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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

ON
DRAFT AMENDMENTS TO THE MEDIA LAW
OF MONTENEGRO

adopted by the Venice Commission
at its 102nd Plenary Session
(Venice, 20-21 mars 2015)

on the basis of comments by

Mr Wolfgang HOFFMANN-RIEM (Member, Germany)
Ms Herdis KJERULF THORGEIRSDOTTIR (Member, Iceland)
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I. Introduction

1. On 17 December 2014 the President of the Parliament of Montenegro, Mr Ranko Krivocapic, requested an opinion of the Venice Commission on draft amendments to the Law on Media of Montenegro (hereinafter: “the draft amendments”; see CDL-REF(2015)005).
2. Mr Wolfgang Hoffman-Riem, Ms Herdís Kjerulf Thorgeirsdottir, Mr Christoph Grabenwarter (former member, Austria) and Mr Pieter van Dijk (former member, the Netherlands) were invited to act as Rapporteurs for this opinion.
3. The English translation of the draft amendments, made by the authorities, may not accurately reflect the original text on all points, and certain comments in this opinion may result from problems in the translation.
4. The present opinion was discussed in the Sub-Commission on Democratic Institutions and Human Rights on 19 March 2015 and adopted by the Commission at its 102nd Plenary Session in Venice, 20-21 March 2015.

II. Background information

5. The proposed amendments to the Law on Media of Montenegro introduce, *inter alia*, a legal basis for temporarily banning the publication (broadcasting) of a media outlet by a court decision, if previously that media outlet repeatedly published materials which incited “forceful destruction of the constitutional system, infringement of the territorial integrity of the state, violation of public morals, breach of guaranteed freedoms and rights of citizens racial, ethnic or religious hate or discrimination” (Article 1 of the draft amendments amending Article 11). They also introduce a legal basis for a more specific temporary and provisional ban of the distribution of media (broadcasting) by a court decision, if the media outlet concerned continues to publish the same or other programming with the same incitement, after the court has prohibited previous publication of the same kind (Article 16a).
6. It appears that the draft amendments were introduced to address a concrete situation, namely a lasting campaign of denigration and harassment of certain public figures and ethnic groups in Montenegro led by a tabloid newspaper.¹ The existing legal mechanisms, which consist mostly of retrospective penalties, were considered to be insufficient to stop the campaign.
7. On 27 January 2015, the Parliamentary Assembly of the Council of Europe adopted a resolution² where it aired its concern “about repeated breaches of the law by one specific media outlet that undermines human dignity”. The PACE urged the Montenegrin authorities not to condone “any abuse of freedom of the media and of expression, adopt legislation to punish attacks on human dignity in the media, and ensure that court decisions are duly enforced”.

¹ The abusive character of several publications was stressed by many observers within the country and abroad:
 - <http://www.article19.org/resources.php/resource/37741/en/montenegro:-article-19-statement-in-support-of-vanja-calovic#sthash.9Di16TTw.dpuf>;

- <http://www.balkaninsight.com/en/article/montenegro-s-tabloid-sex-claims-spark-outrage>;

- <http://www.balkaninsight.com/en/article/montenegro-s-prosecution-sues-informer-for-hate-speech>

² See <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21499&lang=en>

8. The Venice Commission emphasises that these amendments, if adopted, even if intended for one specific situation, will apply to all media outlets in Montenegro. The Commission will, therefore, abstain from entering into the specific situation and will give an opinion on the general scope of the proposed amendments.

III. Are prior restraints of freedom of expression legitimate under the European Convention on Human Rights?

A. Some general principles

9. The basic principles of the freedom of expression have been outlined by the European Court of Human Rights (hereafter: ECtHR) in its case-law³ under Article 10 of the European Convention on Human Rights⁴ and have been reiterated in several opinions of the Venice Commission.⁵ Very similar principles are also contained in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), as developed by the UN Human Rights Committee.⁶

10. Despite the importance of free speech in a democratic society, the ECtHR recognises that certain restrictions to free speech are permissible. The right to freedom of expression is not absolute but carries with it duties and responsibilities and may be limited in order to fulfil one of the legitimate aims laid down in Article 10 § 2 of the European Convention on Human Rights (hereafter – ECHR), provided that the interference is “prescribed by law” and “necessary in a democratic society”.

