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(VENICE COMMISSION)

ALBANIA

OPINION

**ON DRAFT AMENDMENTS TO LAW N°97/2013
ON THE AUDIOVISUAL MEDIA SERVICE**

**Adopted by the Venice Commission on 19 June 2020
by a written procedure
replacing the 123rd Plenary Session**

on the basis of comments by

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I. Introduction

1. By letter of 20 January 2020, the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (the Monitoring Committee) of the Parliamentary Assembly, requested an opinion of the Venice Commission on the Albanian Law no. 97/2013 “On the Audiovisual Media Service” with draft amendments adopted on 18 December 2019 (hereinafter, “Law no. 97/2013” – see CDL-REF(2020)007).

2. In a letter dated of 4 February 2020, Mr Michael Aastrup Jensen, Chairman of the Monitoring Committee clarified that the initial request for an Opinion was related to the draft amendments to Law no. 97/2013 as well as, in connection to this, the draft amendments to Law no. 9918/2018 on Electronic communication (hereinafter, “Law no. 9918/2018”). Therefore, the Commission will concentrate its analysis on the draft amendments to Law no. 97/2013 and consider the draft amendments to Law no. 9918/2018 to the extent that they are related to Law no. 97/2013.

3. Ms Herdís Kjerulf Thorgeirsdóttir, Mr Michael Frenedo and Ms Kateřina Šimáčková acted as rapporteurs for this opinion.

4. On 11-12 February 2020, a delegation of the Commission composed of Ms Kjerulf Thorgeirsdóttir and Mr Frenedo, accompanied by Mr Grigory Dikov, acting Head of Division at the Secretariat and Ms Sevim Sönmez, legal officer at the Secretariat, visited Tirana and had meetings with the President of the Republic of Albania, the Deputy Speaker of the Albanian Parliament, parliamentarians from the ruling and opposition parties, members of the Committee on Education and Media and the Committee on Legal Affairs, Public Administration and Human Rights in Parliament, representatives of the Council of Ministers, the Ministry of Justice, the Ministry of Infrastructure and Energy, the acting Chair of the Constitutional Court, the Albanian Ombudsman, judges of the administrative courts, members of the Audiovisual Media Authority, members of the Electronic and Postal Communications Authority, as well as with the representatives of the civil society and media associations. The Commission is grateful to the Albanian authorities for the excellent organisation of this visit.

5. An official translation in English of Law no. 97/2013 as amended on 18 December 2019 was accompanied by an information note was provided by the authorities (see CDL-REF(2020)018). This opinion was prepared in reliance on this translation. The translation may not accurately reflect the original version on all points.

6. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Tirana. It was adopted by the Venice Commission on 19 June 2020 through a written procedure which replaced 123rd session of the Venice Commission, due to the COVID-19 disease.

II. Background information

A. Short outline of Law no. 97/2013

7. On 4 March 2013, the Albanian Parliament adopted Law no. 97/2013 with a view to implementing the Digital Switchover Strategy aiming at ensuring transition from analogue to digital broadcasting. The purpose of the law was to regulate the broadcasting activity in Albania and to harmonise the media legislation with the Audiovisual Media Services Directive (2010/13 EU) of the European Union.¹

¹<http://data.europa.eu/eli/dir/2010/13/oj>
<https://eur-lex.europa.eu/eli/dir/2018/1808/oj>

8. Law no. 97/2013 established the Audiovisual Media Authority (hereinafter, “the AMA”) as the national regulatory authority in the field of audio and audiovisual broadcasting services and their supporting services. Under the existing law, the main tasks of the AMA may be summarised as follows: granting and revoking licences and/or authorisations; ensuring fair competition; cooperating with other institutions and monitoring of TV and radio programmes. The AMA also oversees the implementation of the law by audiovisual media outlets, and, in case of violation, takes administrative measures and imposes sanctions.

9. The AMA consists of a chairperson, a deputy chairperson and five members, all appointed by Parliament for a five-years term, with the right to be appointed for a second mandate. Article 9 of Law no. 97/2013 provides for an appointment procedure whereby three candidates should have the support of the majority in Parliament and three the support of the opposition. The Chair is appointed through a majority vote in Parliament and the Deputy Chair is chosen by the members of the AMA from a list of three names of members who represent the opposition (five votes are needed to be elected).² Law no. 97/2013 also provides for a Complaints Committee the main task of which is to oversee the implementation of the Broadcasting Code and regulations adopted by the AMA. The members of the Complaints Committee are appointed by the AMA. It is composed of the chair and two members – specialists in the field of media, who have a three-year mandate, with a renewal right of not more than once (Article 20 of Law no. 97/2013).

B. The original “anti-defamation package” and subsequent developments

10. In 2018, the Government announced a set of amendments to Law no. 97/2013 and Law no. 9918/2008, known as the “anti-defamation package”. The main aim of the draft package was to regulate the activity of the electronic publications service providers (hereinafter, “EPSPs”) – the online media outlets. In exchanges with the rapporteurs the proponents of the amendments within Parliament argued that the online media have the capacity to disseminate rapidly and anonymously false and defamatory information. Considering the broad outreach of online media and its influence, it was necessary to update the legal framework regulating those media. Other reasons for adopting the amendments included the fight against child pornography, the need to protect children in general, and considerations of national security, public order and the fight against terrorism. As an illustration of dangers associated with the absence of regulations concerning online publications, the authorities cited the examples of false rumours that have caused panic among the citizens after the recent earthquake in Albania.³ They stressed that the currently existing mechanisms are insufficient to identify rapidly the authors of such false information and prevent their dissemination.

11. Following a formal request by the AMA, the original draft amendments have been evaluated by the international organisations (the OSCE, the Council of Europe) and national experts. According to the authorities, the original draft amendments to Law no. 97/2013 went through a very transparent public consultation process during which all the interested parties were consulted. In particular, the Committee on Legal Affairs, Public Administration and Human Rights of the Albanian Parliament organised public consultation roundtables (see

² Article 11 of Law no. 97/2013:

“1. The AMA selects as deputy chair one of AMA members, selected on the basis of the opposition’s proposal support, according to clause 4 of Article 9 of this law.

2. Selection takes place by secret ballot, according to the following procedure: a) on a ballot are written the names of three members of the AMA, according to clause 1 of this Article; b) each of the members vote by making the respective mark for one of the names in the ballot; c) a member who has received 5 votes is elected as AMA’s deputy chair; d) if none of the candidates received the required number of votes, then is made a second round of voting. The member who receives the most votes in the second round is elected as the deputy chair of the AMA. The voting takes place within the same day.

3. The meeting for the election of the Deputy Chair, when the Chair is absent, is chaired by the oldest member (in age) of the AMA and the election procedure must be performed in the presence of a notary.”

