Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media

LEGAL ANALYSIS OF THE DRAFT LAW OF UKRAINE "ON MEDIA"

Commissioned by the OSCE Representative on Freedom of the Media from Dr. Joan Barata Mir, independent media freedom expert

February 2020

Table of contents

Executive summary

This Analysis examines the Draft Law of Ukraine "On Media" (hereinafter, "the draft").

The object of the legal text is, according to its article 1, to "ensure the exercise of the right to freedom in expressing views, the right to receive comprehensive, accurate and operational information, to ensure pluralism of thoughts and free distribution of information; to protect the Ukrainian national interests and the rights of media-services users; to regulate activities in the sphere of media in accordance with the principles of transparency, justness and objectivity; to stimulate competitive environment, media equality and independence".

Article 1 is devoted to the definition of a series of terms that will be used in the text of the draft. It is obvious that clarifying the different notions included in the draft facilitates a proper understanding and application of the respective legal provisions. This being said, it also needs to be noted that some of the definitions are either vague or not completely adjusted to international standards and comparative best practices, thus creating possible confusions that need to be avoided.

Article 2 is devoted to defining the scope of the draft, particularly the subjects and activities that it covers. To this end, a series of criteria can be found in the different paragraphs of this article. In particular, paragraph 8 includes a series of additional situations where the application of Ukrainian legislation would be justified. These additional criteria are problematic from the point of view of the application of the principle of country of origin, as established by the European Union and Council of Europe standards.

Article 7 contains a series of provisions aiming at protecting and promoting effective economic competition in the provision of media services. These provisions basically include limits to the control by single individuals or entities of media companies, as well as to the concentration of power within the respective media markets. These anti-concentration rules are not aimed at preserving and promoting media pluralism but only market competition. These are two completely separated spheres of public interest: protecting the former does not necessarily imply promoting the later. It is important for a media law to include specific measures to foster competition in the media market (although this area can also be covered by general antitrust law), but these measures need to be complemented with additional limits and requisites specifically aimed at promoting the existence of a diversity of viewpoints in the public sphere as well as a plural offer of media formats and content.

Section II of the draft contains a series of provisions referring to and describing the legal regime applicable to the different subjects involved in the provision of media services. This section contains several notions that may lead to some confusions. These notions are sometimes associated to legal regimes in terms of obligations and liability which would not be in line with applicable international standards.

According to international standards, community media constitutes a third type of media besides commercial and public service media. In order for community media to properly perform their activities, it is very important to preserve the independence and capacity to give voice and serve the interests of the specific group or community that justified their establishment. For this reason, it is very important to guarantee that there is no room for possible interference from commercial interests or political/State guidance. For these reasons, allowing municipal entities to control (even in an indirect manner) the activities

of a community media outlet is not acceptable and this provision needs to be eliminated from the draft.

The draft contains a series of limitations on the content that can be disseminated within the Ukrainian territory. Some of the banned expressions and topics may actually cover legitimate political opinions and discussions, related to matters of public interest in Ukraine, particularly regarding its territorial integrity. According to the applicable international standards, only direct calls to the commission of crimes or to engage in forms of violence, discrimination of hostility can be limited by the legislator or any other State authority. Expression of controversial opinions, even in cases when they contradict a widely majoritarian sentiment or may become particularly unacceptable or offensive for significant portions of the population, is firmly protected under the freedom of expression clause.

Specific situations affecting national security may justify the imposition of certain limits to the right to freedom of expression. However, these restrictions need to be clearly specified on a case-by-case basis, in any case compatible with the three-part test established in international standards. The existence of a national security crisis, as worrying and sensitive as it can be, cannot be used as a justification to impose broad and general limits to the fundamental right in question.

The so-called rights to response and correction are regulated under article 44 of the draft. The right to correct or amend false information that may harm an individual's reputation is recognized and protected in the legislation of most OSCE participating States. Such provisions are to be considered in line with applicable international and regional standards as well as best comparative practices. However, some parts of the mentioned article 44 embrace a much wider definition or simply diverging notion and protection of such right, which would not be acceptable in light of international standards.

Section V of the draft is devoted to the matter mentioned above. From a general perspective, and particularly regarding issues related to the regulation of all the aspects of the license adjudication processes, the draft contains a comprehensive, consistent and detailed set of norms, which are fundamentally in line with international standards and best comparative practices. This being said, there are a few issues that would require some changes in order for the draft to fully respect applicable international standards in this area, in particular the so-called registration process. This process is applicable to any media outlet that is not subjected to the requirement to obtain a radiofrequency license. In reality, this registration process must be seen as an authorization mechanism, inasmuch as it consists of a submission of a series of documents and information by the applicant, a review process by the regulatory authority, and a final acceptance or approval by this last entity in case all the information provided is correct. This general requirement is problematic as it may constitute a disproportionate State intervention vis-à-vis the exercise of the right to freedom of expression. According to international standards and comparative best practices, a mere notification system (i.e. the communication of certain information by the corresponding media outlet to the competent authority) represents a more reasonable and less intrusive public intervention, as those aiming at disseminating content would not need to wait for the approval from the regulator in order to launch their activities.

Section VI of the draft is devoted to defining and developing the legal framework applicable to the appointment of the members, functioning and powers of the National Council of Television and Radio Broadcasting of Ukraine (hereinafter, the National Council) as the independent media regulatory authority. The existence of an independent body to take decisions that affect the main aspects of the provision of audiovisual services, particularly regarding licensing, content regulation or administrative penalties is a requirement derived from applicable international and regional standards and moreover, it has also become a legal obligation of member States of the European Union since the adoption of the last amendments to the Directive regulating the provision of audiovisual media services. This being said, there are a few areas where some recommendations are applicable in order to properly align the text of the draft with international standards. It is recommended that paragraph 1 of article 70, apart from establishing its independence vis-à-vis "other State power agencies, local self-governance agencies, their officials and employees", also states that the regulator needs to remain independent from any political guidance or influence, as well as from the interest (commercial and other) of the subjects it regulates. The requirements to become a member of the National Council are very broad and general and do not necessarily guarantee full capacity to manage and properly participate in the complex decision-making process of an authority of this nature. In particular, independence of criteria on the basis of sound expertise does not appear to be properly safeguarded by the requisites currently in place. Regarding the appointment of members of the National Council, the draft establishes that they need to be appointed by the Verkhovna Rada (half) and the President of Ukraine (half). With regards to the former, it is necessary recommended to replace the requirement of a majority of members of the body with a qualified majority (2/3 of the chamber) in order to guarantee the maximum level of consensus and avoid appointments supported only by the existing ruling majority. Regarding members appointed by the President, it is necessary to add additional safeguards in order not to give this political body an excessive discretionary power when making his/her choice. As for the termination of the mandate of members the National Council, as regulated in article 78 of the draft, it would be necessary that this article introduces a provision guaranteeing that in the course of the termination procedure the affected person is properly heard and has the right to present his/her arguments regarding the existence of a termination cause. In addition to this, putting in the hands of the President and the Verkhovna Rada the possibility to dismiss all the members of the National Council on the occasion of the preparation and presentation of each annual report may put in the hands of those two bodies an immense power to coerce the independent performance of the regulator, which is obviously unacceptable in light of applicable international and regional standards.