11. The limits on free speech depend on the context:⁷ thus, where the “speech” concerns matters of public interest and contains rational criticism of public policies or public figures, there is little scope for restrictions.⁸ Political journalism may even involve, according to the ECtHR, a “degree of exaggeration, or even provocation”.⁹

³ See the case-law of the ECtHR starting from *Handyside v. United Kingdom*, 5493/72, 7 December 1976, §49, *Prager and Oberschlick v. Austria*, no. 15974/90, 26 April 1995, §38; *Steel and Morris v. the United Kingdom*, no. 68416/01, §§ 85 et seq.; *Axel Springer AG v. Germany* [GC], 7 February 2012, no. 39954/08, §§ 85-88 and 89-95; *Ruokanen and Others v. Finland*, no. 45130/06, 6 April 2010, §§35 et seq.; *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, 13 July 2012, § 48, etc.

⁴ Which is entitled “Freedom of expression” and reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

⁵ See, as the most recent one, *Amicus Curiae* Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased, adopted in December 2014, CDL-AD(2014)040, §§19-25

⁶ UN Human Rights Committee, General Comment No. 34, CCPR/C/GC/34,

<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

⁷ Not all liberal democracies agree with that: for example, the 1st Amendment to the US Constitution, as interpreted by the US Supreme Court, prefers a more categorical vision of this freedom excluding nearly all restriction related to the content of the speech, unless it creates a clear and imminent danger of unlawful action – see *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁸ *Öztürk v. Turkey* [GC], no. 22479/93, 28 September 1999, §66; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, 22 October 2007, §46

⁹ *Prager and Oberschlick*, cited above

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12. However, where speech incites to violence against an individual or a sector of the population, the State authorities enjoy a wider margin of appreciation¹⁰ and may regulate such expression by introducing formalities, conditions, restrictions or penalties. Even political journalism has its limits: a robust criticism of public policies, political figures or groups of people should nevertheless be responsible,¹¹ and may not contain hate speech¹² or advocate unlawful violence.¹³ There are international documents which actively require the States to adopt measures, including measures under criminal law, to fight hate crime.¹⁴

13. The ECtHR case-law takes account of the intrusive character of the measures employed by the State to curtail the expression of certain ideas or certain forms of expression in order to assess their proportionality: the restrictions must never go beyond what is necessary in a democratic society to achieve the legitimate aim pursued.¹⁵

B. Prior restraints of freedom of expression in the case-law of the ECtHR

14. The ECtHR recognises that the ECHR does not forbid prior restraints.¹⁶ However, since such measures constitute one of the most serious threats to the free flow of information and public debate, it will subject them to the most stringent scrutiny.¹⁷ It, therefore, requires that the criteria for prior restraints be clearly indicated in the law¹⁸ and procedural safeguards help to avoid that arbitrary encroachments upon the freedom of expression take place.¹⁹ In this regard, the principle of proportionality is of particular importance.²⁰

15. The above *a fortiori* applies in respect of censorship which relates not to existing materials but to future publications: in the absence of any publicised contents, it is difficult to assess their harmful effect, if any, in order to conduct the balancing exercise and to design an appropriate measure.

¹⁰ *Sürek v. Turkey* [GC], no. 26682/95, 8 July 1999, §61

¹¹ *Fressoz and Roire v. France* [GC], no. 29183/95, 21 January 1999, §54; *Kasabova v. Bulgaria*, no. 22385/03, 19 April 2011, §§63 et seq.; *Kaperzyński v. Poland*, no. 43206/07, 3 April 2012, §57

¹² See, by adverse implications, *Dicle v. Turkey*, 10 November 2004, §17

¹³ *Erdogdu and Ince v. Turkey*, no. 25067/94 et al, 9 July 1999, §54

¹⁴ See the 2003 Additional Protocol to the 2001 Budapest Convention on cybercrime, ratified by Montenegro: <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm>. Article 20 of the ICCPR requires the States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” although it does not mention specifically criminal sanctions. Recommendation of the Committee of Ministers of the Council of Europe no. R(97)20 mentions criminal sanctions amongst means of combatting hate crime but calls the courts imposing such sanctions to “ensure strict respect for the principle of proportionality” (Principle 5). PACE Recommendation 1805(2007) calls for “penalisation” of hate speech and “prohibition” of calls for public violence by references to religious matters, “as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2, of the Convention” (see point 17 of the Recommendation).

