LEGAL ANALYSIS ON THE DRAFT LAWS ON CHANGES AND AMENDMENTS TO THE LAW ON AUDIOVISUAL MEDIA AND THE LAW OF ELECTRONIC COMMUNICATIONS IN THE REPUBLIC OF ALBANIA AND OTHER RELEVANT PROVISIONS REGARDING THE REGULATION OF CERTAIN TYPES CONTENT PROVIDED THROUGH THE INTERNET

Commissioned by the Office of the OSCE Representative on Freedom of the Media from
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July 2019

Note: this document constitutes an enlarged version of the legal analysis published on 11 July 2019. It incorporates an additional assessment to the draft proposals to amend legislation on electronic communications and regulatory decisions with regards to protecting children from access to illegal and/or harmful content on the Internet

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Executive summary

This analysis examines a series of proposed amendments to Law no. 97/2013 on audiovisual media in the Republic of Albania and to Law no. 9918 of 19 May 2008 on electronic communications in the Republic of Albania, as well as the text of the Prime Minister's "Decision on measures to protect children from access to illegal and/or harmful content on the Internet" (hereinafter, the Decision).

These proposals have been submitted to the Office of the OSCE Representative on Freedom of the Media (hereinafter, the RFoM), as a follow-up to the legal analyses submitted by this expert in December 2018 on the draft law on "Additions and changes to Law nr. 9918, dated 19.5.2008, on electronic communications in the Republic of Albania", and the draft law on "Changes and additions to Law no. 97/2013 on audio-visual media in the Republic of Albania". This document constitutes an enlarged version of the legal analysis published on 11 July 2019. It incorporates an additional assessment to a new proposal to amend legislation on electronic communications and a Decision with regards to protecting children from access to illegal and/or harmful content on the Internet, as mentioned in the previous paragraph.

There are significant improvements vis-à-vis the previous versions analysed, particularly with regards to the draft amendment to Law no. 97/2013. The most important thing is that some controversial provisions regarding domain name registration and blocking have been eliminated. The draft amending the audiovisual media law explicitly mentions the need for Albanian Media Authority (AMA) to respect international and regional standards when adopting its decisions. Another positive element is the fact that the proposal includes a specific adaptation of the right to reply to the new environment of electronic publications. The last version of the draft also incorporates new provisions, which define the object and scope of the law in a better and more precise way, making it clear that the law only applies to audiovisual media services and electronic publications providers. The draft also includes a better and definitely more consistent definition of electronic publications service providers. Another positive element is the fact that, contrary to previous versions, the draft does not confer any competence to the Compliance Committee with regards to guaranteeing the respect for moral, ethical or professional norms. Last but not least, it also needs to be positively noted that the current draft does not contain the general provision included in previous versions in the wording article 132.1, which seemed to give AMA broad and discretionary blocking powers in cases of "violations of the dispositions of this law".

The expert finds the following major issues in the draft law:

1) New article 132/1 gives AMA the power to oblige electronic publications service providers to publish an apology, remove content or insert a pop-up notice in cases of violations of provisions included in the new articles 33/1, 55/1 and 53/1. The reference included in article 33/1 to the "respect of privacy and dignity of citizens" is too broad and poorly defined and therefore could be interpreted as an empowerment to the regulator to adopt very restrictive decisions (including the removal of content) on an almost discretionary manner. The obligation to publish an apology is to be considered an inappropriate

measure to restore or compensate possible damages o violations of the rights of individuals.

