under the Covenant, including freedom of religion, expression and association*”.⁴⁵ **It is recommended that the reference to “extremist materials” be removed from Article 5(1)(3) of the Draft Law.**
35. As regards “*incitement to terrorism*” specifically, [UN Security Council Resolution 1624 \(2005\)](#) expressly called on states to prohibit such incitement.⁴⁶ However, banning and prosecuting crimes based only on expression of opinion should be exceptional and, as such, the criminal offence and constitutive elements should be clearly defined and strictly circumscribed, so as to prevent undue restrictions, which have been increasingly

⁴¹ See the UN Human Rights Committee, [General Comment No. 34](#) on Article 19 of the ICCPR, CCPR/C/GC/34, para. 46.

⁴² See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (hereinafter “UN Special Rapporteur on Counter-terrorism and Human Rights”), 2015 Thematic Report, [A/HRC/31/65](#), 22 February 2016, paras. 11 and 21, noting that “[d]espite the numerous initiatives to prevent or counter violent extremism, there is no generally accepted definition of violent extremism, which remains an ‘elusive concept’”.

⁴³ See ODIHR and Venice Commission, [Joint Opinion on the Draft Law of Uzbekistan “On Freedom Of Conscience And Religious Organizations”](#), 12 October 2020, para. 30; See also UN Special Rapporteur on Counter-Terrorism and Human Rights, [2020 Report on the human rights impact of policies and practices aimed at preventing and countering violent extremism](#), 21 February 2020, A/HRC/43/46, paras. 12-14.

⁴⁴ See ODIHR and OSCE RFoM Joint [Legal analysis of the draft law on mass media of the Republic of Uzbekistan](#), pp 18-19. See also *Ibid* (ODIHR and Venice Commission, [Joint Opinion on the Draft Law of Uzbekistan “On Freedom Of Conscience And Religious Organizations”](#), 12 October 2020, para 30).

⁴⁵ See UN Human Rights Committee, [Concluding Observations on the third periodic report of Kyrgyzstan](#), CCPR/C/KGZ/CO/3, 9 December 2022, para. 19.

⁴⁶ See also UN Security Council, [Resolution 1624 \(2005\)](#), 14 September 2005, UN Doc. S/RES/1624 (2005), par 1, which calls on states to prohibit, by law, incitement to commit terrorist acts.

frequent in counter-terrorism practice.⁴⁷ To be human rights-compliant, the offence of “*incitement to terrorism or acts of terrorism*” must be prescribed by law in a precise language and (a) expressly refer to the intent to communicate a message and intent that this message incite the commission of a terrorist act; and (b) be limited to the incitement to conduct that is truly terrorist in nature; and (c) include an actual (objective) risk that the act incited will be committed; and (d) preserve the application of legal defences or principles leading to the exclusion of criminal liability in certain cases,⁴⁸ for instance when the statements were intended as part of a good faith discussion or public debate on a matter of religion, education, scientific research, politics, arts or some other issue of public interest.⁴⁹ Hence, **the definition and interpretation of public incitement to terrorist activity should comply with these requirements, and at minimum refer to direct and public incitement.**⁵⁰

4.2. Prohibition of the Promotion of Same-sex Marriage

36. Pursuant to Article 5(1)(4), it is prohibited to “*distribute materials that promote pornography, same-sex marriage, materials that harm the health and morality of the population, the cult of violence and cruelty.*” This provision, as currently formulated, is overly broad and vague and may as a consequence, trigger self-censorship and have a chilling effect on media freedom.
37. First, the use of a term such as “promotion” does not only seem to be very wide, but also rather ambiguous and vague.⁵¹ Promoting certain issues can be understood in different ways. Even a factual report on same-sex marriages conducted through peer-review articles could be construed as a type of promotion. Article 52 (exemption from liability of distributed material) does not include such an exemption, which indicates that such content would be deemed as a way to abuse freedom of expression.
38. Moreover, the prohibition of the promotion of “same-sex marriage” is obviously linked to the question of sexual orientation, and would therefore be discriminatory on the basis of sexual orientation and would unduly limit the right to freedom of expression and to campaign for the recognition of the rights of the LGBTI community, which is protected

⁴⁷ See e.g., OSCE RFoM, OSCE, [Special Report: Accreditation of Journalists in the OSCE area - Observations and Recommendations](#), 26 October, 2006, Part III; and UN Human Rights Committee, [Concluding Observations on the third periodic report of Kyrgyzstan, CCPR/C/KGZ/CO/3](#), 9 December 2022, para. 19. See also e.g., CoE Commissioner for Human Rights, [Misuse of anti-terror legislation threatens freedom of expression](#) (4 December 2018).

⁴⁸ See the model offence of incitement to terrorism provided by the UN Special Rapporteur on counter-terrorism in [2010 Report on “Ten areas of best practices in countering terrorism”](#), A/HRC/16/51, 22 December 2010, para. 31. As expressly stated by the International Mandate-Holders on Freedom of Expression “[i]ncitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring”; see UN Special Rapporteur on freedom of opinion and expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, [2005 Joint Declaration](#), Sub-Section on Anti-terrorism measures. See also e.g., International Mandate-Holders on Freedom of Expression, [2011 Joint Declaration on Freedom of Expression and the Internet](#), Section 8 on Security and Freedom of Expression, par 1 (d). See also OSCE TNTD/SPMU-ODIHR, [Guidebook on Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach](#) (2014), page 42; and ODIHR, [Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework](#) (2018); pages 53 and 55. See also Principle 6 of the [Johannesburg Principles on Freedom of Expression and National Security](#) (1995), adopted on 1 October 1995 by a group of experts in international law, national security, and human rights and endorsed by the UN Special Rapporteur on freedom of opinion and expression. For reference, see also, for the purpose of comparison, Article 5 of the [2005 CoE’s Convention on the Prevention of Terrorism](#) on the “public provocation to commit acts of terrorism”, defined as “the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed”.

⁴⁹ See e.g., OSCE Representative on Freedom of the Media, [Legal Analysis of the Proposed Bill C-51, the Canadian Anti-terrorism Act, 2015: Potential Impact on Freedom of Expression](#) (May 2015), pages 9-10.

⁵⁰ See also UN Human Rights Committee, [Concluding Observations on the third periodic report of Kyrgyzstan, CCPR/C/KGZ/CO/3](#), 9 December 2022, para. 20.