³ <https://exit.al/en/2019/09/24/two-journalists-questioned-over-earthquake-fake-news-scare/>

CDL-REF(2020)018). The civil society, on the contrary, complained of the lack of effective consultations and of the lack of access to the latest versions of the draft amendments.

12. The Venice Commission notes that many important improvements have been made to the original draft amendments following the recommendations by international experts, in particular the OSCE.⁴ However, despite those improvements, international experts, NGOs and media associations⁵ continued to criticise the draft amendments and to express concerns as regards its adverse effects on the freedom of expression. On 18 November 2019, the AMA considered the draft amendments to Law no. 97/2013 and by a decision adopted with three votes to two, issued a negative opinion on this reform.⁶

13. On 18 December 2019, Parliament adopted draft amendments to Law no. 97/2013 and Law no. 9918/08.⁷

14. On 11 January 2020, the President of the Republic of Albania vetoed the draft amendments to Law no. 97/2013 and Law no. 9918/08 and returned the amendments to Parliament.⁸ He considered that some of the provisions of these draft amendments were in contradiction with the principles of democracy, freedom of expression and proportionality, as well as with the case-law of the Constitutional Court of Albania and of the European Court of Human Rights.

15. On 30 January 2020, the vote on these draft amendments by Parliament was postponed until the Venice Commission opinion.

16. The most important changes contained in the last version of the draft amendments to Law no. 97/2013 (those at the focus of the present Opinion) can be summarised as follows. The draft amendments:

- extend the scope of application of the law to cover publications in online media and regulate the activities of the EPSPs (Articles 1-2 as amended);

⁴ OSCE Media Freedom Representative Harlem Désir recommended further improvements to laws on online media in Albania, in latest review sent to authorities, on 9 December 2019: <https://www.osce.org/representative-on-freedom-of-media/441500>

⁵ See <https://www.osce.org/representative-on-freedom-of-media/441500>
<https://europeanjournalists.org/blog/2019/12/10/albania-efj-ifj-urge-parliament-to-reject-online-media-law/>
<https://europeanjournalists.org/blog/2019/12/09/albanian-authorities-pursue-highly-problematic-media-laws-despite-public-outcry/>
<https://www.ecpmf.eu/news/ecpmf/albania-preliminary-findings-of-joint-freedom-of-expression-mission>
<http://www.institutemedia.org/internationalandalbanianmedia.html>
<https://rsf.org/en/news/albania-government-should-withdraw-anti-defamation-legislative-package-introducing-state-regulation>

<https://www.ecpmf.eu/news/ecpmf/joint-statement-against-albanian-anti-defamation-law>. See also Statement of the Council of Europe Commissioner for Human Rights “Commissioner urges Albania’s Parliament to review bills which restrict freedom of expression”, 17 December 2019, <https://www.coe.int/en/web/commissioner/-/commissioner-urges-albania-s-parliament-to-review-bills-which-restrict-freedom-of-expression>

⁶ <http://ama.gov.al/?lang=en> <https://www.oranews.tv/article/ama-overthrows-government>

⁷ Law no. 91/2019 “On some amendments and additions to law no. 97/2013 as well as Law no. 92/2019 “On some additions and amendments to Law no. 9918 dated 19.05.2018 ‘On electronic communications in the Republic of Albania’”.

⁸ See <http://president.al/en/presidenti-meta-dekreton-kthimin-per-rishqyrtim-ne-kuvend-te-ligjit-nr-91-2019-arsyet-e-kthimit-per-rishqyrtim-te-ligjit/>. On same day, the President of the Republic issued another decree returning the draft Law no. 92/2019 considering that it aimed to reflect the proposed amendments to Law no. 97/2013 and that the two laws are part of the same “package procedurally and materially related to each other”. <http://president.al/en/presidenti-meta-dekreton-kthimin-per-rishqyrtim-ne-kuvend-te-ligjit-nr-92-2019-arsyet-e-kthimit-per-rishqyrtim-te-ligjit/>

- impose new media content requirements for the EPSPs (Article 33/1 as amended);
- expand the powers of the AMA and the Complaints Committee by giving them the power to oversee the implementation of the new obligations by the EPSPs (Articles 20 and 51/1 as amended);
- introduce new procedures for the examination of the complaints related to the content of online publications (Article 51/1 as amended);
- introduce a right to correction or reply in relation to publications by the EPSPs (Article 53/1 as amended);
- introduce administrative measures and fines for those who will contravene to the law (Articles 132-133 as amended).

C. Media environment in Albania

17. As follows from the exchanges the rapporteurs had in Tirana, the country's media sector faces challenges related to lack of ethical standards as well as growing self-censorship in journalism due to the impact of the intertwined interests of business and politics. There is furthermore lack of transparency in media ownership and funding sources. There is a Code of Ethics of Journalists, prepared by the Albanian Media Council and the Albanian Media Institute, but for years, media organizations and journalists' associations in Albania have failed to establish a self-regulatory body.⁹

18. During the exchanges with the rapporteurs, the opponents of the draft amendments (some MPs and media organisations) described media ownership in Albania as a "family affair" and the market as concentrated in the hands of a few powerful families, especially since the ownership restrictions for national broadcast media were lifted in 2016.¹⁰ Albanian media outlets often were created by businessmen who used them to support their affiliated business interests in fields like construction, oil, gambling and banking. Thus, coverage of news stories that might conflict with the owners' political or economic interests is avoided; journalists remain vulnerable to pressure and hence resort to self-censorship.¹¹

19. By contrast, the number of online media outlets has seen an important increase in the last few years, with hundreds of news portals and news aggregators having opened, allowing for pluralism and diversity. According to the information provided by the authorities in Tirana, there are 700-plus estimated news portals in the country. Most of those new online media outlets are anonymous; only approximately 45 are identified with known owners. Most of the traditional media outlets also publish online editions.

D. National and international legal framework

20. The Constitution of Albania¹² guarantees the freedom of expression as well as the freedom of press, radio and television. Prior censorship of the media is prohibited, but the law may require

⁹ Only very recently, on 12 February 2020, 19 Albanian media established on the Alliance for Ethical Media, a self-regulatory mechanism in the Albanian journalism community.

