OSCE: Legal analysis on draft proposals to regulate electronic publications in Albania

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On 23 July 2019, the OSCE Representative on Freedom of the Media (RFoM) sent the Prime Minister of Albania, Edi Rama, a legal analysis that examines a series of proposed amendments to Law No. 97/2013 on Audiovisual Media in the Republic of Albania and to Law No. 9918 of 19 May 2008 on Electronic Communications in the Republic of Albania. This communication is part of a long process of consultation between the Office of the Representative and the government during the long – and still ongoing – drafting process of the legislation. Despite the fact that there have been important improvements compared to the drafts prepared earlier in the year, the analysis points at several problematic issues still present in the proposals which appear not to be in line with international standards on freedom of expression.

The independent audiovisual media regulatory agency (Audiovisual Media Authority - AMA) has been given the power to oblige providers of electronic publications services to publish an apology, remove content or insert a pop-up notice in cases of violations of a series of general obligations established in previous provisions of the law, including the obligation to “respect the privacy and dignity of citizens”. According to the analysis, this attribution is too broad and poorly defined, and therefore could lead to the adoption of very restrictive decisions in an almost discretionary manner.

The latest proposal also refers to the possibility of “blocking access to the Internet” in cases where electronic media services “may abet” the criminal offences of child pornography, incitement of terrorist acts or breach of national security. Such resolutions are apparently to be taken by AMA “subsequent to written opinions from NAECES [National Authority for Electronic Certification and Cyber Security] and the Electronic and Postal Communications Authority [AKEP]”. The analysis criticises the fact that the draft is not clear on what the area of competence or the iresponsibility of AMA is in such cases: if the aim of the legal reform was to speed up the process of taking down illegal content online, the introduction of a new intermediary between NAECES and AKEP would seem an inefficient solution that would only prolong the execution of the decision and introduce further legal uncertainty. The analysis particularly points at the fact that the draft does not make it clear whether AMA has the power to review or reconsider NAECES’s decisions in this area.

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From a broader perspective, the RFoM also questions the fact that provisions included in the draft would not incorporate sufficient safeguards with respect to administrative measures to be adopted vis-a-vis providers of electronic publications services in cases of possible excessive temporary and quantitative restrictions to the right to freedom of expression (particularly when it comes to pieces of fully legitimate content also available on websites which host illegal content), as well as access to effective appeal and judicial review mechanisms.

Regarding sanctions, the RFoM welcomes the references introduced regarding sub-legal acts to determine the specificities of the regime of infractions and sanctions. However, the analysis also notes that there is no provision establishing that such sub-legal rules need to particularly follow the principle of proportionality and take into account the size and economic capacity of the media outlets in question. Moreover, the proposed rules refer to very high economic fines to be imposed in cases of contraventions that may not be necessarily serious.

Last but not least, the powers granted to AKEP in the proposal to amend the legislation on electronic communications, notably the power to adopt measures to protect a wide range of interests, including national interests, public security or fundamental rights, are also considered to be inconsistent with international standards of legal certainty, proportionality and necessity.

Legal Analysis on the Draft Laws on Changes and Amendments to the Law on Audiovisual Media and the Law of Electronic Communications in the Republic of Albania and Other Relevant Provisions Regarding the Regulation of Certain Types Content Provided Through the Internet

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