



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

**COMMENTS ON THE DRAFT LAW “ON MAKING CHANGES AND
AMENDMENTS TO THE REPUBLIC OF ARMENIA
LAW ON THE MASS MEDIA”**

The review has been prepared by Dmitry Golovanov, mass media lawyer

Moscow, 2021

TABLE OF CONTENT

BRIEF SUMMARY OF COMMENTS AND RECOMMENDATIONS.....	3
1. INTERNATIONAL AND CONSTITUTIONAL STANDARDS IN THE SPHERE OF FREEDOM OF EXPRESSION AND FREEDOM OF THE MASS MEDIA.....	6
1.1. The significance of freedom of expression and the media.....	6
1.2. Restrictions on freedom of expression and freedom of mass media	10
1.3. Monitoring of obligations of Armenia.....	15
2. ANALYSIS OF THE DRAFT AMENDMENTS TO THE MASS MEDIA LAW	18
2.1. General comments	18
2.2. Specific comments.....	19
2.2.1. Non-identifiable source concept and restrains upon working with this kind of sources 19	
2.2.2. Accreditation rules	20

BRIEF SUMMARY OF COMMENTS AND RECOMMENDATIONS

Having analyzed the draft law of the Republic of Armenia “On making changes and amendments to the Republic of Armenia Law on the Mass Media” in the context of the Constitution and existing mass media legislation of the Republic of Armenia, as well as international regulations on freedom of information and mass media, the expert – commissioned by the Office of the Representative on Freedom of the Media (RFoM) of the Organization for Security and Co-operation in Europe (OSCE) – has come to the following conclusions.

The right to freedom of expression relates to the right to freedom of the media, guaranteed by a variety of commitments of the Organization for Security and Co-operation in Europe (OSCE), which Armenia has expressed its will to follow. The primary goal of regulating the activities of the mass media is to promote the development of independent, pluralistic, and transparent media, thereby ensuring the society’s right to receive information from diverse sources.

There are positive obligations of the OSCE participating States to promote freedom of the media, which consists in the need to develop pluralism within the media and ensure equal access for all to them.

While the right to freedom of the media is not absolute, and in a few specific circumstances it may be restricted, by virtue of the fundamental nature of this right, however, the restrictions must be precise and specifically determined in accordance with the principles of a rule-of-law state. This also refers to the quality of the reviewed draft law.

The draft law under this analysis is titled “Law of the Republic of Armenia “On making changes and amendments to the Republic of Armenia Law on the Mass Media” (hereinafter - draft law) and was received by RFoM from the authorities in June 2021. The draft includes seven articles (six to provide substantive amendments to the law, and one that contains provisions on the entry into force of the draft law).

The draft law aims at setting up a mechanism to legally reduce the ability of the mass media to disseminate information in relation to which their source of information is not transparent enough. It is not allowed for the mass media to reprint or otherwise disseminate information from an Internet website, the owner of which has not been publicly declared.

The draft regulation also aims at strengthening financial and informational transparency of mass media outlets. Requirements for making public a certain amount of data on the Internet mass media, as well as rules for obligatory disclosure of their financial statements, are introduced in the draft law.

Finally, the draft law establishes additional principles for accreditation of the mass media and provides for a prohibition of accreditation of the mass media that do not comply with the legislation on making public a certain amount of data and information about their sources of financing.

Most of the new provisions introduced by the draft law are based on (or at least derive from) the Council of Europe and OSCE recommendations and Armenia's plans for developing human rights institutions.

Having analyzed the draft law, the expert comes to the following conclusions and main recommendations:

1. The provisions of the draft law do not contain provisions and regulations, which are strictly aimed at limiting the freedom of expression. In cases where additional requirements and operation rules are introduced for the mass media, these rules are usually relevant to European standards and mostly reproduce the provisions contained in the recommendation documents adopted within the OSCE and the Council of Europe.

2. At the same time some of the international standards, recommendations and national plans related to the mass media transparency are not followed or implemented in the draft law. In order to develop a functional regulation, the law has to contain provisions aiming to ensure transparency of information not only on the sources of income of the mass media outlets (as it is in current draft law), but also information about their owners, business entities that provide control over the media, and their beneficiaries.

Recommendation: amend the document in order to provide comprehensive regulation of transparency of the mass media. Information on both sources of financing and business control over the mass media outlets should be made available to the public.

