

DRAFT LAW ON MEDIA
Legal opinion and comments

Commissioned by the OSCE Mission to Montenegro

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Brief description of required services:

International consultant will be tasked to review draft of the amendments of Law on National Service Broadcaster and draft of Law on Media and prepare legal opinion on both legal texts. Moreover, the consultant will analyse recommendations suggested in the Media Sector Analyses (CoE) and provide alterations to the text of these recommendations, where deemed necessary.

Background: The Ministry of Culture is in the process of amending the Law on National Public Broadcaster RTCG and drafting the new Law on Media, which started on February 2018. As the process of drafting these laws is coming to an end, it was agreed that OSCE Mission to Montenegro will provide necessary legal opinion, analysis and possible alteration of recommendations stated in the Media Sector Analyses of COE.

Objective: The final objective is to improve the quality of the media legal framework with providing OSCE's legal opinion. The Mission will hire an international consultant to do assessment of the draft legal texts of the two laws providing legal opinion, and analyse and suggest possible alterations of recommendations stated in the Media Sector Analyses of COE.

Tasks and Responsibilities:

During the assignment the consultant will be tasked to produce **a comprehensive analysis with comments and recommendations for:**

- Draft amendments to the Law on National Service Broadcaster RTCG;
- Draft Law on Media;
- Media Sector Analyses (which is done with the support of CoE) recommendations.

During the assignment the consultant will be tasked to draft **legal opinion and advice which refers to:**

- **Draft Law on National Service Broadcaster RTCG**, analyzing entire draft text of all legal provisions and advising on a specific course of action (alteration/change) based on the international principles and standards;
- **Draft Law on Media**, analyzing entire draft of legal provisions and advising on a specific course of action (alteration/change) based on the international principles and standards.

Deliverable 1:
Legal opinion and advice which refers to Draft Law on Media

The draft Media Law is to a large degree harmonized with the Council of Europe recommendations and the basic requirements of the EU *acquis*. The Media Sector Analysis of CoE identified three main areas for the recommended changes, as follows:

- A new definition of media shall be introduced to refer unequivocally to online media;
- If decided to address the responsibility of online media in relation to the third party content such as comments and other user generated content (UGC), the regulatory framework should be in line with the Council of Europe and European Union standards and case law (Delfi AS vs. Estonia and MTE-Index v. Hungary) (CoE 2017a, ECtHR 2015, ECtHR 2016).;
- The right of reply and right of correction in Chapter VI should be extended in line with the CoE Recommendation Rec (2004) 16 of the Committee of Ministers to member states on the right of reply in the new media environment (Committee of Ministers of the CoE 2004).

All three recommendations have been addressed in a satisfactory manner. However, taking into consideration some specifics of the media environment in Montenegro, and in an attempt to make the legal norm as applicable as possible, the expert has recommended additional adjustments of the draft Media Law, as presented in this document.

Draft Media Law

I. SUBJECT OF THE LAW

Article 1

Draft:

This law shall regulate the basic principles of media freedom, the concept and establishment of media, mandatory disclosure of information, protection of media pluralism, rights, obligations, and responsibilities in informing, protection of special rights, right to correction and response, media record keeping and the right of insight, media distribution, foreign information activity as well as penal provisions.

Recommendations:

Considering the relevance of the Article 1 in defining the subject of the law and areas of the special importance/interest of the lawmaker and media stakeholders, it would be recommendable to add the following areas of interest:

1. Publicity of ownership

Although the Article 1 refers to this important element in line 2 (“mandatory disclosure of information”), this definition is too broad and does not expressly include disclosure of the ownership structure of any particular media outlet. Given the importance of the publicity of ownership, which is clearly defined and elaborated in Council of Europe recommendations CM/Rec (2018) 1 (see more in comments on Article 14), the more specific wording would be needed.

2. Accessibility to public information

Accessibility to public information is regulated in a separate legislation (Law on free access to information). However, given the intrinsic value of accessibility to public information for the

whole media ecosystem, this area should be specifically mentioned and identified in the Media law, as well.

3. Protection of market competition

Post-transitional countries such as Montenegro need to pay special attention to the protection of market competition. This is important for at least two major (and convincing) reasons: one, considering the residual elements of the state-controlled market, which are particularly strong in small and financially restricted market as Montenegro is, and two, strong interconnection between politics and powerful business/media lobbies that create (or could create) tangible market distortions. Inclusion of the market competition as the area that should be specifically mentioned in Article 1 stems from the very fact of the establishment of the Fund for the promotion of pluralism and media diversity and a number of different interpretations of the funding allocation criteria. Protection of market competition will be specifically scrutinized under the EU Negotiation Chapter 8 (“Competition policy”). Although the main area of concern is state subsidies and direct financial support, the Chapter 8 defines the rules and regulations for “indirect support” as well; in this case, applicable both to the functioning of the Fund and financing of the Public Service Media in Montenegro.

The new text:

This law shall regulate the basic principles of media freedom, the concept and establishment of media, mandatory disclosure of information, publicity of ownership, protection of media pluralism, rights, obligations, and responsibilities in informing, accessibility to public information, protection of special rights, right to correction and response, media record keeping and the right of insight, media distribution, the manner of protection of market competition, foreign information activity as well as penal provisions.

II. DEFINITION OF TERMS

Article 2

Draft:

Some terms used in this Law shall have the following meaning:

- 1) Media are means of public informing by means of which editorially shaped information, ideas and opinions as well as other program contents intended for an indefinite number of users are transmitted through word, sound or picture.
- 2) Journalist is any person involved in the collection, structuring, sorting and processing of information of public interest for media publishing and is employed by the founder of the media or independently performing journalistic tasks.
- 3) The founder of the media is a natural or legal person who establishes a media to publish media content and establishes program orientation.
- 4) The Editor-in-Chief is a person who freely and independently manages media content and has capacity of the responsible editor of this media and is responsible for media content
- 5) Program content for the purposes of this Law shall be all types of information (news, notices, opinions, reports and other information) and author's works, published through the media with the aim of informing and satisfying cultural, educational and other needs of the public.
- 6) Media content, in terms of this Law, shall be program content referred to in item 5 of this Article together with other information published in the media (advertising and other).
- 7) Media self-regulation implies media voluntariness in respecting and applying professional and ethical standards in accordance with the Code of Journalists, through an internal or external self-regulatory body.
- 8) Personal life information implies a personal record (letter, diary, note, digital record, etc.), a character record (photographic, cartoon, video, digital, etc.) and voice recordings (tape recorder, gramophone, digital, etc.)
- 9) The public sector, in accordance with the Budget Law, included state bodies, municipalities (local self-government units), independent regulatory bodies, legal entities, public institutions and companies where the state or municipalities have majority ownership.