Co-regulation is usually understood as the establishment of a self-regulatory mechanism where public authorities (usually the competent regulator) have some backstop powers in order to guarantee, in last instance, that the self-regulatory mechanism properly serves the public interest and it is effectively implemented. What is established in the draft goes beyond this commonly accepted (in international and regional standards, as well as best comparative practices) notion of co-regulation and rather establishes a mechanism of coordinated interpretation and application of legal notions. This special procedure does not contradict, as such, the applicable international standards. However, what can be seen as problematic is the possibility for the National Council to apply rules adopted within the co-regulatory scheme to media outlets that do not belong to it, particularly on the basis of the mentioned and very vague requisite of concurring an issue of industry-

wide significance. Moreover, it would probably be far more efficient to replace this very complicated and bureaucratic (and also, probably, expensive) mechanism, with a procedure that would allow the National Council to adopt codes and rules developing legal provisions, on the basis of an open, plural and transparent consultation with all the affected stakeholders.

The draft also contains the possibility of imposing on certain media outlets a penalty consisting on banning their dissemination in the territory of Ukraine. It needs to be noted that this measure is established by the draft as different and separate from the penalty of cancelling or annulling the corresponding license or registration. Imposing a general ban affecting all the content of a specific media outlet, during a non-specified (or at least, non-clearly regulated) period of time, and on the basis of very widely formulated causes (the draft essentially refers to all possible legal infractions in general, without any further specification, particularly when it comes to media outlets that are not licensed or registered in Ukraine, and therefore they do not fall, in principle, under the competence of the National Council) represents an excessive and disproportionate measure vis-à-vis the exercise of the fundamental right to freedom of expression, which may introduce a very clear chilling effect to the Ukrainian media sphere and can be potentially used as an instrument to censor media outlets that are not favorably seen by State authorities.

The draft also includes a very long list of final transitional provisions. Some of them introduce amendments to legislation already in force. In particular, the draft includes significant reforms to the Law of Ukraine "On State Support of Mass Information Entities and Social Protection of Journalists". In particular, the draft will introduce several provisions in this Law regarding professional journalists. The legal definition of professional journalism included in the draft is considerably narrow and does not cover new non-professional modalities, such as blogs or social media accounts.

Main recommendations

- Reference to "textual" content needs to be eliminated from the definition of audiovisual media.

- The draft should incorporate a general definition of written media, no matter the technology or support used for the dissemination of the respective messages.

- A proper definition of media should put aside the idea of "mass media" and rather focus on the more general concept of editorially elaborated content, referring to matters of public interest, and aimed at informing educating or entertaining.

- The draft needs to follow Council of Europe (and the European Union) standards and legal requirements regarding jurisdiction over audiovisual media services and e-commerce services, i.e. the principle of country of origin. Other criteria, as those established in the draft, may create serious conflicts and the overlapping of competences between Ukrainian authorities and those of the country where the respective media outlet is actually established.

- The draft needs to incorporate specific provisions, specifically designed and suited to promote the existence of a diversity of viewpoints in the public sphere as well as a plural offer of media formats and content, beyond the mere protection of economic competition in the media sphere.

- The so-called providers of audiovisual services must be redefined as mere distributors, deprived from any editorial responsibility and not subjected to a specific registration requirement.

- Platforms that host content or "content sharing platform providers" (basically social media services or video sharing platforms such as Facebook, Twitter or YouTube) are not deemed to hold any editorial control over the content they distribute. In addition to this, and for these reasons, such platforms cannot be held liable for the content they disseminate unless certain conditions are met according to applicable international and regional standards. In addition, it is not acceptable to give them the power to restrict the right to freedom of expression on the basis of domestic legal limits, which must remain in the hands of State authorities exclusively.

- The draft must not ban expressions and topics which may actually cover legitimate political opinions and discussions, related to matters of public interest in Ukraine, particularly regarding its territorial integrity. According to the applicable international standards, only direct calls to the commission of crimes or to engage in forms of violence, discrimination of hostility can be limited by the legislator or any other State authority.

- Prohibitions to disseminate information, restrictions with regards to rebroadcasting, registration and structure of ownership on the exclusive basis of the existence of editorial control or ownership by individuals or entities of the so-called aggressor/occupant State, and the elaboration of a list of "persons presenting a threat to national media landscape of Ukraine", can only be considered as an extreme and disproportionate measure that is not supported by international standards and thus needs to be eliminated. The existence of an armed conflict affecting part of the territory of Ukraine does not justify, as such, the introduction of such limits.

- Allowing municipal entities to control (even in an indirect manner) the activities of a community media outlet is not acceptable and the corresponding provisions need to be eliminated.

- The regulation of the so-called rights to response and correction needs to be amended in order to make them applicable exclusively to the cases contemplated by international and legal standards.

- Imposing on any media outlet that is not subjected to the requirement to obtain a radiofrequency license the obligation to "register" must be seen as an authorization mechanism and may constitute a disproportionate State intervention vis-à-vis the exercise of the right to freedom of expression. A mere notification system (i.e. the communication of certain information by the corresponding media outlet to the competent authority) would represents a more reasonable and less intrusive public condition. In addition to this, the public interest can be equally and better served with the imposition of full transparency requirements to all media actors.

- Regarding permits for temporary broadcasting, it is recommended to either amend provisions on these matters to focus its application on clearly described and very exceptional cases, or to eliminate them.

- The possibility for the National Council to apply rules adopted within the co-regulatory scheme to media outlets that do not belong to it, particularly on the basis of the mentioned and very vague requisite of concurring an issue of industry-wide significance, needs to be eliminated. Moreover, it is recommended to replace the co-regulatory mechanism, with a procedure that would allow the National Council to adopt codes and rules developing legal provisions, on the basis of an open, plural and transparent consultation with all the affected stakeholders.

- In order to reinforce and to properly establish the independence of the National Council, it is recommended that paragraph 1 of article 70, apart from establishing its independence vis-à-vis "other State power agencies, local self-governance agencies, their officials and employees", it also states that the regulator needs to remain independent from any political guidance or influence, as well as from the interest (commercial and other) of the subjects it regulates.

- Regarding the requirements to become a member of the National Council, it is recommended to introduce additional requirements including high-level managerial experience during a minimal period of time, professional media experience connected to regulatory and ethical journalistic issues, or post-graduate education in the field of media ethics, economics or media regulation.

- Regarding the appointment of members of the National Council, t is recommended to replace the requirement of a majority of members of the Verkhovna Rada with a qualified majority (2/3 of the chamber) in order to guarantee the maximum level of consensus and avoid appointments supported only by the existing ruling majority. Regarding members appointed by the President, it is necessary to add additional safeguards in order not to give this political body an excessive discretionary power when making his/her choice.

- As for the termination of the mandate of members the National Council, as regulated in

article 78 of the draft, it would be necessary that this article introduces a provision guaranteeing that in the course of the termination procedure the affected person is properly heard and has the right to present his/her arguments regarding the existence of a termination cause. In addition to this, the provision that establishes that "(e)arly termination of all the National Council members' powers might occur due to the failure to approve the National Council's annual report on the condition there were the corresponding decisions of Verkhovna Rada and the President of Ukraine. Such decision shall have to be approved during one month since the Verkhovna Rada and the President of Ukraine have received the National Council's Annual Report", needs to be eliminated.

- Bans on the dissemination of media content in Ukraine need to be eliminated from the provisions of the draft.

- The legal definition of professional journalism included in the draft as an amendment to the Law of Ukraine "On State Support of Mass Information Entities and Social Protection of Journalists" is considerably narrow and does not include new modalities of non-professional or non-traditional journalism. Therefore, it is recommended to amend it accordingly.