<https://www.ocnal.com/2020/02/the-ethical-media-alliance-established.html>

¹⁰ See <https://albania.mom-rsf.org/en/owners/individual-owners/>. By a decision dated of 13 May 2016, the Constitutional Court of Albania ruled in favour of a request by the Association of Albanian Electronic Media seeking to repeal Article 62 § 3 of Law no. 97/2013. The paragraph stated that: "No natural or legal, local or foreign person shall have more than 40 per cent of the general capital of a joint stock company that holds a national audio broadcasting license or a national license for audiovisual broadcasting." The request was brought before the Constitutional Court after failed legislative attempts in the Parliament to remove media ownership limitations. The Constitutional Court held that Article 62 § 3 unconstitutional and repealed it. See: http://www.gjk.gov.al/web/NJOFTIM_P_R_MEDIAN_1191_1-1.php

¹¹ <https://albania.mom-rsf.org/en/>

¹² http://www.gjk.gov.al/web/constitution_of_albania_1722.pdf

the granting of authorisation for operating a radio and television station (Article 22 of the Constitution). Hate speech is forbidden. Article 23 guarantees the right to information. Furthermore, limitations of the rights and freedoms provided for in the Constitution may be established only by law in the public interest or for the protection of the rights of others. A limitation shall be proportionate to the situation that has dictated it. "These limitations may not infringe the essence of the rights and freedoms and in no case may they exceed the limitations provided for in the European Convention on Human Rights" (Article 17 of the Constitution).

21. Albania is a State party to major international human rights instruments, including the International Covenant on Civil and Political Rights (hereinafter, "ICCPR") and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, "ECHR"). Freedom of expression is guaranteed by Article 19 of the ICCPR and by Article 10 of the ECHR. The Constitution of Albania also guarantees the supremacy of international law upon national legislation (see Article 5).

22. The Law on the Press only states that the press is free, and that freedom of the press is protected by law. Defamation is a criminal offence in Albania, punishable with fines.¹³ The Civil Code provides for a right of correction for an incorrect, incomplete or fraudulent information and it provides that a person may claim compensation if damage is suffered through "harm to his/her honour and personality".¹⁴ Endangering public peace by inciting hatred against other parts of the population, by insulting or defaming them, or by requesting the use of force or arbitrary actions against them, is a criminal offence punishable by imprisonment. Spreading false information or news, in words, in writing, or in any other manner, in order to incite a state of insecurity or panic in people, is punishable by a fine or imprisonment.¹⁵

23. Setting up a website requires a permit by the Electronic and Postal Communication Authority (hereinafter, "the EPCA"). The general authorisation that can be issued by the EPCA is subject to several conditions, among which is the legal obligation "to respect the restrictions regarding illegal or harmful content according to the legislation in force". Law no. 9918/2008 in its current wording does not apply to the content of the services provided through electronic communications networks (Article 1), but it recognizes the EPCA as the regulatory body in the field of electronic communications and postal service.¹⁶

III. Analysis

A. The scope of application of Law no. 97/2013 as amended

24. The first article of the Law as amended states that "this law regulates the rights, obligations and responsibilities of natural and legal persons who provide audio, audiovisual services and electronic publication services through electronic communications network as well as the promotion of media pluralism and other issues of importance for the media services, in accordance with international conventions and standards". The scope of the Law is then defined in Article 2 as amended, which provides that it will apply for "the linear audiovisual broadcasting, the nonlinear audiovisual broadcasting, their supporting services and for electronic publication services."

25. Amendments to Articles 1 and 2 of the Law intend to broaden the scope of application of the Law and regulate the "electronic publication services". Media types which are currently outside

¹³ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21294>

¹⁴ <https://euralius.eu/index.php/en/library/albanian-legislation/send/71-civil-code/231-civil-code-en>

¹⁵ https://www.legislationline.org/download/id/8235/file/Albania_CC_1995_am2017_en.pdf

¹⁶ <http://www.informatica-juridica.com/anexos/legislacion-albania-law-no-9918-2008-of-19-05-2008-electronic-communications-in-the-republic-of-albania/>

the scope of the regulations on audiovisual media (i.e. those who are not “classical” broadcasters, like linear radio and TV), will be thus brought under the AMA’s supervision.

26. Printed press remains out of the scope of the Law except when printed press goes online. The Venice Commission observes that the establishment of a specific regime only applicable to electronically distributed versions of the written media generates a different legal treatment between identical content. It is true that – as the ECtHR has stated – “the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control.”¹⁷ However, the questions still remain: would the AMA’s decisions be without any impact for the printed version of a newspaper? Why should the EPSPs not benefit from the same legal protection and procedural safeguards that the printed press enjoys, when the same publication content would be at stake? Any distinction between legal regulations applicable to printed press, to online press and to the broadcasting media should be justified.

27. Pursuant to Article 3 as amended, an EPSP “is a natural or legal person, irrespective of whether identified or not as such in the Register of Media Service Providers, which offers the service of [electronic publications]” (Article 3 (17/1)). Electronic publications are defined as “editorially shaped web pages and/or portals containing electronic versions of written media and/or information from the media in a way accessible to the general public with the objective to entertain, inform and/or educate” (Article 3 (26/1)).

28. The Venice Commission considers that, for a start, the notion of “electronic publications” is too nebulously and broadly defined, therefore jeopardising clarity and foreseeability of the scope of application of the law. In particular, it is unclear whether individual bloggers, or people having personal pages on social network platforms (Facebook, Instagram, Twitter etc.) publishing information from the media will be covered by this definition. The information note (see CDL-REF(2020)018) explains that “electronic publications managed by individuals which neither are editorially shaped nor aim at informing or entertain, or education of the general public are not included in this definition”. However, while the notion of “editorial shaping” is in itself amorphous, it is also difficult to foresee what blog would actually be deemed not to be informing or entertaining or educating. During the meetings in Tirana, the authorities stressed that the law is not intended to apply to bloggers and alike and the definition of “electronic publications” is restricted to more professional electronic news media. This assertion, however, does not follow clearly from the law.

29. In a technological environment in which anyone can launch an electronic publication without technical or professional expertise, even individual bloggers can have “editorially shaped” pages “containing information from the media” with the objective to “entertain, inform and/or educate”. With such a broad definition, the area of application of the law extends beyond professional media outlets and nothing prevents this law from applying not only to the online publication of the printed press but also to everyone interested in imparting information, ideas, views to entertain, inform or educate the general public by online publications. This may produce a chilling effect on ordinary individuals that would be deterred from expressing any view online, for fear of possible sanctions left at the discretion of the AMA (see Article 33/1 as amended below). In a country where pluralism in the current media environment is, to an important extent, stemming from individual bloggers and journalists,¹⁸ this raises serious concerns. Thus, the clauses defining the scope of the application of this law should be revised. One option would be to state explicitly in the law, in an open list, who is *not* covered by the law - users of social networks, bloggers, vloggers, authors of personal webpages, and alike. Adding this list would somewhat limit the

¹⁷ *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 98, 16 July 2013; *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*, no. 33014/05, § 63, 5 May 2011.