⁵¹ See e.g., Venice Commission, [Opinion on the issue of the prohibition of so-called “Propaganda of homosexuality in the light of recent legislation in some Council of Europe Member States](#), CDL-AD(2013)022-e, para. 28.

by the right to freedom of expression.⁵² As underlined by the Venice Commission, a different approach would otherwise “*affect the basic tenets of a democratic society, characterized by pluralism, tolerance and broadmindedness, as well as the fair and proper treatment of minorities*”.⁵³ Further, this provision seems to put on an equal footing the promotion of pornography and same-sex marriage. While the former can be legitimately restricted, the latter is a valid area of discussion, which must not be removed from the scope of protection under the freedom of expression. Such a limitation would also go against principles enshrined in the UN Human Rights Committee’s General Comment No. 34, which adopts a positive obligation for the states to protect the rights of media users, and encourages independent and diverse media, especially when it comes to minorities.⁵⁴

39. There is an array of judicial and other pronouncements emanating from international human rights institutions substantiating this point. A somewhat comparable legal provision exists in Russia, where the Law prohibits the “propaganda of homosexuality among minors”. This law was found incompatible with international human rights standards. The UN Human Rights Committee opined that “[w]hile noting that the State party invokes the aim to protect the morals, health, rights and legitimate interests of minors, the Committee considers that the State party has not shown that a restriction on the right to freedom of expression in relation to “propaganda of homosexuality” – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria. Moreover, no evidence which would point to the existence of factors justifying such a distinction has been advanced”.⁵⁵ The European Court of Human Rights also found a violation of Article 10 of the ECHR, where it held that “[t]he Government failed to demonstrate how freedom of expression on LGBT issues would devalue or otherwise adversely affect actual and existing “traditional families” or would compromise their future. The Court has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority.”⁵⁶ Similarly, the Venice Commission has concluded that “the statutory provisions prohibiting ‘propaganda of homosexuality’, are incompatible with ECHR and international human rights standards”.⁵⁷ **It is recommended that the prohibition of the promotion of “same-sex marriage” be removed from Article 5(1)(4) of the Draft Law.**
40. The interpretation and application in practice of Article 5(1)(4) of the Draft Law which mentions “materials that harm the [...] morality of the population” may also be problematic. In its General Comments No. 34, the UN Human Rights Committee has warned against the use of such a ground for restricting freedom of expression, noting that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition” and that “[a]ny such limitations must be understood in the light of universality of human rights and the principle of non-discrimination”.⁵⁸ As underlined by ODIHR and the Venice

⁵² See e.g., Venice Commission, *Opinion on the issue of the prohibition of so-called “Propaganda of homosexuality in the light of recent legislation in some Council of Europe Member States*, CDL-AD(2013)022-e.

⁵³ *Ibid.* para. 48.

⁵⁴ See the UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 14.

⁵⁵ See UN Human Rights Committee, *Fedotova v Russia, Communication No. 1932/2010*, para. 10.6. See also European Court of Human Rights, *Fedotova and Others v. Russia*, no. 40792/10 and 2 others, 13 July 2021, paras. 52-54.

⁵⁶ See European Court of Human Rights, *Bayev and Others v. Russia*, no. 67667/09, 20 June 2017, paras. 67-71, and *ibid* (Fedotova and Others v. Russia), para. 53.

⁵⁷ See e.g., Venice Commission, *Opinion on the issue of the prohibition of so-called “Propaganda of homosexuality in the light of recent legislation in some Council of Europe Member States*, CDL-AD(2013)022-e, para. 83.

⁵⁸ See the UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 32.

Commission in their Joint Opinion on the Draft Constitution of the Kyrgyz Republic, “morals” as a potential ground for restricting human rights and fundamental freedoms should be approached with caution “*due to the likely wide and inherently subjective interpretation of such terms*”.

RECOMMENDATION D.

To narrow the scope of the content restrictions included in Article 5 of the Draft Law, including by:

1. removing the reference “extremist materials” in Article 5(1)(3) and the prohibition of the promotion of “*same-sex marriages*” in Article 5(1)(4); and
2. more clearly and narrowly circumscribing the definition of incitement to terrorism.

4.3. Limitation Based on Infringing the Right to Privacy

41. According to Article 5(1)(6), it is prohibited to “*infringe upon the privacy of individuals, violate their honor and dignity, and damage their business reputation.*” Article 5(1)(7) further prohibits “*disclosing information about an individual’s private life without their consent, unless authorized by law or necessary to protect public interests and/or if measures have been taken to prevent unauthorized identification of third parties.*”
42. The provision refers to the infringement to honour and dignity, which is prohibited. It must be emphasized that the right to freedom of expression protects all forms of ideas, information or opinions, including those that “*offend, shock or disturb*” the state or any part of the population,⁵⁹ and even “*deeply offensive*” speech.⁶⁰ At the same time, Article 19(3)(a) of the ICCPR and Article 10(2) of the ECHR also refers to the protection of the reputation or rights of others as a legitimate ground for limiting the right to freedom of expression. Article 17(2) of the ICCPR also provides that everyone has the right to the protection of the law from “*unlawful attacks on [one’s] honour and reputation*”. UN Human Rights Committee’s General Comment No. 16 on Article 17 of the ICCPR further provide that “[p]rovision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible”. Importantly, the protection of the right to privacy is not absolute and limited interference with private life may be justified for the protection of rights and interests of others or in the public interest. In this respect, the UN Human Rights Committee has underlined that “*the protection of privacy is necessarily relative*” and may be restricted, especially in cases where knowledge about an individual’s private life is “*essential in the interests of society*”.⁶¹ In addition, “*legislation must specify in detail the precise circumstances in which such interferences may be permitted*”.⁶²

⁵⁹ See International Mandate-Holders on Freedom of Expression, [Joint declaration on freedom of expression and “fake news”, disinformation and propaganda](#) (2017), seventh paragraph of the Preamble. See also UN Special Rapporteur on counter-terrorism, [2015 Thematic Report](#), A/HRC/31/65, 22 February 2016, para. 38. See also e.g., European Court of Human Rights, [Handyside v. United Kingdom](#), no. 5493/72, 7 December 1976, para. 49; and [Bodrožić v. Serbia](#), no. 32550/05, 23 June 2009, paras. 46 and 56.

⁶⁰ See UN Human Rights Committee (CCPR), [General Comment no. 34 on Article 19: Freedoms of Opinion and Expression](#), 12 September 2011, paras. 11 and 38.

⁶¹ See UN Human Rights Committee, [General Comment No. 16: Article 17 \(Right to Privacy\)](#), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, para. 7.

⁶² *Ibid.* para. 8 (General Comments No. 16).

43. At the CoE level, for expression to infringe the right to privacy, the European Court of Human Rights expects the expression at stake to meet a certain threshold of “seriousness”.⁶³ In regard to the language used, the Court has recalled on multiple occasions that media operators should be allowed to use “*a certain degree of exaggeration, provocation or harshness*”.⁶⁴ Where freedom of expression comes into conflict with the right to respect for private life guaranteed by Article 8, when assessing the proportionality of an interference, the European Court of Human Rights balances the different interests at stake, taking into consideration several criteria including whether the expression contributed to a debate of general interest; the public status of the person subjected to the statement; the prior conduct of the person who is the subject of criticism; the truth defence (where the expression contains factual statements); the content, form and the consequences of the expression/publication; the severity of the sanctions.⁶⁵
44. In light of the foregoing, while it is true that disclosing certain information has an impact on the right to respect for private life, offensive speech is not by itself unlawful under international law. Journalistic investigation, for example, would generally require some degree of interference with the right to respect for private and family life. Especially, public authorities must respect the right of journalists to disseminate information on questions of public interest, including through recourse to a degree of exaggeration or provocation, provided that they act in accordance with the standards and principles of responsible journalism.⁶⁶ As also noted by the UN Human Rights Committee, the mere fact that the expression is considered to be insulting to a public figure is not sufficient to justify restriction, prohibition or penalties.⁶⁷ Thus, Article 5(1)(6) would limit freedom of expression and may cause a chilling effect on media freedom, including when reporting on issues of public interest. **It is recommended to review Article 5(1)(6) to allow some degree of proportionality without unduly restricting neither the right to freedom of expression nor the right to privacy. This could be achieved, for example, by specifying that such restrictions are only permissible if, in individual cases, the disclosure of certain data or information is capable to cause substantial harm to the protected interests, and if the harm outweighs the public interest in disclosure. The provision could also specify that the prohibition does not apply to statements intended as part of a good faith discussion or public debate on matters of public interest, such as religion, education, scientific research, politics or some other issues of public interest.**
45. In addition, Article 17 of the ICCPR requires state authorities to offer adequate legal protection to the rights to privacy and reputation. The duty that states bear under Article 17 amounts to a three-fold obligation to provide the victim of a violation of Article 17 of the ICCPR with (a) adequate compensation, including for lost earnings and damage to their reputation and legal costs involved in litigation; (b) appropriate measures of