Recommendations:

Paragraph 1: The new Law on Media should reflect the new, multimedia environment of the media content production, dissemination and consumption. The Council of Europe Recommendation [CM/Rec\(2011\)7](#) of the Committee of Ministers to member states on a new notion of media precisely defines this new context as follows: „The functioning and existence of traditional media actors, as well as their economic models and professional standards, are being complemented or replaced by other actors. New actors have assumed functions in the production and distribution process of media services which, until recently, had been performed only (or mostly) by traditional media organisations; these include content aggregators, application designers and users who are also producers of content. A number of “intermediaries” or “auxiliaries”, often stemming from the information and communication (ICT) sector, including those serving at the outset as mere hosts or conduits (for example infrastructure, network or platform operators), are essential for digital media’s outreach and people’s access to them. Services provided by these new actors have become essential pathfinders to information, at times turning the intermediaries or auxiliaries into gatekeepers or into players who assume an active role in mass communication editorial processes. Such services have complemented or, on occasion, partly replaced traditional media actors in respect of those functions. The roles of each actor can easily change or evolve fluidly and seamlessly. Furthermore, some have developed services or applications which have put them in a dominant position on a national or even at a global level“.

Recommendation calls for adoption of a new, broad notion of media. Taking all the above mentioned in consideration, Paragraph 1 and 5 should be adjusted accordingly.

Paragraph 3: Multiple media platforms (print, radio, TV, online) that are available, in some cases within the same media outlet in the integrated newsroom concept, call for more elaborated definition of the term “founder”.

Paragraph 10: Considering the importance of the public information, especially given the still restricted access to the public information sources, inclusion of this definition is recommendable.

For further clarifications, paragraphs 11 and 12 have been added.

The new text:

Some terms used in this Law shall have the following meaning:

1) Media are means of public informing by means of which editorially shaped information, ideas and opinions as well as other program contents intended for an indefinite number of users are transmitted through word, sound or picture. The term “medium” refers to any means of communication for the dissemination to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services.

The definition of media encompasses all actors involved in the production and dissemination, to potentially large numbers of people, of content and applications which are designed to facilitate interactive mass communication, while retaining editorial control or oversight of the contents. .

2) Journalist is any person involved in the collection, structuring, sorting and processing of information of public interest for media publishing and is employed by the founder of the media or independently performing journalistic tasks.

3) “The founder of the media is a natural or legal person who establishes a media to publish media content and establishes programme orientation.”

4) The Editor-in-Chief is a person who freely and independently manages media content and has capacity of the responsible editor of this media and is responsible for media content

5) Program content for the purposes of this Law shall be all types of information (news, notices, opinions, reports, analysis, comment, education, culture, art and entertainment in text, audio, visual, audiovisual and other information) and author’s works, published through the media with the aim of informing and satisfying cultural, educational and other needs of the public.

6) Media content, in terms of this Law, shall be program content referred to in item 5 of this Article together with other information published in the media (advertising and other).

7) Media self-regulation implies media voluntariness in respecting and applying professional and ethical standards in accordance with the Code of Journalists and other acts that determine professional and other rules of behaviour or regulate relations in the media profession, and that are independently established by publishers, journalists and their associations.

8) Personal life information implies a personal record (letter, diary, note, digital record, etc.), a character record (photographic, cartoon, video, digital, etc.) and voice recordings (tape recorder, gramophone, digital, etc.)

9) The public sector, in accordance with the Budget Law, included state bodies, municipalities (local self-government units), independent regulatory bodies, legal entities, public institutions and companies where the state or municipalities have majority ownership.

10) Public information means any information held by bodies of executive, legislative or judicial power, bodies of local and regional self-government units, as well as by other legal and natural persons performing public service or duty, and which pertains to their work and activities.

Article 3

No changes.

III. BASIC PRINCIPLES

Article 4

No changes

Article 5

No changes.

Article 6

Draft:

Media in Montenegro shall be free and media censorship shall be prohibited.

Montenegro shall guarantee the right to free media establishment, smooth work of journalists and their security in order to allow: freedom of expression, media pluralism, independence of the media, freedom of research, collection, dissemination, publication and

reception of information, free access to all sources of information, protection of human beings personality and dignity.

Montenegro shall guarantee equal participation in the information of domestic and foreign legal and natural persons, in accordance with this and the law regulating the field of electronic media.

Freedom of the media shall be permitted to be limited only when it is necessary in democratic society in the interest of national security, territorial integrity or public security, in order to prevent disorder or punishable acts, to protect health and morals, to protect the reputation or rights of others, to prevent disclosure of confidential information or for the preservation of authority and impartiality of the judiciary.

No one shall have the right to influence the program content of the media by force or abuse of the position, nor to unlawfully restrict the freedom of the media in any other way.

Article 6

Media in Montenegro shall be free and media censorship shall be prohibited.

Media freedom should not be reduced only to ‘prohibition of media censorship’. Media freedom should be treated and defined in a wider and a more comprehensive context of the freedom of expression. Although it may seem only as a matter of style, the sentence in the Paragraph 1 should be rather expressed in an ‘affirmative’ form, than in negation (“prohibited”). The adjusted Paragraph 1 should read as follows:

The freedom of expression and freedom of the media shall be guaranteed. Media censorship shall be prohibited.