¹⁵ See *Handyside*, cited above; see also *Ceylan v. Turkey* [GC], no. 23556/94, 8 July 1999, §37; *Tolstoy Miloslavsky v. the United Kingdom*, no. 18139/91, 13 July 1995, §49

¹⁶ See *Cumhuriyet Vakfi and Others v. Turkey*, no. 28255/07, 8 October 2013, §61; *Sunday Times v. United Kingdom*, no. 3166/87, 26 November 1991, §51; *Observer and Guardian v. the United Kingdom*, no. 13585/88, 26 November 1991, §64; *Alinak v. Turkey*, no. 40287/98, 29 March 2005, §37; that being said, in some other legal orders prior restraints are either explicitly or implicitly prohibited (like, for example, in the US or under Article 13 of the American Convention on Human Rights).

¹⁷ *Editions Plon v. France*, no. 58148/00, 18 May 2004, §42

¹⁸ *Gaweda v. Poland*, no. 26229/95, 14 March 2002, § 40

¹⁹ *Cumhuriyet Vakfi*, cited above

²⁰ *Handyside*, cited above

16. Thus, the Court has been extremely critical about banning individual journalists from the profession – even when such ban was temporary.²¹ The Court considered that a criminal sentence depriving a media professional of the right to exercise his or her profession must be seen as very harsh. The former European Commission of Human Rights was of the same view.²²

17. As to banning future operations of the whole media outlet, the ECtHR mostly dealt with cases of revocation of broadcasting licences of audio-visual media. Here it was prepared, exceptionally, to accept such bans. Thus, in *Medya FM Reha Radyo Ve İletişim Hizmetleri A.S. v. Turkey*²³ the ECtHR examined a one-year suspension of the broadcasting licence of a radio programme. It considered such ban to be a very severe sentence; however, it acknowledged that such massive restrictions had a dissuasive effect, which could be seen as necessary since the message diffused by the radio unequivocally called for violence and armed resistance.

18. By contrast, in *Nur Radyo Ve Televizyon Yayincılığı A.S. v. Turkey*,²⁴ the Court ruled that a 180-day prohibition to broadcast was disproportionate. The Court found that the programme at issue had not contained any calls for violence, while being definitely obscurantist and intolerant towards other religious communities.²⁵ In *Özgür Radyo-Ses Radyo-Televizyon Yayın Yapım Ve Tanıtım A.S. v. Turkey*, the Court held that a 90-day suspension of a broadcasting licence was not warranted since, despite the hostile tone of the radio programme, the message transmitted did not contain any calls for violence, violent resistance or mass upheaval.²⁶ It thus appears that the Court makes a distinction between “speech of intolerance” and direct calls for violence.

19. A temporary suspension of the activities of a newspaper is a measure which needs a particularly convincing justification. In the case of *Ürper and Others v. Turkey*²⁷ the Court found a violation of Article 10 on account of the suspension of the publication and distribution of several newspapers for periods ranging from 15 days to a month. The suspension followed *ex parte* proceedings in which the newspapers had not taken part and where certain materials previously published by those newspapers had been found to contain apology of terrorism. The Court noted that the injunction “[was] not imposed on particular types of news reports or articles, but on the future publication of entire newspapers, whose content was unknown at the time of the national court’s decisions”, and that “less draconian measures could have been envisaged, such as the confiscation of particular issues of the newspapers or restrictions on the publication of specific articles”.²⁸

20. In sum, only in extreme cases has the ECtHR accepted that a temporary shutdown of a media outlet was a proportionate measure.