¹⁸ See <http://albania.mom-rsf.org/en/findings/media-concentration/>

scope of application of the amended law, even though it will not solve all the problems of interpretation of those notions in the quickly developing online media environment. The Venice Commission notes that the authorities have expressed their willingness to adopt such a restricted scope of application of the law.

30. The Venice Commission notes that Article 4(1) as amended, prohibits an interpretation of the law that would aim to “censor” media content. It states that “the provisions of this Law cannot be interpreted in such a way as to give the right to censure or restrict the right to freedom of speech or freedom of expression” and “this law is interpreted and applied in accordance with the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, using the practice of the precedent law of the European Court of Human Rights.”

31. Given the important and unique role played by the media in the functioning of democracy and pluralist society, the Venice Commission welcomes the introduction of a provision which refers specifically to the ECHR and makes the interpretation of the law subject to the principles deriving from it. However, this does not address the concern expressed above – that the scope of application of the law is defined too broadly, as covering all sorts of online publications and resources. In addition, it is not clear what could be the implication of this general provision on other parts of the law, especially those concerning the content regulations and sanctions for unlawful content.

B. The regulatory bodies: the AMA and the Complaints Committee

32. By virtue of the draft amendments, the competence and powers of the AMA and the Complaints Committee which are currently limited to “audio and audiovisual broadcasting services and other supporting services” will be extended to cover electronic media. According to Article 19(3) as amended, the AMA will monitor “the implementation” of the law by “the subjects that exercise their activity in this field of electronic media and in case of violations”, it will impose sanctions. Pursuant to Article 20 as amended, the Complaints Committee will be appointed by the AMA, with 3/5 majority, and composed of a chair and four members who are experts in the media field and lawyers, with a three-year mandate. The AMA will have to define the rules that will apply to the selection procedure as well as the regulation of the organisation and functioning of the Complaints Committee. The scope of the work of the Complaints Committee will be “to supervise the implementation of the law; those of the code and regulations approved by the AMA dealing especially with respect of the dignity and of other fundamental rights”. It will also examine the complaints under Articles 51 and 51/1 (related to the procedure), Article 52 (analysis of complaints) and Articles 53 and 53/1 (right to reply). The AMA will be an appeal body *vis-à-vis* the decisions of the Complaints Committee (see Article 20 (3/1) and 51/1, 53/1 (1) and Article 132 (6)).

33. The composition of the AMA and the Complaints Committee, which is selected by the AMA on the basis of the rules developed by the AMA, may raise legitimate concerns of independence of those two bodies.

34. Although there is no single European model of organisation of the media regulatory authorities, the overarching principle is that an institution overseeing the media should be independent and impartial:¹⁹ this should be reflected especially in the way how their members

¹⁹ See Recommendation Rec(2000)23 of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector which called the States to establish such rules which would protect regulatory authorities against any interference by political forces. See also Recommendation CM/Rec(2012)1 of the Committee of Ministers on public service media governance which refers to the system of appointments of the highest authority supervising public service media which “cannot be used to exert political or other influence over the operation of the public service media”.

are appointed.²⁰ In its Declaration on the independence and functions of regulatory authorities for the broadcasting sector, the Committee of Ministers of the Council of Europe called on member states to ensure the independent functioning of broadcasting regulatory authorities, so as to remove risks of political interference.

35. The Venice Commission notes that the principle that the AMA is “independent” is already enshrined in the existing law (Article 6). However, it is clear from the exchanges in Albania with representatives of the media and NGOs that there is a widespread perception that the AMA lacks independence. All members of the AMA have a clear political affiliation, with members proposed by the ruling party/coalition having a slight majority in this body (see above, paragraph 9). In an Opinion on Media Legislation of Hungary, the Venice Commission recommended as follows: “If the media community and the telecommunication industry, through self-regulating bodies or otherwise, delegate representatives to the Media Council, it would make this body more politically neutral and would increase public trust in its independence”.²¹ In the Albanian context, in which there is a widespread distrust vis-à-vis the AMA when it comes to its independence, to have representatives of the media community and the civil society not directly affiliated with main political forces, could be one step to enhance the independence of this body.

36. Second, it is unclear whether members of the AMA and of the Complaints Committee are sufficiently independent from the big media industry or other corporate control, by virtue of the rules on incompatibilities and the conflict of interest. In this regard, with the draft amendments, the incompatibilities and conflict of interest criteria defined in Article 7 now appear to be solely applicable to the AMA, but not to the Complaints Committee. Moreover, it is for the AMA to develop the applicable rules for selection of the Complaints Committee (see Article 20(1) as amended). It is questionable whether the AMA (in the current context, due to its strong political affiliation) should be given the power to develop those rules. It would be more appropriate, in the Albanian context, to fix the ineligibility/conflict of interest rules in the law itself.²²

37. The third question is whether the professional qualification of the members of the AMA and, even more so, of the Complaints Committee is sufficient to perform the tasks they will be entrusted with, namely assessing facts and legal concepts which, in principle, fall within the competence of a judge and require a fair balancing exercise between freedom of expression and information, and the individual rights of others and the interests of the society as a whole. Article 20 as amended does not mention anything in this regard, leaving the selection procedure to the AMA. For the Venice Commission, clear eligibility criteria as regards the skills and experience needed for those who wanted to be members of the Complaints Committee should be applied.²³

²⁰ CDL-AD(2015)015, § 66.

²¹ CDL-AD(2015)015, Opinion on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, § 70

²² As recognised by the Committee of Ministers of the Council of Europe, a legal framework is not enough per se. What is needed is a “culture of independence”. Several legal criteria can assist the development of a culture of independence. Among other, the need to extend incompatibility rules for members, for example by applying them to close family members. For instance, members of regulatory authorities may not be allowed to work in the media business or engage in politics for several years after the expiry of their mandate – see the Declaration on the independence and functions of regulatory authorities for the broadcasting sector, cited above. To prevent members from signing over their commercial interests in a media business to a family member, the law in some countries also requires that close relatives of members give up their commercial interests in the media. This requirement can also extend to relatives holding political office - Guidelines for Broadcast Regulations, Eve Salomon, for the CBA and UNESCO: <http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/guidelines-for-broadcasting-regulation/>

²³ See Guidelines for Broadcast Regulations, cited above.

38. Finally, “any legislation restricting the right to freedom of expression must be applied [...] with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application”.²⁴ The Venice Commission is not convinced that the procedures set forth in the current draft amendments provide such adequate safeguards (see below, paragraphs 52-59).

39. In sum, any serious expansion of the powers of the AMA and the Complaints Committee (as proposed by the draft amendments) should be accompanied by a comprehensive revision of the existing institutional model: it is necessary to ensure that those bodies have a pluralistic composition, enjoy sufficient independence from the political parties and big businesses, follow appropriate procedures and are professionally apt to perform new duties.