Montenegro shall guarantee the right to free media establishment, smooth work of journalists and their security in order to allow: freedom of expression, media pluralism, independence of the media, freedom of research, collection, dissemination, publication and

reception of information, free access to all sources of information, protection of human beings personality and dignity.

Montenegro shall guarantee equal participation in the information of domestic and foreign legal and natural persons, in accordance with this and the law regulating the field of electronic media.

Paragraph 2 defines the area of the essential importance in promoting and safeguarding freedom of expression and freedom of the media. Therefore, it should be more elaborative than in the current draft. This is also important in order to have a better ‘balance’ between the definition and the constitutive elements of the media freedoms and the following paragraph on media freedom restrictions. The recommended text should read:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart mass 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.

The exercise of these rights 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 reputations of others;
- (b) For the protection of national security or of public order, or of public health or morals.

This is a reinterpretation of the Article 19 (1) of the International Covenant on Civil and Political Rights. Aside of its own intrinsic value, it fits well as an introduction into the definition of the area encompassed by the term “freedom of the media”.

Freedom of the media shall comprise in particular: freedom of the expression as defined in Paragraph 2, independence of the media; freedom to seek, collect, research, publish and disseminate information for the purpose of public informing; pluralism and diversity of media, free flow of information and openness of the media to different opinions, beliefs and various contents, accessibility to public information; respect for the protection of human personality, privacy and dignity; freedom to establish legal persons for the performance of activities in public informing in accordance with this law and the law regulating the field of electronic media,

autonomy of editors in chief, journalists and other authors and content producers in compliance with this law and with the professional codex.

Freedom of the media shall be permitted to be limited only when it is necessary in democratic society in the interest of national security, territorial integrity or public security, in order to prevent disorder or punishable acts, to protect health and morals, to protect the reputation or rights of others, to prevent disclosure of confidential information or for the preservation of authority and impartiality of the judiciary.

This is for sure one of the most sensitive, but still constitutive elements of a media law. The exercise of the above mentioned principles of media freedoms could be restricted, indeed, but only under a strictly defined circumstances and observing the equally strict procedures. Introduction to this paragraph as presented in the draft law (“Freedom of the media shall be permitted to be limited...”) sounds too restrictive. It would be better to transfer it from an ‘active’ to a ‘passive’ mode. The safest way of applying it is to use the definition carefully elaborated in the European Convention on Human Rights (10 Freedom of expression, paragraph 2), as recommended by the Council of Europe in CM/Rec(2011)7:

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.

This expert is aware that some of the media stakeholders in Montenegro, being concerned about a possible misinterpretations or overly enthusiastic approach by authorities in applying of this restrictive clause would like to remove this paragraph from the draft law. Understanding their concerns, the prevalent factor should be the fact that this is a universal definition, taken, as mentioned, from the European Convention on Human Rights and featured in all modern media laws.

No one shall have the right to influence the program content of the media by force or abuse of the position, nor to unlawfully restrict the freedom of the media in any other way.

Article 7

No changes.

Article 8

Deleted as in the draft.

The ability of journalists to access official information with a minimum of restrictions is a normal expectation in a functional democracy. The laws guaranteeing the right of journalists and others to access official information are an essential aspect of a safe and enabling environment for journalists.

Considering, both, the importance of the matter (access to the information) and the fact that this issue has been often identified by media professionals in Montenegro as one of the biggest problems they are facing in their daily activities, the area of the right to access to the information, as well as responsibilities of authorities in providing timely and accurate information, should be defined in more detail in a separate Article. The essential importance of the following provisions makes them constitutive elements of the Media Law, although the elements of it could be found in other legislative acts.

NEW: Article 8

Bodies of executive, legislative and judiciary power and bodies of local self-government units, as well as other legal and natural persons who perform public service and/or duty, shall be obliged to provide accurate, complete and timely information on issues from their scope of activity, with the aim of publishing information through the media.

Information held by persons referred to in paragraph 1 of this Article shall be accessible to all journalists under equal conditions.

The head of the body or a legal person referred to in paragraph 1 of this Article shall be obliged, in compliance with the law, to regulate the manner of providing information to the public and determine a person who shall ensure access to public information in compliance with this Act and other special laws.

The head of the body or legal person referred to in paragraph 1 of this Article and the person referred to in paragraph 3 of this Article shall be obliged to provide journalists with the requested information in an appropriate time framework, and shall be accountable for the accuracy and entirety of the information provided.

The person referred to in paragraph 3 of this Article may withhold the provision of information when:

- the requested information have been defined, in the proper manner and for the purpose of protecting the public interest, as a state or military secret;

- the publishing would represent a violation of the confidentiality of personal data in compliance with the law, unless their publication may prevent the execution of a severe criminal acts or immediate danger to the life of people and their property;

In the case referred to in paragraph 5 of this Article, a responsible person shall be obliged to explain in writing the reasons for withholding information within three working days from the day on which the written request for information was received.

In case of withholding of public information, a journalist shall have the right to file a complaint due to the illegal act with the competent court. The competent court shall decide on the complaint under a special law in the emergency procedure, during which it shall examine the reasons for withholding of public information. Should the Court establish that no reason for withholding of information exists as stipulated by this Act; it shall abolish the decision on withholding of information and order the provision of requested information.

IV. MEDIA CONCEPT

Article 9

No changes.

Article 10

No changes.

V. ESTABLISHMENT OF MEDIA

Article 11

A medium shall be established by a founding act, freely and without permission.

An electronic medium shall be established in a way and according the procedure prescribed by the law governing the field of electronic media.

In order to give more prominence to the Media records, the following stipulation should be added:

A medium obtain a status of legal entity upon entering/registering with the Media records.

Article 12

No changes.

VI. RECORDS

Article 13

No changes.

Content of the records

Article 14

Recommendation CM/Rec(2018)1 (Guidelines on media pluralism and transparency of media ownership; 4.Transparency of media ownership, organisation and financing) reads: „States should 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 is necessary for media regulatory and other relevant bodies to be able to conduct informed regulatory and decision-making processes. It also enables the public to analyse and evaluate the information, ideas and opinions disseminated by the media“.