2) The latest proposal includes a new version of article 132 of the law. Paragraph 3 refers to the possibility, in cases of when electronic media services "may abet" criminal offenses of child pornography, encouragement of terrorist acts or national security breach, to "block access to the internet". It needs to be noted that in this version of the draft the reference to the "temporary" nature of the blocking decision has been eliminated. These resolutions are to be taken by AMA "subsequent to written opinions from NAECES and the Electronic and Postal Communications Authority" (NAECES standing for the National Authority for Electronic Certification and Cyber Security). The draft is not clear on what is the area of competence or responsibility of AMA in such cases. If the aim of the legal reform is to speed up the process of taking down illegal content online, the introduction of a new intermediary between NAECES and AKEP would seem an inefficient solution that would only prolong the execution of the decision. In addition to this, the draft is not clear whether AMA has the power to review or reconsider NAECES's decisions in this area. In addition,
3) Article 132 does not incorporate, with regards to measures to be adopted vis-a-vis electronic publications service providers, sufficient safeguards with regards to the introduction of possible excessive temporary and quantitative restrictions to the right to freedom of expression (particularly when it comes to pieces of fully legitimate content also available on websites which host illegal content), as well as regarding access to effective appeal and judicial review mechanisms.
4) Regarding sanctions, it is necessary to welcome the reference introduced in paragraph 1 of article 132 regarding sub legal acts, particularly with regards to their role in determining the specificities of the regime of infractions and sanctions. However, there is no provision establishing that such sub legal rules need to particularly follow the principle of proportionality and also take into account the size and economic capacity of the media outlets in question. Moreover, article 133 still refers to very high economic fines to be imposed in cases of violations that may not be necessarily serious (violation of all provisions contained in articles 33 and 331/1, for example), and does not contain any reference to the sub legal acts mentioned in the previous article.
5) The powers granted to AKEP in the proposal to amend the legislation on electronic communications regarding the adoption of measures to protect a wide range of interests, including the interests, public security, fundamental rights and any provision included in the Albanian legal system, are inconsistent with international standards of legal certainty, proportionality and necessity.
6) The Decision on measures to protect children from access to illegal and/or harmful content on the Internet represents a disproportionate restriction to the right to freedom of expression as it establishes a general monitoring content obligation for electronic communications companies, and for ISPs in particular, which is incompatible with their role as mere intermediaries. It also includes a general obligation of blocking online content illegal and/or harmful for minors that will apparently prevent adults from accessing to such content as well.

The expert provides the following main recommendations:

- The reference included in article 33/1 to the "respect of privacy and dignity of citizens" needs to be eliminated.
- The obligation to publish an apology included in article 132/1 should be replaced with a reference to the obligation to include a correction or reply according to what is established in article 53/1 regarding the right to respond.
- The regulation of the so-called right to respond in the new article 53/1 gives AMA the power to adopt binding decisions for service providers in these cases. It needs to be noted that despite the fact that there are no specific international standards with regards to the entity responsible to take decisions in this area, this kind of disputes is usually mediated, in best comparative international practices, either by the judge or within the context of self-regulatory mechanisms, and not by administrative regulatory bodies.
- Considering the general role and responsibilities of AMA, particularly with regards to the protection of the right to freedom of expression in Albania, it is recommended that AMA's intervention vis-à-vis online content takedown or filtering is kept in order to guarantee that any decision adopted by NAECES does not imply an excessive restriction to such right. Accordingly, it is recommended to change the wording of paragraph 5 as follows:

> "AMA will have the following decision powers with regards to content published by electronic publications service providers:
>
> a) order the takedown or impede the access to content that is suspected, according to related criminal legislation in force, to constitute one of the following criminal offenses:
>
> i) child pornography;
>
> ii) inspiring terrorist acts;
>
> iii) breach of national security.
>
> b) to insert a pop-up notification to the website/portal domain which contain information on the resolutions of AMA's decision-making bodies.
>
> c) AMA will take its decision on the basis of a written request from NAECES. NAECES opinion is binding vis-à-vis the assessment of the suspected commission of a criminal offense. AMA will decide which is the most adequate measure to avoid the negative impact of the dissemination of the suspected criminal content. AMA needs to adopt the measure that has the least impact on the right to freedom of expression in accordance to the principles of necessity and proportionality. In any case, the decision needs to indicate a validity timeframe. AMA also needs to guarantee as much as possible that takedown decisions only affect the pieces of content that are under the suspicion of constituting criminal activities and that the rest of the content published by the provider remains online. AMA's decision will be communicated to AKEP for material execution.

d) Unless there are compelling reasons of public interest to proceed otherwise, before the adoption of its decision, AMA shall hear the electronic publications service provider affected by the proposed measure and, if possible, the author of the suspected piece of content. In any case, AMA's decisions in this area can be appealed before the competent judge immediately after their adoption. The competent judge will decide whether to suspend or to keep AMA's decision in force during the appeal proceedings."

