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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMPILATION
OF VENICE COMMISSION OPINIONS AND REPORTS
CONCERNING
FREEDOM OF EXPRESSION AND MEDIA (*)

() This document will be updated regularly. This version contains all opinions and reports/studies adopted up to and including the Venice Commission's 123rd Plenary Session (18-19 June 2020)*

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INTRODUCTION

This document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning freedom of expression in general and the role of the media and professional journalists in particular. Its aim is to provide an overview of the approach of the Venice Commission with regard to these topics.

The compilation is intended to serve as a source of reference for drafters of constitutions and of legislation regulating freedom of expression and mass-media, for researchers, as well as for the Venice Commission's members, who are requested to prepare opinions and reports concerning legislation dealing with such issues. When referring to elements contained in this compilation, please cite the original document but not the compilation as such.

The compilation is structured in a thematic manner in order to facilitate access to the general lines adopted by the Venice Commission on various issues in this area. It should not, however, prevent members of the Venice Commission from introducing new points of view or diverging from earlier ones, if there is a good reason for doing so. The compilation should be considered as merely a frame of reference.

The reader should also be aware that most of the *opinions* (as opposed to general reports and studies) from which extracts are cited in the compilation relate to individual countries and take into account the specific situations there. The citations will therefore not necessarily be applicable in the context of other countries. This is not to say that recommendations contained therein cannot be of relevance for other systems as well.

Venice Commission *reports and studies* quoted in this compilation seek to present general standards and principles for all member and observer States of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

Each citation in the compilation has a reference that sets out its exact position in the opinion/report/study (paragraph number, page number for older opinions), which allows the reader to find it in the opinion or report/study from which it was taken. In order to gain a full understanding of the Commission's position on a particular issue, it is useful to read whole text of the opinion in question and the complete chapter in the Compilation on the relevant theme. Most of further references and footnotes are omitted in the text of citations; only the essential part of the relevant paragraph is reproduced.

This compilation does not describe special situations related to the role of the media within the election process. The position of the Venice Commission on this topic is outlined in its Compilation of opinions and reports concerning media and elections (see CDL-PI(2018)006 or further updates of this document).

The compilation is not a static document and will be regularly updated with extracts of recently adopted opinions by the Venice Commission. The Secretariat will be grateful for suggestions on how to improve this compilation (venice@coe.int).

1. BASIC PRINCIPLES REGARDING FREEDOM OF EXPRESSION

1.1 OPEN AND ROBUST PUBLIC DEBATE AS A CORNERSTONE OF DEMOCRACY

“A democracy should not fear debate, even on the most shocking or anti-democratic ideas. It is through open discussion that these ideas should be countered and the supremacy of democratic values be demonstrated. [...] Persuasion through open public debate, as opposed to ban or repression, is the most democratic means of preserving fundamental values.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §44

“[...] Freedom of expression [...] is an indispensable condition essential for the self-development of each individual. [...].

Freedom of expression, opinion and information enables the public to hold authorities (in the widest sense of the word) accountable by realizing the principles of transparency and a wide, open, robust, public debate. [...] [The] freedom of expression has special significance in relation to the media, the public watchdog; journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation.”

CDL-AD(2014)040, *Amicus Curiae* Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased, §§20-21; see also CDL-AD(2015)004, §11

“[...] There is little scope under Article 10(2) ECHR for restricting political speech or debate on matters of public interest, broadly defined. [...].”

CDL-AD(2016)002, Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, §67

“[...] In the run-up to a crucial referendum it is particularly important to have a healthy and pluralistic media scene where opposite points of view can be discussed without fear of reprisals. [...].”

CDL-AD(2017)007, Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, §21

1.2 SPECIAL ROLE OF THE PRESS AND OTHER MASS MEDIA¹

“The role of the press in a democratic society is a vital one. The Court has repeatedly underlined that the press and other media have a special place in a democratic society as ‘purveyor of information and public watchdog’. [...].”

CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, §22; see also CDL-AD(2005)017, §36

¹ See also Section 7 below.