Introduction

The present analysis was prepared by Dr. Joan Barata Mir, an independent media freedom expert, at the request of the OSCE Representative on Freedom of the Media (hereinafter, RFoM).

This Analysis refers to the Draft Law of Ukraine "On Media".

The structure of the comment is guided by the tasks formulated by the Office of the RFoM. These tasks include comments on the current version of the draft law by comparing provisions against international media standards and OSCE commitments; indication of provisions which are incompatible with the principles of freedom of expression and media; and recommendations on how to bring the legislation in line with the above-mentioned standards.

The Analysis first outlines the general international standards on freedom of expression and freedom of information and then presents those referring to media services. These respective standards are referred to as defined in international human rights treaties and in other international instruments authored by the United Nations, the OSCE and the Council of Europe.

Part II presents an overview of the proposed legislation, focusing on its compliance with international freedom of expression standards. The Analysis highlights the most important positive aspects of the draft law and elaborates on the drawbacks, with a view of formulating recommendations for the review.

Part I. International legal standards on Freedom of Expression and Freedom of Information

General standards

In Europe, freedom of expression and freedom of information are protected by article 10 of the European Convention on Human Rights (ECHR), which is the flagship treaty for the protection of human rights on the continent within the context of the Council of Europe (CoE). This article follows the wording and provisions included in article 19 of the International Covenant on Civil and Political Rights (ICCPR), and is essentially in line with the different constitutional and legal systems in Europe.

Article 10 reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Freedom of expression and freedom of information are essential human rights that protect individuals when holding opinions and receiving and imparting information and ideas of all kinds. It also presents broader implications, as the exercise of such rights is directly connected with the aims and proper functioning of a pluralistic democracy[1].

On the other hand, freedom of expression and freedom of information, as well as the other rights protected in the Convention, are not absolute and therefore may be subject to certain restrictions, conditions and limitations. However, article 10.2 ECHR clearly provides that such constraints are exceptional and must respect a series of requirements, known as the three-part test. This test requires that: 1) any interference must be provided by law, 2) the interference must pursue a legitimate aim included in such provision, and 3) the restriction must be strictly needed, within the context of a

[1] See the elaboration of such ideas by the European Court of Human Rights (ECtHR) in landmark decisions such as Lingens v. Austria, Application No. 9815/82, Judgment of 8 July 1986, and Handyside v. The United Kingdom, Application No. 543/72, Judgment of 7 December 1976.

democratic society, in order to adequately protect one of those aims, according to the idea of proportionality.[2]

At the OSCE level, there are political commitments in the area of freedom of expression and freedom of information that clearly refer to the international legal standards extant in this area. In particular, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE in 1990 proclaims the right to everyone to freedom of expression and states that:

> "This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards"[3].

Also, the very recent OSCE Ministerial Council Decision 3/2018, adopted by the Ministerial Council in Milan on 7 December 2018, establishes the following:

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

Standards with regards to media regulation

General Comment No. 34 concerning Article 19 of the International Covenant on Civil and Political Rights adopted on 29 June 2011, by the UN Human Rights Committee[5], states the following (para 39):

> "States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of paragraph 3. 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. <…> Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should

[2] See for example The Sunday Times v. UK, Application No. 6538/7426 Judgment of April 1979.

[3] This document is available online at: http://www.osce.org/odihr/elections/14304.

[4] Available online at: https://www.osce.org/chairmanship/406538?download=true

[5] Available online at: http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf.

provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters."

Paragraph 40 of the same document also establishes that:

> "The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views."

Similarly, the international rapporteurs on freedom of expression, including the UN Rapporteur on Freedom of Expression and Freedom of Opinion, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression, have adopted several joint declarations which included relevant provisions and recommendations particularly focusing on audiovisual media services regulation[6].

There is a valuable and solid interpretative jurisprudence in the CoE, established in the course of decades by the European Court of Human Rights, which also includes the provision of media services in their connection with the right to freedom of expression and freedom of information. The case law covers areas including the responsibilities of the State in allocating proper frequencies (*Centro Europa 7 S.r.l. and Di Stefano v. Italy*, 7 June 2012[7]), legal certainty in the regulation of broadcasting (*Groppera Radio AG and Others v. Switzerland*, 28 March 1990[8]), non-arbitrariness in the process of granting a broadcasting license (*Meltex Ltd and Movsesyan v. Armenia*, 17 June 2008[9]), the need to avoid monopolies (*Informationsverein Lentia and Others v. Austria*, 24 November 1993[10]), or the need to properly protect the independence of public service broadcasters (*Manole and Others v. Moldova*, 17 September 2009[11]), among others.

Moreover, the Committee of Ministers and the Parliamentary Assembly of the Council of Europe have developed numerous recommendations and declarations that contribute to clarify, to establish and to develop principles, requirements and minimum standards regarding the effective protection of rights included in Article 10 ECHR, in particular vis-à-vis different aspects related to the provision of audiovisual services and public service media (including media pluralism and transparency or media ownership, public service media governance, remit of public service media in the information society, funding of public service media, as well as promotion of democratic and social contribution of public

---

[6] See for example the latest Joint Declaration, adopted on 2 May 2018, on media independence and diversity in the digital age, available online at: https://www.osce.org/representative-on-freedom-of-media/379351

[7] Available online at: https://hudoc.echr.coe.int/eng#{"itemid":["001-111399"]}

[8] Available online at: https://hudoc.echr.coe.int/eng#{"itemid":["001-57623"]}

[9] Available online at: https://hudoc.echr.coe.int/eng#{"fulltext":["Meltex%20Ltd%20and%20Movsesyan%20v.%20Armenia"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-87003"]}

[10] Available online at: https://hudoc.echr.coe.int/eng#{"itemid":["001-57854"]}

[11] Available online at: https://hudoc.echr.coe.int/eng#{"itemid":["001-94075"]}

media, among others[12]).

It is also important to note how the Council of Europe in the Recommendation CM/Rec (2011) 7 of the Committee of Ministers to member states on a new notion of media:

> Despite the changes in its ecosystem, the role of the media in a democratic society, albeit with additional tools (namely interaction and engagement), has not changed. Media-related policy must therefore take full account of these and future developments, embracing a notion of media which is appropriate for such a fluid and multi-dimensional reality. All actors – whether new or traditional – who operate within the media ecosystem should be offered a policy framework which guarantees an appropriate level of protection and provides a clear indication of their duties and responsibilities in line with Council of Europe standards. The response should be graduated and differentiated according to the part that media services play in content production and dissemination processes. Attention should also be paid to potential forms of interference in the proper functioning of media or its ecosystem, including through indirect action against the media's economic or operational infrastructure"[13].

The Recommendation also points to six criteria when an online resource may legally be acknowledged as a media outlet, be it a "written" or audiovisual media. These are:

- Intent to act as media,
- Purpose and underlying objectives of media,
- Editorial control,
- Professional standards,
- Outreach and dissemination,
- Public expectation.

An increasingly important area of international standards-setting refers to the role and responsibilities of online platforms or intermediaries, particularly when they provide services of content hosting, which include social media and content sharing platforms like YouTube, Facebook, Twitter, Instagram or many others. The Annex to the Recommendation CM/Rec (2018) 2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries[14], indicates, among others, the following obligations for States:

> "Any request, demand or other action by public authorities addressed to internet intermediaries that interferes with human rights and fundamental freedoms shall be prescribed by law, exercised within the limits conferred by law and constitute a necessary and proportionate measure in a democratic society. States should not exert pressure on internet intermediaries through non-legal means. (…)

---

[12] Available online at: https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts and https://www.coe.int/en/web/freedom-expression/parliamentary-assembly-adopted-texts

[13] Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0

[14] Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680790e14

States should take into account the substantial differences in size, nature, function and organisational structure of intermediaries when devising, interpreting and applying the legislative framework in order to prevent possible discriminatory effects. (...)