C. Duties of the EPSPs

40. Article 33/1 sets forth the duties imposed on the EPSPs and associated rights of the users. These duties are as follows: (1) the duty to disclose identity; (2) the duty to publish content warnings; (3) the duty to allow a right to correction and reply; (4) the duty to respect content regulations defined in the law as regards hateful and discriminatory speech and the protection of minors (see Article 33/1 (4) and (5)).

41. Some of the duties of the EPSPs described in Article 33/1 are relatively uncontroversial. Thus, the obligation “to protect the identity of minors” when publishing information which may be prejudicial to them (Article 33/1 (5)) appears reasonable. Furthermore, pursuant to Article 33/1(2) as amended, an EPSP shall also publish adequate warning for content publications which may impair “physical, health, moral, mental, intellectual, emotional and social developments of minors”. These obligations, as such, are judicious.

42. Other duties of the EPSPs can arguably be more problematic. Thus, Article 33/1 (1) requires the EPSP to identify itself, by making “easily, directly and permanently accessible to the general public at least the following information: a) the name of the service provider; b) the service provider’s head office or place of residence, his electronic mail address or website; c) the competent body of the service provider.” As explained to the rapporteurs in Tirana, this provision is designed to prevent abuse of anonymity on the internet.

43. For the Venice Commission, it is not quite clear what is meant by “the competent body of the service provider”. Furthermore, the duty to disclose the identity raises the question of the anonymity on the internet and the balance, albeit difficult, between the right to confidentiality (which is, certainly, not absolute) and the right of third parties who may be affected by the information imparted by the electronic media to take legal remedial action. In May 2003, the Committee of Ministers adopted a Declaration on freedom of communication and the internet which states that “in order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the internet not to disclose their identity. This does not prevent member states from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police.”²⁵

²⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011:

https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

²⁵ Declaration on freedom of communication on the Internet, adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers’ Deputies.

44. The ECtHR has also recognised the importance of anonymity for the rights to freedom of expression and privacy. As underlined by the ECtHR “anonymity has long been a means of avoiding reprisals or un

wanted attention. As such, it is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the internet”.²⁶ At the same time, the ECtHR clarified that anonymity on the internet, while an important factor, can be limited to protect the interests of the others, especially the vulnerable people.²⁷ The Venice Commission subscribes to this view – the right to anonymity should not be seen as absolute, and the “anonymity veil” can be lifted in cases of serious abuses of the freedom of speech, such as, by way of example, hate speech or child pornography.

45. To have an editorial identity of the electronic media available to the general public would keep regulation of the electronic media in line with that of the printed media, since this requirement would be a necessity for the printed media. In principle, the Venice Commission admits that the duty to pre-emptively disclose their identity which exists in respect of the owners of the printed media may be extended to the well-established online news portals. However, it is incorrect to extend such obligation to all internet users indiscriminately. The problem which arises here in this law derives from the vague and broad definition of what an “electronic publication” can be. In fact, the definition given by the law does not provide a clear and unequivocal distinction between electronic publications provided by professional media outlets, and electronic publications provided by individuals who, by publishing information from the media “with the objective to entertain, inform and/or educate”, may also exercise their freedom of expression via editorially shaped web pages. In the context of the Albanian society (as described above in paragraphs 17-19), this may have a negative impact and a deterrent effect on the freedom of expression. In an environment of widespread self-censorship and fear of retaliation, anonymity can play a critical role in securing the right to freedom of expression and information.²⁸ It is submitted that, in context, these considerations outweigh the benefits of identification of the source.

46. Finally, as regards the obligation to de-anonymise the EPSPs, it is questionable whether this measure will work in practice. In particular, it is unclear whether the AMA will be able (legally and technically speaking) to verify whether the identification information provided by an EPSP is true.

47. The most serious limitation is formulated in Article 33/1 (4): it specifies that EPSPs “must not incite, enable incitement or spread hatred or discrimination on the grounds of race, ethnic background, skin colour, sex, language, religion, national or social background, financial standing, education, social status, marital or family status, age, health status, disability, genetic heritage, gender identity or sexual orientation”.

48. This provision prohibits hateful and discriminatory speech. While some grounds listed in this article are in line with general European and international standards on the prohibition of the hate speech;²⁹ the Venice Commission is concerned that it is supplemented by a long list of other grounds for discrimination. Elements from this list may be used to block any critical remarks against public figures and/or suppress legitimate political debate on matters of public interests

²⁶ *Delfi AS v. Estonia*, no. 64549/09 [GC], 16 June 2015, § 147.

²⁷ *Ibidem*, § 149 and *K.U. v. Finland*, no. 2872/02, §§ 47-49, ECHR 2008.

²⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 22 May 2015:

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A.HRC.29.32_AEV.dOC

²⁹ Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users (16 April 2014). See also, *Delfi AS v. Estonia*, cited above, § 110, and the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Human Rights Council, 16 May 2011 (A/HRC/17/27), § 25.

which may be perceived by some groups or individuals as “discriminatory“. For example, the correct English translation of the terms “financial standing” was contested by representatives of the authorities during the meetings in Tirana and its meaning remains unclear. This wording could lead to criticisms against the wealthiest or the most privileged in society, and in particular the oligarchs (multi-millionaires or billionaires who create or take over media empires to serve their business and / or political interests; there is a worldwide trend towards increasingly concentrated ownership of conglomerates that combine media outlets, such as TV channels, radio stations, newspapers, internet websites etc., with banks, telecoms, property firm and construction companies)³⁰ being deemed as a breach of the duties set forth in Article 33/1 (4). The Venice Commission takes note of the explanation given by the Albanian authorities that this provision will not be used to screen wealthy and powerful persons from criticism; however, as it is formulated now, the draft law does not exclude such interpretation. Some other criteria are equally broad – thus, the reference to family and social status in the definition of discriminatory speech may be used to curtail criticism of people with family ties with oligarchs and politicians. It would be more prudent to use in the law a more narrow definition of hate speech – see, as an example, Appendix to Recommendation No. R (97) 20 of the Committee of Ministers to Member States on “hate speech” (first paragraph, “Scope“).