The same Recommendation says that the transparency obligations for media can include disclosure of 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. Beneficial shareholding applies to natural persons who ultimately own or control shares in a media outlet or on whose behalf those shares are held, enabling them to indirectly exercise control or influence on the operation and strategic decision making of the media outlet;
- 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 decision-making 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.

Considering the above mentioned recommendations, Articles 14, 15, 16 and 17 may have a different order of paragraphs, but as a whole, they are in line with the Council of Europe recommendations.

Deletion of media from the Records

Article 15

No changes.

VII. MANDATORY DATA DISCLOSURE

Imprint and abbreviated imprint

Article 16

No changes.

Article 17

No changes.

VIII. SELF-REGULATORY BODIES

Article 18

No changes.

IX. PROTECTION OF MEDIA PLURALISM

Protecting transparency in the media

Article 19

No changes.

Article 20

No changes.

Fund for the promotion of pluralism and media diversity

Article 21

Paragraph 1: The Fund for the promotion of pluralism and media diversity should support commercial media's activities that are complementary to the Public Service Media in producing and disseminating the content of the public interest.

Paragraph 2 and following paragraphs: No changes.

Article 22

No changes.

Article 23

No changes.

Article 24

No changes.

Article 25

Although the article itself is in line with the international standards when it comes to the criteria for the project-based financing, the order of priorities (1. Promoting cultural diversity and preserving tradition; (...) 11. The fight against corruption and organize crime) should be changed to reflect more priority areas as identified by the relevant international organizations/reports. For example, the European Commission's report on Montenegro (2018) reads as follows:

„Montenegro has achieved some level of preparation in the fight against corruption. Despite some progress, corruption is prevalent in many areas and remains an issue of concern. (...)

In the fight against organised crime, there is an initial track record of prosecutions in the fight against smuggling of migrants and against drug trafficking. However, further results are needed to produce a convincing track record, in particular in the fight against money laundering and trafficking in human beings (...)

Montenegro has achieved some level of preparation on freedom of expression, but no progress was made in the reporting period. There have been no notable developments regarding investigations into old cases of violence against journalists

There has been backsliding in the area of public procurement. Looking ahead, Montenegro should focus in particular on competition policy, environment and climate change and public procurement“.

These areas should be prioritized and/or placed higher on the list of thematic areas that would be considered as „important content“.

Selection of the prioritized issues/areas should be prepared by the responsible body with an explanation of the selection criteria.

Article 26

The main text and definitions in Article 26 are in line with the international standards in terms of the project-based financing. For the more clarity, an in order to stimulate quality content production, addiional criteria should be added, as follows:

1. founder of a commercial printed, electronic or online media that meets the following requirements:

(...)

1) founder of a commercial printed, electronic or online media who was not subjected to more than four critical decisions on complaints submitted to the responsible regulatory or self-regulatory body or to ombudsman

Article 27

No changes.

X. RIGHTS, OBLIGATIONS AND RESPONSIBILITIES IN INFORMATION

Manner of collecting information's

Article 28

“Nedozvoljen način”, as the translation of “unauthorized manner” could be misleading and does not reflect the meaning of the English version of the text.

The responsibility of the founder of the media

Article 29

No changes.

Responsibility of portals for comments

Article 30

Article 30, addressing the responsibility of online media in relation to the third party content such as comments and other user generated content (UGC), is in line with the Council of Europe and European Union standards and case law (Delfi AS vs. Estonia and MTE-Index v. Hungary) (CoE 2017a, ECtHR 2015, ECtHR 2016).

Editor-in-Chief

Article 31

The first paragraph (“A media has the Editor-in-Chief”) must be changed to:

“A media must have the Editor-in-Chief”).

Additional clarifications should be as follows:

Newspapers and other periodicals, radio and television stations and news agency programmes shall have an editor in chief appointed and relieved of duty by the publisher, in compliance with the law and statute. Prior to the appointment or relief of duty of the editor in chief, the publisher shall obtain the opinion of the editorial board, unless otherwise stipulated by the media statute.

The editor in chief shall be responsible, in compliance with the law, for each published piece of information. The responsibility of the editor in chief shall also pertain to the editorial processing of published information (the choice of title, subtitle, the text under a photograph etc.).

A person may be appointed editor in chief if s/he fulfils the Terms and Conditions stipulated by the law and the statute of the media.

A person who enjoys immunity from criminal liability may not be appointed editor in chief.

Editor for individual editions or columns

Article 32

No changes.

Journalist

Article 33

No changes.

Author who is not a journalist

Article 34

No changes.

Protection of the author's reputation

Article 35

No changes.

NEW: Article 36

The media statute

1. Relationships between the publisher, editor in chief and journalists, as well as their mutual rights and obligations, shall be determined by the media statute.
2. The media statute means a self-regulatory act which shall especially determine the manner of journalists' participation in the procedure of appointment and dismissal of the editor in chief, the freedom of work and journalists' responsibility, as well as the conditions and procedure pursuant

to which the editor in chief, editors and journalists have the right to a resignation, along with a fair severance pay, in cases of such changes in the ownership or management structure of the media which lead to significant alterations in the programme basis or programme content of that media (the so-called “conscience clause”).

3. The statute of the media shall be adopted by the publisher and a journalists’ representative, with the prior consent from the majority of the total number of journalists from the media. Journalists shall elect their representative by a majority vote.

4. If the publisher and the journalists’ representative fail to adopt the statute within six months from the beginning of operation of the media, the statute shall be passed, upon the request of the journalists’ representative, within three months from the day of receipt of the request, by an arbitration composed of an equal number of representatives of the associations of publishers and of the journalists’ associations.

5. The publisher shall be obliged to conclude an agreement with every person s/he orders a journalist contribution from prior to ordering, in compliance with the regulations and media statute. The contract shall also regulate copyrights related to the journalist contribution.