²¹ *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §118, or *Kaperzyński v. Poland*, cited above.

²² See the Commission report in the case of *De Becker v. Belgium*, no. 214/5, 27 March 1962

²³ *Medya FM Reha Radyo Ve İletişim Hizmetleri A.S. v. Turkey* (dec.) no. 3284/02 14 November 2006

²⁴ *Nur Radyo Ve Televizyon Yayincılığı A.S. v. Turkey*, no. 6587/03, 27 November 2007, §30

²⁵ See also the second case of *Nur Radyo Ve Televizyon Yayincılığı A.S. v. Turkey*, 12 October 2010, §53

²⁶ No. 10129/04, 10 March 2009, §28

²⁷ Nos. 14526/07 et al., 20 October 2009, §§40 et seq.

²⁸ Although this case had an additional important element, namely that the journalists had not participated in the *ex parte* procedures in which the illegal character of the materials they published had been established.

IV. Analysis

A. The scope of the ban

21. New Article 11 of the Media Law, as formulated in the proposed amendments, has two prongs: the first permits the *ex-post* banning²⁹ of a specific existing material (a press article, a TV program, etc.)³⁰, while the second permits the *ex-ante* ban of *all future publications*, i.e. the temporary closure of the media outlet concerned (a newspaper, a TV station etc.).³¹

22. In addition, Article 16a of the draft law introduces the possibility, after a previous prohibition of publication by the court, to stop all future publications of a media outlet as an *interim procedural measure*. This measure is applied by the court in a pending case, on the proposal of the state prosecutor, before the final decision under Article 11 is taken.

23. In the opinion of the Venice Commission, the relationship between those two powers of the court is not clearly formulated in the draft amendments. The measure introduced by Article 16a is “interim” or “provisional” in name only. In practice it has a final effect and cannot be undone as such. In fact, the temporary ban provided by Article 16a as an *interim measure* in its consequences is not different from the temporary ban as a *sanction* under new Article 11. Therefore, Article 16a is problematic: no matter how it is called, temporary shutdown is a very serious interference and may endanger proper functioning of a media outlet and even its very existence (for more details see below). The proceedings in which it is imposed should offer the same guarantees as the proceedings which result in a final decision. It is thus recommended that interim measures as provided for in Article 16a are applied only in relation to the banning of existing publications (*ex-post* banning) and not to *ex-ante* banning.³²

B. The aims which may be pursued by a ban

24. New article 11 lists several aims which the imposition of a ban (*ex-post* or *ex-ante*) may pursue. Thus, it is possible where the materials published by the media outlet promote:

- forceful destruction of the constitutional system;³³
- infringement of the territorial integrity of the State;
- violation of “public morals”;
- breach of guaranteed freedoms and rights of citizens;
- racial, ethnic or religious hate or discrimination.

²⁹ This measure already existed in the law in its current form. It is understood that the measure of “banning of publication” of a media material includes preventing its further distribution, dissemination or withdrawal from circulation.

³⁰ The English translation of the Montenegrin law speaks of the distribution of a “publicized media programming”, but the opinion will use more neutral terms: “material” or “media content”.

³¹ Alternatively, the draft amendments may be read as allowing the ban of certain selected publications which have certain characteristics. From the law it is not entirely clear what exactly the court may ban – the whole operation of a media outlet or just the publication of certain materials having particular characteristics. This must be clarified. The following analysis is based on the assumption that the amendments introduce a comprehensive ban on all the operations of a media outlet (see point 5 above).

³² Such measure is actually already provided by Article 12 of the Media Law in its current form.

³³ The first reason (abolishment of the constitutionally established order) may be the equivalent to the justification “interests of national security” as laid down in Article 10 § 2 of the ECHR. However, the term – at least in its English translation – is not restricted clearly enough to such a reason but enables a broad scope of interpretation, which does not adequately respect the significance of the right to freedom of expression.