49. Article 33/1 (3) introduces a “right to correction and reply to information published through electronic publication” and pursuant to Article 53/1 “any person whose individual reputation is directly affected by the publication of false or inaccurate information from the EPSP shall have the right to reply”. A legal obligation to publish a reply or a rectification may be seen as a normal element of the legal framework governing the exercise of freedom of expression. The right of reply, as an important element of freedom of expression, falls within the scope of Article 10 of the ECHR.³¹ Recommendation Rec(2004)16 of the Committee of Ministers on the right of reply in the new media environment also recognises the right to react to any information in the media presenting inaccurate facts and which affect personal rights.³² At the same time, the restrictions and limitations of the second paragraph of Article 10 of the ECHR are equally pertinent to the exercise of the right to reply. It should be borne in mind that ensuring individual’s freedom of expression does not give private citizens or organisations an unfettered right of access to the media in order to put forward opinions.³³ As a general principle, newspapers and other privately-owned media must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals.³⁴ The Venice Commission considers that the right to reply should be applicable only to untrue factual information which damages someone’s reputation, and not critical opinions which cannot give rise to the right to reply (Article 53/1 (6) points at this direction, but a clearer formulation is required).

D. Procedures for reviewing complaints

50. The main question, however, beyond content regulations and duties as such, is how they will be enforced, and whether the procedures provided by the draft amendments are adequate.

51. Under the draft amendments, the failure to comply with the duties set forth in Article 33/1 are dealt with under the complaints’ procedure (Article 51/1 as amended), which is administrative in nature. Thus, pursuant to Article 51/1 (1), an “EPSP shall be obliged to review any reasoned

³⁰ See a detailed description of the origins of the term “oligarch” in a study prepared by the Reporters Without Borders, p. 15 et seq.,: <https://rsf.org/sites/default/files/2016-rsf-report-media-oligarchs-gpo-shopping.pdf>

³¹ See, *Melnychuk v. Ukraine* (dec.), no. 28743/03, ECHR 2005-IX and *Kaperzynsky v. Poland*, no. 43206/07, § 66, 3 April 2012.

³² Recommendation Rec(2004)161 of the Committee of Ministers to member states on the right of reply in the new media environment, adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers’ Deputies.

³³ *Melnychuk v. Ukraine*, cited above.

³⁴ *Ibidem*.

complaint submitted in writing by any person” who alleges that the programmes published are not in compliance with the requirements of Article 33/1. The person claiming a violation of Article 33/1 may request from the EPSP “the removal of the content” at issue (Article 51/1 (3)). If the EPSP refuses the complaint or does not respond within 72 hours, the person concerned has the right to apply to the Complaints Committee. If, after having reviewed the complaint and/or claim of the EPSP, the Complaints Committee considers that there is a violation of the requirements set forth in Article 33/1, it “shall take appropriate measures including sanctions” (Article 51/1 (7)). In doing so, the Complaints Committee will exercise administrative discretion.

52. The Venice Commission considers that Article 51/1 (7) would have gained in clarity by specifying the measures/sanctions that the Complaints Committee is likely to adopt in this context. For the Commission, this is unclear. The list of measures and sanctions that the Complaints Committee will be empowered to order is mentioned in Article 132 as amended (see below, paragraphs 62-63). According to this Article, the Complaints Committee will be able to order publication of a correction or reply, insertion of a pop-up notification or impose a fine (Article 132 (1)). The Complaints Committee will also have the power to order removal of content. However, this possibility is limited by Article 132(5) to content representing child pornography and content which “encourages terrorist acts” or “breaches national security” (see also the information note, CDL-REF(2020)18, p. 6) — which are not mentioned in Article 33/1. Therefore, it should be assumed that the complaints procedure defined in Article 51/1 does not permit the Complaints Committee to order removal of content when the issue in dispute concerns a failure to comply with the duties mentioned in Article 33/1. Yet, this should have been clearly specified.

53. The complaints procedure will be examined in the following paragraphs in more detail. At the outset, the Venice Commission observes that the Criminal Code and the Civil Code of Albania already provide legal remedies against hate speech and defamation. Such cases fall within the competence of the public prosecutors and/or the relevant criminal and civil courts. The Commission believes that the draft amendments should explain how the “complaints procedure” (which is administrative in character) relates to any criminal and/or civil proceedings which may arise out of the same facts. More generally, laws regulating the media from the perspective of public law, especially administrative law, by means of an overseeing entity such as the AMA should primarily protect the public interest (for e.g. by means of protection from hate speech, protecting children, public order, etc.). On the other hand, protection of honour and dignity of individual private persons should be governed by private law, meaning that affected individuals would primarily demand protection (including any claims for financial indemnification) from civil courts.

54. The Commission observes that the administrative procedure was originally designed to monitor the implementation by the traditional media providers of their obligations as per their licence. Because of the extension of the jurisdiction of the Complaints Committee and the AMA to the EPSPs, that is also to individual internet users, the procedure sets forth in Article 51/1 may result in direct interference with their right to freedom of expression. The procedure for reviewing complaints gives to the Complaints Committee the competence to decide on the merits of a question falling within the scope of freedom of expression and involving a balancing exercise between competing individual rights (Articles 8 and 10 of the ECHR). Thus, an administrative body will be endowed with prerogatives usually vested in a court of law or judge and will have the power to impose measures/sanctions which will constitute an interference with the exercise of the right to freedom of expression. The Complaints Committee will have to decide for instance on allegations of defamation, hateful and discriminatory speech. However, Article 51/1 does not lay down any rules on the right to be heard or on admissibility of evidence or the way in which evidence should be assessed. The Venice Commission notes that when these complaints are directed against EPSPs, the link between administrative responsibility and criminal or civil liability becomes critically blurred.

55. The Commission is especially concerned with the details of this procedure. Pursuant to Article 51/1, any person claiming to have been negatively affected by an electronic publication allegedly contravening to the requirements of Article 33/1 will be entitled to request the EPSP concerned the removal of the content. To assess and respond to such complaints the EPSPs will have only 72 hours. If the EPSP refuses to satisfy the complaint or does not respond within 72 hours, the claimant has the right to apply to the Complaints Committee which has also to review the complaint in a very short timeframe (72 hours). In certain circumstances, the EPSP may only have 48 hours to submit its defence to the Complaints Committee (Article 51/1 (6)). Article 53/1 contains relatively similar procedural rules in relation to the information which gives rise to the “right of reply”.