“[...] [In Article 10 § 1 of the European Convention] no express mention is made to freedom of the media or to media plurality and diversity. Freedom of broadcasting and of the press as part of active and passive freedom of opinion is arrived at by an interpretation of the second sentence of paragraph 1. The European Court of Human Rights first construed Article 10 § 1 in terms of individual rights [...]. The concept of the purpose-serving function of the media as a means of promoting freedom of information has nevertheless been taken up and applied by the Court in connection with paragraph 2 of Article 10 of the European Convention.

[...] [The] State is the ultimate guarantor of pluralism, especially in relation to audio-visual media, whose programmes are often broadcast very widely.”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §36 and §260

“[...] Restrictions on the media are usually examined with the closest scrutiny by international human rights bodies in light of the essential role of a properly working mass media in a democratic society.[...]

[...]

Freedom of the media has a paramount importance within the ICCPR system. According to the UN Human Rights Committee, “a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.”

[...]

[O]ne of the journalistic virtues is to keep a critical attitude towards the authorities and the politicians. Due to the role of the media as a “public watchdog” they enjoy a higher level of protection than any other business;[...].”

CDL-AD(2017)007, Opinion on the Measures provided in the recent Emergency Decree Laws of Turkey with respect to Freedom of the Media, §§23-24 and 53

1.3 RIGHT OF THE PUBLIC TO RECEIVE INFORMATION

“[...] [Article 10 protects *inter alia*] the right to hold opinions and to receive information and ideas, as well as to impart them. [...] Newspaper/Internet readers or television viewers/radio listeners can therefore assert their right to receive information and ideas, a right which must be considered in any Article 10 case involving the media. Contracting states, in particular their national courts, must duly take into account that, where a person is prevented from communicating, or faces a fine or civil award of damages for doing so, the Article 10 right of both the speaker and the audience is interfered with. [...].”

CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, §21

“[...] [The] right to access information concerns mainly the access to general sources of information and aims at prohibiting a Government to prevent anyone from receiving information that others wished or might have been willing to impart to him.

[...] [The] freedom to receive information could not, however, be construed as imposing on a State positive obligations to collect and disseminate information of its own motion. [...]

[...] [Although] no binding rules on this matter may be drawn from the Convention or the case law [of the ECtHR], there is a certain tendency to accept that the right to receive information as element of the right of freedom of expression implies in principle the right of access to information of the administration - information which must be made public at a specific request and subject to the usual grounds of limitation.”

CDL-INF(2000)015, Opinion on Freedom of Expression and Freedom of Access to Information as Guaranteed in the Constitution of Bosnia and Herzegovina, §§13, 16 and 20; see also CDL-AD(2018)028, §100

“The Venice Commission particularly welcomes the inclusion, in [the scope of the law], of [...] the obligation to provide circumstantiated access to a document containing only some secret information and the establishment of a procedure for rapid access to data associated with effective remedies [...].

[...] [The Venice Commission] [...] shares the view that data protection and access to official documents are *a priori* equally legitimate interests, which implies that specific conflicts shall be dealt with by weighing these interests on a case by case basis and that the scope of protection should depend on the specific circumstances surrounding the request for access. [...]

CDL-AD(2012)023, Opinion on Act CXII of 2011 on informational Self-determination and Freedom of Information of Hungary, §§51 and 53

“The ECtHR recognised the right of individuals to access the internet, as in its ruling against the wholesale blocking of online content, it asserted that “the internet has now become one of the principal means of exercising the right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest”. [...] Blocking access to host and third-party websites in addition to websites concerned by proceedings renders much information inaccessible, thus restricting the rights of internet users. [...]

Moreover, the ECtHR acknowledged that “given the important role played by the internet in enhancing the public’s access to news and facilitating the dissemination of information (see *Delfi AS v. Estonia* [...]), the function of bloggers and users of the social media may be assimilated to that of ‘public watchdog’ in so far as the protection of Article 10 is concerned”.⁶⁶ This protection may extend to access to (publicly held) information if it is instrumental for the exercise of the right to freedom of expression: the information to which access is sought must meet a public-interest test. [...]

CDL-AD(2019)016, Joint Report on Digital Technologies and Elections, §§54-55

“[...] [A]ny interference with the freedom of expression and freedom of assembly online, for instance through blocking, filtering, slowing down or shutting down Internet services may amount to a disproportionate interference with the exercise of these rights. The UN Human Rights Committee has considered that any restriction on the operation of information dissemination systems is not legitimate unless it conforms with the test for restrictions on freedom of expression under international law.”