⁶³ See European Court of Human Rights, *Denisov v. Ukraine*, no. 76639/11, 25 September 2018, para. 112, also quoting consolidated case-law such as *A. v. Norway*, paras. 63-64; *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, 21 September 2010, paras. 40 and 44; *Delfi AS v. Estonia*, no. 64569/09, 2015, para. 136; *Bédat v. Switzerland*, no. 56925/08, para. 72. As a matter of example, Section 1 of the United Kingdom’s Defamation Act 2013 reads as follows: ‘A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.’

⁶⁴ See European Court of Human Rights, *Kulis v. Poland*, no. 15601/02, 18 March 2008, para. 47.

⁶⁵ See e.g., European Court of Human Rights, *Jerusalem v. Austria*, no. 26958/95, 27 February 2001, para. 40; *Ruokanen and Others v. Finland*, no. 45130/06, 6 April 2010, para. 52; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, 22 October 2007, para. 59. See also Venice Commission, *Amicus Curiae Brief for the Constitutional Court of Georgia on the Question of the Defamation of the Deceased*, CDL-AD(2014)040, para. 23.

⁶⁶ See e.g., ODIHR, *Urgent Comments on the Draft Criminal Offences against Honour and Reputation in the Republika Srpska* (11 May 2023), para. 31. See also e.g., Venice Commission, *Opinion on Legislation of Defamation on Italy*, CDL-AD(2013)038, para. 81.

⁶⁷ See the UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 38.

satisfaction with a view to restoring their reputation, honor, dignity and professional standing, and; (c) to take steps to prevent similar violations from occurring in the future. To this end, effective remedies for defamatory statements may consist of a full retraction of a newspaper article or a civil court’s ruling establishing the innocence of the defamed person.⁶⁸

46. Article 55 of the Draft Law provides that “[m]oral harm, which encompasses non-property harm inflicted upon a citizen due to the dissemination of misinformation by the mass media, defaming their honor, dignity, business reputation, or causing other forms of non-property harm, shall be subject to compensation as determined by the court. The mass media, journalists involved, as well as responsible officials and individuals found guilty, are obliged to provide compensation in the amount specified by the court.”
47. This provision leaves it to the courts to determine the amount of moral damage and does not specify any limit on the maximum amount that could be awarded. Although such a limit may be provided by other legislation, such as the civil code, **to ensure legal certainty, it is recommended to include a cross-reference to the relevant legislation that should provide for reasonable compensation limits.** Should not such limit exist, the relevant legal framework should be amended to provide for a reasonable limit on the maximum amount of damages that could be awarded in such cases. Indeed, in its General Comment No. 34 on Article 19 of the ICCPR, the UN Human Rights Committee specifically recommends that states should place such reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.⁶⁹ The undetermined amount of compensation may have a chilling effect on the freedom of the media.

RECOMMENDATION E.

To specify in Article 5(1)(6) that restrictions are only permissible if, in individual cases, the disclosure of certain data or information threatens to cause substantial harm to the protected interests, and if the harm outweighs the public interest in disclosure, while ensuring that any prohibition aimed at protecting honour or dignity does not apply to statements intended as part of a good faith discussion or public debate on a matter of religion, education, scientific research, politics or some other issue of public interest.

4.4. Other Limitations

48. Article 5(2) of the Draft Law provides that “[i]t is forbidden to disseminate materials that violate the principle of the presumption of innocence of an individual”. This provision should not be interpreted as preventing reports on allegations of corruption by public officials or other matters of public interest. More generally, as underlined in the 2003 Joint Declaration, “no restrictions on reporting on ongoing legal proceedings may be justified unless there is a substantial risk of serious prejudice to the fairness of those proceedings and the threat to the right to a fair trial or to the presumption of innocence outweighs the harm to freedom of expression”.⁷⁰

⁶⁸ See [Mr. Félix Enrique Chira Vargas-Machuca v. Peru, Communication No. 906/2000](#), U.N. Doc. CCPR/C/75/D/906/2000 (2002), para. 9.

⁶⁹ See the UN Human Rights Committee, [General Comment No. 34](#) on Article 19 of the ICCPR, CCPR/C/GC/34, para. 47.

⁷⁰ International Mandate-holders on Freedom of Expression, [Joint Declaration on Freedom of Expression](#) (2002).

49. Article 10(4) prohibits the establishment of a mass media outlet by foreign citizens and stateless persons. Article 23(5) further states that “[a] citizen of the Kyrgyz Republic holding dual citizenship, a citizen of a foreign state, a foreign legal entity, and a legal entity in the Kyrgyz Republic with foreign investment, where the share (contribution) of foreign investment in the authorized capital is 50 per cent or more, are not eligible to act as founders of TV and radio channels, TV and radio programs, video programs, and websites on the Internet telecommunications network.”
50. Although the limitation on foreign ownership of mass media outlets exists in a number of OSCE participating States, these limitations are normally directed to broadcasting mass media.⁷¹ Provided that the scope of the Draft Law is quite broad, a blanket prohibition on all foreign nationals to own or found any type of mass media outlet would go against the right to freedom of expression. It is also concerning that dual citizens cannot be a founder of TV, radio channels, TV and radio programmes, video programs and websites on the Internet telecommunications network. If dual citizenship as such is legally recognized and permitted in the country, it is especially unclear why it would trigger significant limitations in the scope of rights and freedoms of dual citizens, which would amount to a direct discrimination on the basis of nationality without clear justification. As a comparison, in the case of *Tanase v. Moldova* (2010),⁷² the European Court of Human Rights considered that legislative provisions preventing elected deputies with multiple nationalities from taking seats in the Parliament were disproportionate, noting in particular that the public authorities did not provide an explanation about why concerns had emerged regarding the loyalty of dual citizens,⁷³ while acknowledging that a different approach may be justified where special historical or political considerations render a more restrictive practice necessary.⁷⁴ As a principle, nationals of state in possession of another nationality should have the same rights and duties as other nationals of the said states.⁷⁵ **It is recommended to re-assess the restrictions concerning media ownership and narrow the scope of the restriction for foreign citizens to what is considered justified and proportionate. Moreover, it is recommended to reconsider the blanket prohibition concerning media ownership by dual citizens.**
51. Article 49 of the Draft Law defines conditions for the dissemination of information by foreign mass media. Specifically, Article 49(4) requires prior permission for the distribution of “products of a foreign periodical that is not registered in the Kyrgyz Republic and whose founder or editorial office has a place of permanent residence outside the Kyrgyz Republic, as well as being financed by foreign states, legal entities, or citizens.” It must be reiterated that in the OSCE Charter for European Security (Istanbul, 1999), OSCE participating States committed “to take all necessary steps to ensure the basic conditions for (...) unimpeded transborder and intra-State flow of

⁷¹ Legislation on foreign media ownership in EU member states, shows that 23 EU member States (except Austria, Cyprus, France, Poland, and Spain) do not impose any limit on foreign media ownership; even where there is some kind of restriction, it does not apply to citizens or companies from EU countries. For example, in **France**, non-EU/EEA companies/citizens cannot directly or indirectly hold more than 20% of the capital share or voting rights of a TV/radio channel broadcast in French on digital terrestrial networks; **Poland** sets no restriction for newspapers and a maximum 49% limit of non-EU ownership in the broadcasting sector; see e.g., Resource Centre on Media Freedom in Europe, <<https://www.rcmediafreedom.eu/Multimedia/Infographics/Foreign-media-ownership-in-Europe>>; see also as a reference, European Commission, SEC(2007) 32, Commission Staff Working Document, [Media pluralism in the Member States of the European Union](#).