56. Decisions of the Complaints Committee are immediately executable. They “shall be appealed to the AMA” and the decisions of the AMA “shall be appealed to the Administrative Court of first instance of Tirana”. However, there is no indication as regards any suspensive effect of the appeal procedure (which does not exclude that the judge may suspend the execution if asked, as explained to the rapporteurs in Tirana, and confirmed at the subsequent virtual meeting with the Albanian authorities in June 2020) nor as regards the possibility to hold a hearing. Furthermore, the draft amendments do not provide for the possibility to bring the case before a higher court after the decision of the administrative court of first instance. As underlined by the Venice Commission, the highest courts’ guidance is very important for the lower courts in the interpretation and implementation of human rights standards in their case-law.³⁵ In Albania, however, the capacity of the higher courts to play this role is currently seriously undermined: thus, as a result of the vetting process, the High Court and the Constitutional Court are still not operating properly due to the lack of quorum. At the June virtual meeting with the rapporteurs, the Albanian authorities explained that under the Albanian administrative law administrative decisions have normally an effect of “executive titles”, and that the decisions of the AMA had already had this effect in respect of the audiovisual media. What is a source of concern for the rapporteurs is that this legal regime is now being indiscriminately extended to all online media resources, possibly including small individual bloggers, vloggers and alike (see the discussion of the overbroad definition of the scope of the law above) and that such a legal regime can additionally have devastating financial consequences on certain sections of the media leading to significant self-censorship.

57. The administrative procedure for reviewing complaints, as it stands, does not provide the necessary procedural guarantees, in order to protect the right to freedom of expression in the internet. Considering the short time allowed to decide on the substance of a complaint, the legal consequences of the Complaints Committee decisions, and their immediate impact on the freedom of expression, the Venice Commission is not convinced that the control mechanism that the Administrative Court of first instance of Tirana is supposed to provide will be sufficient to remedy the shortcomings and lack of procedural safeguards of the proceeding before the Complaints Committee and the AMA.

58. In sum, if the draft amendments are adopted, the EPSPs will have to remove content at the request of an applicant or publish a reply following an administrative procedure which will not offer the same procedural safeguards as those offered by the judicial proceedings. It will also be possible for the Complaints Committee which will review complaints to take “appropriate measures including sanctions in accordance with this law” (Article 51/1(7) as amended). The procedure provided for in Articles 51/1 and 53/1 is an extremely rapid response mechanism. Normally, the assessment of content requires legal expertise and a complex balancing exercise between competing interests at stake. This raises issues of due process and puts an excessive burden on small EPSPs lacking the means and capacity to respond in such short period of time to complaints. Even though the law provides for a possibility of judicial review of such decisions,

³⁵ See CDL-AD(2016)011, Turkey - Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication (“the Internet Law”)

the Complaints Committee and the AMA will have an administrative discretion. Thus, the draft amendments give the AMA and the Complaints Committee an efficient but at the same time dangerous legal tool to regulate the Albanian sector of the internet.

E. Measures to be adopted *vis-à-vis* the EPSPs contravening the law

59. Article 132 as amended lists several types of measures to be adopted by the AMA/Complaints Committee when the EPSPs breaches the law.

60. Some of the powers of the Complaints Committee and the AMA provided by Article 132 do not give rise to serious concerns. Article 132 (5) defines situations where the AMA may order the removal of content “according to the specific criminal legislation in force”. The power to take down the content representing child pornography (Article 132 (5) (a) (i)) is, in most cases, uncontroversial. The power to take down content which “encourages terrorist acts” or “breaches national security” (pp. ii. iii. respectively) is more problematic, due to the lack of a clear definition of these offences in this law. Probably, these offences are defined more clearly in the relevant criminal law provisions or in the case-law of Albanian courts in the criminal field. In principle, one understands that a quick and effective preventive measure may be needed when a publication poses a real threat to the national security or public order. Still, content removal is a very dangerous measure for the freedom of speech as “news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.³⁶ Therefore, effective safeguards against abuse, including oversight and review by an independent and impartial tribunal acting expeditiously are needed.³⁷ Article 132 (1) (5) d) provides that the AMA’s decisions in this area can be appealed before the competent judge who will “decide whether to suspend or keep” it during the appeal proceedings. Moreover, to take such decisions, under Article 132 (5) (c), the AMA will have to act on the basis of a written request from “NAECES or the competent authority”. These elements provide for some procedural check on the AMA’s powers.

61. In the opinion of the Venice Commission, the most problematic provision is Article 132 (1), which defines the administrative powers of the AMA, not based on the provisions of the criminal law. Thus, the AMA (“the Board and/or the Complaints Committee”) may “put an obligation” on the EPSP (i) to publish a correction or reply ii) to insert a pop-up notification, and/or (b) to pay a fine.³⁸ The AMA’s decision in this regard will be communicated to the APEC – the regulatory body in the field of electronic communications and postal service – for execution.³⁹ The wording of this provision which refers to the AMA as “the Board and/or the Complaints Committee” does not provide a clear understanding of the distribution of powers between the AMA and the Complaints Committee as regards the sanctions to be decided under Article 132.

62. Furthermore, Article 132 does not sufficiently and clearly define the criteria that will apply to decide which measures to adopt, thus giving wide margin of interpretation to the Complaints Committee and the AMA. It is unclear whether the fines can be applied only in the case where the EPSP refuses to implement other measures ordered by the Complaints Committee and/or by the AMA, or in parallel with those measures.

³⁶ See *Sunday Times v. the United Kingdom (no. 2)*, 26 November 1991, §51, Series A no. 217

³⁷ CDL-AD(2016)011 cited above.

³⁸ As regards other media outlets, the law provides that their licence and/or authorisation may be temporary suspended, shortened in time or withdrawn. In this Opinion, the Venice Commission will focus on the measures that are applicable specifically to the EPSPs (which are not subjected to the licencing)

³⁹ According to Article 12(3) of Law no. 9918/2008 as amended by draft law no. 92/2019, the APEC shall cooperate with the AMA to ensure the implementation of the decisions of the Complaints Committee and the AMA *vis-à-vis* “suppliers on internet access service”.

63. Extremely problematic for the media freedom in the Albanian context is the severely punitive and debilitating nature of the fines. Thus, under Article 133, the EPSPs could be punished with a fine from 100,000 ALL (approximately 810 EUR) to 600,000 ALL (approximately 4,865 EUR) if they do not respect their duties defined in Article 33/1; from 40,000 ALL (approximately 324 EUR) to 800,000 ALL (approximately 6,482 EUR)⁴⁰ if they do not respect the decisions of the Complaints Committee or comply to the right of reply. Three violations of the law in a year would lead to an increase of up to 50% of the amount of the fine. In case of repetition more than five times during a year, the entity concerned will lose fiscal and other benefits for a period of three years (see Article 133 (1)).

64. Two elements make this power to impose fines particularly perilous. The first related to the potentially excessive amounts of fines which *per se* could not be considered in accordance with the principles set forth in Article 4 (1) as amended (see paragraph 30 above). The Venice Commission notes that the authorities have a margin of discretion in setting the exact amount, within the limits set by the law. However, the draft amendments lack in criteria according to which the amount of the fine will be determined in an individual case. Fines do not take account of the size and economic capacity of the EPSPs. To be proportionate, the nature and severity of the fines imposed must be taken into account, and the severity should be decided *inter alia* having regard to the size of the media outlet. A distinction surely must be made between the online publications of powerful media houses and personal blogs.