CDL-AD(2019)017, Joint guidelines on freedom of peaceful assembly (3d edition), §67

1.4 LIMITATIONS ON FREEDOM OF EXPRESSION AND THE MARGIN OF APPRECIATION OF THE STATE

“[...] [T]he Venice Commission does not support absolute liberalism. While there is no doubt that in a democracy all ideas, even though shocking or disturbing, should in principle be protected [...], it is equally true that not all ideas deserve to be circulated. Since the exercise of freedom of expression carries duties and responsibilities, it is legitimate to expect from every member of a democratic society to avoid as far as possible expressions that express scorn or are gratuitously offensive to others and infringe their rights.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §73

“According to the second paragraph of Article 10 and the well-established case law of the Court the exercise of the right to freedom of expression may be subjected to formalities, conditions, restrictions or penalties as are ‘prescribed by law’, pursue one of the legitimate aims identified in an exhaustive manner in the second paragraph of Article 10, and as ‘necessary in a democratic society’”. As ruled by the Court, interference by authorities must correspond to a “‘pressing social need’”, be proportionate to the legitimate aim pursued within the meaning of Article 10(2), and be justified by judicial decisions that give relevant and sufficient reasoning. Whilst the national authorities have a certain margin of appreciation, it is not unlimited as it goes hand in hand with the Court’s European supervision.”

CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, §24; see also CDL-AD(2017)007, §§26-28, 33, 55

1.4.1 Different forms of “expression” and of the interference with it

“[...] [A] distinction can be drawn between, on the one hand, works of art (in whatever form, [...]), and, on the other hand, statements or publications expressing an opinion (speech that is audible in public, journalism, public speaking, tv/radio debate etc). However, a work of art may contain political comment and an ostensibly political expression may also be or become accepted as art. In respect of both forms of expression, therefore, restrictions will only be possible if they cause an undue interference in a guaranteed right of another person or group [...].”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §52

“In most Article 10 cases involving the media, in civil proceedings the interference consists of an adverse judgment, a damages award, the imposition of an order preventing publication (‘prior restraint order’), an order requiring publication of a judgment or apology, an order to disclose a source or for the seizure or destruction of material. In the criminal field, interferences consist of, inter alia, convictions, fines and prison sentences.”

CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, §25

“Secondly, the removal of content from and the blocking of access to the Internet constitute restrictions of the right to freedom of expression that require a justification on any of the grounds and on the conditions listed in the second paragraph of Article 10 ECHR. [...]”

CDL-AD(2016)011, Opinion on Law No. 5651 on regulation of publications on the internet and combating crimes committed by means of such publication (“The internet law”), §64; see also CDL-AD(2017)009, §§59-63

“As follows from the text of the emergency decree laws, media outlets have been closed because of their alleged ‘connections’ with the ‘FETÖ/PDY’ (and other organisations considered “terrorist” [...]). A distinctive feature of this measure is that it is not, formally speaking, associated with any particular act attributed to the media outlets concerned.

In most freedom of expression cases [...] it was possible to link the sanction at issue to a ‘verbal act’: a published text, an oral statement, an image, a footage, etc. In the present case, in the absence of individualised decisions and any precise information, it is impossible for the Venice Commission to tie this measure (liquidation) to specific comments, articles, statements or radio broadcasts – either individually or even collectively.

This lack of clarity, however, does not remove this situation from the ambit of Article 10 of the ECHR. [...] [It] is absolutely clear [...] that those legal entities have been liquidated as media outlets, i.e. essentially in connection with their publications and their specific functions. In the opinion of the Venice Commission this is sufficient to attract protection of Article 10 of the ECHR.

32. Many official interlocutors whom the delegation of the Venice Commission met in Ankara argued that the measures taken by the authorities had nothing to do with freedom of expression because the action was taken in the fight against terrorism. To the great regret of the Venice Commission, such rhetoric reflects profound misapprehension of the concept of free speech. Where the authorities take measures against mass media or journalists in connection with their publications, statements, broadcasts etc. a question under Article 10 always arises, even if the authorities pursue a legitimate aim (fighting against propagation of terrorist ideas). Certain types of speech may be legitimately suppressed, but the authorities are always bound to examine those cases through the prism of Article 10 of the ECHR (and similar provisions of Turkish Constitution or of the international human rights law).”

