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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

AZERBAIJAN

JOINT OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE

ON THE LAW ON MEDIA

Adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022)

On the basis of comments by

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I. Introduction

1. By letter of 2 February 2022, the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (the Monitoring Committee) of the Parliamentary Assembly of the Council of Europe (PACE) requested an opinion of the Venice Commission on the Law on Media of Azerbaijan, which at that point in time was still a draft law.

2. Ms Neila Chaabane, Ms Herdis Kjerulf Thorgeirsdottir, Mr Ben Vermeulen and Ms Krisztina Rozgonyi (DGI expert) acted as rapporteurs for this opinion.

3. The authorities of Azerbaijan informed the Secretariat that they did not consider that meeting with the rapporteurs would be necessary or appropriate for the preparation of this opinion, which has been requested by the Monitoring Committee of PACE and not by Azerbaijan itself. As a consequence, the rapporteurs, assisted by Ms Tania van Dijk from the Secretariat, only held (on-line) meetings with journalists, media lawyers, representatives of the international community in Azerbaijan and the Office of the OSCE Representative on Freedom of the Media on 10 and 12 May 2022. The Commission regrets that the rapporteurs were not able to have an open dialogue with the authorities on key issues of concern and that, also given the absence of an explanatory note and the fact that the rapporteurs were not supplied with relevant information and explanations by the authorities, the aims of certain provisions of the Law could not be further clarified beyond the written comments to the draft opinion provided by the Media Development Agency received on 13 June 2022. The Venice Commission is grateful to the Council of Europe Office in Baku for the technical support it provided.

4. This opinion was prepared in reliance on the English translation of the Law on Media. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 10 and 12 May 2022. It was adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022)

II. Context and scope of the opinion

A. Background information

6. On 30 December 2021, the *Milli Majlis* (Parliament) of Azerbaijan adopted in third and final reading a new Law on Media (hereafter: "the Law"). The idea of a new law was first introduced in January 2021, following Presidential Decree No. 1249 of 12 January 2021 "On deepening media reforms in the Republic of Azerbaijan", which called for the creation of a new media agency, the Media Development Agency, to replace the existing government institution, the State Support Fund for Mass Media Development. The Media Development Agency was subsequently tasked with drafting the new law.

7. A draft Law, as developed by the Media Development Agency was disseminated on 10 December 2021 to a select group of recipients on the occasion of a joint meeting of the Parliamentary Committees on Human Rights, Law and State Building.[1] It was posted on the Parliament's website only on 14 December 2021, the very day the draft Law passed in first reading.[2] In the course of these proceedings various amendments were reportedly made to

[1] See https://meclis.gov.az/news.php?id=3798&lang=az.
[2] See https://meclis.gov.az/news.php?id=3808&lang=az. Already the next day, on 15 December 2021, a group of civil society representatives called on the *Milli Majlis* to remove the draft law from the agenda (and to discuss it with participation of civil society representatives), as it would create "*favourable conditions for unnecessary interference with freedom of expression and the media*".

the draft Law, *inter alia* by including more explicit references to the copyright of journalists. On the eve of the third and final reading, on 30 December 2021, discussions with a selected part of the media community were organised in the *Milli Majlis* (Parliament). The draft law was adopted fundamentally unchanged the same day.

8. The adoption of the Law triggered internal and international criticism of the potential effects of the Law on freedom of expression, including freedom of the media, in Azerbaijan.[3] This criticism focused in particular on the creation of a single registry of media entities, with especially restrictive conditions for journalists to be included in this registry, the issuing of press cards by a state agency to eligible journalists, the requirements pertaining to the establishment of media entities, including on-line media, the licensing of all audiovisual media and restrictions on foreign ownership of media. In addition, according to internal and international observers, the Law was adopted without meaningful consultation with independent media or experts specialising in freedom of expression. The authorities of Azerbaijan have stated on the other hand that the "*drafting process of the new law has been conducted in an inclusive and transparent way*"[4], and that, for example, in the period between 10 and 17 December 2022 more than 110 managers of various media entities, editors-in-chief, journalists and media experts participated in discussions organised in the *Milli Majlis.*

9. The Law was signed into force by the President of Azerbaijan on 8 February 2022, accompanied by a Presidential Decree, containing timelines and modalities for the implementation of the Law.[5] Upon entry into force of the Law that same day, the previous Law on Mass Media and the Law on Television and Radio Broadcasting ceased to exist. Various provisions of the Law will only be fully implemented within six months of the entry into force of the Law (i.e. as of 8 August 2022) when licences will have to be issued to various audiovisual media and the Media Register should become fully operational.

10. The Venice Commission has already in earlier opinions referred to considerable problems relating to the enjoyment of freedom of expression in Azerbaijan and related thereto the difficult environment in which journalists and media operate.[6] The Council of Europe Commissioner for Human Rights, in her 2019 report following her visit to Azerbaijan, expresses her regret that "*no progress has been made with regards to protection of freedom of expression in Azerbaijan*", stating that she "*remains particularly concerned about the lack of pluralism in the country's media and arbitrary interferences with media freedom*".[7]

B. Scope of the opinion

11. According to its preamble, the Law under examination determines "*the organisational, legal and economic bases of activity in the field of media, as well as general rules for the*

[3] For example, in a letter of 18 January 2022 to the President of Azerbaijan, the Council of Europe Commissioner for Human Rights expressed her concerns that the Law "*appears to overregulate the media field and the profession of journalism contrary to the principles of free, independent, uncensored media and pluralism that are essential in a democratic society according to the well-established case-law of the European Court of Human Rights*". She points out that the Law "*deteriorates the situation by granting discretionary powers to state authorities regulating the media sector, including through licensing, excessively restricting journalists' work, and introducing several limitations to the financial, legal and operational activities of media companies and entities. (…) (T)he law would further restrict the ability of journalists and individuals to receive information from a plurality of reliable sources.*"

[4] See the reply from the Executive Director of the Media Development Agency to the abovementioned letter from the Council of Europe Commissioner for Human Rights of 24 January 2022, stating that "*[m]ore than 800 journalists and many media experts had an opportunity to discuss the draft law on media before it was introduced for discussions in the Milli Majlis. Moreover, several public discussions with the participation of numerous experts, media and civil society representatives were organized at the Parliamentary level*".

[5] This decree for example outlines that the Cabinet of Ministers is to submit proposals on the harmonisation of legal acts with the Law on Media and a draft law outlining administrative liability for violations of the Law on Media within two months, or to submit draft rules on the Media Register, the form of the press card (etc.) within three months.

[6] Venice Commission, CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, paragraph 12.

[7] *Report by Dunja Mijatović, Commissioner for Human Rights of the Council of Europe following her visit to Azerbaijan from 8 to 12 July 2019,* CommDH(2019)27, 11 December 2019, paying also particular attention to the practice of detaining and imprisoning journalists and social media activists, who had expressed dissent or criticism of the authorities, on a variety of charges.

acquisition, preparation, transmission, production and dissemination of mass i*nformation*" in Azerbaijan. As such, the Law regulates fundamental aspects of the media sphere in a great level of detail. The way of in which some of these aspects have been regulated can be questioned, in that it for example makes use of narrow definitions (for example, the definition of "mass information" in Article 1 of the Law, but also "journalists" which is described further below), inexplicable differentiations (e.g., the definitions of the various media forms and categorisation of audiovisual and distribution services in Article 1 of the Law) or are excessively detailed (for example, the provisions of Article 12 of the Law on the required use of an unique logo by media entities).[8] However, the Venice Commission will focus on what it considers to be key elements of the Law (in chronological order), which in its opinion are likely to have the most immediate effect on freedom of the media in Azerbaijan and should be given priority for revision. The absence of comments of other provisions of the Law should not be seen as tacit approval of these provisions.

