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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE OFFICIAL WARNING
ADDRESSED ON 13 JANUARY 2010
TO THE BELARUSIAN ASSOCIATION OF JOURNALISTS
BY THE MINISTRY OF JUSTICE
OF BELARUS**

by

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. In accordance with the European Convention on Human Rights and the common democratic values and constitutional traditions of the contracting states of the European Council, the Constitution of the Republic of Belarus contains the guarantee of freedom of thoughts and beliefs and free expression (Article 33), the guarantee of the right to receive, store and disseminate information (Article 34) and the freedom of association (Article 36). Furthermore, it includes a provision according to which the state and all bodies and officials shall operate within the confines of the Constitution and the national laws (Article 7). Restriction of personal rights and liberties shall only be permitted in the instances specified by law and in order to serve specified public interests (Article 23). These constitutional requirements have to be considered by the legislative and administrative bodies when dealing with the regulation and restriction of media freedom and journalists' rights.

2. The written warning stresses the fact that the member of Belarus Association of Journalists (hereinafter: BAJ) has introduced himself as a journalist and showed his official document as a member of BAJ. According to the Mass Media Act of the Republic of Belarus, a journalist working in the mass media is a natural person engaged in the gathering, editing and creation of information announcements and material for a juridical person, upon whom fall the functions of editing a mass medium, linked to this juridical person via work or other contractual relations (Article 1). A journalist is obliged to show his/her service certificate upon request when carrying out his/her professional activity (Article 34). The form of the service certificate of journalists of the mass medium registered in the territory of the Republic of Belarus shall be established by the republic body of state administration in the sphere of mass information. The written warning was issued because the BAJ is not a mass medium according to the Mass Media Act and therefore the display of the legends "PRESS" and "PRESS REPUBLIK OF BELARUS" on the official documents of the members of BAJ is considered unlawful by the Ministry of Justice.

3. Article 10 of the Convention on Human Rights guarantees freedom of expression. As the European Court of Human Rights (Court) has emphasized repeatedly, freedom of expression is one of the most important issues and one of the key pillars of a functioning democracy. Although freedom of press is not explicitly mentioned in Article 10 ECHR, it is clearly recognized under the scope of Article 10 ECHR. The role of the press in a democratic society is a substantial one. The Court has pointed out the role of the press as purveyor of information and public watchdog several times (see among others *Barthold v. Germany*, No. 8734/79, 25 March 1985; *Lingens v. Austria*, No. 9815/82, 8 July 1986; *Monnat v. Switzerland*, No. 73604/01, 21 September 2006). The scope of Article 10 ECHR concerning freedom of press includes multiple activities relating to disseminating information by the means of print media. Not only the publication of information in print media by journalists or by publishers, but also the relationship between journalists and publisher, the general conditions of the journalist's activity and the activity of the journalist himself are protected. In principle, Article 10 ECHR covers all fields of professional activities of a journalist, in particular the way how a journalist receives the information and how he arranges or modifies the information.

Journalists are normally not obliged to reveal their journalistic sources, as the protection of these sources is one of the basic conditions for press freedom (see *Goodwin v. The United Kingdom*, No. 17488/90, 27 March 1996). People might feel free to disseminate information because they know that journalists cannot be forced to disclosure. The fact of having a press card is of particular importance in order to be able to receive information. However, one may depart from the assumption that a State is not obliged to deliver press cards at all. However, if a State decides to deliver a certain type of press cards or if it recognizes press cards of a certain type it must do so in a non discriminatory manner. Without being able to

identify oneself as a journalist, the journalist may not receive that much information. The activity of receiving information and the conditions thereof for instance by being able to identify oneself as a journalist, lie within the scope of Article 10 ECHR.

4. Only recently, the European Court of Human Rights came to the conclusion that the realization of the function of creating a forum for public debate is not limited to the media or professional journalists (see *Társaság a Szabadságjogokért v. Hungary*, No. 37374/05, judgment of 14 April 2009). Also non-governmental organizations are able to be an essential element of informed public debate. The affected organization in the above named decision was an association involved in human rights litigation with various objectives, including the protection of freedom of information. Therefore, the Court characterized it as a social “watchdog”.

In Article 2 the Statute of the BAJ lists the main purpose of the BAJ. One of the purposes is to ensure implementation of civil, economic, social, cultural and professional rights and lawful interests of the organization’s members, to create conditions for security of freedom of expression and publication and to storage and distribute information. According to the Website of the BAJ, the association deals with gathering, systematization and dissemination of information on violation of the freedom of expression and the journalists’ professional rights in Belarus. It works to defend the legitimate rights of journalists and campaigns for promoting the freedom of expression in the country. The purpose of BAJ can clearly be approved as being involved in human rights, more precisely Article 10 ECHR and the protection of freedom of information.