3. Despite the obvious positive intent of the legislator to limit dissemination of information from sources other than those that openly declare key information about their owners, it seems that a direct ban to use information from anonymous sources is excessive and unproportionate. To stop dissemination of information only because it comes from an untrustworthy source, especially in cases when such information is not necessarily false, hardly complies with the principle of freedom of information. It seems more reasonable to oblige the mass media outlets to indicate that the particular source of disseminated information cannot be properly verified.

Recommendation: supplement Article 7 of the Law on the Mass Media (hereinafter – the Law) with a new Part 4 with the following wording:

“It is prohibited to refer to any sources not compliant with the requirements of Article 11 of this Law, except for the cases provided for in Article 9(2) of this Law. It is prohibited to refer to any non-identifiable sources without clearly indicating that the source is not identifiable according to this Law.”

4. There is a need to introduce into the draft law provisions that would exclude a possibility of abuse of the law by an organization setting the accreditation rules: such rules must comply with the law, should not be discriminatory (providing any preferences or limitations based on the editorial policy of the mass media outlet) or lead to infringement of the freedom of the media. The public agencies violating this principle must face legal liability.

Recommendations:

i. supplement Clause 5 of Article 6 of the Law with the provision establishing a ban to use termination of media accreditation in a discriminatory or arbitrary way: such a termination is possible only if based on clear and transparent rules.

ii. provide for the relevant liability of public agencies for termination of accreditation in violation of this principle.

5. It is not possible from the point of the right of freedom of expression to establish a logical and reasonable connection between a refusal to accredit the mass media outlet by the public authorities and non-publication by such outlet of its financial statement on the sources of funding, as the draft law suggests. The liability for a violation of the principle of financial transparency can be of economic (financial) nature only. It is also important to note that the draft law does not formulate a sufficiently clear and understandable composition of the tort - the refusal to accredit the mass media shall follow for any violation of publication rules. In addition, it is inter alia not clear how the decisions on new mass media accreditation rules are supposed to be made in 2021: the mass media are not able to ensure the timely placement of financial information for 2020, as required by the document. Since no transitional provisions are included into the draft law, either discriminatory or ineffective implementation of the norm in the course of its first year is inevitable.

Recommendations:

i. cancel the introduction of a new paragraph 2 in Part 1 Article 6 of the Law establishing ban for accreditation of the mass media outlets that do not comply with the legislation on disclosure of information;

ii. redraft article 7 of the draft law so that it reads as follows:

“This Law shall take effect on the tenth day of the calendar year following the year of its official publication.”

1. INTERNATIONAL AND CONSTITUTIONAL STANDARDS IN THE SPHERE OF FREEDOM OF EXPRESSION AND FREEDOM OF THE MASS MEDIA

1.1. The significance of freedom of expression and the media

Freedom of expression has long been recognized as one of the most essential human rights. It is of fundamental significance for the functioning of a democracy, it is a necessary condition for exercising other rights and itself constitutes an integral component of human dignity.

The Universal Declaration of Human Rights (UDHR), the basic document on human rights, adopted by the General Assembly of the United Nations Organization in 1948,¹ protects freedom of expression in the following wording of Article 19:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”²

The Republic of Armenia is a participating State of the Organization for Security and Cooperation in Europe. The OSCE Helsinki Final Act declares that “participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion. They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.”³

The 1975 Final Act also states that “participating States will act in conformity with the purposes and principles ... of the Universal Declaration of Human Rights”.

The International Covenant on Civil and Political Rights (ICCPR) – a United Nations treaty legally binding on and ratified by the Republic of Armenia in 1993 – guarantees and clarifies the right to freedom of expression in the text of its Article 19:

1. “Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁴

¹ The Republic of Armenia is a member of the United Nations since 1992

² Resolution 217A (III) of the General Assembly of the United Nations, adopted on 10 December 1948. See the full official text in English at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

³ Clause VII of the Helsinki Final Act. See the full text in English at: <https://www.osce.org/helsinki-final-act>

⁴ The International Covenant on Civil and Political Rights. Adopted by resolution 2200 A (XXI) of the General Assembly dated 16 December 1966. Came into effect on 23 March 1976. See the full official text in English on the website of the UN Office of the High Commissioner for Human Rights at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

The UN Human Rights Committee is the body that exercises control over due observance of the International Covenant on Civil and Political Rights. It consists of experts and is empowered to consider applications from individuals claiming to have suffered violations of the rights set forth in the Covenant, including the rights envisaged by Article 19. This Committee has determined that:

“The right to freedom of expression is of paramount importance in any democratic society.”⁵

Declarations of this type abound in precedent-setting court rulings on human rights throughout Europe. The European Court of Human Rights, for instance, has stressed that “freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man”.⁶

As noted in this provision, freedom of expression is of fundamental significance both in itself and as the basis for all other human rights. True democracy is possible only in societies where a free flow of information and ideas is permitted and guaranteed. In addition, freedom of expression is crucial for identifying and disclosing human rights violations and for combating them.