Any legislation applicable to internet intermediaries and to their relations with States and users should be accessible and foreseeable. All laws should be clear and sufficiently precise to enable intermediaries, users and affected parties to regulate their conduct. The laws should create a safe and enabling online environment for private communications and public debate and should comply with relevant international standards. (...)

Any legislation should clearly define the powers granted to public authorities as they relate to internet intermediaries, particularly when exercised by law-enforcement authorities. Such legislation should indicate the scope of discretion to protect against arbitrary application. (...)

Any request, demand or other action by public authorities addressed to internet intermediaries to restrict access (including blocking or removal of content), or any other measure that could lead to a restriction of the right to freedom of expression, shall be prescribed by law, pursue one of the legitimate aims foreseen in Article 10 of the Convention, be necessary in a democratic society and be proportionate to the aim pursued. State authorities should carefully evaluate the possible impact, including unintended, of any restrictions before and after applying them, while seeking to apply the least intrusive measure necessary to meet the policy objective. (...)

State authorities should not directly or indirectly impose a general obligation on intermediaries to monitor content which they merely give access to, or which they transmit or store, be it by automated means or not. (...)

State authorities should ensure that the sanctions they impose on intermediaries for non- compliance with regulatory frameworks are proportionate because disproportionate sanctions are likely to lead to the restriction of lawful content and to have a chilling effect on the right to freedom of expression. (…)

State authorities should ensure that notice-based procedures are not designed in a manner that incentivises the take-down of legal content, for example due to inappropriately short timeframes. Notices should contain sufficient information for intermediaries to take appropriate measures. Notices submitted by States should be based on their own assessment of the illegality of the notified content, in accordance with international standards. (...)

States should guarantee accessible and effective judicial and non-judicial procedures that ensure the impartial review, in compliance with Article 6 of the Convention, of all claims of violations of Convention rights in the digital environment.

States should proactively seek to reduce all legal, practical or other relevant barriers that could lead to users, affected parties and internet intermediaries being denied an effective remedy to their grievances."

In this specific area, although EU law is not part of international standards but bearing in mind the commitment by Ukrainian authorities to align national legislation with EU legal framework, the Directive 2000/31/EC, known as the e-commerce Directive[15], establishes

[15] Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031

liability exemptions for intermediaries under certain conditions of lack of knowledge of illegal activity or information and expeditious removal and disabling upon knowledge (article 14). The Directive also includes an important provision regarding the absence of any legal obligation for providers to monitor content (article 15).

Part II. Overview of the proposed legal reform

Content and scope of the proposed legislation

The draft that is the object of this analysis is titled "Law of Ukraine on Media". The version used by this expert is the unofficial translation into English provided by the OSCE.

The draft does not include any preamble. However, the OSCE provided the expert with a translation of the "Explanatory note".

The draft contains six sections, devoted to the following matters:

Section I: General.

Section II: Media sphere entities.

Section III: Community broadcasting.

Section IV: Requirements to information content and to arranging media-services provision.

Section V: Licensing and registration in the media sphere.

Section VI: National Council of Televisions and Radio Broadcasting and its powers.

Section VII: Joint regulation (co-regulation) in the media sphere.

Section VIII: Liability for the violation of the legislation in the media sphere.

Section IX: Restrictions related to the armed aggression.

Section X: Final and transitional provisions.

Analysis of the provisions of the proposal in light of applicable international standards

Definitions

Article 1 is devoted to the definition of a series of terms that will be used in the text of the

draft. It is obvious that clarifying the different notions included in the draft facilitates a proper understanding and application of the respective legal provisions. This being said, it also needs to be noted that some of the definitions are either vague or not completely adjusted to international standards and best comparative practices, thus creating possible confusions that need to be avoided:

- *audiovisual media*: this media format is described as media "that distribute in textual, audio, visual or other form" via any distribution system for linear or non-linear audiovisual services. This reference to textual content is inadequate and may lead to possible confusions and misinterpretations. Firstly, it is obvious that any written text included as part of the content of audiovisual media service providers is to be considered as part of the audiovisual service in question. Secondly, if the legislator has in mind the provision of the so-called teletext services, it needs to be noted that this is an additional service generally provided through broadcasting programmes (or channels) which better deserves to be treated as written media and thus regulated accordingly.

- *print media*: the definition of print media basically refers to information that is disseminated through "printed form". In order to respect international standards and best comparative practices it is important for any media law to regulate the different media formats on the basis of the type of message (written, audio, audiovisual…) rather than the physical support or infrastructure used for their distribution. For this reason, the draft should incorporate a general definition of written media, no matter the technology or support used for the dissemination of the respective messages. These remarks are also applicable to the definition of "online media" also included in article 1, which refers to the distribution of "information in textual, audio, visual or other form in electronic (digital) presentation with the help of Internet". Once again, the differentiation of the legal regime applicable to a medium format depending on the technological platform that it uses violates the general standard of technological neutrality applicable to communications regulation. Moreover, it may lead to the introduction of regulatory discriminations between identical forms of speech, in terms of scope and limits to the exercise of the right to freedom of expression.

- *mass information*: this notion is also vague and connected to an old idea of mass media understood as a series of powerful media outlets addressing a big passive audience. The current communications landscape has become more complex and interactive and makes this reference to the massive nature of communications to become outdated. Connected to this definition we can also find the notion of media as "means of mass information". This definition only focuses on the idea of dissemination of something called, once again "mass information", and on the periodic or regular nature of its dissemination. A proper definition of media should put aside the idea of massiveness and rather focus on the more general concept of editorially elaborated content, referring to matters of public interest, and aimed at informing educating or entertaining.

Scope of the law

Article 2 is devoted to defining the scope of the draft, particularly the subjects and activities that it covers. To this end, a series of criteria can be found in the different paragraphs of this article. In particular, paragraph 8 includes a series of additional situations where the application of Ukrainian legislation would be justified:

- *services rendered by the entity totally or mostly are provided for the Ukrainian territory or to the Ukrainian audience, or are accessible on the Ukrainian territory*: considering that in both the spheres of the Council of Europe and the European Union the fundamental competence requisite is based on the application of the principle of country of origin, using the criteria of accessibility from Ukraine or targeting a Ukrainian audience may create serious conflicts and the overlapping of competences between Ukrainian authorities and those of the country where the respective media outlet is actually established. Therefore, this expansion of power of Ukrainian authorities is not acceptable. The same concerns must be applied to the requisite referring to the fact that "services, provided by the entity, could be paid for by Ukrainian citizens or legal entities from the Ukrainian territory".

- *access to the services, rendered by the entity, are provided with using a domain name in the domains .UA or .УКР*: despite the fact that Ukrainian authorities have competences over the attribution of such domain, its use to disseminate media content does not necessarily imply that the media service in question falls under the competence of Ukrainian authorities, based on the considerations made in the previous point.

In a similar vein, criteria established in indents 2 and 3 of paragraph 9 of the same article would also trigger conflicts of competence with regulatory bodies of other Council of Europe and European Union member States, as they are not compatible with the way the principle of country of origin is defined and established by the relevant standards adopted by these organizations.