III. National and international legal framework

12. The Constitution of Azerbaijan provide for freedom of thought and speech (Article 47) and freedom of information (Article 50). To this end, Article 47 stipulates that "[*e*]*veryone has the right to freedom of thought and speech"*.[9] In turn, Article 50 provides: "*I. Everyone is free to legally seek, receive, impart, produce, and disseminate any information. II. Freedom of mass information is guaranteed. State censorship in mass media, including the press, is prohibited. III. Everyone's right to refute or reply to the information published in mass media and violating his/her rights or damaging his/her interests shall be guaranteed*". Restrictions of the rights provided for in the Constitution may only be established on grounds provided in the Constitution and by law, and which are proportional to the result expected by the state (Article 71), recognising *inter alia* that they may be partially and temporarily restricted in times of war, martial law and state of emergency, whereby the population is to be notified in advance on the restrictions of their rights and liberties.[10]

13. Azerbaijan is a state party to major international human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR) and the International Covenant on Civil and Political Rights (hereafter: ICCPR). Freedom of expression is guaranteed by Article 10 ECHR and by Article 19 ICCPR. The Constitution of Azerbaijan also guarantees the supremacy of international law upon national legislation in Article 151 of the Constitution.

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[8] See for a comprehensive discussion of these aspects: OSCE, *Legal Analysis on the Law of the Republic of Azerbaijan "On Media"*, commissioned by the Office of the OSCE Representative on Freedom of the Media from Dr. Joan Barata Mir, an independent media freedom expert (February 2022).

[9] The two further paragraphs of this Article state: *"II. No one shall be forced to proclaim or to repudiate his/her thoughts and beliefs. III. Agitation and propaganda inciting racial, national, religious, social discord and animosity or relying on any other criteria is inadmissible".*

[10] It is noted that this Article has already been commented on by the Venice Commission, CDL-AD(2016)029, Opinion on the draft modifications to the Constitution of Azerbaijan submitted to the Referendum of 26 September 2016 (paragraph 31), which welcomed the elevation of the principle of proportionality to the constitutional level, but recommended to use the formula of the 2002 constitutional law ("*a legitimate aim provided by the Constitution*") as "expected results" reduced the meaning of the proportionality principle.

IV. Analysis

A. Scope of application of the law (Article 3)

14. Article 3 of the Law envisages an extraterritorial scope of the application of the Law, by providing that it also applies to "*media entities which are located outside the Republic of Azerbaijan and whose activities are oriented to the territory and population of the Republic of Azerbaijan (…), and also journalists"*. Additionally, Article 5, paragraph 6, provides that "*(i)f the requirement of this Law are found to be violated in the activities of media entities located outside the Republic of Azerbaijan, the Council and a body (institution) designated by a relevant executive authority shall take measures provided for in international agreements to which the Republic of Azerbaijan is a party and in this Law*". The authorities of Azerbaijan have indicated that Article 3 has positive rather than negative implications, in that it extends the use of the protection mechanism defined by the Law also to media entities outside Azerbaijan whose activities are directed to the territory and population of the Republic of Azerbaijan. Others have on the contrary claimed that this provision aims to target certain media outlets outside Azerbaijan known for their critical reporting.[11] The ambiguity of the phrase "*activities (…) oriented to the territory and population of the Republic of Azerbaijan, and also journalists"* also leaves the door open for other international media outlets, such as AFP, BBC and Reuters, and their correspondents (who would also fall under the provisions limiting foreign funding of media activities) to be affected by the Law when reporting on Azerbaijan. Given this lack of legal certainty (lack of predictability) and the possible inconsistency in its application (in that certain media outlets, in addition to being subject to the jurisdiction of their country of origin, will also be subject to the jurisdiction and powers of the regulatory authorities of Azerbaijan depending on whether their activities are considered to be "*oriented to territory and population of the Republic of Azerbaijan*"), the Venice Commission recommends to delete these provisions.

B. Restrictions on activities and content (Articles 7-9, 11, 14, 15 and 21)

15. The Law contains various restrictions on the activities of media entities and journalists and the content of what can be reported and hence interferes with their rights to freedom of expression as protected by Article 10 ECHR. In the Court's case-law, the essential role of the press in a democratic society is connected with its task of imparting information and ideas on all matters of public interest for the corollary right of the public to be properly informed. The sections below will analyse if these interferences can be justified. It is recollected that in case of interferences with Article 10 of the ECHR, the Court analyses:
1) whether the impugned measures are "prescribed by law", which implicitly refers to a certain quality of the law in question, both in terms of the accessibility and foreseeability (or clarity) of the legal rules in question[12];
2) whether they pursue a legitimate aim, as provided by paragraph 2 of Article 10 ECHR, namely "*the protection of national security, the protection of territorial integrity, the protection of public safety, the prevention of disorder or crime, the protection of health, the protection of morals, the protection of the reputation or rights of others, the prevention of the disclosure of information received in confidence and the maintenance of the authority and the impartiality of the judiciary*"; and
3) whether they are "necessary in a democratic society", which according to the Court requires a "pressing social need" for these measures, whereby a proportionate balance needs to be struck between the measures chosen to satisfy a legitimate aim and the degree of injury inflicted on expression rights. Where freedom of the media and journalists is at stake, the authorities have only a limited margin of appreciation to decide whether a "pressing social

[11] See e.g. Reporters without Borders (RSF), *RSF calls for revision of Azerbaijani bill legalising censorship* (30 December 2021).
[12] See *inter alia* ECtHR, *Gawęda v. Poland*, no. 26229/95, §39, 14 March 2003; *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, §49, Series A no. 30.

need" exists.[13] The Court thus closely examines whether the national authorities provided relevant and sufficient reasons to justify its measures of interference.

16. The dissemination of information in violation of Articles 7-9, 11, 14, 15 and 21 will have consequence for the licences of audiovisual media, may lead to a court order to suspend or even terminate the operations of print or on-line media and, according to the Code on Administrative Offences on the abuse of freedom of media and journalistic rights, may also entail administrative liability.[14]

1. Articles 7-9 (martial law, state of emergency, religious extremism and terrorism)

17. Article 7 of the Law provides that the "*activities of workers in the field of media during martial law and state of emergency are regulated by the Laws of Azerbaijan on Martial Law and on the State of Emergency*". The respective provisions of these laws in turn impose censorship on the media during a state of emergency or martial law, restricting the content of what can be distributed or published by the media. Similarly, Article 9 of the Law provides that "*the activities of media workers in a zone where an anti-terror operation is conducted are regulated by the Law of Azerbaijan on Combating Terrorism*", which imposes restrictions on the media's access to the site of an anti-terror operation and restricts the type and content of information that the media can distribute or publish regarding operations against terrorism or on a specific case. In turn, Article 8 of the Law outlines that "*[m]edia workers' activities in the area where a special operation against religious extremism is conducted shall be determined by the body conducting the operation*" whereby the "*public is informed about a special operation conducted against religious extremism in the form and amount determined by the body conducting the operation*" and "*dissemination of information envisaged in Article 9.3 of the Law of the Republic on Combating Religious Extremism is not allowed"*. This provision is understood to refer to information that outlines the tactics of special operations against religious extremism, may cause a threat to the life and health of people, interferes with the conduct of the special operation, justifies or promotes religious extremism, or outlines which persons participate in or help conduct these operations.

18. It is not possible to assess the legitimacy and the proportionality of the rules contained in the Laws on Martial Law, on the State of Emergency, on Combating Religious Extremism and on Combating Terrorism *in abstracto*. However, as outlined in the Council of Europe guidelines on protecting freedom of expression and information in times of crisis, states should refrain to limit unnecessarily the rights of media professionals such as their freedom of movement and access to information under the pretext of a crisis.[15] Similarly, the Venice Commission has held that "[*i*]*n an emergency context, however, restricting freedom of expression would deprive the public of an essential check on the increased executive powers*".[16] Furthermore, "*because the regime of emergency powers affects democracy, fundamental and human rights, as well as the rule of law"*, control by the media (in addition to parliamentary and judicial control) of "*the declaration and prolongation of the state of emergency, as well as of activation and application of emergency powers is vital*".[17] Specifically as regards combating terrorism, the Commission also held that "*[l]imitations on the media reporting during a terrorist crisis should*

[13] ECtHR, *Stoll v. Switzerland* [GC], no. 69698/01, §105, 10 December 2007.
[14] Article 388 of the Code on Administrative Offences foresees fines in an amount of two hundred to three hundred manats (110-165 EUR) for individuals or two thousand to three thousand manats (1110-1650 EUR) for legal entities for – for example – disclosure of information prohibited by law for disclosure. It would appear that fines under this article are frequently imposed on journalists.
[15] Council of Europe, CM/Del/Dec(2007)1005/5.3-appendix11, *Guidelines of the Commission of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis* (Adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies). A crisis in this context "*includes, but is not limited to, wars, terrorist attacks, natural and man-made disasters, i.e. situations in which freedom of expression and information is threatened (for example, by limiting it for security reasons)*".
[16] Venice Commission, CDL-AD(2020)014, Report - Respect for democracy, human rights and the rule of law during states of emergency: Reflections, paragraph 50.
[17] Ibid, paragraphs 79 and 91.