⁷² European Court of Human Rights, *Tanase v. Moldova* [GC], no. 7/08, 27 April 2010), para. 180.

⁷³ *ibid.* Para. 174 (European Court of Human Rights, *Tanase v. Moldova*, 27 April 2010).

⁷⁴ *ibid.* paras. 172 and 180 (European Court of Human Rights, *Tanase v. Moldova*, 27 April 2010).

⁷⁵ As an example, Article 17 of the *European Convention on Nationality*, ETS No.166, which entered into force on 1 March 2000 for those states that ratified it, provides that “[n]ationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party”.

information”.⁷⁶ A mechanism of prior permission before distributing/importing materials of a foreign origin as a preventive measure risks creating a system of censorship and endangering the very essence of the freedom to impart information.⁷⁷ As underlined above, restriction to the right to freedom of expression and to seek, receive and impart information need to fulfil the strict requirements provided by the ICCPR and it is questionable whether a system of prior permission would be considered proportionate. This provision may impact not only the distribution of periodicals owned by foreign outlets, but also educational materials distributed during professional meetings, trainings, thereby limiting the ability of media outlets to receive professional support if and as required. It would also contradict Article 48 of the Draft Law, which provides for international co-operation and engagement “*in international cooperation in the mass media sector through agreements with individuals and legal entities from foreign states, as well as international organizations.*” **It is recommended to remove the requirement for prior permission for the distribution of foreign periodicals.**

52. Article 10 of the Draft Law prohibits a person who has been declared legally incapacitated to establish a mass media outlet. It is noted that concerns have been raised regarding the system of legal incapacitation in the Kyrgyz Republic and its impact on the exercise of human rights.⁷⁸ It is also unclear what such restrictions are aiming to accomplish. In addition, the Kyrgyz Republic is a state party to the UN Convention on the Rights of Persons with Disabilities (CRPD).⁷⁹ In this respect, Article 12 of the CRPD clearly states that persons with intellectual or psychosocial disabilities shall enjoy legal capacity and participate in political and public life on an equal basis with others.⁸⁰ General Comment No. 1 to Article 12 of the CRPD on equal recognition before the law states that legal capacity is the key to accessing full and effective participation in society and in decision-making processes and should be guaranteed to all persons with disabilities, including persons with intellectual disabilities, persons with autism and persons with actual or perceived psychosocial impairment, and children with disabilities, through their organizations.⁸¹ In addition, legal capacity is recognized as “*an inherent right accorded to all people, including persons with disabilities.*”⁸² Instead of a system of legal incapacitation, states should seek to assist persons with disabilities to exercise their legal capacity, by providing them with access to different types of supported decision-making arrangements.⁸³ Further, pursuant to Article 21 of the CRPD, States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice. Article 27 of the CRPD also underlined the recognition of the right of persons with disabilities to work, on an equal basis with others, which includes the right to the opportunity to gain a living

⁷⁶ See OSCE, *Istanbul Document 1999* (Charter for European Security: III. Our Common Response), para. 26.

⁷⁷ See e.g., UNESCO, *Freedom of expression and public order: training manual* (2015), p. 21, which states that the right to freedom of expression includes “*the right to import newspapers from other countries or to use the Internet to access content from around the world [...] limited restrictions may be imposed on the right, but these must meet the standards of international law*”.

⁷⁸ See e.g., UNDP, *Promoting the Rights Of Persons with Disabilities in Central Asia: Institutional Experiences and the Way Forward*, p. 34. See also e.g., UNICEF, *Children and Adolescents with Disabilities in Kyrgyzstan* (2021), pp. 47-49.

⁷⁹ See the *UN Convention on the Rights Of Persons With Disabilities* (CRPD), 13 December 2006, entered into force 3 May 2008. The Kyrgyz Republic ratified the CRPD on 16 May 2019. .

⁸⁰ See the *UN Convention on the Rights Of Persons With Disabilities* (CRPD), 13 December 2006, entered into force 3 May 2008. The Kyrgyz Republic ratified the CRPD on 16 May 2019. .

⁸¹ See paras. 8 and 9 of *CRPD General Comment No. 1* (2014).

⁸² *Ibid.*, para. 7 *CRPD General Comment No. 1* (2014).

⁸³ See ODIHR and OSCE RFoM, Joint *Legal analysis of the draft law on mass media of the Republic of Uzbekistan*, p. 23.

by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.

53. In light of the foregoing, and although going beyond the scope of this Joint Opinion, the process of depriving a person of legal capacity in the Kyrgyz Republic should be reviewed and reconsidered as such.

RECOMMENDATION F.

To re-assess the restrictions in Article 23(5) concerning media ownership and to narrow the scope of the restriction of media ownership by foreign citizens to what is considered justified and proportionate, while reconsidering the blanket prohibition concerning media ownership by dual citizens (Article 23(5)) and the system of prior permission to import and distribute foreign periodicals (Article 49(4)).

5. PROVISIONS PERTAINING TO THE REGISTRATION OF MASS MEDIA OUTLETS

54. Chapter 3 of the Draft Law prescribes the rules and conditions for the registration of media outlet. The responsibilities for the registration of mass media are shared by the Ministry of Digital Development for online media, and the Ministry of Justice (and the Ministry of Digital Development) for other mass media outlets. Both ministries maintain a registry of registered mass media outlets in the manner prescribed by the Cabinet of Ministers of the Kyrgyz Republic (Article 16(7)).
55. Article 16(2) also states that the registration of online media is done in the manner prescribed by the Cabinet of Ministers; however, the Ministry of Digital Development is also mentioned in further articles, which regulates the registration of “traditional” mass media. Therefore, it is not clear whether the same provisions apply to online media or if there are additional rules that need to be taken into account. **This ought to be clarified.** It is important that this additional government regulation will not unduly complicate the procedure as it is currently described in the Draft Law and will not create unnecessary impediments to media registration. While it is usual for broadcasters to undergo certain licensing procedures to obtain access to frequencies (subject to procedural guarantees and safeguards), **the registration of the press should in principle be simple and voluntary** (see also Sub-Section 6 regarding the absence of independent regulator).

5.1. Compulsory Registration

56. Generally, an obligation for a media to register creates an additional burden on the founders, especially for small online outlets with limited institutional and financial capacity. As underlined by the UN Human Rights Committee, regulatory systems should take into account the differences between the print and broadcast sectors and the Internet, while also noting the manner in which various media converge.⁸⁴ Regarding the Draft Law, the drafters did not take into consideration the differences between the print and broadcast sectors, and the Internet.⁸⁵ This will result in these different entities

⁸⁴ See the UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 39.