- It is recommended that provisions on sanctions for administrative contraventions (including general guidelines for sub legal instruments) enshrine additional application criteria in order to properly protect the principles of proportionality and necessity, as well as to guarantee that any sanction is adopted after proper consideration of the size and economic capacity of the media outlet in question.
- It is recommended that the new competence granted to AKEP in the draft amendment to the law on electronic communications – letter rr) of article 8 – is completely eliminated.
- It is recommended that articles 5 and 7 of the Decision on measures to protect children from access to illegal and/or harmful content on the Internet are eliminated, and a clear obligation for companies to guarantee with technical measures that some pieces of content are accessible for adults only is included.

Introduction

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

The analysis examines a series of proposed amendments to Law no. 97/2013 on audiovisual media in the Republic of Albania and to Law no. 9918 of 19 May 2008 on electronic communications in the Republic of Albania. These proposals have been submitted to the Office of the OSCE Representative on Freedom of the Media (hereinafter, the RFoM), as a follow up to the legal analysis submitted by this expert in December 2018 on the draft law on "Additions and changes to Law nr. 9918, dated 19.5.2008, on electronic communications in the Republic of Albania", and the draft law on "Changes and additions to Law no. 97/2013 on audio-visual media in the Republic of Albania", and the analysis submitted in June 2018 on a different set of proposals to amend Law no. 97/2013 on audio-visual media in the Republic of Albania only. This document also constitutes an enlarged version of the legal analysis published on 11 July 2019. It incorporates an additional assessment to a new proposal to amend legislation on electronic communications and a Decision with regards to protecting children from access to illegal and/or harmful content on the Internet, as mentioned in the previous paragraph.

Some of the proposals have been discussed with representatives of Albanian authorities in the course of several follow-up meetings with this expert and members of the Office of the RFoM, after the submission of the previous legal analyses mentioned above. The present analysis is based on the unofficial legal version of such proposals.

The structure of the report is guided by the tasks formulated by the Office of the OSCE Representative on Freedom of the Media. 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 may be 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 particularly referring to online 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 proposals and elaborates on the drawbacks, with a view to 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 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. They also present 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, b) 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 existent 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 online media content

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".

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[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.

The UN Human Rights Council declared in its resolution 32/13 of 1 July 2016: "(...) 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, in accordance with articles 19 of the UDHR and ICCPR." In doing so, it recalled its resolutions 20/8 of 5 July 2012 and 26/13 of 26 June 2014, on the subject of the promotion, protection and enjoyment of human rights on the Internet.

Previously, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in his Report of 16 May 2011, outlined the importance of the Internet as a platform that enables individuals to share critical views and find objective information". [6] At the same time, he warned that restrictions on the exercise of the right to freedom of expression through the Internet can take various forms, including blocking and filtering. Such measures may be incompatible with States' obligations under international human rights law and create a broader "chilling effect" on this specific right. The Rapporteur also warned about the fact that:

> "States' use of blocking or filtering technologies is frequently in violation of their obligation to guarantee the right to freedom of expression, as the criteria mentioned under chapter III are not met. Firstly, the specific conditions that justify blocking are not established in law, or are provided by law but in an overly broad and vague manner, which risks content being blocked arbitrarily and excessively. Secondly, blocking is not justified to pursue aims which are listed under article 19, paragraph 3, of the International Covenant on Civil and Political Rights, and blocking lists are generally kept secret, which makes it difficult to assess whether access to content is being restricted for a legitimate purpose. Thirdly, even where justification is provided, blocking measures constitute an unnecessary or disproportionate means to achieve the purported aim, as they are often not sufficiently targeted and render a wide range of content inaccessible beyond that which has been deemed illegal".