CDL-AD(2017)007, Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, §§29-32

“[...] Radical dissidents and fierce critics of the regime may be sanctioned for exceeding the limits of permissible speech, notwithstanding the little scope under Article 10 § 2 of the Convention for restrictions on political debate, but at least they should not be placed on the same footing with the members of terrorists groups. The Venice Commission thus considers that the ‘membership’ concept (and alike) should not be applied to the journalists, where the only act imputed to them is the content of their publications.”

CDL-AD(2017)007, Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, §72

1.4.2 Types of expression enjoying absolute immunity

“The provisions of [...] the Criminal Code protecting, as privileged statements, defamatory expression in proceedings before a judicial and administrative authority, would benefit from increased clarity. [...] It is also recommended that an absolute privilege defence be introduced in the context of other instances, such as the debates in parliaments [...].

Under Article 599 § 2 of the Criminal Code, dealing with ‘retaliation and provocation’, persons having committed insult or defamation ‘in a state of anger which has been caused by an unjust act by a third party and is suffered after this act [...]’ are exempted from sanctions.

It is basically in line with the Court’s case law to take account of the conduct and former expression of a person targeted by defamation and the particular context in which the statement at issue was made. However, the discretion in the law (not to punish at all) may go too far with regard to Article 8 ECHR if the competent court is not balancing the interests involved. [...]”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §§52-54

“Under Article 10.1.1, members of the legislator and other representative bodies are immune from defamation suits for statements made in the course of these bodies’ and their respective structures’ proceedings. The Draft should more clearly state that these persons enjoy the above privilege only in the exercise of their public function.

On the other hand, there is a startling omission in that, although there are strong public interest reasons under Article 6 ECHR and Article 10 ECHR, statements made, e.g. by judges, parties or witnesses, in connection with judicial proceedings are not mentioned among of privileged statements. It is strongly recommended that this defence be included in the Draft Law. This defence also allows the fair and accurate reporting of these statements in the media [...].

In this connection, clarification is needed concerning the defence under Article 10.1.4. The person or body in charge of the report should not be responsible for its contents, unless the plaintiff puts a well-reasoned argument that certain defamatory statements included in the report are not a reflection of the information reported.

Privileged statements under Article 10.3.1 and 10.3.2 include republished statements that have not been refuted by the complainant. In essence the statement must be on a matter of public interest and republished by a journalist without adoption. [...] It is thus important that the journalist/publisher who cannot verify the truth of the statement acts responsibly by making clear that the defamatory allegations are not being adopted or agreed with. ”

CDL-AD(2013)024, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, §§102-105

“[...] Freedom of expression of Members of Parliament is an essential part of democracy. Their freedom of speech has to be a wide one and should be protected also when they speak outside Parliament. The non-violent pursuit of non-violent political goals such as regional autonomy cannot be the subject of criminal prosecution. Expression that annoys (speech directed against the President, public officials, the Nation, the Republic etc.) must be tolerated in general but especially when it is uttered by Members of Parliament. Restrictions of the freedom of expression have to be narrowly construed. Only speech that calls for violence or directly supports the perpetrators of violence can lead to criminal prosecution. [...]”

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CDL-AD(2016)027, Opinion on the suspension of the second paragraph of Article 83 of the Constitution of Turkey (parliamentary inviolability), §79; see also CDL-AD(2019)015, §§150 and 157

“Parliamentary immunity relating to parliamentary rights (opinions and votes expressed in Parliament) should apply not only during a member’s term of office, but should be perpetual and final [...], as is the case in some countries. While the speech uttered within Parliament and on parliamentary business enjoys very strong protection, other forms of expression (outside of Parliament’s work or inside Parliament but on purely private matters) may give rise to liability.

Substantive immunity (as opposed to non-violability [...]) means that the voting of the MP in the plenary session or in the parliamentary committees, or opinions expressed during the discussions enjoys very strong protection and, in many countries, cannot give rise to liability at all. This is the basic principle of European political tradition [...]. However, there are substantial differences with regard to the scope of protection: it normally protects MPs against all sorts of external legal action, including criminal prosecution as well as civil lawsuits, but in some countries it only applies to penal procedures [...]. In many countries MPs are immune from charges of defamation or insult, but in some countries such expressions are exempted from immunity, allowing members to be sued on this basis in the same way as other citizens [...].”