In addition to this, paragraph 5 of article 4 establishes that restrictions on receiving or retransmitting radio-channels, TV-channels, programs' catalogs originated from the countries being Parties to the European Convention on Trans-Frontier Television or member-states of the European Union can be imposed in cases where the language used by these media outlets in not an official language in one of these States. Such an exception exclusively based on the language used seems excessive and unjustified.

Economic competition in the media sphere

Article 7 contains a series of provisions aiming at protecting and promoting effective economic competition in the provision of media services. These provisions basically include limits to the control by single individuals or entities of media companies, as well as to the concentration of power within the respective media markets. These rules can only be welcomed and need to be considered as complementary and more specific than those included in general antitrust provisions and mechanisms already existing in Ukrainian legislation. It is important to note, in this sense, that this article establishes that relevant markets in the audiovisual media sphere will be defined by the Anti-Monopoly Committee of Ukraine, on the basis of a report submitted by the National Council.

This being said, it is also relevant to underline that these anti-concentration rules are not aimed at preserving and promoting media pluralism but only market competition. These are two completely separated spheres of public interest: protecting the former does not necessarily imply promoting the later. It is important for a media law to include specific measures to foster competition in the media market (although this area can also be covered by general antitrust law), but these measures need to be complemented with

additional limits and requisites specifically aimed at promoting the existence of a diversity of viewpoints in the public sphere as well as a plural offer of media formats and content. This last objective requires the adoption of specific provisions, specifically designed and suited to serve such particular public interest objectives (which may in many cases diverge from the economic approach that guides antitrust legislation). The draft only includes some transparency requirements (articles 25 to 27) but no other measures or restrictions applicable to limit possible concentrations or abuse of dominant positions that may affect diversity and pluralism in the public sphere. Therefore, it is recommended to include further provisions in this area.

Subjects in the field of media

Section II of the draft contains a series of provisions referring to and describing the legal regime applicable to the different subjects involved in the provision of media services. This section contains several notions that may lead to some confusions. These notions are sometimes associated to legal regimes in terms of obligations and liability which would not be in line with applicable international standards.

- *online media*: as previously mentioned, the establishment of this separated category (article 16) presents problems in terms of technological neutrality and alters what must be the fundamental division between the three main media formats: written, audio, and audiovisual, independently from the technology or distribution support.

- *providers of audiovisual services*: these subjects are defined as service providers holding "editorial control over selection and arrangement of TV-channels or radio-channels into bundles" (article 17). These subjects are in charge of granting users "access to TV-channels and radio-channels' bundles on a contractual basis unassisted or with the participation of an electronic communication services provider, who sign a corresponding contract with the user". This activity cannot be considered as media activity, but rather as a distribution service consisting of transporting and delivering third party content to final users. Therefore, this activity consists of the provision of an electronic communications service (telecommunications) and not a media service. In addition to this, and contrary to the wording of the draft, the activity of selecting and bundling a series of television and radio channels cannot be seen as the exercise of any kind of editorial responsibility over media content. Such responsibility remains in any case attached to the editors of the channels in question. Article 22 establishes a series of obligations applicable to these service providers which in fact indirectly confirm the lack of direct editorial control over content (as these obligations basically consist of requirements of transparency and guaranteeing the provision of the distribution service under certain conditions in order to protect the final users of the service). However, the registration requirement included in article 61 constitutes an additional authorization (besides the licenses needed for the establishment and operation of the distribution infrastructure as such) that is not justified in terms of protecting the public interest. It needs to be noted that the different channels distributed by these service providers are also obliged to obtain the respective license or to register, thus duplicating the intervention of the State in this area. Therefore, this registration requirement applicable to the so-called providers of audiovisual services (distributors, in reality) would need to be repealed, maintaining and perhaps enlarging the current obligations of transparency and information, as well as the exercise of possible monitoring powers by the audiovisual regulator.

- *content sharing platform providers*: article 18 defines these providers as those giving the users "the opportunity to download and store information, including also audiovisual programs and other user information for viewing and using by unlimited number of users, which is not exposed to early editorial control on behalf of content sharing platform's provider, and arrangement of programs and user information placement is performed by such a provider with using automatic means and algorithms, including also the images sequencing and systematization". According to international standards, intermediary platforms that host content (basically social media services or video sharing platforms such as Facebook, Twitter or YouTube) are not deemed to hold any editorial control over the content they distribute, taking also into account the fact that possible content moderation decisions adopted once a piece of content has already been uploaded cannot be seen as exercising editorial control. In addition to this, and for these reasons, such platforms cannot be held liable for the content they disseminate unless certain conditions are met (as established by articles 12-14 of the e-commerce Directive of the European Union, and the Council of Europe Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries[16]). Last but not least, it is also important to mention that according to international standards and EU e-commerce legislation, jurisdiction to regulate of intermediary platforms is also determined according to the principle of country of origin, and therefore, and despite there is no reference to this matter in the draft, Ukrainian authorities could only regulate duties and responsibilities of platforms established in the territory of the country.

All these considerations are in contrast with some of the provisions contained in the draft vis-à-vis the mentioned category of subjects. In particular, article 23 establishes a series of requirements applicable to content sharing platform providers (according to the terminology of the draft). Some of them are problematic based on the following considerations:

a) It is necessary to insist on the fact that these obligations could only be applied to platforms established in Ukraine.
b) The obligation for platforms to "ensure checking of the user age before providing him/her with the access to information that may harm minors' physical, moral or mental development" is impossible to apply in practice. Platforms can establish certain age thresholds for users when accessing certain services (putting aside the problem of how user's age can be effectively verified), but forcing them to analyze every single piece of content to determine whether it may or may not harm minors' development would represent imposing an obligation of general content monitoring that is incompatible with applicable standards. In addition to this, the notion of harming minors' development is extremely vague in this context and the legislator would be putting in the hands of private intermediaries the discretionary power to determine when a certain piece of speech is legitimate and protected and when it is not.
c) Similarly problematic is the requirement consisting of "stipulate in the conditions for using the content sharing platform's service a ban on disseminating user information that breaches Ukrainian legislation, including

[16] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14

also requirements of Section IV hereof, as well as requirements of the Law "On Copyright and Related Rights", and the obligations emerging in case of the need to deny unauthentic information". Establishing a general obligation to interpret and monitor the application of Ukrainian laws regarding every piece of content is incompatible with lack of editorial responsibility and the mere intermediary role that platforms are supposed to play. In cases of serious violations of the law by platforms' users, these actors may indeed be obliged to adopt measures on the basis of a clear prior administrative or judicial order. However, it is not acceptable to transform them into law interpretation and enforcement agencies thus giving them, as it has already been noted, a power to restrict the right to freedom of expression, which must remain in the hands of State authorities exclusively.

d) These restrictive powers are particularly problematic in light of the provisions contained in article 114 of the draft, which basically hold platforms liable for any legal infraction committed by a third party in case they did not properly perform the duties enshrined in article 23. Apart from directly contravening applicable international and regional standards, the existence of this liability provisions forces platforms to err on the side of caution and over-remove content in order to avoid any possible legal responsibility. This has a clear impact on the right to freedom of expression.
e) In addition to the concerns expressed in the previous indent, liability of platforms in cases of "placement by the content sharing platform provider, which is not a resident of Ukraine, of an advertisement in the territory of Ukraine, which has not been paid to a resident of Ukraine" and "provision by the content sharing platform provider, which is not a resident of Ukraine, of access to users in the territory of Ukraine to the content sharing platform on the terms, which envisage user access fee or use of such platform, without registration" do not only violate the principle of country of origin in terms of jurisdiction but also impose, from a general point of view, a restriction on the right to freedom of expression that cannot be justified in terms of necessity and proportionality.

