



**Organization for Security and Co-operation in Europe
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RECOMMENDATIONS ON PROTECTING MEDIA FREEDOM AND FREEDOM OF EXPRESSION IN THE REGULATION OF ONLINE CONTENT IN SOUTH EAST EUROPE

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INTRODUCTION

The rapid development of the Internet is transforming the media landscape in the Western Balkans. It has affected traditional media and offered new opportunities for the creation of a plurality of online media platforms in recent years.

Throughout the region, a liberal legal framework has facilitated the development of new media outlets, including regional media. The absence of restrictions on the Internet has in turn paved the way for the expansion of freedom of expression, including freedom of media online and access to more diverse sources of information. Self-regulation initiatives have also been launched in the States of the Western Balkans region, often with the support of the OSCE missions and the OSCE Representative on Freedom of the Media.

However, the Western Balkans, as other parts of the OSCE region, are confronted with major issues which may affect Internet regulation, such as hate speech, terrorist and extremist propaganda, and “fake news.” It is therefore essential to ensure that future policies and legislation will not erode the existing liberal climate that has contributed to the development of a free and diverse media landscape in the region. Any regulation of the Internet will have to ensure that it will not impact negatively on freedom of expression, and that it will be fully consistent with international standards on freedom of expression and freedom of the media.

The objective of this non-paper is to contribute to the debate on the issue of Internet regulation, and to enhance regional cooperation in the Western Balkans by involving OSCE participating States, policy makers, media professionals, civil society and all other stakeholders ahead of the adoption of new policies.

Regional cooperation on this matter is of paramount importance. Only this will avoid the fragmentation of the Internet and the erosion of freedom of expression norms online, with different regulations in different states. The online space can only fulfil its potential for creativity, exchange of information and economic growth if it remains open, free and interconnected.

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1. LEGISLATION ON ONLINE MEDIA IN THE WESTERN BALKANS

1.1 Regulation of media outlets online: a brief overview

The Internet has transformed today's communication environment more than any other technology. Traditional news organisations (i.e. the press, radio and television broadcasters) and professional journalists and communicators no longer possess a monopoly over public discourse, as many different Web 2.0 platforms (e.g. blogs, social media, wikis) have enabled internet users to become a "medium" of his/her own. User-generated content – such as images, videos, and tweets – has created a new digital culture of information sharing and exchange on a global level. Two-way communication, between journalists and engaged individuals, has also become essential for online editions of traditional media.

Across the OSCE region, several approaches to official recognition of media outlets have been adopted: notification, registration and licensing. "Notification" means a media outlet is required to notify the competent authorities of its existence and operation, and is then included in a specific register. "Registration" requires media outlets to obtain permission from the authorities before they can start operating in the market. A "licensing" regime is typical for radio and television stations, since it is applicable to the allocation of finite or scarce resources (e.g. radio frequencies). According to OSCE standards, since online media platforms do not have bandwidth restrictions, there is no need or requirement to register or license them.

Traditional media organisations encompass registered media outlets, such as print media, radio and television stations, including their online editions. While online media – such as blogs, social media, search engines, aggregators, independent Web portals and other digital platforms – may or may not be regulated under the scope of media legislation, users of these platforms may nonetheless be held liable under general criminal and civil law.

Western Balkan countries have a developed self-regulatory practice regarding online media. The Serbian Press Council, Council of Media Ethics of Macedonia, Press Council of Bosnia and Herzegovina, Media Council for Self-regulation of Montenegro and the Albanian Media Council all cover online media in the scope of their work.

1.2. Country overview

This section briefly overviews the legal frameworks concerning online media across the states of the Western Balkans.

a. Albania

The country's Law on Press, as amended in 1997, is the least developed, containing only one article which states: "Press is free. Freedom of the press is protected by law." Online media organisations meanwhile are not regulated in any way.

b. Bosnia and Herzegovina

In Bosnia and Herzegovina, there is no national law that generally covers media and public information, since the country comprises two entities: Republik Srpska and the Federation of Bosnia and Herzegovina, while a third, Brcko District, is administered by local government. Republik Srpska has its own Law on Public Information, dating back to 1997, while in the Federation of Bosnia and Herzegovina there is only a Law on Public Information of the Tuzla Canton. However, neither of these laws mention or regulate online media nor impose legal obligations of media outlets on them.