The right to freedom of expression relates to the right to freedom of the media. Freedom of the media is guaranteed by a variety of documents of the Organization for Security and Cooperation in Europe, with which Armenia has expressed its agreement. In addition to the Helsinki Final Act of the Conference on Security and Co-operation in Europe, relevant are the Final Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe,⁷ the Charter of Paris for a new Europe agreed in 1990,⁸ the closing document “Towards a Genuine Partnership in a New Era” of the CSCE Summit in Budapest in 1994,⁹ the Declaration of the OSCE Summit in Istanbul,¹⁰ and the Ministerial Decision on safety of journalists adopted in 2018 in Milan.¹¹

The Istanbul Charter for European Security of the OSCE states, in particular:

“We reaffirm the importance of independent media and free flow of information as well as the public’s access to information. We commit ourselves to take all necessary steps to ensure the

⁵ Case of Tae-Hoon Park v. Republic of Korea, 20 October 1998, Communication No. 628/1995, para. 10.3.

⁶ Case of Handyside v. the United Kingdom, 7 December 1976, Application No. 5493/72, para. 49. The text of the judgment in English can be found on the website of the European Court of Human Rights at: <http://hudoc.echr.coe.int/eng?i=001-57499>.

⁷ Copenhagen session of the CSCE Conference on the Human Dimension, June 1990. See clauses 9.1 and 10.1 in English on the website of OSCE at: <https://www.osce.org/files/f/documents/9/c/14304.pdf>.

⁸ Charter of Paris for a New Europe, CSCE Summit, November 1990. See in English on the website of the OSCE <https://www.osce.org/files/f/documents/0/6/39516.pdf>

⁹ Towards a Genuine Partnership in a New Era. OSCE Summit, Budapest, 1994, clauses 36–38. See in English on the website of OSCE at: <https://www.osce.org/files/f/documents/5/1/39554.pdf>

¹⁰ Istanbul Document 1999. See in English on the website of OSCE at: <https://www.osce.org/files/f/documents/6/5/39569.pdf>

¹¹ See <https://www.osce.org/files/mcdec0003%20safety%20of%20journalists%20en.pdf>

basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society”.

The Moscow meeting of the CSCE Conference on the Human Dimension unambiguously agreed that “independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms” and that any restrictions on the right to freedom of expression should be established “in accordance with international standards”.¹²

A guarantee of freedom of expression is particularly important with respect to the media. This postulate has also been expressed in rulings of human rights courts. The European Court of Human Rights always stresses the “pre-eminent role of the press in a State governed by the rule of law”. It has noted:

“Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.”¹³

Moreover, free media, as the United Nations Human Rights Committee has stressed, play a substantial role in the political process:

“Free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.”¹⁴

The European Court of Human Rights has also stated that it is incumbent on the media to disseminate information and ideas concerning all spheres of public interest:

“Although the press should not cross the boundaries set for [protection of the interests defined in Article 10(2) of the European Convention on Human Rights]... it is, nevertheless, assigned the mission of disseminating information and ideas of public interest; if the press is set

¹² The Moscow Meeting of the CSCE Conference on the Human Dimension (October 1991), clause 26. See in English on the website of OSCE at: <https://www.osce.org/files/f/documents/2/3/14310.pdf>

¹³ Case of Thorgeirson v. Iceland, 25 June 1992, Application No. 13778/88, para. 63. The text of the judgment in English can be found on the website of the European Court of Human Rights at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=thorgeirson&sessionId=4691853&skin=hudoc-en.10>

¹⁴ General comment No. 25 of the United Nations Organization Human Rights Committee, 12 July 1996

the task of disseminating such information and ideas, the public, for its part, has the right to receive them. Otherwise, the press would be unable to fulfil its function as society's watchdog".¹⁵

These provisions are reflected in Article 27 and other parts of the Constitution of the Republic of Armenia of 05.07.1995 (as amended).¹⁶

"Everyone shall have the right to freely express his/her opinion. No one shall be forced to recede or change his/her opinion.

Everyone shall have the right to freedom of expression including freedom to search for, receive and impart information and ideas by any means of information regardless of the state frontiers.

Freedom of mass media and other means of mass information shall be guaranteed. The state shall guarantee the existence and activities of an independent and public radio and television service offering a variety of informational, cultural and entertaining programmes."