- ***European standard***

25. The aims listed in Article 11 of the draft law generally correspond to those listed under Article 10 of the ECHR as legitimate aims for interferences with the right to freedom of expression (“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”).³⁴

- ***Constitutional level***

26. Under Article 47 of the Constitution of Montenegro, the right to freedom of expression may be limited by the right of others to dignity, reputation and honour, and if the expression threatens public morality or the security of Montenegro. Thus, the aims listed in new Article 11 can be reasonably related to the aims listed in Article 47 of the Constitution.

27. Article 50 of the Constitution of Montenegro contains a prohibition of censorship as a particular form of interference with the freedom of expression. According to the second paragraph of Article 50, the competent court may prevent dissemination of information and ideas via the public media only in order to pursue a number of legitimate aims, namely:

- prevent invitation to forcible destruction of the order defined by the Constitution;
- preservation of territorial integrity of Montenegro;
- prevention of propagating war or incitement to violence or performance of criminal offences;
- prevention of propagating racial, national and religious hatred or discrimination.

28. As can be seen, the list of “legitimate aims” under Article 50 of the Constitution is similar *but not identical* to those listed in the new Article 11; thus, in relation to preventive restraints, the Constitution does not refer to “public morals” nor to “defence of the guaranteed freedoms and rights of citizens”. It therefore appears that Article 50 of the Constitution does not allow preventive restraints in order to protect public morals or individual rights.

C. *Ex-ante* ban as a sanction for the failure to execute a court order

29. As follows from new Article 11, read in conjunction with new Article 16a, the *ex-ante* ban may be applied in the case of *repetitive* publications of illegal media contents after a previous ban by a court decision. As follows from the explanatory note to the draft amendments, the main purpose of the law is to introduce a sanction for wilful non-compliance with the court judgments by media outlets, and, thus, to maintain the “reputation of the overall judiciary”.

30. The Venice Commission admits that malicious non-compliance with a court order is a serious offence which may deserve harsh sanctions. Article 10 of the Convention mentions “maintaining the authority of the judiciary” as a legitimate aim in its own right. The ECtHR has explained this phrase referring to the courts as being the proper forums for the settlement of disputes and stressing that the public must have respect for their capacity to fulfil this function³⁵.

31. That being said, a general ban on all future publications is the *most serious* sanction possibly applied to a media outlet, and that for several reasons. First of all, the news is a

³⁴ Although the reference to the “forceful destruction of the constitutional system” might be substituted with more general reference to the “interests of national security”.

³⁵ *Sunday Times*, cited above, §55

“perishable commodity”; prior censorship gives the authorities an opportunity to *delay* media coverage that might be harmful to them for a long enough period to lose its news-value. Moreover, prior censorship also enables the authorities to suppress reports which nobody has seen and thus it is difficult if not impossible for the public to verify whether the repression was justified. Finally, a general ban deprives the public of their right to be informed by this particular media.

32. Finally, new Article 11 gives the courts a power to order temporary closure of the whole media outlet, and not to restrict itself to prohibiting certain publication on a selected topic. This power can be used only in extreme circumstances, since even a temporary cessation of activities may be lethal for the business of a newspaper. In general, newspapers all over Europe are financed to an increasing extent not by the revenues from selling but from advertising. A paper that may not be published, even if only for two weeks, will face serious problems because the steady financial support based on long term advertising campaigns etc. will suddenly be interrupted. Given the fact that many newspapers all over Europe are currently in a critical financial situation because of an increasing importance of electronic media and the shift of advertising budgets from the press to electronic media, this aspect gains even more importance. Even a relatively short interruption in the publication of a daily newspaper will in practice often be equal to a permanent ban. Thus, a temporary ban may be deadly not only to a particular material or a news item, but to the newspaper as a whole.

33. If the courts use the power to interrupt publication of newspapers or broadcasting of electronic media, it is an extreme interference with the practice of journalism and a grave threat to the public’s fundamental right to receive diverse news and opinions. The relation between right and restriction and between norm and exception must not be reversed.³⁶ States have a duty to protect and promote a pluralistic media landscape³⁷ and must prevent measures aimed at silencing journalism,³⁸ and the closure of the newspapers and TV stations may lead to the last mentioned result.