be of short duration, and concern only specific types of information (…), in line with the principle of proportionality. The journalists should be free to inform the public about the general situation during the terrorist crisis, subject to their duties under the ECHR; principles of responsible media coverage may be defined in the self-regulations".[18]

19. The authorities of Azerbaijan have stated that regulations on the activities of the media in times of crisis (i.e. during martial law and emergency situations, during special operations against religious extremism and/or anti-terror operations) aim to protect public order and the rights of others. It is furthermore stated by the authorities that rather than hindering their professional activities, the regulations create conditions for journalists to operate in a safe environment and oblige state bodies to provide media representatives with detailed information on relevant facts and events to allow for access and the operative acquisition of information. However, none of this is obvious from the references in Articles 7-9 of the Law, nor from the provisions of the Law on Martial Law, the Law on Emergency Situations, the Law on Countering Religious Extremism or the Law on Countering Terrorism, which mainly refer to restrictions placed on the media regarding their access to certain places and/or the information they can publish. In this context, it can be questioned whether the general references to other legislation provide for interferences with Article 10 ECHR which are sufficiently foreseeable. Given the importance of the provision of accurate, timely and comprehensive information in times of crisis (be it a war, natural disaster, terrorist attack etc.), the Venice Commission finds that the Law should provide for clearer and more accessible legal grounds for restricting the exercise of freedom of expression, with sufficient procedural safeguards.[19]

2. Article 11, paragraph 4 (reciprocity of restrictions)

20. Article 11, paragraph 4 of the Law, provides that *"In the event that other states impose special restrictions on the professional activities of journalists included in the Media Register, similar restrictions may be imposed in the Republic of Azerbaijan on journalists from the states which imposed those restrictions"*. According to the authorities this provision has been included in the Law to protect the professional activities of Azerbaijani journalists abroad and to indicate that any interference in their activities is not accepted by Azerbaijan. The Venice Commission considers that the activities of journalists, whether foreign or national, should not be susceptible to political interference and should impair their right to gather news as little as possible. The mere fact that a foreign jurisdiction has imposed restrictions on one or more journalists from Azerbaijan cannot form a sufficient justification for imposing similar restrictions on journalists from these states. Such a ban solely based on the country of origin of the journalists concerned would be discriminatory and cannot be considered either to pursue one of the legitimate aims mentioned in Article 10, paragraph 2 ECHR, nor to correspond to a pressing social need.[20] This provision should therefore be deleted from the Law.

3. Article 14 (restrictions on content)

21. Article 14 of the Law provides for extensive restrictions on what type of information can be published and/or disseminated by the media.[21] Such information should *inter alia* not: call

[18] Venice Commission, CDL-AD(2018)024, Opinion on the Law on preventing and combating terrorism of the Republic of Moldova, paragraph 87.

[19] Guidance for such provisions can be found in the abovementioned Guidelines on protecting freedom of expression and information in times of crisis, which *inter alia* emphasise that member states "*should assure to the maximum possible extent the safety of media professionals – both national and foreign*"; "*guarantee freedom of movement and access to information to media professionals*" and "*constantly strive to maintain a favourable environment, in line with the Council of Europe standards, for the functioning of independent and professional media, notably in crisis situations*".

[20] See in this context also United Nations Human Rights Committee, General Comment No. 34 to Article 19 of the International Covenant on Civil and Political Rights, CCPR/C/GC/34, providing that accreditation (including those of foreign journalists) "*should be applied in a manner that is non-discriminatory and* (…) *based on objective criteria* (…).

[21] Pursuant to Article 66.2, a court can also prohibit the import and dissemination of foreign print media products if it contains any of the content outlined in Article 14 (with the exception of those on the use of the state language).

for the disintegration of its territorial integrity, disrespect state symbols or norms of the state language; "propagate" terrorism, religious extremism, violence and/or cruelty; use words, expressions, gestures with "immoral lexical content" (swearing); humiliate someone's honour or dignity or tarnish his/her business reputation; disseminate "secret" information about a person's family and private life, "propagate" actions contrary to health and environment; present facts and developments one-sidedly; "propagate" parapsychology, superstition or "other sorts of fanaticism".[22]

22. The Venice Commission points out that prior restraints on the press are not themselves incompatible with Article 10.[23] However, such restraints must not provide a subterfuge for repressive measures against anti-governmental media.[24] As mentioned before, "*it may be considered necessary in democratic societies to sanction or even prevent forms of expression which spread, incite, promote or justify hatred based on intolerance*".[25] Indeed, various international instruments urge states to take positive measures to combat hate speech or to protect children against sexually explicit or violent media content. However, since prior restraints "*constitute one of the most serious threats to the free flow of information and public debate, it [the Court] will subject them to the most stringent scrutiny".*[26]

23. Scrutiny under Article 10 ECHR would obviously follow the three-fold test to see whether the restrictions on content can be considered as a justifiable interference with the right to freedom of expression. Under such scrutiny, most restrictions outlined in Article 14 of the Law fall short, in that they are too ambiguous, leaving too much room for arbitrary interpretation and thereby lacking foreseeability (e.g. the "propagation" of various actions or the dissemination of "immoral lexical content"). Furthermore, it cannot be accepted that they pursue a legitimate aim (e.g. the "propagation" of parapsychology or superstition; disrespect of state symbols; one-sided presentation of facts etc.). Of course, it is an illusion that absolute legal certainty can be achieved through a legal text, and it is clear that the protection of territorial integrity, the prevention of terrorism, the protection of health and the protection of the reputation or rights of others (which to a certain extent find their reflection in Article 14 of the Law) are all legitimate aims which the State may pursue under Article 10 ECHR. However, when freedom of the press is at stake, a "pressing social need" would have to be clearly identifiable and significant enough to warrant such restrictive measures, even if these legitimate aims were to be more precisely defined in Article 14 of the Law.[27] It is however difficult to deduce from – for example – a general restriction on "actions that are contrary to the protection of health" in Article 14 an underlying pressing social need of sufficient significance to justify an interference with Article 10 ECHR. In general, the restrictions contained in Article 14 give the authorities too much latitude to control the exercise of the right to freedom of expression and thus do not meet the requirements of Article 10 ECHR.

24. More specifically, as regards one of the aims mentioned in Article 14 to counter "disintegration of territorial integrity", the Venice Commission has stressed that *"in the absence*

[22] Article 14 of the Law also makes references to other legislation, such as the Law on Information, Informatisation and Protection of Information, which provides additional restrictions on "owners of information resources", for example prohibiting the placement of information of "*an insulting or defamatory nature*" (etc.).
[23] ECtHR, *Gawęda v. Poland*, no. 26229/95, §35, 14 March 2003; *Observer and Guardian v. the United Kingdom,* 26 November 1991, §60, Series A no. 216.
[24] D. Harris, M. O'Boyle, C. Warwick, *Law of the European Convention on Human Rights* (4th edn, OUP, Oxford 2018), p. 618.
[25] Venice Commission, CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, paragraph 52.
[26] Venice Commission, CDL-AD(2015)004, Opinion on draft amendments to the media law of Montenegro, paragraphs 14-16, outlining also that the Court requires "*that the criteria for prior restraints be clearly indicated in the law and procedural safeguards help to avoid those arbitrary encroachments upon the freedom of expression take place. In this regard, the principle of proportionality is of particular importance. 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".* See also ECtHR, *Gawęda v. Poland* and *Observer and Guardian v. the United Kingdom,* as cited above.
[27] ECtHR, *Pentikäinen v. Finland*, no. 11882/10, §87, 4 February 2014; *Morice v. France*, no. 29369/10, §124, 11 July 2013; *Stoll v. Switzerland*, no. 69698/01, §101, 25 April 2006.