In addition, Article 3 of the Constitution stipulates that

"The human being, his/her dignity and the fundamental human rights and freedoms are an ultimate value.

The state shall ensure the protection of fundamental human and civil rights in conformity with the principles and rules of the international law.

The state shall be limited by fundamental human and civil rights as directly applicable."

For protecting the right to freedom of expression, it is of vital importance for the media to be able to carry out their activities independently of state control. This enables them to function as "society's watchdog" and provides the public with access to a broad range of views, especially on matters affecting public interests. The primary goal of regulating the activities of the media must, therefore, be to promote the development of independent and pluralistic media, thereby ensuring the population's right to receive information from diverse sources.

Article 2 of the ICCPR makes the state responsible for "adopting such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." This means that it is required of states not only to refrain from violating rights but also to undertake positive measures to ensure respect for the rights, including the right to freedom of expression. In fact, states are obliged to create conditions in which diverse and independent media can develop, thereby satisfying the population's right to information.

An important aspect of states' positive obligation to promote freedom of expression and freedom of the media consists in the need to develop pluralism within the media and ensure equal

¹⁵ Case of Castells v. Spain, 24 April 1992, Application No. 11798/85, para. 43. The text of the judgment in English can be found on the website of the European Court of Human Rights at: <http://hudoc.echr.coe.int/eng?i=001-57772>

¹⁶ See <http://www.parliament.am/legislation.php?sel=show&ID=1&lang=eng>

access for all to them. The European Court of Human Rights has noted: "[Dissemination] of information and ideas of general interest... cannot be successfully accomplished unless it is grounded in the principle of pluralism".¹⁷

The United Nations Human Rights Committee has stressed the role of pluralistic media in the process of national construction, noting that attempts to force the media to engage in propaganda of "national unity" infringe on the right to freedom of expression:

"The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights."¹⁸

1.2. Restrictions on freedom of expression and freedom of mass media

It cannot be disputed that the right to freedom of expression is not absolute: in a few specific circumstances it may be restricted. By virtue of the fundamental nature of this right, however, the restrictions must be precise and specifically determined in accordance with the principles of a rule-of-law state. In addition, the restrictions must pursue legitimate goals; the right may not be restricted merely because a statement or expression is seen as insulting or because it challenges accepted dogmas.

Article 43 of the Constitution of the Republic of Armenia stipulates:

"Limitations on fundamental human and civil rights and freedoms may not exceed the scope defined by the international commitments assumed by the Republic of Armenia."

Article 19(3) of the ICCPR indicates that the exercise of freedom of expression carries with it special duties and responsibilities. For this reason, restrictions on the right are permitted to ensure the respect the rights or reputations of others or the protection of national security or of public order or of public health or morals. However, when a state party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Human Rights Committee has indicated that the relation between right and restriction and between norm and exception must not be reversed.¹⁹

Article 19(3) of the ICCPR also lays down specific conditions and it is only subject to these conditions that restrictions may be imposed (the "three-part test"):

- *First*, the restrictions must be "provided by law"

¹⁷ The case of Informationsverein Lentia and Others v. Austria, 24 November 1993, Application Nos. 13914/88 and 15041/89, para. 38. The text of the judgment in English can be found on the website of the European Court of Human Rights at: <http://hudoc.echr.coe.int/eng?i=001-57854>

¹⁸ The case of Mukong v. Cameroon, 21 July 1994, Communication No. 458/1991, para. 9.7.

¹⁹ See Human Rights Committee, General Comment No 27, Freedom of Movement (Article 12), CCPR/C/GC/21/Rev.1/Add.1, 2 November 1999, para 13.

○ *Second*, the restrictions may only be imposed for one of the grounds set out in Article 19(3)(a) or (b) of the ICCPR; and

○ *Third*, they must conform to the strict tests of necessity and proportionality.²⁰

Restrictions are not allowed on grounds not specified in Article 19(3) of the ICCPR, even if such grounds would justify restrictions to other rights protected in the ICCPR. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.²¹

Such a limitation is justified on the grounds that it is provided by law and is necessary. Restrictions must be “necessary” for a legitimate purpose, in the sense that there must be a “pressing social need” for the restriction.²² The principle of proportionality also has to be respected in the sense that any restriction “must be the least intrusive measure to achieve the intended legitimate objective and the specific interference in any particular instance must be directly related and proportionate to the need on which they are predicated”.²³ The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.²⁴

In General Comment No 34 on freedom of expression, the UN Human Rights Committee provided further guidance on the meaning on “a law” in Article 19(3) of the ICCPR.