6. A journalists’ contribution referred to in paragraph 5 of this Article shall be a published written, verbal, image or on-line: report, information, comment (notice or comment, social chronicle, article, review), criticism, cartoon, essay, interview, reportage (travelogue, sketch, feature), as well as titles and announcements. A journalist contribution shall also be specialist works and genres, such as editing, photography, photo-news, photo-reportage, photo-editing and photo-cartoon.

7. The publisher shall be obliged to keep a separate record of contracts referred to in paragraph 5 of this Article.

Article 37 (36)

Given the importance of protection journalists’ integrity in promotion and implementation of higher professional standards, Article 36 should be additionally elaborated, as follows:

1. A journalist shall have the right to express his standpoint with regard to all events, occurrences, persons, subjects and activities.

2. A journalist's work contract may not be terminated, his salary decreased or his position on the editorial board altered, the contracted income or part thereof decreased or suspended, because of an expressed standpoint.

3. If in case of a dispute a journalist expresses facts which justify the doubt that the termination of the work contract, decrease of salary or altered position on the editorial board, or decrease or suspension of the contracted income is the consequence of expressing a standpoint from paragraph 1 of this Article, the burden of proof falls on the publisher.

4. A journalist shall have the right to refuse to prepare, write or participate in the drafting of a report, the content of which is contrary to the rules of the journalist profession and ethics, about which he will inform the editor in chief in writing.

5. If a journalist refuses to act upon order because, by doing so, he would violate the rules of the journalist profession, the employer may not terminate his work contract, decrease his salary or alter his position on the editorial board.

6. If in case of a dispute the journalist expresses facts which justify the doubt that the termination of the work contract, decrease of salary or altered position on the editorial board is the consequence of refusing to act upon order from paragraph 1 of this Article, the burden of proof falls on the publisher.

Article 38 (37)

No changes.

Protecting the source of information

Article 39 (38)

Protection of the source of information is one of the cornerstones of professional and responsible journalism. Article 38 f the draft provides for only basic definitions, which should be more elaborated to reflect the sensitivity of the matter. Recommendation:

Article 39

A journalist shall not be obliged to provide data about the source of published information or the information he intends to publish.

The right of a journalist referred to in paragraph 1 of this Article shall also pertain to editor in chief, editors and authors of published reports who are not journalists.

Prior to publication, the journalist shall be obliged to inform the editor in chief of the fact that the information is from an unidentified source in the manner stipulated in the media statute. In that case all the provisions on the protection of the source of information shall also apply to the editor in chief.

The State Attorney's Office, when such limitations are required in the interest of national security, territorial integrity and protection of health, may lodge a request with the competent court to order the journalist to disclose data on the source of the published information or information he intends to publish.

The court may order the journalist to disclose data on the source of the published information or information he intends to publish, if so required for the protection of public interest and if it concerns particularly important and serious circumstances and the following has been indisputably established: - that a reasonable alternative measure for disclosing data on the source of information does not exist or that the person or body from paragraph 4 of this Article seeking the disclosure of the source of information has already used that measure, - that legal public interest for disclosing data on the source of information clearly prevails over the interest for protecting the source of information.

When assessing the circumstances of the case, the court shall exclude the public in the course of the procedure of disclosing information and warn the persons present that they are obliged to keep confidential everything they have found out in the procedure as well as of the consequences of disclosing confidential information.

Liability for damages

Article 40 (39)

No changes.

Joint responsibility

Article 41 (40)

No changes.

Adequate application

Article 42 (41)

No changes.

Exemption from liability

Article 43 (42)

No changes.

Due journalistic attention

Article 44 (43)

No changes.

Exclusion of liability for damages

Article 45 (44)

No changes.

Article 46 (45)

No changes.

Article 47 (46)

No changes.

XI. PROTECTION OF SPECIAL RIGHTS

Presumption of innocence

Article 48 (47)

No changes.

Reporting on court proceedings

Article49 (48)

No changes.

Prohibition of hate speech

Article 50 (49)

No changes.

Protection of the right to information of persons with disabilities

Article 51 (50)

No changes.

Prohibition of discrimination

Article 52 (51)

No changes.

Protection of children

Article 53 (52)

No changes.

Prohibition of public exposure of pornography

Article 54 (53)

No changes.

Prohibition of advertising

Article 55 (54)

In addition to the definition presented in the draft, Article 55 should address the following issues:

Free advertising shall have a special marking.

Concealed and misleading advertising in the media shall not be permitted. Concealed advertising shall be every form of journalism (written text, photograph, picture, drawing, etc.) which is paid in any manner but not clearly marked as advertising.

Sponsored programme contents in the broadcast have to be clearly marked as such with the name, logo and/or other symbol of the sponsor.

Advertising in the media in which women and men are depicted in an insulting or humiliating manner with respect to gender or sexual orientation shall be prohibited.

Personal dignity

Article 56 (55)

No changes.

Right to privacy

Article 57 (56)

Every person shall have the right to the protection of privacy, dignity, reputation and honour.

A person performing public service or duty shall have the right to the protection of privacy, except in cases related to public service or duty that he or she performs.

A person who draws public attention by his/her statements, behaviour and other acts relating to his/her personal or family life may not request the same level of the protection of privacy as other citizens.

NEW: Article 58

There shall be no violation of the right to the protection of privacy if in relation to the published information a justified interest of the public prevails over the protection of privacy with regard to the journalist profession or information.

Article 59 (57)

No changes.

Article 60 (58)

No changes.

XII. THE RIGHT TO RESPONSE AND CORRECTION

Taking into consideration the importance of the right to response and correction in terms of the promotion of the factual and responsible journalism, Council of Europe issued Recommendation (Rec 2004-16-1) on the right to reply, stating that the governments of the member states should examine and, if necessary, introduce in their domestic law or practice a right of reply or any other equivalent remedy, which allows a rapid correction of incorrect information in online or off-line media along the lines of the following minimum principles, without prejudice to the possibility to adjust their exercise to the particularities of each type of media:

„Definition

For the purposes of this Recommendation:

The term “medium” refers to any means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services.