of an element of "violence", the prohibition on expression favouring territorial separatism (which may be seen as a legitimate expression of a person's views), may be considered as going further than is permissible under the ECHR".[28] Furthermore, regarding the presentation of "facts and developments one-sidedly" and the statements of the authorities that the media "*should not change correct, impartial information, objective opinions or abuse them in order to create public opinion*", the Venice Commission has already considered that "facts" cannot always be distinguished from "opinions", and that "*the vagueness of the terms employed (…) may turn those provision into a suppression of free speech, even if originally it was supposed to promote non-opinionated news reporting"*.[29] This must be seen against the background of well-established case-law of the Court, in that Article 10 ECHR is not only "*applicable to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offence, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'* ".[30] Finally, regarding the humiliation of "someone's honour or dignity or tarnishing his/her business reputation" and the "secret information about a person's family", the wording of these provisions are very ambiguous and may prevent journalists from reporting for instance on the secret wealth of oligarchs and their family members. This restriction must be seen in light of the so-called corporate secrecy amendments, which came into effect in October 2012, curtailing public access to information about ownership structures and charter capital of commercial entities, thereby hindering journalistic investigations into corruption.[31]

25. In light of the above, the restrictions on content of media information in Article 14 of the Law, which constitute extensive prior restraints, should in order to be compatible with the case-law of the Court on Article 10 ECHR, provide for more legal certainty, by thoroughly revising or deleting ambiguously worded restrictions, repealing those restrictions which do not pursue a legitimate aim and making sure that for any remaining restrictions a pressing social need warranting such restrictions can be identified.

4. Article 15, paragraph 1, sub 3 and 4 (information on preliminary investigations)

26. Article 15, paragraph 1, sub 3 of the Law prohibits the dissemination of "*preliminary investigation information without the permission of an interrogator, investigator, prosecutor who perform the procedural management of a preliminary investigation or a court*". Article 15, paragraph 1,sub 4 in turn prohibits the dissemination of "*actual copies of criminal prosecution materials that are compiled in accordance with the Criminal Procedure Code of the Republic of Azerbaijan and regarded as information documented in accordance with the Law of the Republic of Azerbaijan on Obtaining Information"*.

27. The media reporting on criminal proceedings is a matter at the crossroads of Article 10 ECHR, Article 6 ECHR on the right to a fair trial and Article 8 ECHR on the right to respect for private and family life. In this respect, the Court has observed, that *"[r]estrictions on freedom of expression permitted by the second paragraph of Article 10 'for maintaining the authority and impartiality of the judiciary' do not entitle States to restrict all forms of public discussion on matters pending before the courts.* (…) *Whilst the courts are the forum for the determination of a person's guilt or innocence on a criminal charge, this does not mean that there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in*

[28] Venice Commission, CDL-AD(2014)010, Opinion on the Draft Law on the Review of the Constitution of Romania, paragraph 73.
[29] Venice Commission, 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, paragraph 50.
[30] *Observer and Guardian v. the United Kingdom*, 26 November 1991, §60, Series A no. 216, §59; *Handyside v. the United Kingdom*, 7 December 1976, §49, Series A no. 24.
[31] Council of Europe, "Analysis of Azerbaijani Legislation on Access to Information", EU / Council of Europe Joint Programme "Partnership for Good Governance" (2017), p. 16; Institute for Reporters' Freedom and Safety, "A comprehensive analysis of Azerbaijan's Media Landscape" (June 2017).

specialised journals, in the general press or amongst the public at large".[32] As outlined in Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings, the possible conflicting interests protected by Articles 6, 8 and 10 ECHR make it necessary to balance these rights in view of the facts of every individual case. As a general principle: "*[t]he public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles*".[33] These limitations include (but are not limited to) the right to presumption of innocence, the right to the protection of privacy of suspects, accused or convicted persons or other parties to criminal proceedings (with particular protection to be provided to parties who are minors or other vulnerable persons, victims, witnesses and the families of suspects accused or convicted). They also require judicial authorities to "*inform the media about their essential acts, so long as this does not prejudice the secrecy of investigations and police inquiries or delay or impede the outcome of the proceedings*".[34] As is clearly argued by the Court "*publicity contributes to the achievement of the aim of Article 6, para. 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society"*.[35]

28. In earlier opinions the Venice Commission has maintained that certain restrictions on reporting on criminal or administrative proceedings can indeed be justified, indicating that publishing pictures, identification or records of convicted minors must be prohibited at all times.[36] Similar restrictions can be imposed to – for example – protect the identity of a victim or to safeguard the presumption of innocence. However, such specific restrictions fundamentally differ from a general requirement to obtain prior permission of a public authority to publish. The authorities have indicated that this requirement to obtain prior permission only refers to a specific set of documents, which have been given the status of confidential documents pursuant to the Code of Criminal Procedure. It is however not clear which specific set of documents is referred to in Article 15 of the Law (which may lead journalists to self-censor themselves). While Article 15, paragraph 1, sub 3 applies only to information related preliminary investigations, Article 15, paragraph 1, sub 4 refers to "*actual copies of criminal prosecution materials*". The right of the public to receive information on criminal and administrative proceedings does not sit well with a general requirement upon journalists and media entities to seek prior permission to publish such information, notwithstanding responsibilities of journalists and media entities to balance the public interest served by imparting this information with the rights to a fair trial and to privacy of the parties directly involved in the proceedings. In light of this, the Venice Commission recommends to delete Article 15, paragraphs 1, subs 3 and 4 from the Law or at the very least clarify in the Law which specific documents related to a preliminary investigation or prosecution require prior permission to be published, whereby it also needs to be ensured that this requirement relates to a specific, narrowly defined set of documents for which it can be shown that there is a justifiable and overriding interest to require such prior permission.

[32] ECtHR, *Worm v. Austria,* 29 August 1997, §50, Reports of Judgments and Decisions 1997-V.
[33] Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings (Adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies), principle 1 and further.
[34] Ibid, principle 6. More specifically as regards the secrecy of investigations, the Court has emphasised that this is geared to protecting, on the one hand, the interests of the criminal proceedings by anticipating risks of collusion and the danger of evidence being tampered with or destroyed and, on the other, the interests of the accused, notably from the angle of presumption of innocence, and more generally, his or her personal relations and interests. Such secrecy is also justified by the need to protect the opinion-forming and decision-making processes within the judiciary. See for example, ECtHR, *Brisc v. Romania*, no. 26238/10, §109, 11 December 2018; *Bédat v. Switzerland [GC]*, no. 56925/08, §68, 29 March 2016; *Dupuis and Others v. France*, no. 1914/02, §44, 7 June 2007; *Tourancheau and July v. France*, no. 53886/00, §63, 24 November 2005.
[35] ECtHR, *Sutter v. Switzerland,* no. 8209/78, §26, 22 February 1984.
[36] Venice Commission, CDL-AD(2009)055, Opinion on the Draft Law about obtaining information on activities of the Courts of Azerbaijan, paragraph 27.

5. Article 21 (Use of secret and hidden recordings)

29. Article 21 in essence prohibits secret audio and video recordings and photographs if there is no written consent of the person recorded or photographed or if it is not authorised by a court. The Venice Commission considers that, in particular when it concerns public figures, the public interest may prevail over the right to privacy of secretly recorded or photographed persons, provided the rights of third parties are protected. A categorical prohibition on the use or dissemination of such recordings and photographs without the consent of the person concerned or a court order is not compatible with Article 10 ECHR. In a case in which the Court examined the fair balance to be struck between the rights protected by Article 10 and those protected under Article 8 ECHR, with regard to an article accompanied by intimate photographs taken from secretly recorded video footage of a public figure, the Court held that Article 8 ECHR does not entail a legally binding pre-notification requirement prior to the publication of information about a person's private life.[37] In this light, a requirement to always obtain written consent of the subject of the secret recording or photograph or a court authorisation seems disproportionate and unworkable, and should therefore be revoked.

C. Disclosure of confidential sources (Article 15, paragraph 3)

30. Article 15, paragraph 2 of the Law provides that an editor and/or a journalist responsible may not be forced to disclose the source of information in connection with a case being investigated or dealt with by a court, except for cases specified in Article 15, paragraph 3 of the Law. Article 15, paragraph 3 of the Law in turn requires the editor or journalist responsible to disclose their sources based on a court ruling, in the following cases: in order to protect human life, to prevent serious and particularly serious crimes (i.e. those crimes carrying a sanction of a minimum of seven years' imprisonment) or to defend a person who is accused of committing a serious or particularly serious crime.