These principles have also been outlined by 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

[6] Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

the media's economic or operational infrastructure"[7].

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.

The international mandate-holders on freedom of expression, including the UN Rapporteur on Freedom of Opinion and Freedom of Expression, 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, in their Joint Declaration of 1 June 2011 on freedom of expression and the Internet[8], and state the following:

> "(…) When assessing the proportionality of a restriction on freedom of expression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other interests.
>
> (…) Approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it.
>
> (…) Greater attention should be given to developing alternative, tailored approaches, which are adapted to the unique characteristics of the Internet, for responding to illegal content, while recognising that no special content restrictions should be established for material disseminated over the Internet.
>
> (…) Self-regulation can be an effective tool in redressing harmful speech, and should be promoted".

Regarding filtering and blocking, they also state the following:

> "Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse".

Similarly, the Recommendation CM/Rec (2007) 16, of the Committee of Ministers of the Council of Europe, to member states on measures to promote the public service value of the Internet, stresses the need for member states to "affirm freedom of expression and

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

[8] Available at: http://www.osce.org/fom/78309

the free circulation of information on the Internet, balancing them, where necessary, with other legitimate rights and interests, in accordance with Article 10, paragraph 2, of the European Convention on Human Rights as interpreted by the European Court of Human Rights" by "promoting freedom of communication and creation on the Internet, regardless of frontiers," in particular through "not subjecting individuals to any licensing or other requirements having a similar effect, nor any general blocking or filtering measures by public authorities, or restrictions that go further than those applied to other means of content delivery". [9]

Last but not least, it is important to underscore the statements made by the European Court of Human Rights in this area, within the context of the landmark decision in the case of *Ahmed Yildirim v. Turkey* (Application no. 3111/10), of the 18 of December 2012[10]. Affirming that "the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information", the Court also declares that "(i)n matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power". On the other hand, the Court also establishes the need for States to adopt in this area measures that are not only foreseeable, but also that do not impose excessive restrictions and therefore restrict the rights of Internet users and have significant collateral effects.

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[11], 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. (…)
>
> 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. (...)

[9] Part III, para a). Available at: https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/T-CY/T-CY_2008_CMrec0711_en.PDF

[10] Available at: https://hudoc.echr.coe.int/eng#{"fulltext":["Yildirim"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-115705"]}

[11] Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168 0790e14

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 Albanian authorities to align national legislation with EU

legal framework, the Directive 2000/31/EC, known as the e-commerce Directive[12], establishes 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).

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

Part II. Overview of the proposed legal reform

Content and scope of the proposed legislation

As previously mentioned, this analysis examines a series of proposed amendments to Law no. 97/2013 on audiovisual media in the Republic of Albania. These proposals have been submitted to the Office of the OSCE Representative on Freedom of the Media (hereinafter, the RFoM), as a follow-up to the legal analyses delivered by this expert in December 2018 and June 2019.

The draft under analysis includes new proposals to amend solely Law no. 97/2013 on audio-visual media in the Republic of Albania. According to these proposals, this law will change its title to become the Law on media services in the Republic of Albania. These new proposals are the result of a meeting between the expert, representatives of the Albanian Government and members of the Office of the RFoM, where the recommendations issued in a legal analysis dated June 2019 were discussed.

The proposal cover the following general areas:

- Subject and field of application of the law.
- Competence and powers of Albanian Media Authority (hereinafter, AMA).
- Introduction of a new type of media service providers: EPSPs, which are subject to a new and specific legal regime.
- Regulation of the Register of Media Service Providers.
- New provisions on administrative violations and sanctions, as well as powers of AMA vis-à-vis EPSPs.

This analysis also examines one of the proposed changes to the Law no. 9918 of 19 May 2008 on electronic communications in the Republic of Albania, in particular the proposal to introduce a new competence of AKEP (the independent regulatory body in the area of electronic communications in Albania). This new competence would give AKEP the power to adopt certain measures vis-à-vis electronic communications service and network providers with regards to the protection of a wide range of interests, including the country's interests (sic), public security, fundamental rights and any provision included in the Albanian legal system.