“For the purposes of Article 19(3) of the ICCPR, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.”

The Human Rights Committee formulated in General Comment No 34 several comments relevant for bottlenecks in implementation of freedom of expression. The Committee interpreted journalistic work and basic principles for accreditation of journalists as follows:

“Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of selfpublication in print, on the internet or elsewhere, and general State systems of registration or licensing of

²⁰ See Human Rights Committee, Communication No 1022/2001, *Velichkin v Belarus*, CCPR/C/85/D/1022/2011, Views adopted on 20 October 2005.

²¹ See Human Rights Committee, General Comment No 22, Freedom of Thought, Conscience and Religion (Article 18), CCPR/C/21/Rev.1/Add.4, para 8.

²² European Court for Human Rights (European Court), *Handyside v United Kingdom*, App. No. 5493/72, Series A No 24, Judgment of 12 December 1976, 1 EHRR 737, para 48.

²³ General Comment No 22, *op.cit.*, para 8.

²⁴ See Human Rights Committee, Communications No 1128/2002, *Marques v. Angola* CCPR/C/83/D/1128/2002, views adopted on 29 March 2005; Human Rights Committee, Communication No 1157/2003, *Coleman v. Australia* CCPR/C/87/D/1157/2003, views adopted 17 July 2006.

journalists are incompatible with paragraph 3 [of Article 19 of the ICCPR]. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is nondiscriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.”

Committee of Ministers of the Council of Europe in its Recommendation to member States on the protection of journalism and safety of journalists and other media actors²⁵ stressed (in para 13):

“Member States must exercise vigilance to ensure that legislation and sanctions are not applied in a discriminatory or arbitrary fashion against journalists and other media actors. They should also take the necessary legislative and/or other measures to prevent the frivolous, vexatious or malicious use of the law and legal process to intimidate and silence journalists and other media actors. Member States should exercise similar vigilance to ensure that administrative measures such as registration, accreditation and taxation schemes are not used to harass journalists and other media actors, or to frustrate their ability to contribute effectively to public debate.”

The European Court of Human Rights has emphasized that the following declarations deserve protection:

“[Freedom of expression] is applicable not only to "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".”

Besides, the boundaries within which legitimate restrictions on freedom of expression may be permitted are established in Article 19, paragraph 3 of the ICCPR quoted above:

“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputation of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.”

Article 10 of the European Convention on Human Rights also ratified by the Republic of Armenia reads as follows:

²⁵ Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors (Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers’ Deputies), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1

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.”

According to the case-law of the European Court of Human Rights, the expression “prescribed by law”, which is also used in Articles 9 and 11 of the Convention on Human Rights, and the expression “in accordance with the law”, used in Article 8 of the Convention, not only require that an interference with the rights enshrined in these Articles should have some basis in domestic law, but also refer to the quality of the law in question. That law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.²⁶

In addition, domestic law must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention on Human Rights. In 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. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.²⁷

In the context of the scope of the draft law, it is also important to consider approaches to ensuring the transparency of the activities of the media, which were formulated in the Recommendation of the Committee of Ministers of the Council of Europe to member States on media pluralism and transparency of media ownership adopted in 2018.²⁸ This detailed and

²⁶ See, among many other authorities, *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I. European Court of Human Rights available at: <http://hudoc.echr.coe.int/eng?i=001-61638>

²⁷ See *Meltex Ltd. and Mesrop Movsesyan v. Armenia* of 17 June 2008, *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000-V, and *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96. The text of the judgment in English can be found on the website of the, § 84, ECHR 2000-XI

²⁸ Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies). The text of the document available at <https://rm.coe.int/0900001680790e13>

diversified document proceeds from the idea that in the present “multimedia environment, online media and other internet platforms enable access to a growing range of information from diverse sources... This ongoing evolution raises concerns for media pluralism.” According to the Committee of Ministers, Internet intermediaries have acquired increasing control over the flow, availability, findability and accessibility of information online. This may affect the variety of media sources that individuals are exposed to and result in their selecting or being exposed to information that confirms their existing views and opinions, which is further reinforced by exchange with other like-minded individuals (this phenomenon is referred to as a “filter bubble” or “echo chamber”).

The Committee of Ministers stressed in the introductory part of the Recommendation that fresh appraisals of approaches to media pluralism are needed in order to address the challenges for freedom of expression resulting from how stakeholders have adapted their behaviour to the modern developments. In this connection, “it is imperative that these changes are appropriately reflected in media regulation in order to maintain or restore the integrity of the democratic process and to prevent bias, misleading information or suppression of information”.