31. The protection of journalistic sources is one of the cornerstones of freedom of the press, as outlined in various cases before the Court. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest, which can undermine the vital "public watchdog" role of the press and adversely affect the ability of the press to provide accurate and reliable information.[38] Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potential chilling effect an order of source disclosure has on the exercise of that freedom, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest, as stated by the Venice Commission specifically in respect of Azerbaijan.[39] While the cases referred to in Article 15, paragraph 3 of the Law fall within the statutory exceptions to the right to protection of a journalist's sources, this does not mean that under all circumstances a journalist or editor is to disclose his/her sources, even if this for example could prevent a crime.[40]

32. In cases concerning the protection of journalistic sources, the Court frequently refers to Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information. As it has done in previous opinions,[41] the Venice Commission recommends to align Article 15, paragraph 3, with Recommendation No. R (2000) 7 by complementing the

[37] ECtHR, *Mosley v. the United Kingdom*, no. 48009/08, §132, 10 May 2011.
[38] ECtHR, *Ressiot and Others v. France*, nos. 15054/07 and 15066/07, § 99, 28 June 2012; *Tillack v. Belgium*, no. 20477/05, §53, 27 November 2007; *Ernst and Others v. Belgium*, no. 33400/96, §91, 15 July 2003; *Goodwin v. the United Kingdom*, no. 17488/90, §39, 27 March 1996.
[39] Venice Commission, CDL-AD(2013)024, Azerbaijan – Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, paragraph 97. See also ECtHR, *Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, §59, 15 December 2009; *Goodwin v. Kingdom*, no. 17488/90, §39, 27 March 1996.
[40] See in a similar vein: ECtHR, *Jecker v. Switzerland*, no. 35449/14, §41, 6 October 2020.
[41] Venice Commission, 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, paragraphs 55 and 56.

right of journalists not to disclose their sources of information, referred to in Article 15, paragraph 2 of the Law, with a clear provision indicating that a court can only order disclosure if "(…) *it can be convincingly established that (i) reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and that (ii) the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that an overriding requirement of the need for disclosure is proven; the circumstances are of a sufficiently vital and serious nature and the necessity of the disclosure is identified as responding to a pressing social need* (…)*".*[42]

D. Establishment of media entities (Article 26)

33. The Law sets out requirements regarding the establishment of four different media entities: audiovisual media entities, print media entities, online media entities and news agencies.[43] The Law requires that the founder of a media entity is "*a citizen of Azerbaijan, permanently residing in Azerbaijan*".[44] In addition, persons who have a previous conviction for serious or particularly serious crimes or for "*crimes against public morality*"[45], whose convictions have not been served or revoked or who are regarded by the court as having limited legal capacity cannot be establish (or "participate" in) a media entity.[46] Furthermore, the Law provides for strict limitations on the foreign funding of media entities.[47]

34. These limits on founding and participating in media entities may unnecessarily restrict access to the media market in Azerbaijan and limit the possibility of various individuals from exercising their right to freedom of expression through founding (or participating in) a media entity, by reference to their nationality, citizenship and crimes which by their very nature have little connection with the establishment of media entities. It is difficult to understand why someone who has – for example – been convicted for damaging an historic monument, should be excluded from founding (or participating in) a media entity. In addition, a requirement relating to criminal convictions cannot be evaluated without taking the Court's judgments relating to the arbitrary application of criminal legislation in Azerbaijan into account.[48]

35. As previously outlined by the Venice Commission, "*[p]luralism of the media may (…) be considered as one aspect of freedom of expression. (…) Media pluralism is achieved when there is a multiplicity of autonomous and independent media at the national, regional and local levels, ensuring a variety of media content reflecting different political and cultural views*".[49] In the view of the Venice Commission, legal provisions on media ownership should foster the policy aims of media pluralism and independence.[50] Any restrictions on founding or owning

[42] Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information (Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies), principle 3.

[43] As regards this categorisation, the rapporteurs refer to the comments provided in the abovementioned legal analysis commissioned by the OSCE.

[44] If the founder is a legal entity, the preferential share in its authorised capital (75 percent) must belong to a citizen or citizens of the Republic of Azerbaijan permanently residing in the country or a legal entity registered in the Republic of Azerbaijan.

[45] Crimes against public morality is a separate chapter in the Criminal Code on such as criminal offences as the production and distribution of pornographic materials or objects, prostitution, organising and maintaining a brothel or gambling venue, desecrating graves and the deliberate destruction or damage of historical and cultural monuments.

[46] In addition, political parties and religious organisations may only be founders or shareholders of print media.

[47] To this end, Article 26, paragraph 5 of the Law provides that the funding of a media entity by individuals or legal entities of foreign countries which are not its founders (or shareholders, bearing in mind that 75% of the preferential share of the authorised capital of a media entity must belong to a citizen of Azerbaijan, permanently residing in the country or a legal entity registered in Azerbaijan) is prohibited.

[48] See for example the reference to a number of these judgments in *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, §223, 20 September 2018, in which the Court states *"these judgments reflect a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law."*

[49] Venice Commission, CDL-AD(2005)017, Opinion on the compatibility of the laws 'Gasparri' and 'Franttini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, paragraphs 37 and 40.

[50] See also Recommendation CM/Rec(2018)1, of the Committee of Ministers to member States on media pluralism and transparency of media ownership (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies).

media entities should align with these objectives. The Law falls short of this, for instance as regards to the exclusion of foreign ownership and the limitations of foreign funding. More specifically as regards foreign ownership, the Venice Commission refers to Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content, which provides: "*Any restrictions on the extent of foreign ownership of media should be implemented in a non-arbitrary manner and should take full account of States' obligations under international law and, in particular, the positive obligation to guarantee media pluralism*".[51] It is difficult to find objective justifications for excluding persons with foreign nationality, persons with Azerbaijani nationality residing abroad or persons with previous convictions for crimes which have limited connection to media activities from founding or participating in media entities. These provisions should therefore be repealed.

E. The Council (Article 43)

36. The Law establishes the Audiovisual Council of the Republic of Azerbaijan (hereinafter: the Council), which has broad powers to regulate and control audiovisual media entities.[52] As outlined by the Venice Commission, *"[a]lthough there is no single European model of organisation of media regulatory authorities, the overarching principle is that an institution overseeing the media should be independent and impartial: this should be reflected especially in the way how their members are appointed*".[53] Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector underlines "(…) *to guarantee the freedom of the media whilst at the same time ensuring a balance between that freedom and other legitimate rights and interest*", (…) *specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play* (…)".[54] The recommendation sets out a number of criteria to safeguard the independence of regulators, as regards the status and powers, financial autonomy, autonomy of decision-makers, knowledge, transparency and accountability mechanisms.

37. Article 45, paragraph 1 of the Law provides that the Council has "*organisational and functional independence, and unlawful interference in its activities is inadmissible*". It is financed from the state budget and *"other sources not prohibited by law"* (Article 43, paragraph 2 of the Law), which implies that the Council will be systematically dependent on the State's discretion to provide its budget annually. Furthermore, "*the structure of the Council and the number of its staff*" are to be "*determined by a body (…) designated by a relevant executive authority*" (Article 45, paragraph 2 of the Law) and its seven members are "*appointed to their position and relieved of their position by a body (…) designated by a relevant executive authority*" (Article 48, paragraph 2 of the Law).[55] In spite of Article 45, paragraph 1 of the Law, the Council cannot be considered to be an independent regulatory body: It lacks the necessary financial independence, decision-making autonomy and independently selected and nominated members.[56] This lack of independence of the Council from the executive is a matter of concern in view of its powers regarding the licensing of audiovisual media (see further

[51] Ibid, paragraph 3.7.
[52] As set out in Article 46, the Council is *inter alia* authorised to adopt regulations, set quality indicators for audio and images in audiovisual broadcasting, issue licences for audiovisual media entities, carry out inspections in the field of entrepreneurship, make binding decisions on audiovisual media entities, carry out the planning of terrestrial frequencies for radio broadcasting, give consent to the broadcasting of foreign audiovisal broadcasting programmes, take measures in accordance with the Code of Administrative Offences etc.
[53] Venice Commission, CDL-AD(2020)013, Albania – Opinion on draft amendments to the Law no. 97/2013 on the Audiovisual Service, paragraph 37.
[54] Recommendation Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector, Adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies.
[55] According to Article 2.2. of the Decree of 8 February 2022 of the President of the Republic of Azerbaijan on the Implementation of the Law of the Republic of Azerbaijan "On Media", the relevant executive authority is the President of the Republic.
[56] Preferably the mandates of members of the Council would be non-renewable, so that members of the Council can give their opinion free of any considerations on being reappointed (which corresponds to the Venice Commission's position on ombudspersons as outlined in the Venice Principles).

below). In view of the Venice Commission, the existing institutional model of the Council should be revised in line with Article 45 paragraph 1 of the Law, to ensure that it is enjoys sufficient independence from the executive.