Minimum principles

1. Scope of the right of reply

Any natural or legal person, irrespective of nationality or residence, should be given a right of reply or an equivalent remedy offering a possibility to react to any information in the media presenting inaccurate facts about him or her and which affect his/her personal rights.

2. Promptness

The request for a reply should be addressed to the medium concerned within a reasonably short time from the publication of the contested information. The medium in question should make the reply public without undue delay.

3. Prominence

The reply should be given, as far as possible, the same prominence as was given to the contested information in order for it to reach the same public and with the same impact.

4. Free of charge

The reply should be made public free of charge for the person concerned.

5. Exceptions

By way of exception, national law or practice may provide that the request for a reply may be refused by the medium in question in the following cases:

- if the length of the reply exceeds what is necessary to correct the contested information;
- if the reply is not limited to a correction of the facts challenged;
- if its publication would involve a punishable act, would render the content provider liable to civil law proceedings or would transgress standards of public decency;
- if it is considered contrary to the legally protected interests of a third party;
- if the individual concerned cannot show the existence of a legitimate interest;
- if the reply is in a language different from that in which the contested information was made public;
- if the contested information is a part of a truthful report on public sessions of the public authorities or the courts.

6. Safeguarding an effective exercise of the right of reply

In order to safeguard the effective exercise of the right of reply, the media should make public the name and contact details of the person to whom requests for a reply can be addressed.

For the same purpose, national law or practice should determine to what extent the media are obliged to conserve, for a reasonable length of time, a copy of information or programmes made publicly available or, at least, while a request for inserting a reply can be made, or while a dispute is pending before a tribunal or other competent body.

7. Electronic archives

If the contested information is kept publicly available in electronic archives and a right of reply has been granted, a link should be established between the two if possible, in order to draw the attention of the user to the fact that the original information has been subject to a response.

8. Settlement of disputes

If a medium refuses a request to make a reply public, or if the reply is not made public in a manner satisfactory for the person concerned, the possibility should exist for the latter to bring the dispute before a tribunal or another body with the power to order the publication of the reply“.

The draft Media law refers to the right to response and correction in Articles 61 (59), 62 (60), 63 (61), 64 (62), 65 (63), 66 (64), 67 (65) and 68 (66).

Although in different order than in the Council of Europe Recommendation, all key requirements of the right to response and correction have been adequately addressed.

XIII. STORAGE OF MEDIA RECORDING AND RIGHT TO INSIGHT

XIV. DISTRIBUTION OF MEDIA

XV. FOREIGN INFORMATIV ACTIVITY

XVI. PENALTY PROVISIONS

XVII. TRANSITIONAL AND FINAL PROVISIONS

No changes.

DRAFT MEDIA LAW

CONSOLIDATED

Article 1

DRAFT MEDIA LAW

CONSOLIDATED

I. SUBJECT OF THE LAW

Article 1

This law shall regulate the basic principles of media freedom, the concept and establishment of media, mandatory disclosure of information, publicity of ownership, protection of media pluralism, rights, obligations, and responsibilities in informing, accessibility to public information, protection of special rights, right to correction and response, media record keeping and the right of insight, media distribution, the manner of protection of market competition, foreign information activity as well as penal provisions.

II. DEFINITION OF TERMS

Article 2

Some terms used in this Law shall have the following meaning:

1) Media are means of public informing by means of which editorially shaped information, ideas and opinions as well as other program contents intended for an indefinite number of users are transmitted through word, sound or picture. The term “medium” refers to any means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services.

The definition of media encompasses all actors involved in the production and dissemination, to potentially large numbers of people, of content and applications which are designed to facilitate interactive mass communication, while retaining editorial control or oversight of the contents.

- 2) Journalist is any person involved in the collection, structuring, sorting and processing of information of public interest for media publishing and is employed by the founder of the media or independently performing journalistic tasks.
- 3) The founder of the media is natural or legal person who establishes a media, publishes its programme contents through the media and participates in public informing, regardless of technical means with which its editorial programme contents are published, transmitted or are accessible to the public.
- 4) The Editor-in-Chief is a person who freely and independently manages media content and has capacity of the responsible editor of this media and is responsible for media content
- 5) Program content for the purposes of this Law shall be all types of information (news, notices, opinions, reports, analysis, comment, education, culture, art and entertainment in text, audio, visual, audiovisual and other information) and author's works, published through the media with the aim of informing and satisfying cultural, educational and other needs of the public.
- 6) Media content, in terms of this Law, shall be program content referred to in item 5 of this Article together with other information published in the media (advertising and other).
- 7) Media self-regulation implies media voluntariness in respecting and applying professional and ethical standards in accordance with the Code of Journalists and other acts that determine professional and other rules of behaviour or regulate relations in the media profession, and that are independently established by publishers, journalists and their associations.
- 8) Personal life information implies a personal record (letter, diary, note, digital record, etc.), a character record (photographic, cartoon, video, digital, etc.) and voice recordings (tape recorder, gramophone, digital, etc.)
- 9) The public sector, in accordance with the Budget Law, included state bodies, municipalities (local self-government units), independent regulatory bodies, legal entities, public institutions and companies where the state or municipalities have majority ownership.

10) Public information means any information held by bodies of executive, legislative or judicial power, bodies of local and regional self-government units, as well as by other legal and natural persons performing public service or duty, and which pertains to their work and activities.

11) Interview means a conversation and statement in written or verbal form, intended for publishing in the media.

12) Authorization means a certification of the authenticity of a statement or conversation intended for publishing, provided in written or verbal form, if there is a sound recording on verbal authorization.

Article 3

No changes.

III. BASIC PRINCIPLES

Article 4

No changes

Article 5

No changes.

Article 6

The freedom of expression and freedom of the media shall be guaranteed.

Montenegro shall guarantee the right to free media establishment, smooth work of journalists and their security in order to allow: freedom of expression, media pluralism, independence of the media, freedom of research, collection, dissemination, publication and reception of information, free access to all sources of information, protection of human beings personality and dignity.