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, §§149-150

1.4.3 Lawful character of restrictions; level of regulations

“[...] The requirement of ‘lawfulness’ implicitly refers to a certain quality of the law in question. A limitation would not be ‘lawful’ if the law is not sufficiently clear, accessible or if its application is unforeseeable. [...]”

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, §22; see also CDL-AD(2008)026, §50

“[...] The terms used in the amendment have potential for such a wide scope of application that they lack the clarity and precision needed to be in compliance with the condition that a limitation of the freedom of speech has to be ‘foreseen by law’.”

CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, §52; see also CDL-AD(2005)017, §155

“As regards the media sphere, it may be justifiable to seek stability in the way the media regulatory authority is organised and functions, and to require a supermajority to fix or change those rules. [...] However, the Commission sees no particular reason to use cardinal laws for other, especially ‘detailed’ regulations in the media sphere. They should be left to ordinary legislation or even to soft-law instruments developed by the State regulatory body or even the bodies of self-regulation of the media community [...].”

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, §18

“The [European] Court accepts, with regard to the calculation of damages for injury to reputation, that national laws must make allowance for an unlimited variety of situations and that a considerable degree of flexibility may be needed to enable an assessment of damages tailored to the circumstances of the particular case. However, national laws on defamation must be formulated with sufficient precision to enable citizens to regulate their conduct: they must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the given circumstances, the consequences which a particular action may entail.”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §18

“The Commission is mindful that not all types of illegal media content may be precisely defined in law. It is an illusion that absolute legal certainty may be achieved through a legal text. Thus, for example, it may prove difficult to describe obscenity without using obscene language and/or images. In principle, the legislator may defer to the courts and let judges develop and clarify those concepts through case-law. [...] However, the law should be revisited in order to ensure that those vague concepts [...] are not interpreted by the courts too broadly.

[...] The Venice Commission considers that [...] the Media Council should develop and publish its own policy guidelines. The primary aim of the guidelines should be to limit the Media Council's discretion in interpreting legal provisions on illegal media content and on applying its sanctioning powers. The guidelines should be regularly updated to take into account the recent developments in the case-law related to the application of [the law], in particular the case-law of the Constitutional Court and the ECtHR. The guidelines must be clear and allow for predictable and coherent interpretation by the Media Council of the general principles contained in the law and help media operators fully exercise their freedom of expression without any chilling effect possibly resulting from vagueness of the concepts employed in the law. Such guidelines should not be binding on the courts, which remain the ultimate guarantors of the freedom of the press.”

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, §27 and §32

“[...] [A] number of the terms or concepts referred to in the proposed amendments to Article 1 of the Constitution are overly broad or potentially ambiguous and/or lack precision, which is essential for a legal text. They may lead to various and potentially diverging interpretations. In particular, the reference to 'love for the motherland', 'honour and dignity', 'unity of the people of the Kyrgyz Republic' or 'peace and accord in the country', should not be used as a tool to limit, for instance, the right to freedom of expression [...].

Further, the reference to 'morality' as one of the 'highest values' of the Kyrgyz Republic should not be used as a ground for limiting the exercise of human rights and fundamental freedoms, as the concept is vague and subject to a potentially wide and changing interpretation of the term “morals”

CDL-AD(2016)025, Joint Opinion on the draft law "on Introduction of amendments and changes to the Constitution" of the Kyrgyz Republic, §§31 and 34

“[...] [Under] the emergency decree laws, the media outlets have been liquidated not because of their previous wrongful behaviour and not with reference to the previously existing legal

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provisions; thus, the liquidations cannot be seen as a form of an ‘administrative and judicial sanction’ for specific violations of the law. The liquidations were based on a new criterion (‘connections’, ‘affiliations’ etc. to the ‘terrorist organisations’ and other organisations which are declared by the National Security Council to pose a security threat) and where done through a new expedited procedure.