F. Licensing of audiovisual media (Article 50)

38. On top of the requirements for founding or owning a media entity, the Law establishes a licensing system for operating audiovisual media. These licenses will be issued by competition. Under the third sentence of Article 10, paragraph 1 ECHR, countries may indeed regulate by means of a licensing system the way in which broadcasting is organised on their territory, particularly in its technical aspects. As a result of the technical progress over the last decades, the ECtHR considers that the justification for restrictions relating to frequencies and channels available are no longer relevant.[57] However, the Court has made it explicit that the compatibility of the decisions under which a license is (not) granted will still have to be assessed in light of the other requirements of paragraph 2 of Article 10 ECHR.[58] In respect of the Law in Azerbaijan, much will depend on how the licensing system will operate in practice, once it is operational from 8 August 2022 onwards, to determine whether decisions on (not-)issuing licenses are in conformity with Article 10 ECHR. In this context reference is also made to the Court's observations on pluralism in the audiovisual sector, indicating that in such a sensitive sector, in addition to its negative duty of non-interference, the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.[59]

39. The authorities have stated that licences for audiovisual media in Azerbaijan are issued for an indeterminate period of time and would only incur small (sometimes symbolic) fees. The Venice Commission welcomes this. It nevertheless considers that the licensing system foreseen by the Law is overly restrictive and limits freedom of expression, in that it 1) foresees licensing instead of registration for all types of audiovisual media services, 2) extends licensing beyond national and regional terrestrial television and radio broadcasters to satellite and cable-based television (platform broadcasters) and to on-demand broadcasting, none of which are related to the use of scarce resources (and which would usually be subject to a duty to register only), 3) appears to confuse the licensing of audiovisual content-services (television and radio) with those of electronic communication services (cable and satellite) and 4) does not provide for adequate authorisation of electronic communication services.[60] Amendments to the Law on Licences and Permits of April 2022 make clear that platform operators are also covered by a licensing requirement. The justification for imposing such an extensive licensing regime is not clear. The authorities have stated that the licensing regime for broadcast media using limited resources is carried out on the basis of a competition, whereas for other audiovisual media entities the licences are issued without competition and, as such, it is a mere formality. This differentiation is however not clear from the Law. The Venice Commission therefore recommends that it be spelled out in the Law that platform broadcasters, on-demand

[57] *Informationsverein Lentia and Others v. Austria*, nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, §39, 24 November 1993.
[58] ECtHR, *Demuth v. Switzerland*, no. 38743/97, §33, 5 November 2002; *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, no. 32240/96, § 25, 21 September 2000; *Informationsverein Lentia and Others v. Austria*, nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, §32, 24 November 1993.
[59] ECtHR, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, §134, ECHR 2012.
[60] See in this context also Recommendation Rec(2000)23. General Comment No. 34 to Article 19 ICCPR (paragraph 39) in turn outlines that *"[s]tates parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of paragraph 3 [of Article 19 ICCPR]. Regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge. (…)States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations. (…) It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses*". See also for further good practices on licensing: Commonwealth Broadcasting Association, "Guidelines for broadcasting regulation" (2008).

broadcast service providers and platform operators do not require a license but are only subject to a registration requirement.

40. Licenses can be suspended and ultimately terminated by the Council for a variety of reasons set out in Article 58 of the Law (e.g. if the requirements for setting up a media entity have been violated, if broadcasting is not carried out for thirty consecutive days or sixty days in one year etc.). The suspension and termination of a license should be a measure of last resort. As outlined in Recommendation Rec(2000)23, "*[a] range of sanctions which have to be prescribed by law should be available, starting with a warning. Sanctions should be proportionate and should not be decided upon until the broadcaster in question has been given an opportunity to be heard. All sanctions should also be open to review by the competent jurisdictions according to national law*".[61] In a similar vein the Venice Commission has outlined that "*[t]he principle of 'proportionate and progressive' application of sanctions is particularly important in respect of powers of the Media Council which may be considered as 'censorship' powers: this is (…) the power to withdraw from the media outlet its broadcasting licence (…). (…) [I]t should be made clear in the law that the Media Council may use its powers to impose heavy sanctions (…) only as a measure of last resort, where all other reasonable attempts to steer the media outlet on the right path have failed, and where it is publications repeatedly and seriously (both conditions should be satisfied) endangered public peace and order (for example, where the media outlet has repeatedly made calls for unlawful violence in respect of minority groups or advocated a violent overthrow of a democratic public order)".*[62] The authorities have stated that it is possible on the basis of other legislation to impose other sanctions (such as warnings, suspension of broadcasting for 1 to 24 hours or fines) and thus proportional sanctions have been provided for. In the view of the Venice Commission, the Law itself should ensure the proportionality of sanctions (for example, currently a license can already be terminated if there is incorrect information found in the documents submitted for obtaining a license, pursuant to Article 58, paragraph 1, sub 6, or if the requirements on setting up a media entity have been violated without reference to the gravity of these shortcomings - see further above). The provisions in question should guarantee that these sanctions are applied progressively and should envisage a transparent and fair procedure in which the license holder is heard and can have the decision to suspend or terminate his/her license reviewed. As indicated by the Court, the principle of fairness in the procedure, and procedural guarantees also apply in the context of a refusal to issue a broadcasting license.[63] By analogy this applies to the suspension and termination of licences as well.

G. Publication of print and on-line media products (Article 62)

41. The Venice Commission welcomes that according to Article 62, paragraph 1 *"permission from state authorities is not required to found print media and an online media entity"*. However, such entities will be subject to the same requirements on founding and "participating" in a media entity as for other media entities, as described above, with the Law additionally providing that the operation of print and on-line media entities may only be financed "*with the sponsorship of citizens of the Republic of Azerbaijan and legal entities of the Republic of Azerbaijan"* and that only 25 percent of each item they produce may be financed by foreign natural or legal persons (Article 69, paragraphs 1 and 2). In apparent contradiction to Article 62, paragraph 1, in order to operate as a print or on-line media entity an "application" must be made to the Media Development Agency seven days prior to the first time the print or on-line media produces a print media product or distributes material (Article 62, paragraph 2). From Article 73, paragraph 5, it would appear that such an application would ultimately lead to inclusion in the Media Register (on which further below). The authorities of

[61] Recommendation Rec(2000)23, paragraph 23.
[62] Venice Commission, 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, paragraphs 40 and 41.
[63] ECtHR, *Aydoğan and Dara Radyo Televizyon Yayıncılık Anonim Şirketi v. Turkey*, no. 12261/06, §43, 13 February 2018.

Azerbaijan indicate that this application would merely serve to inform them of the existence of a print or on-line media entity and should not be seen as a requirement to request permission to operate. If this is the case, it should be clarified in the Law that it is a formal requirement to notify the authorities rather than an "application" to be allowed to publish and disseminate print and online media products.

42. The Law further provides that the Media Development Agency can request the competent court to suspend operations of print and on-line media entities (and ultimately terminate such operations, if the "violations" have not been repaired), if (1) a foreign or stateless person, or a person without higher education, becomes the head of the governing body of such entity (Article 65, paragraph 2, sub 1), (2) a person who received an administrative penalty for abusing freedom of activity in the field of media and for abusing a journalist's rights commits the same offence within one year from the date of the administrative penalty (Article 65, paragraph 2, sub 2), (3) it is revealed that the print or on-line media entity is financed by foreign persons (legal or natural) (Article 65, paragraph 2, sub 4), or (4) it is revealed that the print media entity has not displayed or has intentionally misrepresented information required to be displayed (Article 65, paragraph 2, sub 5).