This document also assesses the text of the Prime Minister's "Decision on measures to protect children from access to illegal and/or harmful content on the Internet".

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

Scope of the media draft, definition, and registration requirements for electronic publications service providers

First of all, the last version of the draft incorporates a new wording of the provisions which define the object and scope of the law. These new provisions make clear that the law only applies to audiovisual media services and electronic publications providers (according to the definitions later established in the draft as well). This needs to be welcomed.

The fact that the draft now includes a better and definitely more consistent definition of electronic publications' service providers also needs to be welcomed. The definitory elements can be combinedly found in the wording of paragraph 17/1 (in the latest version submitted to this expert), 26.1 and 26.2 of article 3. It also needs to be particularly acknowledged the fact that in its current version, the draft is finally clear when stating that electronic publications service providers do not need to register in order to be able to perform their activities in Albania.

Obligations and responsibilities of electronic publications service providers

The latest draft keeps a series of content obligations for electronic publications' service providers (articles 33/1 and 33/2). It needs to be acknowledged and welcomed that proposals in this area are now formulated in a more precise way than in previous versions, and that they avoid overbroad and arbitrary restrictions to the right to freedom of expression.

A special acknowledgment goes to the fact that, contrary to previous versions, the draft does not confer to the Compliance Committee any competence with regards to guaranteeing the respect for moral, ethical or professional norms.

Measures to be adopted vis-à-vis electronic publications service providers who contravene the law

The latest proposal of the media law draft amendments includes a new version of relevant parts of article 132 of the law.

According to the draft, paragraph 1 of article 1 is amended as follows:

"a) The obligation of the media service provider to:

i. publish the apology formula, according to the form and content determined by AMA;

ii. remove the content violating the rights;

iii. insert via AKEP a "pop up"notice;

b) a fine, the amount of which shall be determined in accordance with the pro-visions of this Law and related sublegal acts;

c) temporary suspension of the license and/or authorization and/or access to the Internet;

ç) shortening the validity period of the license and/or authorization;

d) removal of the license and/or authorization.".

The following content is added under paragraph 3:

"Subsequent to written opinions from NAECES and the Electronic and Postal Communications Authority, based on the relevant AMA decision, to:

a) Block access to the Internet in cases where electronic media services may abet one of the following criminal offences;

i. Child pornography;

ii. Actions for terrorist purposes;

iii. Breaches of national security;

b) Insert a "pop up" notice on the website/domain of the portal provid-ing information on decisions by AMA decision-making bodies."

After Article 132, Article 132/1 is added, with the following content:

"Article 132/1

Measures against EPSP violations

1. In cases of violation of legal obligations under articles 33/1, 51/1 and 53/1 of this law, the Appeals Council[13] shall decide on:

a) The obligation of the media service provider to:

i. publish the apology formula according to the form and content determined by AMA;

ii. remove the content violating the rights;

iii. insert via AKEP a "pop up" notice:

b) a fine, the amount of which shall be determined in accordance with the pro-visions of this Law and its sublegal acts;

2. The Council of Appeals shall impose sanctions provided for in this law no later than one year from the date of the violation.

3. The decision of the Appeals Council may be appealed according to the pro-visions of paragraph 4, Article 132, of this law. The appeal shall not suspend the execution of the Appeals Council's decision.

4. The decisions of the Appeals Council shall be executed by the Bailiff's Ser-vice, in accordance with the provisions of the Civil Procedure Code. The AC is not bound to pay in advance the bailiff's fee."

From a general point of view, blocking or suspending online publications is considered to be an extreme State measure vis-à-vis the right to freedom of expression, and therefore it is contemplated and accepted by international standards in cases of very serious violations of other human rights or democratic principles and when other possible measures cannot be applied (that is to say, in cases of dissemination of child pornography, or terrorist content). Otherwise, suspending or blocking measures should be seen as unjustified, unnecessary and disproportionate, and therefore in contravention with human rights international standards.