⁸⁵ According to Article 19 of the Draft Law, print media is exempt from registration with a press run of less than one hundred (100) copies.

being put into the same category of mass media outlets for the process of registration with the competent authority.

57. In general, a requirement to obtain a license would only be justified when the distributor aims at using scarce infrastructure technologies (such as terrestrial frequencies)⁸⁶ but not vis-à-vis other cases (e.g. cable and satellite) where in principle, according to good practices in the OSCE, European Union and the Council of Europe, a mere notification to the competent telecommunications authority would suffice.⁸⁷ Consequently, **the Draft Law should distinguish between the print, broadcast and the Internet media and the requirement to obtain a license should only be retained for the use of scarce infrastructure technologies (such as terrestrial frequencies) while for others, a mere system of notification should apply.**
58. Licensing or registration is not necessarily problematic in itself providing that the procedure is neither unduly cumbersome nor subject to arbitrary interpretation. In this respect, as underlined by the UN Human Rights Committee in its General Comment no. 34, states must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations, and the criteria for the application of such conditions and license fees should be reasonable and objective, clear, transparent, non-discriminatory and otherwise compliant with international human rights standards.⁸⁸ Examples from other participating States show that some countries have opted out of requiring registration for print media (Canada, Germany, the Netherlands, Norway, Ukraine, the United Kingdom and the United States). In the United Kingdom, only TV and radio broadcasting media are required to register. However, this is overseen by independent bodies, not state organs.⁸⁹ Similarly, in Ukraine, only radio and TV broadcasting outlets are expected to be registered while registration of online media is voluntary and provides certain benefits.⁹⁰
59. Pursuant to Article 16(4) of the Draft Law, registration should be completed by the Ministry of Justice within five business days from the day of application, and the registered mass media outlet has six months to commence activities, otherwise the registration will be revoked (Article 16(11)). That the Ministry of Justice needs to take a decision and not simply process the registration may indicate that the contemplated procedure is likely to amount to a system of prior authorization rather than a notification procedure and that the Ministry may have certain discretionary power with which it can deem an application unsuitable and decline registration. Although registration can offer media certain rights (including online), legal provisions should be clear, precise and foreseeable to avoid the risk of discretionary or arbitrary application and that these rules may be abused by the authorities to unduly limit freedom of expression.⁹¹ The requirements/conditions should also be reasonable and objective, transparent and non-discriminatory.⁹²
60. The procedure of registration is outlined in Article 17 of the Draft Law, which lists a number of details required to accompany an application. Some of this information, such as on the form and frequency of publication, presumed territory where the mass media

⁸⁶ See the UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 39.

⁸⁷ See e.g., OSCE RFoM, *Legal Analysis of the Law of the Republic of Armenia "On Audiovisual Media"* (Adopted on 16 July 2020), p. 4.

⁸⁸ See the UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 39.

⁸⁹ See the *Media Law of the United Kingdom*.

⁹⁰ See Article 50 of the *Law on Media of Ukraine*.

⁹¹ See *Ensuring Independent Regulation for Online/Citizen Media*, LSE Media Policy Project, 2014. See also ODIHR and OSCE RFoM Joint *Legal Analysis of the Draft Law on Mass Media of the Republic of Uzbekistan*, November 2020, Chapter 4.

⁹² See the UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 39.

will be distributed or the possible subject matter and topics to be covered would appear to go beyond what may be necessary for the purpose of registration and to create an unnecessary burden on the founders, especially given the broad understanding of the notion of “mass media” contemplated by the Draft Law. At the same time, the provision of such information would be justified for *broadcast media* for the purpose of licensing, given the need for the state to ensure pluralism and information needs of different communities in the licensing process when distributing limited quantity of frequencies. In addition, listing these details could potentially give the Ministry of Justice discretionary power to deny registration, as provided by Article 20 of the Draft Law, which could lead to censorship. **It is recommended to review such requirements to ensure that they are strictly necessary to the purpose.** This is without prejudice to recommendations and good practices to promote greater transparency of content production in an easily accessible manner to inform the public, while ensuring that media and communication governance should aim to safeguard and promote media pluralism.⁹³

61. In contrast, according to Article 19, registration is not required for “*mass media established by public authorities and local self-government bodies solely for publication of their official communications and materials, normative legal acts.*” This places state media in a more favorable position compared with private outlets.
62. Moreover, Article 18 of the Draft Law requires the renewal of registration due to, for example, changes in ownership or the name of the mass media outlet. While the same Article also provides that the operation of a mass media outlet shall not be suspended during the process of registration renewal, the process itself places an additional burden on the mass media outlet as the renewal follows the same procedures as the initial registration. While this procedure may be a useful tool to prevent and act against media ownership concentration, which is detrimental to media pluralism, the objective and modalities of denial in case an excessive media concentration is revealed should be made more explicit, with proper avenues for legal redress one would challenge the denial; otherwise, **a more simple notification procedure of change of media ownership would be preferable.** It is also questionable whether the requirement for all media to pay a fee is sufficiently justifiable, especially since the exact amount remains unclear and may turn out to be excessive. **In light of the foregoing, apart from the licensing linked to the use of scarce infrastructure technologies, the requirement for a registration decision of the Ministry should be reconsidered entirely to ensure that the contemplated procedure amounts to a mere notification and not a prior authorization.**
63. As underlined above, media regulation should adopt a graduated and differentiated approach to media governance depending on the type of media to be regulated. In this respect, to obligate a mass media outlet that only operates a website as its form of content dissemination, to register is against international good practice. As stated by the OSCE RFoM in the past, “[s]tates should not impose mandatory registration to online media as a precondition for their work which can have a very negative effect on media freedom” because such practice could seriously restrict the public's access to diverse sources of information.⁹⁴ **The registration of a domain name with the proper authority may be required to operate a website but no other registration**

⁹³ CoE Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance (adopted by the Committee of Ministers on 6 April 2022 at the 1431st meeting of the Ministers' Deputies), paras. 8-9.

⁹⁴ [OSCE media freedom representative expresses concern regarding new registration system and threat of potential closure of online portals in Albania](#), 18 October, 2018.

obligation. It is also recognized that online media self-regulation and the option for the online media to opt-in and to choose to belong to such a self-regulatory regime is generally a good option as a way to prevent governments from interfering extensively with media content online, while allowing media to fulfil its role as watchdog.⁹⁵

64. **It is recommended to narrow the types of media outlets that require registration, while excluding the press and online media from the scope of compulsory registration. It is also recommended to ensure that the registration procedure is as simple as possible and only requires strictly necessary and relevant information/documents**

RECOMMENDATION G.

G.1. Apart from the licensing or registration linked to the use of scarce infrastructure technologies, the registration requirement should be reconsidered to ensure that the contemplated procedure amounts to a mere notification and not a prior authorization.

G.2. To adopt a graduated and differentiated approach to media governance depending on the type of media to be regulated while excluding the press and online media from the scope of compulsory registration and ensuring that the registration procedure only requires submission of strictly necessary and relevant information/documents.