Community media

Article 29 establishes that "(c)ommunity broadcasting also could be implemented by municipal non-commercial enterprises, founded by self-governance bodies, which have the right to represent territorial community interests, including the interests of an amalgamated community, or on the basis of a cooperation agreement in the sequence, set by the Ukrainian Law "On Cooperation of Territorial Communities", but on the condition that territorial communities, that signed cooperation agreement, shall cumulatively be not more than one oblast (province)."

According to international standards, community media constitutes a third type of media besides commercial and public service media. In order for community media to properly perform their activities, it is very important to preserve the independence and capacity to give voice and serve the interests of the specific group or community that justified their establishment. For this reason, it is very important to guarantee that there is no room from possible interference from commercial interests or political/State guidance. For these reasons, allowing municipal entities to control (even in an indirect manner) the activities of a community media outlet is not acceptable and the mentioned provision needs to be eliminated.

Restrictions on information content

Article 37 contains a series of limitations on the content that can be disseminated within the Ukrainian territory. In particular, this provision of the draft bans a wide catalogue of expressions (in some cases we could even talk about topics, rather than specific expressions):

> "calls to violent upheaval, to toppling the Ukrainian constitutional order; unleashing or conducting aggressive war or military conflict; violation of Ukrainian territorial integrity, including also recognizing the Ukrainian territory occupation to be legal; denial of territorial integrity of Ukraine; materials or information, to justify or propagate actions directed to violent change, toppling of the Ukrainian constitutional order; unleashing or conducting aggressive war or armed conflict; violation of Ukrainian territorial integrity, including also recognizing the Ukrainian territory occupation to be legal; denial of territorial integrity of Ukraine" (…)
>
> "materials or information, which justify criminal character of the communist totalitarian regime in Ukraine in 1917-1991, criminal character of national-socialist (Nazi) totalitarian regime, or which create a positive image of people, who held management positions in the Communist party (the position of the secretary of the regional party committee and higher), in the USSR, in Soviet Socialist Republic of Ukraine, other soviet republics and autonomous republics (excluding the institutions that provide for development of Ukrainian science and culture), employees of soviet agencies of state security; materials justifying activities of the soviet agencies of state security, establishment of soviet power on the Ukrainian territory or in separate administrative-territorial units, manhunt of Ukrainian freedom fighters who strived for the national independence in the 20th century." (…)
>
> "materials or information, where totalitarian communist or national-socialist (Nazi) symbols are demonstrated with the aim of justifying or denying their criminal character."

Some of the banned expressions and topics may actually cover legitimate political opinions and discussions, related to matters of public interest in Ukraine, particularly regarding its territorial integrity. According to the applicable international standards, only direct calls to the commission of crimes or to engage in forms of violence, discrimination of hostility can be limited by the legislator or any other State authority. Expression of controversial opinions, even in cases when they contradict a widely majoritarian sentiment or may become particularly unacceptable or offensive for significant portions of the population, is firmly protected under the freedom of expression clause. It is also important to stress the fact that in order to prohibit expressions deemed to "justify or propagate" certain types of actions, it is necessary that the legislator establishes the need to consider the actual intentions of the speaker. Acting otherwise may particularly affect the public expression of certain forms of political criticism, thus endangering the dissemination of fully legitimate pieces of protected speech, according to the applicable regional and international standards.

It needs to be reminded that the ECtHR has established since its first decision on freedom

of expression (*Handyside v United Kingdom)*[17], that such right does not only cover ""information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"". In the *Otegi Mondragon v Spain*[18] case, the call analyses the criminal conviction of a Basque separatist leader who called the King of Spain "he who protects torture and imposes his monarchical regime on our people through torture and violence". Acknowledging the harshness of the language used, the Court stresses that "the fact that the King occupies a neutral position in political debate and acts as an arbitrator and a symbol of State unity should not shield him from all criticism in the exercise of his official duties or – as in the instant case – in his capacity as representative of the State which he symbolizes, in particular from persons who challenge in a legitimate manner the constitutional structures of the State, including the monarchy". The Court has also considered protected under article 10 of the European Convention the publication and distribution of pamphlets containing, among others, the call "on all Kurdish and Turkish democratic patriots to assume their responsibilities and oppose this special war being waged against the proletarian people" (*Incal v Turkey*)[19]". On the other hand, in *Soulas et autres c. France*[20] the Court does not see a violation of article 10 in a case of a book which criticized islam in a very harsh manner and contained paragraphs as : "c'est seulement s'il éclate une guerre civile ethnique que la solution pourra être trouvée", vis-a-vis "l'amplification prévisible de la délinquance et des guérillas territoriales menées par les bandes ethniques". Last but not least, in *Stern Taulats and Roura Capellera v Spain*[21] the ECtHR found that the Spanish courts had violated the freedom of expression of two citizens by imposing criminal sanctions for expressing political disapproval by burning a picture of the Spanish royals during an official visit. The ECtHR reasoned that the setting fire to a photograph of the royal couple during a demonstration had been part of a political critique of the institution of monarchy in general, and in particular of the Kingdom of Spain, and went no further than the use of a certain permissible degree of provocation in order to transmit a critical message in the framework of freedom of expression. Further, the ECtHR stated that the impugned act could not reasonably be construed as incitement to hatred or violence nor could it be considered as constituting hate speech. Moreover, the criminal penalty imposed on the applicants – a prison sentence, to be executed in the event of failure to pay the fine – amounted to an interference with freedom of expression which had been neither proportionate to the legitimate aim pursued nor necessary in a democratic society.

On the basis of the mentioned standards and considerations, it is also necessary to make reference to the provisions contained in paragraph 3 (indents 8 and 9) of article 110 which includes among "significant violations" (punished with significant economic penalties, according to the same article), the dissemination of the kind of content analyzed above. In line with what has already been pointed out, such limitations and

[17] http://hudoc.echr.coe.int/eng?i=001-57499
[18] http://hudoc.echr.coe.int/eng?i=001-103951
[19] http://hudoc.echr.coe.int/eng?i=001-58197
[20] http://hudoc.echr.coe.int/eng?i=001-87370
[21] http://hudoc.echr.coe.int/eng?i=001-181719

penalties need to be eliminated.