New policy responses and strategic solutions are needed to sustain independent, quality journalism and to enhance citizens’ access to diverse content across all media types and formats. It is also necessary to address the growing concerns arising from pressure exerted on the media by political and economic interests, acting alone or in concert, in order to influence public opinion or otherwise impinge on the independence of the media.

In order to implement principles specified above the Committee of Ministers approved Guidelines on media pluralism and transparency of media ownership. Those include description of a complex of measures to be taken to strengthen media pluralism aiming at ensuring diversity of content, development of the institutional frameworks, implementation of support measures.

One of the areas of activities of the Council of Europe Member States under the Guidelines should include regulation of media ownership aspects: ownership, control as well as concentration and transparency of media ownership, organisation, and financing. Subject to the Guidelines, Member States should *inter alia* promote a regime of transparency of media ownership that ensures the public availability and accessibility of accurate, up-to-date data concerning direct and beneficial ownership of the media, as well as other interests that influence the strategic decision making of the media in question or its editorial line. This information enables the public to analyse and evaluate the information, ideas and opinions disseminated by the media.

According to the Guidelines, media transparency requirements should be specific and include a requirement for media outlets “to disclose ownership information directly to the public on their website or other publication and to report this information to an independent national

media regulatory body or other designated body, tasked with gathering and collating the information and making it available to the public”.

States should adopt and implement legislative that set out disclosure or transparency obligations for media in a clear and precise way. Such obligations can include the following information:

- legal name and contact details of a media outlet;
- name(s) and contact details of the direct owner(s) with shareholdings enabling them to exercise influence on the operation and strategic decision making of the media outlet. States are recommended to apply a threshold of 5% shareholding for the purpose of disclosure obligations;
- name(s) and contact details of natural persons with beneficial shareholdings;
- information on the nature and extent of the shareholdings or voting rights of the above legal and/or natural persons in other media, media-related or advertising companies which could lead to decisionmaking influence over those companies, or positions they may hold in political parties;
- name(s) of the persons with actual editorial responsibility;
- changes in ownership and control arrangements of a media outlet.

High levels of transparency should also be ensured with regard to the sources of financing of media outlets in order to provide a comprehensive picture of the different sources of potential interference with the editorial and operational independence of the media and allow for effective monitoring and controlling of such risks. To this end, States are encouraged to adopt and implement legislation that set out the disclosure of information on the sources of the media outlet’s funding obtained from State funding mechanisms (advertising, grants and loans).

States are furthermore encouraged to promote the disclosure by media outlets of contractual relations with other media or advertising companies and political parties that may have an influence on editorial independence.

1.3 Monitoring of obligations of Armenia

Armenia is a participant of the Universal Periodic Review (UPR) process which involves a review of the human rights records of all UN Member States. The UPR is a state-driven process under the auspices of the UN Human Rights Council, which provides the opportunity for each state to declare what actions they have taken to improve the human rights situations in their countries and to fulfil human rights obligations.

Third Cycle of the UPR for Armenia took place in 2019-2020. The Office of the United Nations High Commissioner for Human Rights summarized several statements made by the key

stakeholders – national and international human rights organizations.²⁹ Those statements included the following observations and recommendations related to the mass media sphere:

- journalists who were critical of the authorities of Armenia and those who exposed human rights violations and corruption were subject to harassment, restrictions on their work, threats and attacks.

- Armenia was recommended to ensure that journalists are able to work freely and without fear of retribution for expressing critical opinions or covering topics that the Government deems sensitive.

- OSCE/ODIHR stated that its Election Observation Mission for the 2018 early parliamentary elections recommended that authorities continue to support editorial independence of the public media and foster citizens' access to impartial, critical and analytical political information and programmes, including when reporting on activities of officials.

The UPR also resulted in a few recommendations from countries,³⁰ including those relevant for freedom of expression. In particular, the Czech Republic recommended to step up the efforts to enact comprehensive media regulations, including by adopting the legal measures to ensure media ownership transparency and independence of public broadcasters.