5.2. Denial and Termination of Registration

65. According to Article 21 of the Draft Law, the registration of the media outlet can be invalidated if (1) the media outlet has not published (has not aired) for more than six months, or (2) the charter of the editorial office or the agreement substituting it has not been adopted and/or approved within two months from the day of the first publication (airing). This provision could be problematic. While it is understandable that there should be some way of de-registering media outlets that only exist on paper or that do not function for a lengthy period of time, forcing a media company to cease operations after only six months of being inoperative is not justified. **At a minimum, the period of inactivity which would trigger the suspension or termination of a media outlet should be significantly extended, for example to one year or more.**
66. Article 29(1) of the Draft Law provides that the activities of a “*mass media outlet can only be terminated or suspended either by decision of the owner (founder) or by a court order in civil proceedings initiated by the authorized state body.*” Article 29(3) further provides that the court “*may terminate the activities of a mass media outlet if the editorial office repeatedly violates the requirements of this Law within a twelve-month period, despite written warnings issued by the Ministry of Justice, the Ministry of Digital Development, or the Prosecutor General of the Kyrgyz Republic to the founder and/or the editorial office (editor). Additionally, non-compliance with a court order to suspend the activities of the media outlet can also be grounds for termination by the court.*”
67. It is not clear from the wording of Article 29(3) which number of violations or warnings within a twelve-month period may trigger termination of the registration of the mass

⁹⁵ See e.g., OSCE RFoM, *The Online Media Self-Regulation Guidebook* (2013), pp. 77-78; see also e.g., *Ensuring Independent Regulation for Online/Citizen Media*, LSE Media Policy Project, 2014.

media outlet. **This should be clearly stated in the law.** It is also unclear whether the court would be verifying the validity of the warnings or simply ensure the existence of such warnings and confirm termination. Moreover, with the wording of the Draft Law, it is unclear as to whether the warnings themselves can be appealed and whether courts can consider their validity, although this could be regulated separately under relevant administrative or civil procedure code. In any case, it is important that every warning by the state bodies can be subject to judicial review. In one case, the European Court of Human Rights ruled that the automatic termination of the registration of a mass media outlet by a court on the basis of two warnings without considering their content led to a violation of Article 10 of the ECHR. In the Court's view, the operation of that regulation under national law disproportionately affected the freedom of the press and the applicant's participation in the exercise of that freedom.⁹⁶

68. The scope of administrative discretion for suspension (which can subsequently lead to termination) is even broader (Article 29(4)). The grounds for suspension by a court include (1) the need to provide injunctive relief in connection with the claim and (2) in case of a violation of the Constitution and national legislation. ODIHR hereby refers to the findings and recommendations from the *Joint Opinion on the Draft Constitution of the Kyrgyz Republic* (2021), which notes with concerns that Article 10(4) of the Constitution which deals with mass media, includes a vague reference to the protection of the younger generation, or to contradiction with “*moral and ethical values and public conscience of the people of the Kyrgyz Republic*” as a potential ground for limiting freedom of expression and of the media (and potentially other freedoms). It concludes that such a provision appears unduly broad and vague to comply with the principle of legal certainty.⁹⁷ Moreover, the content of Article 29(4) of the Draft Law implies that any (however small and insignificant) violation of the national legislation can lead to a suspension of the state registration of the mass media. In addition to not being compliant with the principle of legality provided in Article 19(3) of the ICCPR, as the grounds for suspension are overly broad and vague, and hence not foreseeable, this provision does not comply with the principle of proportionality, according to which the sanction should be balanced against the severity of the violation. The requirement of proportional responses to the violations is a requirement of international human rights law, which has been emphasized in multiple judgments of the European Court of Human Rights and other international human rights institutions.⁹⁸
69. As a result, media outlets can be penalized and their work can be suspended or terminated for discussing legitimate issues of public interest. For example, a media outlet can be terminated for engaging in a legitimate debate for instance in relation to same-sex marriage. These legal provisions may create a chilling effect on freedom of expression, leading media to refrain from engaging in independent and critical reporting and undermining the role of the media as public watchdogs.⁹⁹ As noted by the Venice Commission, the mere threat of heavy sanctions may have a chilling effect on journalists and media outlets, especially where the sanctions are imposed for violations of vague requirements.¹⁰⁰

⁹⁶ See European Court of Human Rights, *Mukhin v. Russia*, no. 3642/10, 14 December 2021, para. 185.

⁹⁷ See ODIHR and Venice Commission, *Joint Opinion on the Draft Constitution of the Kyrgyz Republic* (2021), para. 140.

⁹⁸ See, for example, UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 11. See also European Court of Human Rights, *Times Newspapers Ltd v. the United Kingdom*, nos. 3002/03 and 23676/03, 10 March 2009, para. 47; and *Tolstoy Miloslavsky v. the United Kingdom*, no.18139/91, 13 July 1995, para.49.

⁹⁹ See European Court of Human Rights, *Giniewski v. France*, no 64016/00, 31 January 2006, para. 55.

¹⁰⁰ See Venice Commission, *Opinion on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary*, CDL-AD(2015)015-e, 22 June 2015, para. 38.

70. **It is recommended that the grounds for termination are clarified, while ensuring that the suspension and termination of mass media are treated as a sanction of last resort and proportionate to the violations that were committed.**

RECOMMENDATION H.

To significantly extend, in Article 21, the period of inactivity which may trigger suspension or termination, for example to one year or more, while clarifying the grounds for termination listed in Article 29 and ensuring that suspension and termination of mass media are treated as a sanction of last resort and are proportionate to the violations that were committed by the said media.

6. ABSENCE OF AN INDEPENDENT MEDIA REGULATORY BODY

71. As mentioned in Sub-Section 5, the Ministry of Digital Development and the Ministry of Justice are in charge of registration of mass media outlets, and some form of oversight. The Draft Law does not provide for an independent media regulatory body, instead media regulation is fully concentrated under government bodies. None of these state institutions satisfy the necessary criteria of independence of a media regulator as recommended at the international level.¹⁰¹ Moreover, proposed “simultaneous” involvement of multiple state institutions in media regulation matters will inevitably create a certain degree of confusion where it concerns division of duties/areas of responsibility between them and may lead to inconsistent application of the media law and other relevant legislation.
72. Regarding licensing, in case of scarce infrastructure technologies as mentioned above, international good practice provides that state parties should establish an independent licensing authority, with the power to examine applications and to grant licenses to broadcasters.¹⁰² Regarding regulatory authorities for the broadcasting sector in particular, states should “*ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence*”.¹⁰³ The principle has been further reaffirmed by the CoE Committee of Ministers in the *Declaration on the Independence and Functions of Regulatory Authorities (2008)*, with its annex including details on existing legislative frameworks of member states (at the time) and guidance on best practices and suitable legal and institutional frameworks for the set-up of independent regulatory authorities.¹⁰⁴
73. While the aforementioned recommendation and declaration focus specifically on the broadcasting sector, at the international level the same principle has been put forward in respect to the entire media sector, irrespective of the technology utilized to transmit information.

¹⁰¹ See e.g., UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 39. See for comparative purposes also Council of Europe, *Recommendation Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector* (adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies).

¹⁰² See the UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 39.

¹⁰³ See the *Council of Europe Committee of Ministers, 'Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector'*, 20 December 2000, para. 1.