65. As already underlined by the Venice Commission, the mere threat of application of heavy sanctions may have a chilling effect on journalists and media outlets.⁴¹ The average level of salaries in Albania is modest, by European standards.⁴² In such circumstances, it is likely that heavy fines, as provided by Article 133, would be beyond the means of many smaller EPSPs, and would eventually lead to the cessation of their activities. “Excessively high fines pose a threat with almost as much chilling effect as imprisonment, albeit more insidious”⁴³ and could be seen an indirect way to exercise pressure on media.

66. The second element has already been discussed in the previous section: all the fines imposed by the Complaints Committee will have to be paid immediately. An appeal against the Complaints Committee decision does not automatically suspend the execution of the decision (Article 132 (6)). The Venice Commission recalls that heavy sanctions should not be immediately enforceable; court proceedings in such cases should have a suspensive effect and the courts should have the power to review the substance of the decisions in the framework of proceedings which offer basic fair trial guarantees.⁴⁴

IV. Conclusions

67. As in many other countries, online media is a quickly growing sector of the media market in Albania. Until recently, it was regulated only by the general provisions of the civil law and criminal law on defamation, hate speech etc. In the opinion of the proponents of reform, these legal tools were ineffective, in the Albanian context. This led in their view to irresponsible media behaviour: spreading of hurtful rumours, slanderous attacks on public figures, etc. To counter it the Government introduced what was called an “anti-defamation package”, which would extend the competency of the Albanian Media Authority (the AMA) and of the Complaints Committee (the CC) to the sector of online media and give this authority new administrative powers in this field.

⁴⁰ According to currency exchange rates of March 2020.

⁴¹ Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, CDL-AD(2015)015, § 38

⁴² <https://www.averagesalarysurvey.com/albania>

⁴³ Opinion on the Legislation on Defamation in Italy, CDL-AD(2013)038, § 62.

⁴⁴ CDL-AD(2015)015 cited above, § 44

68. The draft amendments were a subject of public consultations, and underwent various changes, in response to the criticism expressed domestically and by the international partners of Albania (in particular the Council of Europe and the OSCE). The Venice Commission acknowledges the efforts of the Albanian authorities to be transparent, to respond to the criticism and to improve the text of the draft amendments. The Albanian authorities demonstrated their openness to dialogue and their concern for the preservation of the free speech in the country. For example, it is positive that the law explicitly states that it should be interpreted in the light of the case-law of the European Court of Human Rights. Moreover, the problems identified by the Albanian authorities are real and need to be addressed.

69. That being said, in the interest of the freedom of expression of the media and pluralism in Albania, the Venice Commission considers that the draft amendments are not ready for adoption in their current form. The law suffers from vagueness and would likely to have a “chilling effect” suppressing free discussion and political speech in the Albanian sector of the internet. The main flaws of the proposed amendments are the following:

- The intent of the drafters is to extend the powers of the CC/AMA to “professional” online media outlets – those which exercise editorial control over their publications. However, this is not clearly defined in the law and there is a risk that individual bloggers, users of social networks, etc. will also be targeted by this law. It is essential that the draft law narrows the scope of its application by, for example, explicitly excluding any non-professional online media outlets, individual bloggers, users of social networks and alike;
- The law requires the de-anonymisation of all Albanian online media resources. As long as the scope of application of the law is overly broad (see above), this may run counter to the international standard that the will of users of the internet not to disclose their identity should normally be respected. In addition, it is questionable whether this measure will be efficient;
- The CC/AMA are given weighty administrative powers in relation to the online media. This is problematic with regard to the freedom of expression of online media from prior restraints and given that there are doubts about the independence of those bodies; these new powers should not be entrusted to those bodies without first ensuring that they are sufficiently independent from the political parties, big media businesses or other corporate interests connected with politics; different options are possible in this respect, for example adding representatives of the media community and of civil society not directly affiliated with main political forces to the composition of the CC/AMA;
- Considering that the CC/AMA can intervene *per se* in the exercise of the freedom of expression and that their independence is questionable, the complaints procedure does not offer sufficient procedural safeguards: the CC/AMA may impose, in a very quick administrative procedure, heavy fines which are immediately enforceable, and order taking down internet content, also with an immediate effect. The “economic capacity” of the media outlet is not a factor defining the amount of a fine, which may result in a situation where the activities of smaller media outlets (or even individual bloggers) are paralysed by disproportionate fines. This will magnify the chilling effect of those provisions and lead to self-censorship to the detriment of the political debate essential to any democracy. Additional safeguards should be introduced to guarantee due process and the proportionality of the sanctions.

70. In light of the above the Venice Commission recommends reconsidering the adoption of the draft amendments to Law no. 97/2013 (and the related draft amendments to Law no. 9918/2008), in their current form, as voted by the Parliament in December 2019. This recommendation does not imply that the Albanian authorities should discontinue working on the regulations in the online media sphere as such. The problems identified by the Albanian authorities are serious. Some justifiable administrative-law sanctions may be useful to combat abuses in the online media field. However they would need to be imposed by a truly independent and professional body, in a

proper procedure, target narrowly defined category of online media portals (and not all Albanian internet users), do not have the force of immediately enforceable “executive titles”, and the sanctions need to be proportionate and be subject to full judicial review. Unless the above identified main flaws are effectively addressed, the draft law will bring about problems that outweigh its benefits. Mending those flaws will require a deep revision of the text of the draft amendments and of Law no. 97/2013 itself.

71. Thus, it will be useful to revise the method of selection of the AMA and the CC members, in order to ensure that these bodies have a pluralistic composition, are composed of qualified individuals, represent the media community, and enjoy trustworthy autonomy from government and corporate control. The Venice Commission, while appreciating that a comprehensive reform of the AMA enhancing its independence and professionalism may be a politically challenging endeavour, advises against extending the mandate of the AMA in the field of the online media without a corresponding strengthening of its independence and professionalism. The current text of the draft amendments, unless deeply revised, carries with it a significant potential of doing more harm than good for the freedom of expression in Albania, in so far as the online media is concerned.

72. In the meantime, in order to address the problem of malicious or irresponsible media behaviour on the internet, the Venice Commission encourages the Albanian authorities to support the setting-up of an effectively functioning and independent self-regulatory body involving all relevant stakeholders of the media community and capable of ensuring an effective and respected system of media accountability in the online media field through self-regulation. It is furthermore necessary to ensure the effectiveness of the existing legal and, in particular, judicial remedies combatting defamation and hate speech committed via online publications.

73. The Venice Commission remains at the disposal of the Albanian authorities for further assistance in this matter.