34. In the opinion of the Venice Commission, closing down of a media outlet (even when it is a temporary measure) is neither an appropriate response nor an acceptable sanction in case of non-compliance with court decisions. Each legal system, including the Montenegrin one, provides for mechanisms to enforce judicial decisions: the Venice Commission considers that such general measures, not specific to the media sphere, can be used to make sure that court rulings are obeyed. The sanction to close down a media outlet (even temporarily) in case of disobedience is disproportionately severe and does not seem to meet the test of democratic necessity.

D. *Ex-ante* ban in cases of repetitive publication of materials violating “public morals” or the rights of others

35. Under the draft amendments, the operations of a media outlet may be suspended in case of repetitive publication of illegal media contents, which includes contents violating public morals or the rights of others. In the opinion of the Venice Commission, however, reference to “public morals” is not precise enough to form a legal basis for such a severe interference as an *ex-ante* ban.

³⁶ UN Human Rights Committee, General Comment No. 34, §21.

³⁷ Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration (*Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers’ Deputies*)

³⁸ UN Human Rights Committee, General Comment No. 34, §21

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36. First, morality is a quickly evolving concept and its content is often uncertain.³⁹ Indeed, the requirements of morals, as the ECtHR said in the *Handyside* case, “varies from time to time and place to place, especially in our era which is characterised by rapid and far-reaching evolution of opinions on the subject”.⁴⁰ In cases of prior restraints on media publications there are more stringent requirements, which demand that “the law must provide a clear indication of the circumstances when such restraints are permissible, *a fortiori*, if the consequences of the restraint are to block publication of a periodical completely”.⁴¹ So, unless there exists a long standing case-law which restricts the application of this measure to very serious cases which are foreseeable, mere reference to “morals” in the law is too vague.

37. Even if “morality” needs to be protected, the State should choose the *least intrusive means* of doing it. Preserving “morality” may be a legitimate aim to impose *certain* restrictions on the speech, but the broadness of its possible content is not compatible with the required strict proportionality test in case of prior censorship. This lack of narrowness within the term “public moral” is not compatible with the high degree of importance of the freedom of expression in a democratic society.

38. The same concerns a broadly formulated aim of the “breach of the guaranteed freedoms and rights of citizens”. This exception is not narrowly constructed and thus it is open to abuse. As it was already stated above, the ECtHR has clarified that prior restraint should be a measure of last resort, applied only when a publication seriously threatens life, health, public safety or national security. Therefore, media coverage which, for instance, is simply defamatory to public figures or private individuals, blasphemous or obscene usually does not meet the above criteria. In any case, the reference to “citizens” in the English translation is too restrictive, as this would amount to an unjustified difference in treatment between citizens and non-citizens.

39. The Venice Commission reiterates its conclusion above that Article 50 of the Montenegrin Constitution does not permit censorship for the purpose of preserving public morals or individual rights. In sum, the Venice Commission is of the view that all references to “morality” and “rights of citizens” should be removed from the law, insofar as banning of the future publications is concerned.

E. *Ex-ante* ban in cases of continuous propaganda of hatred and violence

40. The Venice Commission is prepared to accept that *in extreme* cases a temporary cessation of activities might be the only efficient measure to prevent future violations – for example, where the media outlet repeatedly published materials which incite hatred associated with violence.⁴²

41. The Venice Commission recalls that the exercise of the right to freedom of expression by media professionals assumes special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State. The media must not become a vehicle for the dissemination of hate speech and the promotion of violence.⁴³

³⁹ Although an example can be envisaged such as a leaflet promoting child pornography, a universally condemned topic, where a violation of “public morals” would be self-evident.

⁴⁰ *Handyside*, cited above, § 48.