In a similar vein, Section IX of the draft is devoted to "restrictions related to armed aggression". These restrictions are described in articles 122 to 124 and are justified and presented on the basis of the current situation of illegal occupation (as declared by relevant international bodies) of part of the territory of Ukraine by another State. It is true that specific situations affecting national security may justify the imposition of certain limits to the right to freedom of expression. However, these restrictions need to be clearly specified on a case-by-case basis, in any case compatible with the three-part test mentioned in a previous section of this analysis. The existence of a national security crisis, as worrying and sensitive as it can be, cannot be used as a general justification to impose broad and general limits to the fundamental right in question. For these reasons, the mentioned provisions present a series of problematic issues that can be described as follows:

a) Prohibitions to disseminate information included in points 1 and 2 of paragraph 1 of article 119, particularly "materials containing promotion or propaganda of any bodies of the aggressor state/occupant state, its officials, persons, and organizations, which are controlled by the aggressor state/occupant state, and of their individual actions, those justifying or recognizing as legitimate the armed aggression, annexation of territory of Ukraine, violation of territorial integrity, sovereignty of Ukraine, including a public denial of said actions", and "false materials about armed aggression and actions by the aggressor state/occupant state, its officials, persons and organizations, which are controlled by the aggressor state/occupant state, if this has resulted in inciting hostility and hatred or calls for a violent change of territorial integrity or constitutional system", represent an excessive, disproportionate and non-justified restriction on the right to freedom of expression, including in the current context of armed conflict. Such restrictions are vaguely worded and include references to veracity and falsity, thus putting in the hands of State authorities the arbitrary role of establishing the "official truth". This power may be used to restrict expressions protected under the free speech clause as expressions of political opinions or sympathies.
b) Restrictions with regards to rebroadcasting, registration and structure of ownership on the exclusive basis of the existence of editorial control or ownership by individuals or entities of the so-called aggressor/occupant State are also problematic. The mere fact of a person or an entity belonging to a foreign State (including cases of aggression) appears to constitute a too broad basis to justify the imposition of restrictions on the right to freedom of expression. Only in cases where the media outlets or individuals in question have repeatedly committed major infractions according to applicable international standards (hate speech, propaganda for war, incitement to crime…) and when any other less intrusive measure have proven to be insufficient, it might be justified to apply such measures, always respecting the principle of necessity and proportionality.
c) The elaboration of a list of "persons presenting a threat to national media landscape of Ukraine", as established in article 124 represents depriving *de facto* a number of individuals from their right to freedom of expression during a period not clearly defined by the law, and can only be considered as an

extreme and disproportionate measure that is not supported by international standards. Disseminating information that violates the limits to the right to freedom of expression can and must be proportionately punished on a case-by-case basis. Establishing this general ban, rather than punishing previous behavior seems to articulate a sort of "preventive penalty" which can also be seen as an unacceptable form of prior censorship.

Right to response and correction

The so-called rights to response and correction are regulated under article 44 of the draft. The right to correct or amend false information that may harm an individual's reputation is recognized and protected in the legislation of most OSCE participating States. Such provisions are to be considered in line with applicable international and regional standards as well as best comparative practices. However, paragraph 1 of the mentioned article 44 embraces a much wider definition and protection of such right, which would cover cases of "information, disseminated by media sphere entity, is true to life, but was provided with violating the principle of objectivity, or not in full volume, or not precisely, and it provided for humiliating the honor, dignity and business reputation of a person". This provision is problematic for the following reasons:

a) It applies not only to false information (as contemplated in paragraph 2 of the same article) but also to true information on matters of public interest.
b) It refers to cases where information is considered not to be objective and affects, beyond any individual's reputation, their "dignity and business reputation".

Imposing media outlets the obligation to accept responses or corrections vis-à-vis content that is truthful and refers to matters of public interest would represent an unjustified restriction to the right to freedom of information and, in particular, editorial freedom of the media outlets in question. Therefore, the fact that such content may affect rights or interests of the affected person (reputation, dignity or business reputation) would not justify such a restriction.

This being said, in the cases, contemplated in paragraph 2, where the disseminated information is untrue, the affected person would only have a right to correction if he/she can prove that it directly harms his/her individual reputation. Extending the scope of this right to cover cases affecting broader and vaguer principles such as dignity or business reputation may disproportionately and unnecessarily affect the right to freedom of expression by giving persons whose reputation is not directly affected by a piece of content the possibility to force media outlets to publish their own take on a certain issue.

Licensing and registration

Section V of the draft is devoted to the matter mentioned above. From a general perspective, and particularly regarding issues related to the regulation of all the aspects of the license adjudication processes, the draft contains a comprehensive, consistent and detailed set of norms, which are fundamentally in line with international standards and best comparative practices. It needs to be particularly commended the fact that these rules are particularly aimed at guarantee equal opportunities, transparency and fairness in the mentioned process.

This being said, there are a few issues that would require some changes in order for the draft to fully respect applicable international standards in this area:

a) Article 60, paragraph 4 establishes that one of the cases that may justify the annulation of a license is "cessation of using the standard (technologies) of analogous broadcasting by the corresponding broadcasting channel or its part (separate broadcasting radio-electronic means)". The need to preserve the right to freedom of expression for those who are legitimately exercising it on the basis of a legitimate legal status, as well as best comparative practices in the field of transition from analogue to digital terrestrial television, make this provision excessive and unnecessary. It is recommended to replace it with the regulation of the possibility for the regulator to introduce changes in a valid license in order to adapt to the new standard. This solution would also bring the experience and knowledge of analogue broadcasters to the new digital arena.
b) Article 61 establishes a general regulation of the so-called registration process. This process is applicable to any media outlet that is not subjected to the requirement to obtain a radiofrequency license. In reality, this registration process must be seen as an authorization mechanism, inasmuch as it consists of a submission of a series of documents and information by the applicant, a review process by the regulatory authority, and a final acceptance or approval by this last entity in case all the information provided is correct. This general requirement is problematic as it may constitute a disproportionate State intervention vis-à-vis the exercise of the right to freedom of expression. According to international standards and best comparative practices, a mere notification system (i.e. the communication of certain information by the corresponding media outlet to the competent authority) represents a more reasonable and less intrusive public intervention, as those aiming at disseminating content would not need to wait for the approval from the regulator in order to launch their activities. Moreover, and according to the provisions contained in the draft, in case a relatively minor omission has been committed in terms of facilitating documents and information, this may give the power to the regulator to put on hold the effective provision of the service. In addition to this, and considering the potentially wide variety of electronic publications performing media activities within the present Ukrainian media landscape, establishing a constantly updated registry with a full list of all possible *speakers* (bloggers, web portals, online publications, etc.) looks like a burdensome task. The public interest can be equally and better served with the imposition of full transparency requirements to all media actors. Last but not least, due to the specific, non-media, nature of online platforms, imposing a registration obligation to them is not only disproportionate but it also contravenes the EU provisions in the field of e-commerce services and the recommendations of the Council of Europe in this area.
c) Article 63 establishes an exceptional procedure to grant "permits for temporary broadcasting". The reasons that may legitimize granting such a privilege are described in very vague terms in paragraph 1 of this article: "To protect citizens' information rights through stimulating new technologies development". Inasmuch as this may lead to discriminatory or privileged treatment of specific media outlets on the basis of a much discretionary

decision of the regulator (thus circumventing all the public interest requirements and procedures established in the draft) it is recommended to either amend this provision to specify its application to clearly described and very exceptional cases, or to eliminate it.

National Council of Television and Radio Broadcasting of Ukraine

Section VI of the draft is devoted to defining and developing the legal framework applicable to the appointment of the members, functioning and powers of the National Council as the independent media regulatory authority in Ukraine. The existence of an independent body to take decisions that affect the main aspects of the provision of audiovisual services, particularly regarding licensing, content regulation or administrative penalties is a requirement derived from applicable international and regional standards and moreover, it has also become a legal obligation of member States of the European Union since the adoption of the last amendments to the Directive regulating the provision of audiovisual media services[22].