¹⁰⁴ See the CoE Committee of Ministers, '*Declaration on the independence and functions of regulatory authorities*', 26 March 2008

74. **In any case, it is recognized that any institution overseeing the media should be independent and impartial**, while acknowledging that **media self-regulation appears to be a solution to increase media accountability and public trust, while offering more flexibility than state regulation and upholding freedom of expression and professional standards.**¹⁰⁵ As underlined in the 2023 Joint Declaration of the International Mandate-Holders on Freedom of Expression, “*States should ensure that all public bodies which exercise powers in print, broadcast, other media and/or telecommunications regulation, including bodies that receive complaints from the public, are independent, transparent, and effectively functioning in law and in practice. They should be protected from undue interference, particularly of a political or commercial nature. The legal status of these bodies should be clearly defined and their institutional autonomy and independence guaranteed and protected by law. This should include a participatory and transparent appointment process for the governance and senior managerial structures of these bodies, the ability to employ their own qualified staff, and a clear mandate and power of regulation as well as public accountability and adequate funding.*”¹⁰⁶ In addition, as underlined in previous opinions of the OSCE Representative on Freedom of the Media and ODIHR, “*any legitimate media regulator should enjoy political, functional, managerial and financial independence from the Government, as well as from political, commercial and other interests*” and “[t]he appointment system for members of this body should ensure diversity of the representation and prevent political dependency and conflict of interests”.¹⁰⁷ Accordingly, it is important to ensure a participatory and transparent appointment process for the governance and senior managerial structures of these bodies.¹⁰⁸
75. There is a number of examples in the OSCE participating States where independent bodies have been entrusted with media regulation.¹⁰⁹ In addition, it is important that the media develop, set and maintain, through transparent and participatory processes, effective self-regulatory mechanisms to uphold codes of conduct; such policies and mechanisms should incorporate comprehensive equality principles to prevent and combat discrimination in media content but also promote gender balance and diversity within the media sector work force, at all level, including decision-making, while putting in place policies and complaints mechanisms in case of discrimination and harassment.¹¹⁰
76. In light of the above, **it is recommended to consider establishing a separate independent media regulatory body and ensure that media regulation is independent in law and in practice.**

¹⁰⁵ See e.g., International Mandate-Holders on Freedom of Expression, [Joint Declaration on Freedom of Expression and Responses to Conflict Situations](#), 4 May 2015, clause 4(a), note 9; ODIHR and OSCE RFoM Joint [Legal Analysis of the Draft Law on Mass Media of the Republic of Uzbekistan](#), November 2020, Chapter 2; and Venice Commission, [Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service](#), CDL-AD(2020)013, paras. 34-37. Regarding media self-regulation, see e.g., UNESCO, [The Importance of self regulation of the media in upholding freedom of expression](#) (2011); OSCE RFoM, [The Online Media Self-Regulation Guidebook](#) (2013); and [The Media Self-Regulation Guidebook](#) (2008). See also Venice Commission, [Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service](#), CDL-AD(2020)013, paras. 34-37; and International Mandate-Holders on Freedom of Expression, [Joint Declaration on Media Freedom and Democracy](#) (2023), p. 9.

¹⁰⁶ See International Mandate-Holders on Freedom of Expression, 2023 [Joint Declaration on Media Freedom and Democracy](#).

¹⁰⁷ See e.g., ODIHR and OSCE RFoM Joint [Legal Analysis of the Draft Law on Mass Media of the Republic of Uzbekistan](#), November 2020, Chapter 2.

¹⁰⁸ See International Mandate-Holders on Freedom of Expression, [Joint Declaration on Media Freedom and Democracy](#) (2023), p. 4(a).

¹⁰⁹ See e.g., for examples within the European Union, European Audiovisual Observatory and the EPRA, [Media regulatory authorities and the challenges of cooperation](#) (2021), Chapter 3.

¹¹⁰ See International Mandate-Holders on Freedom of Expression, [Joint Declaration on Media Freedom and Democracy](#) (2023), p. 9(e) and (f).

RECOMMENDATION I.

To consider establishing a separate independent media regulatory body, which would be effective and independent both in law and in practice.

7. ACCESS TO INFORMATION

77. The right to seek, receive and impart information is part of the right to freedom of expression, and is fundamental to individuals' participation in public affairs and in ensuring transparency and accountability of government. This right is expressly protected in Article 19 of the ICCPR. General Comment No. 34 of the UN Human Rights Committee further states that in order to give effect to that right, state parties should enact the necessary procedures by means of freedom of information legislation.¹¹¹
78. Legislation that regulates access to information should allow for the timely processing of requests for information. Authorities should provide reasons for any refusal to provide access to information, while arrangements should be put in place for appeals against refusals to provide access, as well as for a failure to respond to requests.¹¹² Thus, access to information should be provided in an accessible, prompt, effective and practical manner; submitting an information request should not require filling in any excessive data.
79. The Draft Law refers to the right of access to information of the media and media workers, which is positive. Article 39 of the Draft Law notes that citizens have the right to receive timely and accurate information through the mass media about the activities of state and bodies, organizations, public associations, and their officials. State bodies, local self-government bodies, public associations, enterprises, organizations, and institutions, irrespective of their ownership status, along with their officials are also obligated to provide information about their activities to the media upon request from editorial offices. However, Article 41 imposes limitations on sharing information, when "*the information falls under the category of state, trade, or other secrets that are legally protected.*" While reasons of the denial should be communicated (Article 41(1)), no relevant legislation is properly cross-referenced in these cases to clarify the terminology or provide further necessary details. Certain information may legitimately be secret on grounds of national security or protection of other overriding interests listed in Article 19(3) of the ICCPR.¹¹³ At the same time, as noted in the ODIHR Guidelines on the Protection of Human Rights Defenders, national security is frequently used to justify the over-classification of information, thus limiting access to information of public interest and creating another obstacle for whistleblowers and investigative journalists trying to bring to light alleged corruption and human rights violations by state actors.¹¹⁴ Hence, secrecy laws should define national security precisely and include narrowly and clearly defined prohibited disclosures, which are necessary and proportionate to protect

¹¹¹ UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 19. See also, for the purpose of comparison, European Court of Human Rights, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016, para. 111.

¹¹² See *ODIHR Opinion on draft Laws of the Republic of Kazakhstan on Access to Information*, 18 April 2012, para. 11.

¹¹³ See e.g., International Mandate-Holders on Freedom of Expression, *2004 Joint Declaration* (6 December 2004), Sub-Section on "Secrecy Legislation", 3rd paragraph.

¹¹⁴ ODIHR, *Guidelines on the Protection of Human Rights Defenders* (2014), par 144.

national security. They should indicate clearly the criteria, which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label “secret” for purposes of preventing disclosure of information which is in the public interest.¹¹⁵ Moreover, disclosure should not be limited in the absence of the Government’s showing of “*a real and identifiable risk of significant harm to a legitimate national security interest*”¹¹⁶ that outweighs the public’s interest in the information to be disclosed.¹¹⁷ If a disclosure does not harm a legitimate state interest, there is no basis for its suppression or withholding.¹¹⁸ Furthermore, clear and transparent procedures should be put in place to avoid over-classification of documents, unreasonably long time-frames before de-classification and undue limitations in accessing historical archives.¹¹⁹

80. In light of the above, vague prohibitions on the ground of secrecy without due reference to the essential role played by the media in a democratic society and its duty to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest may unduly impact on freedom of expression.¹²⁰ In that context, it is important to ensure the adequate protection of “whistleblowers” (i.e., individuals releasing confidential or secret information although they are under an official or other obligation to maintain confidentiality or secrecy) releasing information on violations of the law, on wrongdoing by public bodies or abuse of public office, on a serious threat to health, safety or the environment, or on human rights or international humanitarian law violations – all such information being considered presumptively as information of public interest.¹²¹ These individuals should be protected against legal, administrative or employment-related sanctions if they act in “good faith” when releasing information.¹²² As indicated by the International Mandate-Holders on Freedom of Expression, individuals other than public officials or employees, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information if they do not place anyone in an imminent situation of serious harm, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information.¹²³ As a minimum, **the Draft Law should exempt a person from liability for the disclosure of classified information when public interest in knowing classified information outweighs possible harm resulting from its disclosure, unless they committed fraud or another crime to obtain the information.**
81. Article 42 of the Draft Law states that an editorial office of a mass media outlet is not allowed to disclose the information provided by individuals or legal entities under the

¹¹⁵ See e.g., International Mandate-Holders on Freedom of Expression, [2004 Joint Declaration](#) (6 December 2004), Sub-Section on “Secrecy Legislation”, 3rd paragraph.