Montenegro shall guarantee equal participation in the information of domestic and foreign legal and natural persons, in accordance with this and the law regulating the field of electronic media. 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.

Freedom of the media shall comprise in particular: freedom of the expression of opinion as defined in Paragraph 2, independence of the media; freedom to collect, research, publish and disseminate information for the purpose of public informing; pluralism and diversity of media, free flow of information and openness of the media to different opinions, beliefs and various contents, accessibility to public information; respect for the protection of human personality, privacy and dignity; freedom to establish legal persons for the performance of activities in public informing in accordance with this law and the law regulating the field of electronic media, autonomy of editors in chief, journalists and other authors and content producers in compliance with this law and with the professional codex.

Freedom of the media shall be permitted to be limited only when it is necessary in democratic society in the interest of national security, territorial integrity or public security, in order to prevent disorder or punishable acts, to protect health and morals, to protect the reputation or rights of others, to prevent disclosure of confidential information or for the preservation of authority and impartiality of the judiciary.

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.

No one shall have the right to influence the program content of the media by force or abuse of the position, nor to unlawfully restrict the freedom of the media in any other way.

Article 7

No changes.

Article 8

Bodies of executive, legislative and judiciary power and bodies of local self-government units, as well as other legal and natural persons who perform public service and/or duty, shall be obliged to provide accurate, complete and timely information on issues from their scope of activity, with the aim of publishing information through the media.

Information held by persons referred to in paragraph 1 of this Article shall be accessible to all journalists under equal conditions.

The head of the body or a legal person referred to in paragraph 1 of this Article shall be obliged, in compliance with the law, to regulate the manner of providing information to the public and determine a person who shall ensure access to public information in compliance with this Act and other special laws.

The head of the body or legal person referred to in paragraph 1 of this Article and the person referred to in paragraph 3 of this Article shall be obliged to provide journalists with the requested information in an appropriate time framework, and shall be accountable for the accuracy of the information provided.

The person referred to in paragraph 3 of this Article may withhold the provision of information when:

- the requested information has been defined, in the proper manner and for the purpose of protecting the public interest, as a state or military secret;
- the publishing would represent a violation of the confidentiality of personal data in compliance with the law, unless their publication may prevent the execution of a severe criminal acts or immediate danger to the life of people and their property;

In the case referred to in paragraph 5 of this Article, a responsible person shall be obliged to explain in writing the reasons for withholding information within three working days from the day on which the written request for information was received.

In case of withholding of public information, a journalist shall have the right to file a complaint due to the illegal act with the competent court. The competent court shall decide on the complaint under a special law in the emergency procedure, during which it shall examine the reasons for withholding of public information. Should the Court establish that no reason for withholding of information exists as stipulated by this Act, it shall abolish the decision on withholding of information and order the provision of requested information.

IV. MEDIA CONCEPT

Article 9

No changes.

Article 10

No changes.

V. ESTABLISHMENT OF MEDIA

Article 11

A medium shall be established by a founding act, freely and without permission.

An electronic medium shall be established in a way and according the procedure prescribed by the law governing the field of electronic media.

A medium obtains a status of legal entity upon entering/registering with the Media records.

Article 12

No changes.

VI. RECORDS

Article 13

No changes.

Content of the records

Article 14

Deletion of media from the Records

Article 15

No changes.

VII. MANDATORY DATA DISCLOSURE

Imprint and abbreviated imprint

Article 16

No changes.

Article 17

No changes.

VIII. SELF-REGULATORY BODIES

Article 18

No changes.

IX. PROTECTION OF MEDIA PLURALISM

Protecting transparency in the media

Article 19

No changes.

Article 20

No changes.

Fund for the promotion of pluralism and media diversity

Article 21

Paragraph 1: The Fund for the promotion of pluralism and media diversity should support commercial media's activities that are complementary to the Public Service Media in producing and disseminating the content of the public interest.

Paragraph 2 and following paragraphs: No changes.

Article 22

No changes.

Article 23

No changes.

Article 24

No changes.

Article 25

No changes.

Article 26

For the more clarity, an in order to stimulate quality content production, addiional criteria should be added, as follows:

1. founder of a commercial printed, electronic or online media that meets the following requirements:

(...)

l) founder of a commercial printed, electronic or online media who was not subjected to more than four accepted complaints submitted to the responsible regulatory or self-regulatory body or to ombudsman

Article 27

No changes.

X. RIGHTS, OBLIGATIONS AND RESPONSIBILITIES IN INFORMATION

Manner of collecting information's

Article 28

No changes.

The responsibility of the founder of the media

Article 29

No changes.

Responsibility of portals for comments

Article 30

No changes.

Editor-in-Chief

Article 31

The first paragraph (“A media has the Editor-in-Chief”) must be changed to:

“A media must have the Editor-in-Chief”).

Additional clarifications should be as follows:

Newspapers and other periodicals, radio and television stations and news agency programmes shall have an editor in chief appointed and relieved of duty by the publisher, in compliance with the law and statute. Prior to the appointment or relief of duty of the editor in chief, the publisher shall obtain the opinion of the editorial board, unless otherwise stipulated by the media statute.

The editor in chief shall be responsible, in compliance with the law, for each published piece of information. The responsibility of the editor in chief shall also pertain to the editorial processing of published information (the choice of title, subtitle, the text under a photograph etc.).

A person may be appointed editor in chief if s/he fulfils the Terms and Conditions stipulated by the law and the statute of the media.

A person who enjoys immunity from criminal liability may not be appointed editor in chief.

Editor for individual editions or columns

Article 32

No changes.

Journalist

Article 33

No changes.

Author who is not a journalist

Article 34

No changes.

Protection of the author's reputation

Article 35

No changes.