In light of these standards, there are a few following observations that need to be made with regards to the powers granted to AMA in this provision, particularly vis-à-vis the

[13] The Council of Appeals or Appeals Council in the present unofficial translation needs to be understood as the Compliance Committee in previous versions of the text.

possibility of temporarily blocking or limiting EPSPs.

Firstly, it needs to be said that the current draft does not contain the general provision included in previous versions in the wording article 132.1 which seemed to give AMA broad and discretionary blocking powers in cases of "violations of the dispositions of this law". This development is to be welcomed.

Secondly, new article 132/1 gives AMA the power to oblige electronic publications service providers to publish and apology, remove content or insert a pop-up notice in cases of violations of provisions included in the new articles 33/1, 55/1 and 53/1. These articles include a series of provisions regarding the respect for dignity and privacy of citizens, protection of children and the exercise of the rights to correct and respond to information published by the mentioned providers. A few comments need to be made here:

a) The reference included in article 33/1 to the "respect of privacy and dignity of citizens" is too broad and poorly defined and therefore could be interpreted as an empowerment to the regulator to adopt very restrictive decisions (including the removal of content) on an almost discretionary manner and in areas (for example, defamation) where a decision must be taken by the competent judge and not an administrative body. It is therefore recommended that it should be eliminated.
b) The obligation to publish an apology is to be considered an inappropriate measure to restore or compensate possible damages of violations of the rights of individuals. This measure should be replaced with a reference to the obligation to include a correction or reply according to what is established in article 53/1 regarding the right to respond.
c) The regulation of the so-called right to respond in the new article 53/1 gives AMA the power to adopt binding decisions for service providers in these cases. It needs to be noted that despite the fact that there are no specific international standards with regards to the entity responsible to take decisions in this area, this kind of disputes is usually mediated, in best comparative international practices, either by the judge or within the context of self-regulatory mechanisms, and not by administrative regulatory bodies.

In addition to this, paragraph 3 refers to the possibility, in cases when electronic media services "may abet" criminal offenses of child pornography, encouragement of terrorist acts or national security breach, to "block access to the internet". It needs to be noted that in this version of the draft the reference to the "temporary" nature of the blocking decision has been eliminated, which seems to give a disproportionate power to AMA to block access not only a piece of content but to whole applications during an unlimited or not pre-determined period of time. Decisions are to be taken by AMA "subsequent to written opinions from NAECES and the Electronic and Postal Communications Authority". According to the information provided by Albanian Government representatives, NAECES is the authority in charge of fighting cybercrime in the country. According to the same sources, this authority already has the power, in conformity with the applicable legislation regarding cyber security, to order the takedown of online content in Albania.

It is not the object of this analysis to assess the role and competences of NAECES according to Albanian legislation. However, inasmuch as their powers are now

referenced in the draft object of this analysis, it is worth to make some considerations regarding the newly introduced possible combined actions of AMA, NAECES and AKEP. According to the draft, NAECES seems to have the power to take the substantive decision on whether a piece of content that falls under the criminal categories the draft needs to be taken down or left online. In addition to this, AKEP seems to be granted the power to materially execute this decision. In this context, the draft is not clear on what is the area of competence or responsibility of AMA in such cases. If the aim of the legal reform is to speed up the process of taking down illegal content online, introducing a new intermediary between NAECES and AKEP would seem a rather inefficient solution, that would only prolong the execution of the decision. It needs to be noted, precisely, that the draft is not clear on whether AMA has the power to review or reconsider NAECES's decisions in this area.

In addition to this, these provisions do not incorporate sufficient safeguards with regards to the introduction of possible excessive temporary and quantitative restrictions to the right to freedom of expression (particularly when it comes to pieces of fully legitimate content also available on websites which host illegal content), as well as regarding access to effective appeal and judicial review mechanisms.