Hence, even if the liquidated media outlets were implicated in the past in some illegal acts (such as propaganda of terrorism or money laundering), those acts have not been referred to neither in the decree laws nor in any other official document. Moreover, the reason for the liquidation of the media outlets was formulated too vaguely. Neither the emergency decree laws, nor any other official document develop the terms of ‘connections’, ‘affiliations’ in more detail. [...] [The] Venice Commission [has] already expressed concern that such broad definitions imply that any sort of link to the ‘FETÖ/PDY’ (or other ‘terrorist organisations’) may lead to the liquidation of the legal person concerned. Whatever are the exact terms in Turkish, it is clear that these formulas are not specific enough to assess where the line is to be drawn between innocent media outlets and those that had been implicated in some unlawful activities.

In sum, if the purpose of the Turkish authorities was to sanction the media outlets for their past behaviour, the ‘lawfulness’ of this measure under Article 10 of the ECHR is questionable. In addition, arguably, this situation may also raise an issue under Article 7 of the ECHR, which is an un-derogable right under Article 15 thereof.

Alternatively, mass liquidations of media outlets may be seen as a preventive measure. One may argue that the media outlets have been liquidated not for what they have done, but for what they might do in the future.

However, even from this perspective the lawfulness of this measure remains problematic. Emergency decree laws defined the reason for the liquidation of media outlets (“connections” etc. to ‘terrorist organisations’) and applied it immediately to the specific legal entities. The only legal basis of the decree laws was Article 121 § 3 of the Turkish Constitution, which gives the Government a very general mandate to issue emergency decree laws during the state of emergency ‘on matters necessitated by the state of emergency’.

Such use of ad hominem legislation has already been criticised in [a previous opinion on Turkey]. In the present context the Venice Commission considers that Article 121 § 3 may hardly be seen as constituting a sufficient ‘lawful basis’ for the Government’s actions vis-à-vis media outlets. Any other interpretation would mean that Article 121 § 3 gives the Government unfettered powers to legislate at their own will, and that would be a very dangerous supposition. The Venice Commission has repeatedly held that ‘even in a state of public emergency the fundamental principle of the rule of law must prevail’.

CDL-AD(2017)007, Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, §§39-44

“The rather vague and broad terms used in this Article such as ‘any activity through which discrimination is [...] indirectly called for, incited [...] or prompted’ risk being used to restrict disproportionately the right to free expression. This Article ought to be reformulated very carefully in the light of the relevant case law of the ECtHR so as not to breach freedom of expression guaranteed by Article 10 of the ECHR.”

CDL-AD(2018)001, Opinion on the Draft law on Prevention and Protection against Discrimination of "The former Yugoslav Republic of Macedonia", §36

“Article 4 par 2 (1) also prohibits the preaching of ‘religious fanaticism’. This wording is also relatively vague and could potentially lead to undue limitations of the right to freedom of expression [...]. It would be more appropriate to refer to the incitement to violence on religious grounds or to the advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. In order to give a general direction to judges applying Article 4, the explanatory memorandum to the Draft Law should stipulate clearly that mere advocacy of supremacy/rightness of one’s religious views or other beliefs, or criticism of views/beliefs held by others should not be regarded as an incitement to discrimination, hostility or violence, unless it is associated with the calls for violence or other similar unlawful behaviour. The Draft Law should ensure a space for free discussion and criticism.”

CDL-AD(2018)002, Joint Opinion on the Draft Law amending the Law on Freedom of Conscience and on Religious Organisations of Armenia, §44

“[...] [T]he prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information’, are incompatible with international standards for restrictions on freedom of expression [...] and should be abolished.”

CDL-AD(2019)016, Joint Report on Digital Technologies and Elections, §90

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

CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, § 26

1.4.4 General principles regarding the “necessity” of restrictions on freedom of expression

“Public authorities must respect the right of journalists to disseminate information on questions of general interest, including through recourse to a degree of exaggeration or provocation, provided that they act in accordance with responsible journalism.”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §81

“[...] [In] a true democracy imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme. [...] It is only the publication or utterance of those ideas which are fundamentally incompatible with a democratic regime because they incite to hatred that should be prohibited.”

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CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §46

“[...] The Venice Commission recalls that defending ‘constitutional order’, ‘public morals’ or ‘dignity’ or individuals is a legitimate aim which the State may pursue; however, by itself it cannot justify an interference with the freedom of expression. The Press Act should make it clear that the limits of this freedom depend on the context and the freedom of expression may in certain circumstances outweigh other legitimate interests and prevail. Not every statement which may be seen as attacking constitutional order, dignity, or morals is illegal. [...]”