43. As outlined above, for a restriction on the rights protected by Article 10 ECHR to be justified, it would not only have to be prescribed by law but would also have to pursue one of the legitimate aims described in paragraph 2 of Article 10 ECHR and be necessary in a democratic society in that it corresponds to a pressing social need and is proportional to the aims pursued. The reasons given in Article 65 for which the operations of an on-line or print media entity can be suspended seem to have no or very little connection or relevance to the performance of the operations by such media entity. They cannot be related to any of the aims outlined in Article 10 ECHR and are additionally not proportionate to the aims pursued. While suspension of the operations of a print or on-line media entity could for example be legitimate on the basis of a court order if the entity was involved in repeated incitements to violence against an individual or a sector of the population,[64] a similar sanction seems wholly disproportional for situations in which for instance a person without higher education becomes the head of governing body of such an entity. The Venice Commission refers to its observations on the necessity of a proportionate and progressive application of sanctions in relation to audiovisual media above, which are of analogous relevance to print and on-line media. Article 65 would have to be replaced by a provision providing for proportionate sanctions, progressively applied, and providing for a transparent and fair procedure.

H. Journalists and their accreditation (Articles 70-72)

44. An entire chapter (7) of the Law deals with the activities of journalists. The Venice Commission welcomes that in earlier parts of the Law the right to independence of journalists and the unacceptability of illegally interfering in journalists' professional activities is explicitly provided for (Article 6, paragraphs 1 and 2 of the Law), and that the Law prescribes that it is "*unacceptable to persecute and exert pressure on journalists in connection with the collection, preparation, editing and production, and transmission of information*". The Law however does not seem to contain any provisions to enforce these parts. The authorities have reported that draft amendments to the Code of Administrative Offences have been prepared, which would establish administrative liability for the persecution or harassment of journalists for the collection, preparation, editing, production and transmission of information intended for public use and not restricted by the legislation of the Republic of Azerbaijan, in addition to the already existing Article 163 of the Criminal Code on the obstruction of journalists' legitimate professional activities.

[64] See in this vein, referring to a wider margin of appreciation of the state in these cases, ECtHR, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, §61, 8 July 1999.

45. More problematic are some other provisions which can have an unnecessary and detrimental effect on the activities of journalists. For instance, Article 1 of the Law gives a rather narrow definition of a journalist as "*a person who works on the basis of an employment agreement at a media entity or individually based contractor agreement*' and "*whose main activity is to continuously collect, prepare, edit, produce and transmit information, as well as to express an opinion (to comment) on that information, and who performs this activity for the purpose of gaining an income".* Council of Europe Recommendation No. R (2000) 7 defines a journalist as "*any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication*". Since 2000, it has however increasingly been recognised that is necessary to take a more flexible approach to the status of journalists. For example, General Comment No. 34 to Article 19 of the ICCPR provides: "*Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and other who engage in a forms of self-publication in print, on the internet or elsewhere (…)*".[65]

46. The definition of a "journalist" has wide implications for individuals pursuing journalist activities as regards their legal status, their working conditions (including social security) and to the privileges of their work in fulfilment of their role in a democratic society.[66] In the view of the Venice Commission, the notion of journalist should be defined and interpreted broadly, extending the democratic control by the media over authorities and other power holders ("public watchdog" role) to the broadest possible range of journalistic activities conducted by any individual to seek and impart information in the "*free exchange of opinions and ideas*"[67] serving the corollary public right to receive such material to be properly informed. The current definition in the Law is overly restrictive and would exclude journalists who do not have an employment agreement or individually based contractor agreement (thus excluding most freelancers), or who do not "continuously" (full-time) carry out this work (etc.). For journalists not covered by this definition, it will be impossible to register in the Media Register (on which further below), which presumably makes it impossible for them to carry out their work. They will not be accredited (and will thereby not be permitted to report on situations of martial law or a state of emergency or where a special operation against religious extremism or against terror is being conducted, or otherwise reap the benefits of accreditation, see below) and cannot – for example – enjoy the protection offered by Article 163 Criminal Code (which criminalises the obstruction of lawful professional activities of journalists). In the view of the Venice Commission, the current definition of a journalist therefore needs to be broadened and defined in line with their "public watchdog" role.

47. Furthermore, the Law foresees that journalists are to be issued with a press card (Article 70, paragraph 1 of the Law). This press card, which will be issued by "*a body designated by a relevant executive authority*" against a to-be-determined fee and will be valid for a period of three years, accredits journalists with state bodies (institutions), enterprises, organisations and non-governmental organisations with the consent of these organisations and in compliance with accreditation rules established by them to access information (Article 72). Foreign journalists are required to obtain the consent of the Ministry of Foreign Affairs first. Apart from privileged access to certain events and information, the accreditation also gives free access to museums and cultural events and entitlements to certain financial discounts (e.g. soft loans), discounts on certain trainings and "*benefits related to the improvement of social security and financial security*" (Articles 71 and 76). The accreditation can be taken away by the institution concerned if the journalist (or media entity) has "*disseminated information that*

[65] General Comment No. 34 to Article 19 ICCPR, paragraph 44.
[66] The relevance and importance of who is to be considered a journalist is first and foremost about who is entitled to so-called "media privilege", which means "*all provisions that (1) guarantee through special information rights that the media are able to fulfil their opinion-shaping function, (2) ensure through special protective instruments of a procedural nature that freedom of the media is safe from state interference and/or (3) prevent people affected by media reporting from being able to suppress it by reference to general provisions of civil or criminal law without any consideration of the media's freedom to communicate*". See "Journalism and the media privilege", *IRIS Special 2017-2*, European Audiovisual Observatory, Strasbourg (2017), p. 1.
[67] ECtHR, *Gillberg v. Sweden* [GC], no. 41723/06, §95, 3 April 2012.

tarnishes the business reputation of the institution they are accredited to" (or have disseminated information that is distorted or untrue, as confirmed by a court ruling, or have violated accreditation rules) (Article 72, paragraph 4).

48. The Venice Commission has observed earlier that "*(…) the issue of licensing journalists remains a very controversial one*".[68] As indicated above, General Comment No. 34 to Article 19 of the ICCPR outlines that "*general State systems of registration or licensing of journalists are incompatible with paragraph 3. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events.*[69] As further provided in this General Comment, such accreditation schemes would have to be "*applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on clear and non-discriminatory criteria and taking into account that journalism is a function shared by a wide range of actors*".[70] The authorities have indicated that the press card or accreditation is provided on a voluntary basis, and only serves to indicate that the person has been included in the Media Register: without obtaining such a card, journalists would still be able to carry out journalistic activities without any obstacles. However, the Venice Commission notes that the accreditation scheme does prevent journalists from having access to certain news events or institutions (in particular in light of provisions that permit only accredited journalists to report on situations of martial law or a state of emergency, or where a special operation against religious extremism or against terror is being conducted). It was also told of instances of journalists being asked by the police for their press card when covering demonstrations. Furthermore, linking certain unrelated benefits (e.g. soft loans) to the accreditation can easily be construed as a reward for government-friendly journalism. In this context, the Venice Commission notes that the accreditation can simply be withdrawn if an institution considers that its business reputation has been tarnished, which is hardly a guarantee for independent news gathering. In the view of the Venice Commission, the accreditation scheme as it currently stands does not pursue a legitimate aim and needs to be repealed.