Considering the general role and responsibilities of AMA, particularly with regards to the protection of the right to freedom of expression in Albania, it is recommended that AMA's intervention in this area is maintained in order to guarantee that any blocking or filtering decision adopted by NAECES does not imply an excessive restriction to such right. Accordingly, it is recommended to change the wording of paragraph 5 as follows:

"AMA will have the following decision powers with regards to content published by electronic publications service providers:

a) order the takedown or impede the access to content that is suspected, according to specific criminal legislation in force, to constitute one of the following criminal offenses:

i) child pornography;

ii) encourage terrorist acts;

iii) national security breach.

b) to insert a pop-up notification to the website/portal domain which contain information on the resolutions of AMA's decision-making bodies.

c) AMA will take its decision on the basis of a written request from NAECES. NAECES opinion is binding vis-à-vis the assessment of the suspected commission of a criminal offense. However, AMA will decide which is the most adequate measure to avoid the negative impact of the dissemination of the suspected criminal content. AMA needs to adopt the measure that has the least impact on the right to freedom of expression in accordance to the principles of necessity and proportionality. In any case, the decision needs to indicate a validity timeframe. AMA also needs to guarantee as much as possible that takedown decisions only affect the pieces of content that are under the suspicion of constituting criminal activities and that the rest of the content published by the provider remains online. AMA's decision will be communicated to AKEP for material execution.

d) Unless there are compelling reasons of public interest to proceed otherwise, before

> the adoption of its decision AMA shall hear the electronic publications service provider affected by the proposed measure, and, if possible, the author of the suspected piece of content. In any case, AMA's decisions in this area can be appealed before the competent judge immediately after their adoption. The competent judge will decide whether to suspend or to keep AMA's decision in force during the appeal proceedings."

This analysis, in line with what has already been expressed in the previous opinions provided to the RFoM, also needs to refer to the possibility of imposing administrative fines up to 1.000.000 lekë to those providers who do not respect the obligations established by the law (article 133). it is necessary to welcome the reference introduced in paragraph 1 of article 132 regarding sub legal acts, particularly with regards to their role in determining the specificities of the regime of infractions and sanctions. However, there is no provision establishing that such sub legal rules need to particularly follow the principle of proportionality and also take into account the size and economic capacity of the media outlets in question. Moreover, as mentioned, article 133 still refers to very high economic fines to be imposed in cases of contraventions that may not be necessarily serious (violation of any of the provisions contained in articles 33 and 33/1, for example), and does not contain any reference to the sub legal acts mentioned in the previous article. Considering the size and characteristics of the electronic publications service providers who may become subjected to the new legal provisions, the amount of the fines would be clearly excessive for almost all Albanian service providers. Therefore, these fines could in fact be seen as an indirect way to force the closure or create serious survival problems to such operators. This measure clearly amounts to a violation of the principle of proportionality. It is therefore recommended that provisions on sanctions for administrative contraventions (including general guidelines for sub legal instruments) enshrine additional application criteria in order to properly protect the principles of proportionality and necessity, as well as to guarantee that any sanction is adopted after proper consideration of the size and economic capacity of the media outlet in question.

New competences for AKEP

As previously mentioned, the object of this analysis is also to examine one of the changes to the Law no. 9918 of 19 May 2018 on electronic communications in the Republic of Albania, in particular the proposal to introduce a new competence of AKEP. This new competence is enshrined under a new letter rr) of article 8 of the Law no. 9918 of 19 May 2008 on electronic communications in the Republic of Albania:

> "rr) take measures so that entrepreneurs of electronic communication networks and of electronic communication services apply the obligations related to the protection of the country's interests, public security also in the event of war or state of emergency, as well as to guarantee fundamental human rights and freedoms, and each and every obligation provided for in the effective legal framework in the Republic of Albania."