NEW: Article 36

The media statute

1. Relationships between the publisher, editor in chief and journalists, as well as their mutual rights and obligations, shall be determined by the media statute.
2. The media statute means a self-regulatory act which shall especially determine the manner of journalists' participation in the procedure of appointment and dismissal of the editor in chief, the freedom of work and journalists' responsibility, as well as the conditions and procedure pursuant to which the editor in chief, editors and journalists have the right to a resignation, along with a fair severance pay, in cases of such changes in the ownership or management structure of the media which lead to significant alterations in the programme basis or programme content of that media (the so-called "conscience clause").
3. The statute of the media shall be adopted by the publisher and a journalists' representative, with the prior consent from the majority of the total number of journalists from the media. Journalists shall elect their representative by a majority vote.
4. If the publisher and the journalists' representative fail to adopt the statute within six months from the beginning of operation of the media, the statute shall be passed, upon the request of the journalists' representative, within three months from the day of receipt of the request, by an arbitration composed of an equal number of representatives of the associations of publishers and of the journalists' associations.

5. The publisher shall be obliged to conclude an agreement with every person s/he orders a journalist contribution from prior to ordering, in compliance with the regulations and media statute. The contract shall also regulate copyrights related to the journalist contribution.

6. A journalists' contribution referred to in paragraph 5 of this Article shall be a published written, verbal, image or on-line: report, information, comment (notice or comment, social chronicle, article, review), criticism, cartoon, essay, interview, reportage (travelogue, sketch, feature), as well as titles and announcements. A journalist contribution shall also be specialist works and genres, such as editing, photography, photo-news, photo-reportage, photo-editing and photo-cartoon.

7. The publisher shall be obliged to keep a separate record of contracts referred to in paragraph 5 of this Article.

Article 37 (36)

1. A journalist shall have the right to express his standpoint with regard to all events, occurrences, persons, subjects and activities.

2. A journalist's work contract may not be terminated, his salary decreased or his position on the editorial board altered, the contracted income or part thereof decreased or suspended, because of an expressed standpoint.

3. If in case of a dispute a journalist expresses facts which justify the doubt that the termination of the work contract, decrease of salary or altered position on the editorial board, or decrease or suspension of the contracted income is the consequence of expressing a standpoint from paragraph 1 of this Article, the burden of proof falls on the publisher.

4. A journalist shall have the right to refuse to prepare, write or participate in the drafting of a report, the content of which is contrary to the rules of the journalist profession and ethics, about which he will inform the editor in chief in writing.

5. If a journalist refuses to act upon order because, by doing so, he would violate the rules of the journalist profession, the employer may not terminate his work contract, decrease his salary or alter his position on the editorial board.

6. If in case of a dispute the journalist expresses facts which justify the doubt that the termination of the work contract, decrease of salary or altered position on the editorial board is the consequence of refusing to act upon order from paragraph 1 of this Article, the burden of proof falls on the publisher.

Article 38 (37)

No changes.

Protecting the source of information

Article 39 (38)

A journalist shall not be obliged to provide data about the source of published information or the information he intends to publish.

The right of a journalist referred to in paragraph 1 of this Article shall also pertain to editor in chief, editors and authors of published reports who are not journalists.

Prior to publication, the journalist shall be obliged to inform the editor in chief of the fact that the information is from an unidentified source in the manner stipulated in the media statute. In that case all the provisions on the protection of the source of information shall also apply to the editor in chief.

The State Attorney's Office, when such limitations are required in the interest of national security, territorial integrity and protection of health, may lodge a request with the competent court to order the journalist to disclose data on the source of the published information or information he intends to publish.

The court may order the journalist to disclose data on the source of the published information or information he intends to publish, if so required for the protection of public interest and if it concerns particularly important and serious circumstances and the following has been indisputably established: - that a reasonable alternative measure for disclosing data on the source of information does not exist or that the person or body from paragraph 4 of this Article seeking the disclosure of the source of information has already used that measure, - that legal public interest for disclosing data on the source of information clearly prevails over the interest for protecting the source of information.

When assessing the circumstances of the case, the court shall exclude the public in the course of the procedure of disclosing information and warn the persons present that they are obliged to keep confidential everything they have found out in the procedure as well as of the consequences of disclosing confidential information.

Liability for damages

Article 40 (39)

No changes.

Joint responsibility

Article 41 (40)

No changes.

Adequate application

Article 42 (41)

No changes.

Exemption from liability

Article 43 (42)

No changes.

Article 44 (43)

No changes.

Exclusion of liability for damages

Article 45 (44)

No changes.

Article 46 (45)

No changes.

Article 47 (46)

No changes.

XI. PROTECTION OF SPECIAL RIGHTS

Presumption of innocence

Article 48 (47)

No changes.

Reporting on court proceedings

Article 49 (48)

No changes.

Prohibition of hate speech

Article 50 (49)

No changes.

Protection of the right to informing of persons with disabilities

Article 51 (50)

No changes.

Prohibition of discrimination

Article 52 (51)

No changes.

Protection of children

Article 53 (52)

No changes.

Prohibition of public exposure of pornography

Article 54 (53)

No changes.

Prohibition of advertising

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Free advertising shall have a special marking.

Concealed and misleading advertising shall not be permitted. Concealed advertising shall be every form of journalism (written text, photograph, picture, drawing, etc.) which is paid in any manner but not clearly marked as advertising.

Sponsored programme contents in the broadcast have to be clearly marked as such with the name of the sponsor or his sign.

Advertising in which women and men are depicted in an insulting or humiliating manner with respect to gender or sexual orientation shall be prohibited.

Personal dignity

Article 56 (55)

No changes.

Right to privacy

Article 57 (56)

Every person shall have the right to the protection of privacy, dignity, reputation and honour.

A person performing public service or duty shall have the right to the protection of privacy, except in cases related to public service or duty that he or she performs.

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Article 59 (57)

No changes.

Article 60 (58)

No changes.

XII. THE RIGHT TO RESPONSE AND CORRECTION

No changes

XIII. STORAGE OF MEDIA RECORDING AND RIGHT TO INSIGHT

XIV. DISTRIBUTION OF MEDIA

XV. FOREIGN INFORMATIV ACTIVITY

XVI. PENALTY PROVISIONS

XVII. TRANSITIONAL AND FINAL PROVISIONS

No changes.