⁴¹ *Gaweda v. Poland*, 14 March 2002, §40

⁴² A good illustration would be the case of Radio Télévision Libre des Mille Collines – a radio station which instigated genocide in Rwanda - see <http://www.unict.org/en/cases/ict-99-52>

⁴³ *Erdogdu and Ince v. Turkey*, no. 25067/94 et al, 8 July 1999, § 54

42. Thus, temporary curtailment of operations of a media outlet may be possible where the repeated⁴⁴ publications were not only *illegal* (obscene, defamatory, blasphemous, etc.) but represented a *very serious case* of media misbehaviour – namely were those publications directly incited to unlawful violence against individuals or groups, to the violent overthrow of the constitutional order and alike.⁴⁵

43. Even in such cases *ex-ante* banning should be used as a measure of last resort; a careful distinction must be made between genuine and serious incitement to hatred and unlawful violence and, on the other hand, the right of individuals (including journalists and politicians) to express their views freely and to “offend, shock or disturb” others. A variety of opinions is essential to the public debate. In most cases, illegal publications, even if they are obscene or defamatory in nature, or demonstrate intolerance towards certain individuals, groups or ideas, or disrespect for symbols and authorities must be combated with less drastic means (such as a fine or a narrowly formulated injunction not to publish certain materials).⁴⁶

F. Absence of time-limits

44. New Article 11 does not put any *upper* time-limit on the *ex-ante* ban. This increases the chilling effect of the provision and may lead to a disproportionate result. In any event, the duration of the temporary ban should be commensurate to the seriousness of the media misbehaviour at issue.

G. Notion of “repetitive offence”

45. Under new Article 11 the court may impose an *ex-ante* ban “in the case of repetition of the same offence”. It is unclear what amounts to a repetitive offence. It appears⁴⁷ that the *ex-ante* ban is impossible unless the media outlet has already been previously condemned by a court for a similar case of media misbehaviour. However, it should be specified in more precise terms.

46. It is also unclear what happens if the media outlet publishes a new story, which is similar but not identical⁴⁸ to the previous one. And what if the next abusive publication appears many years later, and concerns another personality or another subject-matter? In such cases the element of “repetitiveness” may be absent. In sum, the Venice Commission considers that the draft law should describe the characteristics of a “repetitive offence”, both procedural and substantive.

H. The object of the ban

47. The draft amendments must make it clear that only the media outlet (a newspaper, a radio station, a TV-station etc.) which was responsible for the infringement of the Media Law can be the addressee of the measure, and not the media company as a whole. Otherwise, it would be possible to ban the distribution of all media products (newspapers, TV channels etc.) of the same company even though parts of them have not violated the law. The last sentence of

⁴⁴ It is understood that, according to the new Article 11 read in conjunction with Article 16 a temporary closure must become possible only where the media outlet has already been condemned by a court in adversarial proceedings, and, despite that, published similar materials within a relatively short period of time and in evident disregard of the previous court judgment.

⁴⁵ It is important to emphasise that there is a distinction between publishing opinions of others fulfilling the requirements of hate speech and expressing hate speech oneself – see *Jersild v. Denmark*, 23 September 1994, §§27 et seq.

⁴⁶ *Cumhuriyet Vakfı and Others v. Turkey*, no. 28255/07, 8 October 2013, §62

⁴⁷ See, in particular, new Article 12 of the draft amendments.

⁴⁸ If one compares the texts of new Article of 11 and Article 16a, a certain discrepancy between them becomes evident: new Article 11 speaks of the “repetition of the same offence” whereas Article 16a speaks of publishing, “after the courts prohibition” of the “same or other [emphasis added] programming” having certain characteristics.

Article 16a of the draft amendments addresses this point, but only partly, since it concerns interim measures and not the sanction as such, which is established by new Article 11. A similarly-worded provision should therefore be added to new Article 11.

48. Furthermore, the law (both the existing law and the draft amendments) is unclear as to what extent it may be applicable to the “new media” (such as web-sites) where content may be freely added by users. Given the complexity of this issue,⁴⁹ the Venice Commission considers that the area regulated by this law should be limited to the “traditional” (printed and audio-visual) media or the content providers, which have “editorial policy” and are thus responsible for the content published there.