¹¹⁶ See e.g., UN Special Rapporteur on Freedom of Opinion and Expression, [Report on the Protection of Sources and Whistleblowers](#) (2017), A/70/361, para. 47; and the [Global Principles on National Security and the Right to Information](#) (The Tshwane Principles), developed and adopted on 12 June 2013 by a large assembly of experts from international organisations, civil society, academia and national security practitioners, Principle 3(b).

¹¹⁷ See e.g., UN Special Rapporteur on Freedom of Opinion and Expression, [Report on the Protection of Sources and Whistleblowers](#) (2017), A/70/361, para. 10.

¹¹⁸ See the UN Human Rights Committee, [General Comment No. 34](#) on Article 19 of the ICCPR, CCPR/C/GC/34, para. 30.

¹¹⁹ ODIHR, [Guidelines on the Protection of Human Rights Defenders](#) (2014), para. 146.

¹²⁰ See European Court on Human Rights, [Axel Springer AG v. Germany](#), no. 39954/08, 7 February 2012, para. 79.

¹²¹ See e.g., International Mandate-Holders on Freedom of Expression, [2004 Joint Declaration](#) (6 December 2004), Sub-Section on “Secrecy Legislation”, 4th paragraph. See also ODIHR, [Guidelines on the Protection of Human Rights Defenders](#) (2014), para. 148; and See e.g., UN Special Rapporteur on Freedom of Opinion and Expression, [Report on the Protection of Sources and Whistleblowers](#) (2017), A/70/361, paras. 10 and 63.

¹²² See e.g., International Mandate-Holders on Freedom of Expression, [2004 Joint Declaration](#) (6 December 2004), Sub-Section on “Secrecy Legislation”, 4th paragraph. See also, for the purpose of comparison, European Court of Human Rights, [Halet v. Luxembourg](#), no 21884/18, 14 February 2023, paras. 128-130.

¹²³ See e.g., International Mandate-Holders on Freedom of Expression, [2004 Joint Declaration](#) (6 December 2004), Sub-Section on “Secrecy Legislation”, 2nd paragraph.

condition of confidentiality in the disseminated communications and materials. It is also required to maintain the confidentiality of the source of information. This fundamental right of media is formulated as an obligation rather than as a right. This is an indispensable guarantee that should be secured to ensure a favorable environment for the media. In addition, it is understandable that confidentiality should be protected; however, further clarification would be necessary to protect this right. The European Court of Human Rights has stressed the importance of clear and precise procedural guarantees in the context of protecting journalistic sources.¹²⁴

RECOMMENDATION J.

To provide for an exemption of liability for a person disclosing classified information when public interest in knowing classified information outweighs possible harm resulting from its disclosure, unless they committed fraud or another crime to obtain the information.

8. STATE MEDIA

82. As it could be inferred from the text of the Draft Law, the system of state media is going to be retained in the Kyrgyz Republic with state media also being afforded certain privileges compared to the situation of the non-state media. This approach does not comply with the international good practices in the area. In the most recent 2023 Joint Declaration, International Mandate-Holders on Freedom of Expression emphasized that all government or State media should be transformed into public service media without further delay.¹²⁵ It is indeed a high priority task for a state to ensure that all media which receive primarily public funding are independent politically, financially, and managerially, and form a functioning system of public service media. It is, therefore, recommended **to consider excluding references to the state media from the current Draft Law, consider the possibility of transformation of all state media into genuine public service media and develop and adopt specific legislation to this end.**

RECOMMENDATION K.

To consider excluding references to the state media from the current Draft Law, to consider the possibility of transformation of all state media into genuine public service media and develop and adopt specific legislation to this end.

9. RECOMMENDATIONS RELATED TO THE PROCESS OF PREPARING AND ADOPTING THE DRAFT LAW

83. OSCE participating States have committed to ensure that legislation will be “*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*” (1990 Copenhagen Document, para. 5.8).¹²⁶ Moreover, key commitments specify that “*[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or*

¹²⁴ See European Court of Human Rights, *Sanoma Uitgevers B.V. v. the Netherlands*, no 38224/03, 14 September 2010, para. 88.

¹²⁵ See [2023 Joint Declaration on Media Freedom and Democracy](#)

¹²⁶ See [1990 OSCE Copenhagen Document](#).

through their elected representatives” (1991 Moscow Document, para. 18.1).¹²⁷ The Venice Commission’s Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.¹²⁸

84. It is understood that the drafters have sought to create a working group involving representatives of the media and of civil society, which is in principle welcome, although as underlined above, there seems to be a lack of proper feedback mechanism and it is unclear to which extent the comments/input received on these occasions have been considered. Moreover, it seems that the drafters provided quite short deadlines for the submission of feedback/comments.
85. For consultations on draft legislation to be effective, they need to be inclusive and involve consultations and comments by the public, including civil society. They should also provide sufficient time for stakeholders to prepare and submit recommendations on draft legislation, while it is good practice for the public authorities to provide meaningful and qualitative feedback in due time on the outcome of every public consultation, including clear justifications for including or not including certain proposals.¹²⁹ To guarantee effective participation, consultation mechanisms must allow for input at an early stage *and throughout the process*,¹³⁰ meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). While the willingness to organize public consultations throughout the law-making process is welcome, the modalities of such public consultations and the lack of adequate and timely feedback mechanism may raise doubt as to whether the public consultations were or will be meaningful and inclusive as mentioned above.
86. In light of the above, **the public authorities are encouraged to ensure that the Draft Law is subjected to inclusive, extensive and meaningful consultations, including with representatives of civil society and of the media, offering equal opportunities for women and men to participate. According to the principles stated above, such consultations should take place in a timely and meaningful manner, at all stages of the law-making process, including before Parliament. As an important element of good law-making, a consistent monitoring and evaluation system of the implementation of the Law and its impact should also be put in place that would continuously evaluate the operation and effectiveness of the Draft Law, once adopted.**¹³¹

[END OF TEXT]

¹²⁷ See [1991 OSCE Moscow Document](#).

¹²⁸ See Venice Commission, [Rule of Law Checklist](#), CDL-AD(2016)007, Part II.A.5.

¹²⁹ See e.g., [Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes](#) (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

¹³⁰ See e.g., *op. cit.* footnote 90, Section II, Sub-Section G on the Right to participate in public affairs ([2014 OSCE/ODIHR Guidelines on the Protection of Human Rights Defenders](#)).

¹³¹ See e.g., OECD, [International Practices on Ex Post Evaluation](#) (2010).