I. Media register (Article 73-76)

49. The Law furthermore envisages in Article 73 the establishment of a Media Register, an electronic database managed by the Media Development Agency with the aim of systematising information on media entities (audiovisual, print and online media entities and news agencies) and journalists. Inclusion in the Media Register (with detailed information on the identity of journalists) appears to be a condition for media entities and journalists to carry out their media activities (considering also that journalists cannot be accredited without having been included in the Media Register, see above). For journalists to be included in the Media Register, the Law lists no less than twelve conditions in paragraph 74, paragraph 2. In addition to an employment contract or independent contractor agreement, some of the other conditions also appear to be excessive, such as the following requirements: 1) to have higher education, 2) at least three years' work experience (which leads to the question how any young journalist can accumulate this experience if they cannot be included in this register without having such experience), 3) to not have been previously convicted for serious or particular serious crimes or crimes against public morality, 4) to have served or to have been cleared of any conviction (which given the violations the Court has established in respect of Azerbaijan for the application of criminal legislation against journalists in the absence of a reasonable suspicion of an offence[71] seems especially problematic), 5) the media entity for which they work for being

[68] Venice Commission, CDL-AD(2010)053rev, Opinion on the warning addressed to the Belarussian association of journalists on 13 January 2010 by the Ministry of Justice of Belarus, paragraph 86.
[69] General Comment No. 34 to Article 19 ICCPR, paragraph 44.
[70] Ibid.
[71] See *inter alia:* ECtHR, *Mirgadirov v. Azerbaijan and Turkey*, no. *62775/14*, 7 September 2020; *Khadija Ismayilova (no. 2) v. Azerbaijan*, no. 30778/15, 27 February 2020; *Haziyev v. Azerbaijan*, no. 19842/15, 6 December 2018, *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014. It is noted that the execution of several of these judgments continue to be under

included in the register (which immediately rules out journalists who work for certain independent media outlets which have themselves not been able to get registered in Azerbaijan) and 6) the media entity for which a journalist works to operate "continuously" (the criteria of which seem particularly excessive for on-line media entities[72]).

50. The purpose of the establishment of the Media Register is not clear. It is not operational yet, and it is as yet unclear how it will be decided whether a journalist or media entity can be registered or not. The authorities have stated that registration in the Media Register is voluntarily but have not elaborated what the consequences of non-registration are. Presumably, journalists and media entities cannot legally continue their work without their inclusion in the Media Register (and may even expose themselves to charges of illegal entrepreneurship). In the view of the Venice Commission, as the Law stands the combination of a quite restrictive definition of a journalist with strict requirements for the registration as a journalist (and as a media entity) (as well the conditions for accrediting journalists as described above) are likely to have the effect of curtailing the right of journalists (and media entities) to impart information and the corollary right of the public to be properly informed in a way that is incompatible with Article 10 ECHR. In this respect, the Venice Commission again refers to General Comment No. 34 to Article 19 ICCPR, which provides that "*general State systems of registration or licensing of journalists are incompatible with paragraph 3 [of Article 19 ICCPR]*".[73] Moreover, since the role of the media and of journalists as the "public watchdog" is to hold authorities and other power holders accountable in a democratic society, the registration by state authorities of unnecessarily detailed personal information would create systemic risks for journalists. The Venice Commission considers that these provisions, and in particular the conditions as regards education, contract, experience and criminal convictions and the provision of detailed personal information, would need to be repealed, in order to offer the possibility to a wide range of actors engaged in journalist activities to register as journalists and for a wide range of media entities to be able to employ their activities in Azerbaijan in line with the requirements of the ECHR.

J. Other issues

51. The Law attempts to regulate almost everything related to the media sector in Azerbaijan, including on-line media (in what appears to be the first legislation in Azerbaijan to address on-line media). The Law is a clear case of overregulation in a legislative environment which was already very restrictive.[74] It is regrettable that the Law leaves no room for any self-regulation and thus limits the potential for responsible journalism to exist in its own right, with the Media Development Agency taking on the role of a Ministry of Media. In all matters that are regulated by the Law, it is also remarkable in what it does not regulate: In spite of listing diversity of opinion and freedom of activity and stimulation of activities of media entities and journalists as key responsibilities of the state (Article 4), the Law does not contain any provisions on facilitating the work of journalists, for example as regards their access to government information (notwithstanding the fact that a separate Law on Access to Information exists)[75] or the promotion of their freedom of expression, nor on the duties of the state in safeguarding the safety of journalists to carry out their work in Azerbaijan. The Law has a problematic focus

enhanced supervision by the Committee of Ministers of the Council of Europe. See: https://www.coe.int/en/web/execution/azerbaijan.

[72] For on-line media entities "continuous operation" has been defined in Article 60, paragraph 5, as as publishing at least 20 pieces of "mass information" a day for 20 days a month, with not more than one third of these coming from another media entity, according to Article 13, paragraph 2 of the Law. This seems an excessive requirement, in particular considering the time it can take to produce a news item or research an investigative piece.

[73] General Comment No. 34 to Article 19 ICCPR, paragraph 44.

[74] As is also evident from other legislation such as the Law on Access to Information, the Law on Information, Informatisation and the Protection of Information, Law on Commercial Secrets and legal provisions on defamation (see in this respect also CDL-AD(2013)024) and what appears to be a frequent application of Article 388 of the Code of Administrative Offences on abuse of freedom of the media and journalistic rights.

[75] See for an assessment of this Law the abovementioned Analysis of Azerbaijani Legislation on Access to Information.

on restricting the activities of the media rather than creating the necessary conditions enabling the media to fulfil their “public watchdog” role.

V. Conclusion

52. The Venice Commission has examined the Law on Media without having been able to discuss this with the authorities of Azerbaijan and without having been supplied by the authorities with relevant information and explanations (other than the written comments which have been submitted to the draft opinion). It has come to the conclusion that in the context of an already extremely confined space for independent journalism and media in Azerbaijan, the Law will have a further “chilling effect”. Many provisions are not in line with European standards on freedom of expression and media freedom and do not allow the media to effectively exercise its role as a “public watchdog”. Therefore, the Law should not be implemented as it stands. If the Law is nevertheless not repealed in its entirety, the Venice Commission urgently calls on the authorities of Azerbaijan to:

- repeal the excessive restrictions on the establishment of media entities in Article 26 of the Law, including as regards foreign ownership and foreign funding, in order to foster media pluralism;
- either abolish the Media Register or repeal the excessively restrictive conditions for journalists and media entities in order to be included in the Media Register, in particular the conditions that relate to the provision of detailed personal information, requirements as regards education, labour contract, absence of a criminal record, work experience of journalists and continuous operation of media entities, and to ensure that a broad range of entities involved with informing the public can carry out their operations;
- repeal the accreditation scheme for journalists;
- amend Article 14 of the Law to ensure that the restrictions on content are compatible with the case-law of the Court on Article 10 ECHR;
- amend Article 15, paragraph 3 of the Law by complementing the right of journalists not to disclose their sources of information under Article 15, paragraph 2, with clear provisions indicating that a court can only order disclosure if all reasonable alternative measures have been exhausted and the legitimate interest in disclosure is of a sufficiently vital and serious nature, responding to a pressing social need, which outweighs the public interest in non-disclosure;
- stipulate that platform broadcasters, on-demand service providers and platform operators are not subject to the licensing regime but only require to be registered;
- clarify that the application requirement for the publication and dissemination of print and online media products is no more than a requirement to notify the authorities;
- amend the provisions on suspension and termination of the licences of audiovisual media and on the suspension and termination of print and on-line media entities, to ensure that such sanctions are proportionate (i.e. limited to situations that would justify such an exceptional measure), progressively applied by an independent regulatory authority and provide for a transparent and fair procedure in which the license holder is heard and can have the decision on suspension / termination reviewed.

53. In addition, the Venice Commission finds that:

- the definition of a journalist in Article 1 of the Law would need to be broadened and defined in line with the “public watchdog role” of journalists;
- references in Article 3 of the Law to the extraterritorial scope of application of the Law would need to be deleted;
- paragraphs 7, 8 and 9 of the Law would need to be amended, to provide for clear and accessible legal grounds for restricting the exercise of freedom of expression during a

state of emergency, martial law, during special anti-terror operations or special operations against religious extremism, with sufficient procedural safeguards;

- references to the reciprocity of restrictions in Article 11 paragraph 4 of the Law would need to be deleted;
- the general requirement upon journalists and media entities under Article 15, paragraph 1, subs 3 and 4, of the Law, to seek prior permission to publish information on preliminary investigations or prosecutions would need to be deleted or at the very least it should be clarified in the Law which specific, narrowly defined set of documents this refers to (whereby a justifiable and overriding interest for requiring prior permission for publication can be identified);
- the categorical prohibition on the use of secret audio and video recordings and photographs without the consent of the person concerned or a court order would need to be replaced by a provision that allows for such use in cases in which there is a clear public interest in the publication of such material, provided the rights of third parties are protected;
- the existing institutional model of the Media Council would need to be revised, in line with European standards, to ensure it has the capacity to act as an independent regulatory authority.

54. The Venice Commission remains at the disposal of the authorities of Azerbaijan and the Parliamentary Assembly for further assistance in this matter.