Armenia in its UPR reply report³¹ undertook obligations to make steps towards ensuring freedom of expression. As a reaction to the Czech Republic proposal, the Armenian authorities emphasised that “the Human Rights Strategy for 2020-2022 foreseen to legally stipulate the requirement for disclosure of the real owners of the organizations operating in the field of mass media and public access of data about them”. Indeed, the Action Plan for 2020-2022, deriving from “National Strategy for Human Rights Protection of the Republic of Armenia,” has as one the goals establishing legislation with the requirement to reveal real owners of the organizations registered in the Republic of Armenia and operating in the mass media as well as to publish information regarding them.³²

As a result of its negotiations to join the Council of Europe, Armenia undertook commitments that were set out in a special memorandum. This was done pursuant to article 3 of the Statute of the Council of Europe, which requires each member to accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms and collaborate sincerely and effectively in the realization of the aim of the

²⁹ See Summary of Stakeholders' submissions on Armenia. The text of the Summary in English can be found on the website of the UN at: <https://undocs.org/A/HRC/WG.6/35/ARM/3>

³⁰ Matrix of recommendations can be found on the website of the UN at <https://www.ohchr.org/EN/HRBodies/UPR/Pages/AMIndex.aspx>

³¹ The text of the Report of the Working Group on the Universal Periodic Review in English can be found on the website of the UN at <https://undocs.org/A/HRC/44/10/Add.1>

³² Non official translation available at Ministry of Justice web-site at https://www.moj.am/storage/uploads/02Appendix_2.pdf

Council (Statute of the Council of Europe, 1949). Memorandum implied monitoring of commitments made by Armenia

Information note of the Parliamentary Assembly of the Council Monitoring Committee “Honouring of obligations and commitments by Armenia” AS/Mon(2019)14 of 2 July 2019 refers to state of things in mass media sector of Armenia in its paragraph 39 as follows: “While media environment is diverse, many private outlets are demonstrating biased coverage.”

It is worth mentioning that in the reports of the Monitoring Committee of the Parliamentary Assembly over the past five years, the activities of the media as an institution of a democratic society in Armenia have not received wide coverage.

2. ANALYSIS OF THE DRAFT AMENDMENTS TO THE MASS MEDIA LAW

2.1 General comments

The draft law regulates three basic sets of provisions concerning the legal framework of the mass media activities. Those are regulations for journalists' and mass media's accreditation, dissemination of anonymous information by the Internet media, and rules aiming at providing transparency of mass media activities.

In its part ensuring mass media transparency, as it is clear from its content, the draft law follows the principles laid down in the general recommendations contained in the international law, goals proclaimed in the national law of Armenia, and also represents reaction to the comments provided directly to Armenia as part of the process of monitoring of international obligations in the field of human rights within the UN framework (Universal Periodic Review).

The draft law provides for an obligation of the mass media to publicly report information on sources of income and amounts of such income (amendments to Article 12 of the Law on Mass Media). The report is to be published annually in March. Since the preparation of financial statements for companies in Armenia (as well as in other countries) is a standard annual duty, the implementation of this law provision will not cause technical difficulties.

However, taking in account the above mentioned factors it is clear that the draft law failed to implement Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States of the Council of Europe on media pluralism and transparency of media ownership, as well as the Action Plan for 2020-2022 deriving from "National Strategy for Human Rights Protection of the Republic of Armenia" and the matrix of recommendations provided according to UPR. According to all abovementioned documents, media regulation should contain provisions aiming to ensure full and complex transparency of information, and not only concerning the sources of the income (financing) of the mass media. It includes also information concerning their owners, business entities that have control over the media, and beneficiaries. The ownership and business control information should be updated regularly as soon as relevant changes are made. None of the above data is supposed to be published in Armenia subject to the draft law.

Recommendation: Amend the document in order to provide comprehensive regulation of transparency of the mass media. Information on both sources of financing and business control over the mass media outlets should be made available to the public

2.2 Specific comments

2.2.1. Non-identifiable source concept and restrains upon working with this kind of sources

The draft law introduces the notion of “non-identifiable source” (amendment to Article 3 of the Law on Mass Media), interpreting it as any Internet based source of information (website, app or channel) that does not have transparent publicly available identification data on the owner of such source. It is not allowed for the mass media to refer to non-identifiable sources (amendment to Article 7 of the Law on Mass Media).

Despite the positive intent of the legislator to limit dissemination of information from sources other than those that openly declare key info about their owners, it seems that a direct ban to use information from anonymous sources is excessive and unproportionate.

This kind of regulation surely is a restriction of the freedom of expression as it prohibits dissemination of information based on only criteria the source of information. The restriction is provided by law. However, two other stages of three-part test of ICCPR are not passed: there are not clear unambiguous grounds set out in Article 19(3) of the ICCPR applicable for establishing restriction, no obvious necessity for introducing ban is clear from the draft law. The only fact that source of information is not clear enough does not mean that dissemination of information may harm interests of any concrete persons or society.

Blocking the dissemination of information only because it comes from an untrustworthy source, especially in cases such information is not inadequate or intentionally false, hardly complies with the principle of freedom of dissemination of information.