c. Montenegro

The law on Media in Montenegro, as amended in 2011, does not reference online media. The definition of media is broader, covering print, radio, television, news agency services, teletext and "other forms of periodically published and editorially shaped program contents with the transmission of sound or images in a manner that is available to the public". There are no provisions requiring online media, such as blogs, personal websites, social media channels, to be registered or which impose legal obligations on them. According to the Rulebook on Electronic Publications, electronic publications should be registered in the Registry of Electronic Media, operated by the Agency for Electronic Media, although no sanctions apply for those portals that do not register.

d. Serbia

Under the Serbian Law on Public Information and Media adopted in 2014, online media platforms are not legally considered media outlets, with additional rights and responsibilities, unless they are willing to register at the Media Registry. This provides them with an opt-in possibility and has proven to be the most workable solution in the region. Moreover, given the provision is reasonably clear, the possibilities for judicial interpretations which adversely impact upon freedom of expression are minimised.

e. The former Yugoslav Republic of Macedonia

A controversial Law on Media was adopted in 2013, which included a broad definition of “electronic publications”. However, the law was amended in 2014, and reference to “electronic publications” was deleted from the law. It should be noted that the Law on Audio and Audiovisual Media explicitly *excludes* “services that are non-commercial and are not competing with radio or television broadcasting, such as private web-sites and services comprised of provision or distribution of audiovisual content created by private users for the purpose of sharing and exchanging within the communities of interest” from the definition of audio or audiovisual media services.

1.3. Recent developments

There have been no significant initiatives to regulate online media and news portals in recent years. In the former Yugoslav Republic of Macedonia, a new Proposal of the Law on Audio and Audiovisual Media Services was announced in June 2017, but according to official statements, the proposal would not include online media in the scope of this legislation.

Currently, there are no restrictive provisions covering online media (i.e. platforms such as blogs, independent news portals, citizen journalism websites, forums, social media pages). At the same time, there are growing fears of “fake news” and misinformation campaigns, which could potentially be exploited to impose additional regulation on online speech. Thanks to blogs, social media, news portals and other platforms, individuals living in the Western Balkans are exposed to a broader range of information in the public interest and may even participate in the newsgathering process as “citizen journalists” themselves.

While improvements to legislation governing online media are encouraged across the Western Balkans region, it remains crucial that new regulations are consistent with international standards on freedom of the media.

1.4. General legislation pertaining to media

| Country | Applicable law(s) | Link (in English unless otherwise indicated) |
|---------|--|--|
| Albania | Law on Press, as amended on 3 September 1997 | Albanian: http://www.ikub.al/LIGJE/709030004/ArticIe-Per-ndryshime-ne-ligjin-nr-7756-date-11-10-1993-Per-shtypin-.aspx |

| | | |
|---|---|--|
| Bosnia and Herzegovina | <p>Law on Public Information of Republik Srpska</p> <p>Law on Public Information of Tuzla Canton – Federation of Bosnia and Herzegovina</p> | <p>Republik Srpska (Serbian): http://www.djeca.rs.ba/uploaded/Zakon%20o%20javnom%20informisanju.pdf</p> <p>Tuzla Canton (Bosnian): http://www.tk.kim.ba/Vlada/Dokumenti/Zakoni/2008/zakon_o_javnom_informisanju.pdf</p> |
| Montenegro | <p>Law on Media</p> <p>Rulebook on Electronic Publications</p> | <p>Montenegrin:</p> <p>Law on Media: http://paragraf.me/propisi-crnegore/zakon-o-medijima.html</p> <p>Rulebook: http://www.sluzbenilist.me/PravniAktDetalji.aspx?tag=%7B09B3A7CC-79DF-4CC8-8458-7A561E62838D%7D</p> |
| Serbia | Law on Public Information and Media | Serbian: https://www.paragraf.rs/propisi/zakon_o_javnom_informisanju_i_medijima.html |
| The former Yugoslav Republic of Macedonia | <p>Law on Media, as amended on 23 January 2014</p> <p>Law on Audio and Audiovisual Media</p> | <p>Law on Media, amendments in 2014: http://avmu.mk/wp-content/uploads/2017/05/Prevod_Zakon_za_mediumi_final.pdf</p> <p>Original Law on Media from 2013: http://avmu.mk/wp-content/uploads/2017/05/LAW_ON_MEDIA_as_published_in_the_Official_Journal.pdf</p> <p>Law on Audio and Audiovisual Media: http://avmu.mk/wp-content/uploads/2017/05/Law_on_Audio_and_Audiovisual_Media_Services_as_published_in_Official_Journal.pdf</p> |

2. RECOMMENDATIONS TO STATE AUTHORITIES ON THE BLOCKING OF CERTAIN ONLINE CONTENT

2.1. Blocking measures and their impacts

A number of states have recently adopted and applied extensive restrictions on certain online content. These measures involve blocking the ability of Internet users to access certain content, which otherwise continues to exist on the network. Such policies purport to target content that is considered unlawful under domestic law or deemed to be harmful, such as so-called “hate speech”, terrorist or extremist content, or false information.