This provision contains a very broad empowerment to AKEP which, in practical terms, would give this body the capacity to adopt any measure to compel Internet service providers (ISPs) to block or prevent access to any piece of online content available to individuals connected to the web in Albania, on the basis of the alleged violation of no

matter which (included the most simple and less harmful) infraction of whatever norm included in the Albanian legal system. Moreover, AKEP could go even further and allege a much broader and imprecise harm to vague principles such as "the country's interest" or "public security" to adopt such measures. Even if the case of AKEP acting for the purpose of protecting the exercise of a fundamental right, this legal provision does not include any specific rule with regards to the way this need would be assessed and how key elements at stake such as the proper protection of the right to freedom of expression would be taken into consideration. No references to the role of the judiciary or to the existence of any appeal or review mechanism are included either. This would mean, for example, that in cases of dissemination of alleged defamatory statements, the affected person (or even AKEP *ex officio*) would in principle be able to push measures aimed at blocking access to the content in question, without any prior judicial or even administrative decision based on minimum safeguards and due process principles. According to article 4 of the draft, in correspondence with article 137 of Law no. 9918, ISPs can face serious financial punishments in cases they fail to adopt the measures mentioned above.

In addition to this, it needs to be particularly underscored the fact that AKEP is a regulatory body in charge of electronic and postal networks and services and has no competence regarding the content of the services provided through electronic communications networks. Therefore, nothing justifies the fact that such body is tasked with the responsibility of assessing the impact of content provided through electronic communications services and networks and the even more important responsibility of defining and enforcing the limits to the exercise of the right to freedom of expression.

Therefore, this proposed new competence gives AKEP powers that are completely inconsistent with international standards of legal certainty, proportionality and necessity, which need to be respected when establishing limits to the right to freedom of expression.

Decision on measures to protect children from access to illegal and/or harmful content on the Internet

The Decision contains two provisions with relevant impact on the right to freedom of expression.

Firstly, article 5 establishes the following:

> "Entrepreneurs have the obligation to immediately block any websites/material containing illegal and/or harmful content for children on the Internet, which is published on the portal of blocked illegal websites administered by the National Authority for Electronic Certification and Cyber Security. Entrepreneurs have the obligation to provide technical opportunities for parents and above-mentioned educational institutions to exercise control over children's access to internet."

Secondly, article 7 states:

> "7. The State Agency for the Rights and Protection of the Child shall scrutinize every reporting from third parties, any case ascertained during its activity related to sites/materials with potentially unlawful and/or harmful content for children on the

internet and:

– in cooperation with the Audio-visual Media Authority, shall take the relevant measures on their blocking, in the events when publications with unlawful and/or harmful content for children by media services providers are ascertained;
– in cooperation with the Electronic and Postal Communications Authority, shall take measures on blocking websites, in the events when it is verified that sites/materials have unlawful and/or inappropriate content for children on the internet and shall publish them in the portal of blocking websites with unlawful content, administered by the National Authority for Electronic Certification and Cyber Security."

With regards to the former, the regulation obliges electronic communications networks or electronic communications services (that is no say, technical intermediaries) to block access to any site containing illegal and/or harmful content for children on the Internet. This provision is not acceptable in light of international standards for the following reasons:

a) It establishes a general monitoring content obligation for electronic communications companies, and for ISPs in particular, which is incompatible with their role as mere intermediaries (as the obligation does not only refer to specific websites but also to "content" in general). The fact that these illegal or harmful pieces of content will be included in a general list elaborated by an administrative body is not per se sufficient in this sense, as any blocking measure should be the result of an individual request (preferably by a judge) after a proper and fair process. This obligation would thus violate not only international standards in this area, but also the principles enshrined in the EU e-commerce Directive.
b) It establishes a general obligation of blocking online content illegal and/or harmful for minors. This may result in preventing adults from accessing to such content as well. This is a disproportionate and clearly excessive restriction to the right to access to published information, taking into account that there are alternative and less restrictive possible measures in order to prevent children from accessing content that is legitimate for adults. The reference to the companies' obligation "to provide technical opportunities for parents and above-mentioned educational institutions to exercise control over children's access to internet", should also include the need to guarantee that some pieces of content are accessible for adults only.

Regarding article 7, it is equally problematic in terms of freedom of expression due to the fact that it contains the specific provisions aimed at detailing the implementation of the measures criticised above.