BAJ’s membership is possible for every person who is a journalist or in profession related to development of journalism in the Republic of Belarus (Article 3.1 Statute of BAJ). In most of the cases the members of BAJ will already have press cards because of their activity as journalists. Sometimes journalists might prefer to show the press card of the BAJ when asking for information because BAJ is known for its efforts in enforcing journalistic freedom. Although BAJ is not a legal person operating in mass media according to the Mass Media Act, it can play a substantial role in public debate. The fact that the members of BAJ consist of journalists strengthens BAJ’s importance for the realization of the function of creating a forum for public debate.

5. With regard to a possible justification of restrictions of freedom of the press under Article 10 para. 2 of the Convention it is, first of all, open to doubt whether there is a legal basis for the 13 January-order either in the Mass Media Act (MMA) or the Public Associations Act (PAA). The provisions quoted in the order (Article 5 PAA, Articles 7 para. 7 and 26, 27 and 34 MMA) do not seem to provide for a sufficient legal basis for a warning or the obligations imposed under 2. in the end of the order.,

As to the proportionality of the interference it is in the first place for the national authorities to assess whether there is a “pressing social need” for restrictions and, in making their assessment they enjoy a certain margin of appreciation. It might be lead by public interests to restrict the distribution of press cards under the Mass Media Act to certain journalists. The written warning of the Ministry of Justice criticized the display of the legends “PRESS” and “PRESS REPUBLIK OF BELARUS” on the official documents of the members of BAJ. This prohibition is equivalent to an interference with the process of receiving and collecting information as a journalist. An association that is dealing with gathering, systematization and dissemination of information on violation of the freedom of expression and the journalists’ professional rights and whose members are for the most part journalists themselves, has to be able to distribute press cards in any form by using words such as “PRESS” in order to show its affiliation to journalism, freedom of the press and its principles.

Members of BAJ are engaged in journalism and should have the possibility to disclose themselves as journalists in order to carry out their journalistic activities. A threat of malpractice by using press cards cannot be seen. Restrictions of distributing press cards only to certain types of associations operating in mass media according to the Mass Media Act might pursue certain legitimate public aims and might also be practical to achieve these aims, but it cannot be seen as proportional. It would be sufficient to distribute specific press cards under the Mass Media Act to make clear that these are under state control, but forbidding other associations as the BAJ to use press cards using such words as "PRESS" is not proportional. In the end, this may lead to a kind of censorship for the BAJ journalists because then the association is not able to receive and in succession to disseminate information as other journalistic actors do. Actually, banning the use of press cards for associations as the BAJ in general by administrative means like the objective written warning can be regarded as an intentional interference with Article 10 ECHR in order to restrict the freedom of the press directly.

As a result, the written warning of the Ministry of Justice can be regarded as a violation of the rights to freedom of press.

6. Moreover, prohibition of distributing and using BAJ press cards can lead to discrimination according to Article 14 ECHR. On the one hand, BAJ is subject to a difference in treatment from others in a comparable situation in the enjoyment of the freedom of expression guaranteed under the Convention, which cannot be objectively and reasonably justified. BAJ is - although not being a legal person operating in mass media, according to the Mass Media Act - engaged in journalism, like many other associations that disseminate information via mass media. Such associations consist of journalists that are interested in disclosing themselves as journalists by their press cards in order to carry out journalistic activities. On the other hand, both journalists, who are members of BAJ, and journalists, who are connected with legal persons operating in mass media according to the Mass Media Act, pursue journalistic activities. Both need to collect and receive information - an exercise that can be carried out more easily by using a press card. There might be a legitimate aim the Republic wants to pursue by restricting the distribution and the use of press cards only to those who are established under the Mass Media Act, as for instance the need to establish a Republic-level agencies state control in the sphere of mass media (see written warning p. 1). Nevertheless, there is no objective and reasonable justification for such discrimination. It would be sufficient to distribute specified press cards to those journalists who are directly connected with legal persons operating in mass media under the Mass Media Act. Banning every reference to the word "PRESS" in press cards of other associations engaging in journalism cannot be regarded as proportionate.

Therefore, the written warning of the Ministry of Justice can also be regarded as violation of Article 10 taken together with Article 14 ECHR.

7. Finally the order also restricts the freedom of association of the BAJ in particular with regard to membership documents. It lies at the heart of this freedom of an association to issue documents that show that particular persons are its members. Restrictions to issue "official" documents may pursue a legitimate aim, i.e. the interest of public order, more precisely the aim of avoiding that a variety of "quasi-official" documents exist, the authorities not being able to discern "official documents" from others. However, such a restriction would not be justified under Article 11 para. 2, namely the lack of a legal basis and the lack of proportionality of such measures. Hence, the order also constitutes a violation of the right to association under Article 11.