While only a limited number of states have so far employed these tools, such restrictions are being considered and debated more widely. Although such measures may serve important state interests – notably the protection of national security or the protection of public order – or protect individual rights – such as liberty, security and equality – they interfere with freedom of expression and the right of access to information and, consequently, can have negative implications upon democratic values.

By definition, blocking measures are far-reaching in their scope. They therefore present significant restrictions upon the exercise of freedom of expression, including political and artistic speech. It is recalled that freedom of expression encompasses the right to disseminate information or ideas that ‘offend, shock or disturb the State or any sector of the population’, as stated by the European Court of Human Rights. Yet, blocking measures may target, or have a disparate impact upon, the rights of those who wish to disseminate or receive diverse viewpoints in society, including those who stand in opposition to, or are critical of, the views of the government or a major section of society. Blocking measures would have a particularly onerous impact upon journalists, since their newsgathering processes depend on their free and unimpeded exercise of freedom of expression and the right of access to information.

Blocking measures may also be discriminatory against minority and marginalised groups, such as LGBT and migrant communities wishing to convey and seek certain types of information that may be subject to a blocking measure. Moreover, blocking measures present fundamental barriers to the realisation of the individual right of access to information, including through the media, the “public’s right to know” and the free flow of information, which are essential to the health of democratic societies. Furthermore, given that their nature and scope is usually undisclosed, such measures frequently lack the transparency necessary for any media and public scrutiny. Since they are seldom ordered by a court and seldom provide for any independent judicial oversight once they are applied, such measures also frequently lack any formal public accountability.

Given the above-mentioned impacts of blocking measures, they must be assessed according to states' relevant international human rights commitments, particularly Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights. In the OSCE context, these restrictions must also be assessed according to participating States' relevant commitments on freedom of expression, freedom of the media and the free flow of information.

2.2. Recommendations

Against the backdrop of a growing trend of states' blocking measures, and in accordance with states' OSCE commitments and the international human rights framework, the OSCE Representative on Freedom of the Media offers the following recommendations to OSCE participating States in the Western Balkans on the permissibility of blocking measures. These recommendations are intended to assist participating States in formulating their laws and regulations concerning the Internet in conformity with international standards on freedom of expression and freedom of the media. They are also intended to promote co-operative exchange between and also within participating States, aiming at the protection of a free, open and interoperable Internet.

A. GENERAL PRINCIPLES

1. States should recognise that **blocking measures constitute very serious interferences with freedom of expression.**
 - a. Blocking measures are likely to be disproportionate interferences with freedom of expression and, as such, are only acceptable in an extremely limited range of circumstances.
 - b. States should reflect through their law and policies the principle that the same rights that individuals have offline must also be protected online, particularly freedom of expression and access to information.
 - c. States should refrain from imposing any generic bans on the operation or activities of Internet intermediaries, whether network or hosting Intermediaries.
 - d. States should not impose compulsory registration of online media outlets as a condition to operate freely. Any registration procedure, for example as a requirement for State aid, should be implemented through transparent and independent procedures, without political bias, and should not interfere with the editorial independence of the outlet.

B. LEGALITY

2. States should ensure that any blocking measures are **provided by law**.
 - a. Blocking measures should have a clear and precise basis in law. Key concepts that may be referenced in such measures or in their application – such as “terrorism”, “extremism”, or “hate speech” – should be clearly and narrowly defined in law.
 - b. Any law providing for blocking measures should:
 - i. Specify the categories of content that can be lawfully blocked;
 - ii. Specify the level or levels at which blocking may be applied (e.g. national level or ISP level) and the kinds of technologies that may be used; and
 - iii. Specify that blocking should only be authorised by an independent and impartial court with appropriate procedural safeguards under the rule of law, as indicated below.
 - c. Blocking measures should, for reasons of transparency and due process, should be accompanied by information about the reason(s) why content was blocked.
 - d. Users should be made aware of the different forms that blocking can take, including filtering, blacklists, keyword blocking, content rating and de-indexing.