I. Procedural safeguards

49. The Venice Commission emphasises that in cases of heavy interferences with the freedom of the media a strictly obeyed and speedy procedure is indispensable.⁵⁰ Any decision to impose a prior restraint, especially where it consists of the temporary closure of the media outlet, should be taken in the proceedings which comply with all the guarantees of fair trial.⁵¹

50. A new paragraph added to Article 12 stipulates that, where a court imposes an *ex-post* ban on a media outlet, it will issue a formal warning that further violations of the law by this media outlet may result in the *ex-ante* ban (i.e. the temporary suspension of its operations). This provision is supposed to make the application of the *ex-ante* ban more predictable.

51. It is questionable whether it is the court’s role to issue such warnings and thus anticipate the outcome of future cases; after all, the initiative to ask for a ban rests with the State Attorney. Furthermore, it is unclear whether this warning is anything but a simple reminder. At least, according to the draft amendments the imposition of the *ex-ante* ban is not dependent on the existence of a previous formal warning.

J. Additional fines for the media outlet

52. Article 45a of the draft amendments introduces fines for the journalists and media outlets guilty of repeated publication of illegal media content. Again, the term “repeated offence” needs to be clarified, otherwise imposition of any fine would be unforeseeable. Such fines do not conflict with Article 10 in principle. Mass media must obey ordinary criminal law on the basis that Article 10 gives them protection. The safeguards afforded by Article 10 in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism.

53. Moreover, the fines fixed by Article 45a may be an efficient measure to combat wilful non-compliance with court orders by a repeated malicious publication of untrue and defamatory factual allegations – a problem which the draft amendments seek to address through introducing a temporary closure of a media outlet.⁵²

⁴⁹ See the case of *Delfi AS v. Estonia*, no. 64569/09, 10 October 2013, pending before the Grand Chamber

⁵⁰ ECtHR, 7/5/2002, *McVicar v UK*, No. 46311/99; ECtHR, 20/5/1999 (GC), *Bladet Tromsø a. Stensaas v NOR*, No. 21980/93.

⁵¹ Thus, in *Ürper and Others*, cited above, the Court observed *inter alia* that the decision to suspend publication of a newspaper followed *ex parte* proceedings where this newspaper had not participated.

⁵² Although “with regard to comments about public figures, consideration should be given to avoiding penalising or otherwise rendering unlawful untrue statements that have been published in error but without malice” – see General Comment no. 34, cited above, §47

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54. The amounts of the fines (which vary from EUR 1,000 for an editor-in-chief to EUR 10,000 for the media as a whole or its owner⁵³) do not seem disproportionate as such, but, in principle, the legislature should only set a maximum, while leaving the determination of the level of the exact amount to the court, which should also have the power to decide that a lower fine or no fine at all should be imposed.

55. In the light of their significance, those fines may be characterised as criminal sanctions, at least when applied to individuals.⁵⁴ They should therefore be imposed within proceedings which comply with the requirements of “fair trial” under Article 6 of the Convention. It is recommended that this be specified in the law.

V. Conclusions

56. A temporary ban on the functioning of a media outlet is an extremely severe measure which may only be compatible with the protection of freedom of speech under Article 10 ECHR in extreme cases, as specified by the ECtHR.

57. The Venice Commission considers that the draft amendments under consideration should be revised; it recommends the following:

- The possibility for a court to order the temporary ban on a publication or on the functioning of a media outlet as a response to or a sanction for non-compliance with a judicial decision should be removed from the law;
- the possibility for such a ban should only be provided for the extreme cases where it is necessary to prevent incitement to violence, the violent overthrow of the constitutional order and similar very serious threats to the public order and only as a measure of last resort;
- the lower limit of the fines provided by the new Article 45a should be removed.
- the meaning of “repeated offence” should be clearly spelled out in the law.

58. The Venice Commission remains at the disposal of the authorities for any further assistance they may desire.

⁵³ It is necessary to specify whether the fine may be imposed at the same time on the media outlet, its owner and the editor-in-chief, or imposition of the fine on one of them excludes application of this measure to others for the same offence.

⁵⁴ See, for the summary of the ECtHR on the matter *Ezeh and Connors v. the United Kingdom*, 9 October 2003, nos. 39665/98 and 40086/98, §§ 82 et seq.