Another interpretation of the proposed regulation is possible as well. The restriction can be considered as aiming at the counteraction to promoting a non-identifiable source rather than to dissemination of information itself. According to this scenario, by general rule, the dissemination of information is possible on behalf of the mass media (redistributing information), but this media takes a risk doing so without referring to the source: if the information is incorrect, the media that disseminated it, but not the source, is liable. This approach looks quite reasonable, but its implementation will lead to the fact that the user will not be able to evaluate whether the information is reliable or accurate: he/she will not know where it comes from. This contradicts principles that may be found in recommendations of the Council of Europe.

The following approach seems to be more balanced: a mass media outlet must indicate that the particular source of disseminated information cannot be properly verified.

Recommendation: supplement Article 7 of the Law on the Mass Media (hereinafter – the Law) with a new Part 4 with the following wording:

“It is prohibited to refer to any sources not compliant with the requirements of Article 11 of this Law, except for the cases provided for in Article 9(2) of this Law. It is prohibited to refer to any non-identifiable sources without clearly indicating that the source is not identifiable according to this Law.”

2.2.2. Accreditation rules

The draft law contains three major provisions regarding the accreditation of the media and journalists. First, the draft law prohibits the accreditation of mass media that do not disclose data on their outlet or financial information in the manner prescribed by law. Second, the draft law provides for the possibility of termination of the mass media accreditation due to the reasons established by the accrediting agencies. Third, the draft law provides for the obligatory notification by the mass media of the accrediting body of the termination of legal relations with the journalist accredited in the body.

The latter position does not cause any doubts and seems to be quite reasonable and balanced, while the first two cannot be characterized in this way.

The draft law includes a very specific ban – the mass media violating regulations on disclosure of its financial information (Articles 11 and 12 of the Law on Mass Media) shall be prohibited from having accreditation at public agencies. It is important to mention that the draft law does not allow an agency to allow access of mass media or to deny it depending on its will: it is an imperative provision constituting administrative misdemeanour (Article 6 of the Law on Mass Media).

However, it is not possible from the point of the right of freedom of expression to establish a logical and reasonable connection between a refusal to accredit the mass media outlet by the public authorities and non-publication by such outlet of its financial statement on the sources of funding, as the draft law suggests. The liability for a violation of the principle of financial transparency can be of economic (financial) nature only. It is also important to note that the draft law does not formulate a sufficiently clear and understandable composition of the tort - the refusal to accredit the mass media shall follow for any violation of publication rules. In addition, it is *inter alia* not clear how the decisions on new mass media accreditation rules are supposed to be made in 2021: the mass media are not able to ensure the timely placement of financial information for 2020, as required by the document. Since no transitional provisions are included into the draft law, either discriminatory or ineffective implementation of the norm in the course of its first year is inevitable.

Another novelty of the draft law is introduction of the possibility of termination of the mass media accreditation due to the violation of rules established by the accrediting agencies. The issue of possibility to establish accreditation rules by an organization independently, and then, on the basis of these rules, to deny accreditation to mass media has been repeatedly the subject of consideration and analysis by the Office of the OSCE Representative on Freedom of the Media. In particular, when analysing similar rules proposed when changing the law on mass media in Belarus, the OSCE expert provided the following remarks:

“In the draft law the list of cases when a correspondent may be deprived of accreditation is open... All this leaves the fundamental issues of accreditation at the discretion of the accrediting bodies themselves, which emasculates the meaning of accreditation, consisting in the unhindered receipt of information about the activities of public organizations.”³³

There is a need to introduce into the draft law provisions that would exclude a possibility of abuse of the law by an organization setting the accreditation rules: such rules must comply with the law, should not be discriminatory (providing any preferences or limitations based on the editorial policy of the mass media outlet) or lead to infringement of the freedom of the media. The public agencies violating this principle must face legal liability.

Recommendations:

a. supplement Clause 5 of Article 6 of the Law with the provision establishing a ban to use termination of media accreditation in a discriminatory or arbitrary way: such a termination is possible only if based on clear and transparent rules;

b. provide for the relevant liability of public agencies for termination of accreditation in violation of this principle;

c. cancel the introduction of a new paragraph 2 in Part 1 Article 6 of the Law establishing ban for accreditation of the mass media outlets that do not comply with the legislation on disclosure of information;

d. redraft article 7 of the draft law so that it reads as follows:

“This Law shall take effect on the tenth day of the calendar year following the year of its official publication.”

³³ Comments available in Russian at: <https://www.osce.org/files/f/documents/1/8/32600.pdf>