C. LEGITIMATE AIM

3. States should ensure that any blocking measures **pursue a legitimate aim**.
 - a. Blocking measures can only be justified on the basis of an objective recognised by international standards on freedom of expression, namely the “respect of the rights or reputations of others” and “for the protection of national security or of public order (ordre public), or of public health or morals” (Article 19 para 3, International Covenant on Civil and Political Rights).
 - b. States should therefore refrain from seeking to block legitimate online content, including content that expresses ideas or views which oppose those of the government or religious authorities, or offend, shock or disturb any sector of society.

- c. In deciding on whether to block online content, states should have in mind, as a primary consideration, freedom of expression and the right to access to information, as well as the public interest in having access to such content.
- d. States should not prosecute journalists, researchers, activists or human rights defenders, or others, for having disseminated information of public interest.

D. PROPORTIONALITY

- 4. State authorities should ensure that blocking measures are **strictly proportionate to the legitimate aim pursued**.
 - a. Any blanket blocking of a site, which is without particular reference to unlawful content, is not permissible as it is a disproportionate restriction on freedom of expression. Lawful content should never be blocked, even as collateral.
 - b. Before using specific technologies, impact assessments should be carried out to determine whether the proposed technologies have a detrimental impact on freedom of expression and whether alternative, less intrusive, methods could be used to achieve the same purpose.
 - c. Any blocking to prevent the future use of technologies for dissemination of unlawful content is a form of prior censorship and, as such, is a disproportionate restriction on freedom of expression.
 - d. Courts, tribunals and other independent and impartial bodies tasked with issuing blocking orders should therefore:
 - i. Consider the risks of over-blocking (i.e. whether lawful content will be impeded by issuing an order), including by reference to an examination of the technologies available in order to comply with the order;
 - ii. Ensure that any such order is the least restrictive means available to deal with the alleged unlawful content in terms of its scope and duration;
 - iii. Ensure that a list of banned sites is made public as a matter of principle by Internet Service Providers and/or the authorities concerned.

E. PROCEDURAL SAFEGUARDS

5. States should ensure that blocking measures are **subject to appropriate procedural safeguards**.
 - a. Blocking orders should *only* be imposed following an order from a court, tribunal or other independent and impartial body, as government bodies are more likely to issue overbroad orders in the name of protecting particular state interests. Where blocking decisions are issued by public bodies, it is vital that these authorities are independent of government and their decisions are subject to prompt review by an independent and impartial court or tribunal.
 - b. In considering whether to grant a blocking order, any court or other independent and impartial body should take into account the overall impact of the order on lawful content and the technological possibilities for preventing over-blocking.
 - c. Those affected by blocking orders – whether the authors of the content, those seeking to access the content, or as those providing access to, hosting, transmitting and indexing such content (including journalists, publishers, researchers, website owners, internet service providers and other Internet intermediaries, or the public at large) – should be notified of the scope of and reason for the blocking orders and should be given a meaningful opportunity to contest their legality and their implementation.
 - d. Whenever certain content has been blocked by a blocking order, anyone attempting to access it should be able to see that it has been blocked and a summary of the reasons why it was blocked, in order that they may have the opportunity to challenge the decision. In particular, blocked pages should contain the following information:
 - i. the party requesting the block;
 - ii. the legal basis for the decision to block, the reasons for the decision in plain/user friendly language (i.e. not legal jargon), the relevant court order, and HTTP status code 451 (i.e. the error status code of the HTTP protocol when the user requests a source which cannot be served for legal reasons);
 - iii. the period during which the order is valid;
 - iv. the contact details in case of an error;
 - v. information about avenues of appeal or other redress mechanisms.

- e. All interested parties, including such as freedom of expression advocates, media associations or digital rights organisations, should be granted the opportunity to intervene in proceedings in which a blocking order is sought.

F. AN ENABLING ENVIRONMENT

- 6. States should promote an **enabling environment for freedom of expression and freedom of the media**. To this end, states should:
 - a. Refrain from imposing any blanket bans on encryption and anonymity, as such policies are inherently unnecessary and disproportionate, and hence unacceptable restrictions on freedom of expression;
 - b. Refrain from prosecuting or penalising journalists and other media actors for performing their legitimate work, including through their online activities;
 - c. Safeguard the role of the independent media, including online media, in informing the public of information in the public interest by amongst other things:
 - i. Supporting persecuted journalists and greater efforts to end impunity for attacks against journalists;
 - ii. Supporting development of effective self-regulatory mechanisms, including codes of conduct, ombudsman offices and media councils;
 - iii. Ensuring that media regulatory authorities are independent, transparent and objective.
 - d. Take measures to promote media and digital literacy as well as critical thinking, including by covering these topics as part of the regular school curriculum and by engaging with civil society organisations and other stakeholders to raise awareness about these issues.