This being said, there are a few areas where some recommendations are applicable in order to properly align the text of the draft with international standards:

a) In order to reinforce and to properly establish the independence of the National Council, it is recommended that paragraph 1 of article 70, apart from establishing its independence vis-à-vis "other State power agencies, local self-governance agencies, their officials and employees", it also states that the regulator needs to remain independent from any political guidance or influence, as well as from the interest (commercial and other) of the subjects it regulates.
b) Regarding the requirements to become a member of the National Council indicated in article 72, the mere references to "complete higher education", "managerial experience", "faultless reputation", "high moral-ethical qualities", and "working in the field of media sphere or electronic communications sphere" for the last five years, are very broad and general and do not necessarily guarantee full capacity to manage and properly participate in the complex decision-making process of an authority of this nature. In particular, independence of criteria on the basis of sound expertise does not appear to be properly safeguarded by the requisites currently in place. For this reason, it is recommended to add other requirements including high-level managerial experience during a minimal period of time, professional media experience connected to regulatory and ethical journalistic issues, or post-graduate education in the field of media ethics, economics or media regulation. In addition, it is excessive to become incapable of being a member of the National Council on the sole basis of having a previous conviction. Only convictions related to the office responsibilities may be relevant in terms of incapacitating possible candidates: serious crimes, crimes related to corruption, misuse of public funds, adoption of arbitrary decisions, and similar. For the same reason, the existence of a conviction (for whatever crime) should not be a cause for the dismissal of a member of the National Council according to article 78, paragraph 1, indent 4.
c) Regarding the appointment of members of the National Council, the draft establishes that they need to be appointed by the Verkhovna Rada (half) and the President of Ukraine (half). With regards to the former, it is recommended to replace the

[22] https://eur-lex.europa.eu/eli/dir/2018/1808/oj

requirement of a majority of members of the body with a qualified majority (2/3 of the chamber) in order to guarantee the maximum level of consensus and avoid appointments supported only by the existing ruling majority. Regarding members appointed by the President, it is necessary to add additional safeguards in order not to give this political body an excessive discretionary power when making his/her choice. In particular, the draft needs to require that the selection process is fully transparent and accountable, and based on the application of objective criteria. In addition to this, the decision of the President needs to be based on the criteria and conclusions established by the selection commission, and in case of diverging opinions, the President would need to properly justify his/her decision.

d) As for the termination of the mandate of members the National Council, as regulated in article 78 of the draft, it would be necessary that this article introduces a provision guaranteeing that in the course of the termination procedure the affected person is properly heard and has the right to present his/her arguments regarding the existence of a termination cause[23]. In addition to this, the provision that establishes that "(e)arly termination of all the National Council members' powers might occur due to the failure to approve the National Council's annual report on the condition there were the corresponding decisions of Verkhovna Rada and the President of Ukraine. Such decision shall have to be approved during one month since the Verkhovna Rada and the President of Ukraine have received the National Council's Annual Report", needs to be eliminated. The Council of Europe recommends that "precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure"[24]. Putting in the hands of the President and the Verkhovna Rada the possibility to dismiss all the members of the National Council on the occasion of the preparation and presentation of each annual report may put in the hands of those two bodies an immense power to coerce the independent performance of the regulator, which is obviously unacceptable in light of applicable international and regional standards.

Co-regulation

Section VII of the draft is devoted to co-regulation ("joint regulation" is the term used in the translation provided by the OSCE, although the former is technically more accurate). The mechanism is relatively complex, but it basically consists of the establishment of a

[23] See for example the Recommendation Rec(2000)23 of the Committee of Ministers of the Council of Europe to member states on the independence and functions of regulatory authorities for the broadcasting sector , when it establishes that "dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court". The Recommendation is available online at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e0322

[24] See previous footnote.

body participated on a voluntary basis by media outlets and representatives of the National Council. The main objective of this joint effort is to establish specific rules or guidelines that develop the obligations established by the law or the respective license. These particular rules may be exercised by the National Council when adopting decisions vis-à-vis the members of this regulatory scheme. Moreover, article 96, paragraph 2, indent 2 opens the possibility for the National Council to apply rules established within the co-regulatory system to media outlets that do not participate in it, inasmuch as the issue "has an industry-wide significance".

From a general point of view, co-regulation is usually understood as the establishment of a self-regulatory mechanism where public authorities (usually the competent regulator) have some backstop powers in order to guarantee, in last instance, that the self-regulatory mechanism properly serves the public interest and it is effectively implemented. What is established in the draft goes beyond this commonly accepted (in international and regional standards, as well as best comparative practices) notion of co-regulation and rather establishes a mechanism of coordinated interpretation and application of legal notions. This special procedure does not contradict, as such, the applicable international standards. However, what can be seen as problematic is the possibility for the National Council to apply rules adopted within the co-regulatory scheme to media outlets that do not belong to it, particularly on the basis of the mentioned and very vague requisite of concurring an issue of industry-wide significance. This last provision needs to be eliminated. Moreover, it would probably be far more efficient to replace this very complicated and bureaucratic (and also, probably, expensive) mechanism, with a procedure that would allow the National Council to adopt codes and rules developing legal provisions, on the basis of an open, plural and transparent consultation with all the affected stakeholders.

Bans on media dissemination in the territory of Ukraine

Article 97 paragraph 3, point 3, article 110 paragraph 5, article 111 paragraph 5, article 112 paragraph 5, and article 116 contain the possibility of imposing on certain media outlets, a penalty consisting on banning their dissemination in the territory of Ukraine. It needs to be noted that this measure is established by the draft as different and separated from the penalty of cancelling or annulling the corresponding license or registration. Imposing a general ban affecting all the content of a specific media outlet, during a non-specified (or at least, non-clearly regulated) period of time, and on the basis of very widely formulated causes (the draft essentially refers to all possible legal infractions in general, without any further specification, particularly when it comes to media outlets that are not licensed or registered in Ukraine, and therefore they do not fall, in principle, under the competence of the National Council) represents, once again, an excessive and disproportionate measure vis-à-vis the exercise of the fundamental right to freedom of expression, which may introduce a very clear chilling effect to the Ukrainian media sphere and can be potentially used as an instrument to censor media outlets that are not favorably seen by State authorities. It is important to note that such a ban can also be imposed on websites or similar online media services as a whole. According to applicable international standards, specific measures targeting online content shall only be applied vis-à-vis specific pieces of content, but not to the whole service or application. Establishing otherwise constitutes a clear violation of the principles of necessity and proportionality.

Final and transitional provisions

The draft also includes a very long list of final transitional provisions. Some of them introduce amendments to legislation already in force. In particular, the draft includes to significant reforms to the Law of Ukraine "On State Support of Mass Information Entities and Social Protection of Journalists". In particular, the draft will introduce some provisions in this Law regarding professional journalists:

> "a journalist is a creative worker of media sphere entity who is professionally gathering, obtaining, creating, editing, disseminating and preparing information for the media. The journalist's status is evidenced by a document issued by a media sphere entity, professional or creative union of journalists. The document evidencing the journalist's status should contain the name and type of the media, its identifier in the Register of Media Sphere Entities, photo, surname, given name, and patronymic of the journalist, document number, date of issue, and its validity period, and signature of a person to have issued the document" (rephrasing of paragraph 10 in article 1).

It needs to be pointed out that, according to international standards, State legislation or regulations establishing the specific criteria to be recognized as journalist and a detailed legal regime applicable to the exercise of the profession may represent an excessive intervention from State authorities in the right to freedom of information. It is clear that in Ukraine non-traditional media has started to play an important role in disseminating information of public interest, in some cases with a higher degree of flexibility than traditional and "professional" media organizations.

The presence of a diverse range of "new media" has also triggered important debates at both the national and international levels concerning the specific legal status of those who seek and impart information of public interest that is published via non-conventional media, and not necessarily on a professional basis, such as blogs or social media accounts. The legal definition of professional journalism included in the draft is considerably narrow and does not include these new modalities. Therefore, it is recommended to amend it accordingly.