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, §30

“[...] [The] principle of ‘least intrusiveness’ is an important element of the proportionality requirement [...]”

CDL-AD(2016)011, Turkey - Opinion on Law No. 5651 on regulation of publications on the internet and combating crimes committed by means of such publication (“The internet law”), §36; see also CDL-AD(2017)007, §51

“[...]]States] parties should take particular care to encourage independent and diverse media. The freedom of expression encompasses the statements of thoughts which are in the nature of criticism as well. Permissible limitations to the freedom of expression are limited to situations in which the expression incites violence and/or hatred, in case the expression is gratuitously offensive, etc. However, it should be reiterated that a polemical and aggressive tone, a degree of exaggeration or even provocation will be ordinarily accepted in the case-law of the ECtHR. [...]”

CDL-AD(2017)007, Opinion on the Measures provided in the recent Emergency Decree Laws of Turkey with respect to Freedom of the Media, §23

“Regardless of the violation of specific human rights guarantees, attention must be drawn to the “chilling effect’ which the measures taken under the state of emergency may have on the media freedom in general. This effect is also a factor which plays a role in assessing the proportionality/necessity – and thereby the justification – of any sanctions imposed. Moreover, states are under an obligation to create a favourable environment where different and alternative ideas can flourish, allowing people to express themselves and to participate in public debates without fear.”

CDL-AD(2017)007, Opinion on the Measures provided in the recent Emergency Decree Laws of Turkey with respect to Freedom of the Media, §25

“While states have a positive responsibility to prevent undue interference with civil and political rights by third parties, undue state intervention through excessive or undue regulation can result in undermining the very rights that it is meant to protect. Unjustified state surveillance of private communications and the different ways in which online platforms may be used so as to – intentionally or accidentally – affect the flow of information, directly curb the freedom of expression, hinder democratic dialogue, and infringe the principles of institutional neutrality and electoral equity. Enabling the authorities to interfere with the public discourse may be abused to

silence dissidents and prevent discussion which challenges mainstream thought and restricts criticism of societal attitudes. In particular, the filtering, blocking and take-down of illegal content on the internet in order to combat notably hate crimes and to protect national security, as well as intellectual property and privacy or defamation rights must be in accordance with the law, which includes a precise and narrow definition of the offences in cause, and it must pursue one of the legitimate aims listed in Article 10 ECHR. The criteria of necessity in a democratic society and proportionality must always be respected. Effective judicial review by independent and impartial courts must be guaranteed.”

CDL-AD(2019)016, Joint Report on Digital Technologies and Elections, §146

“Article 45 provides for the liability for ‘dissemination of information materials which call for carrying out terrorist activities or support them’. Dissemination of such information may lead to “termination or discontinuation” of the activity of the media outlet concerned, or temporary suspension of its activities, and forfeiture of the unsold part of the print. [...]

It is difficult to assess the proportionality of this norm *in abstracto*, without the context of a particular case. The Venice Commission is ready to acknowledge that a media outlet openly calling for violent attacks against civilians and/or government institutions may need to be suspended and even closed. However, the authorities should not give an overly large definition of ‘support’ or ‘public justification’ of terrorism in order to hush legitimate criticism of their policies. This risk is exacerbated by the fact that Article 45 provides for only two sanctions – definitive ‘discontinuation of activities’ (= liquidation) and temporary suspension of activities of the media outlet concerned. [...]

In order to reduce the likelihood of a disproportionate interference with the freedom of expression, this Article should provide for a more gradual response to publications which may contain elements of ‘justification’ or ‘support’ of terrorism: even where the media outlet overstepped the permissible bounds, it should not be necessarily struck immediately with as harsh a sanction as a temporary shut-down, which may tantamount to *de facto* liquidation, or with the *de jure* liquidation). The law must provide for additional – less harsh – sanctions which may be sufficient to deter media outlets from expressing ‘support’ to terrorists.

Limitations on the media reporting during a terrorist crisis should be of short duration, and concern only certain specific types of information (i.e. on the forces involved in the counter-terrorist operations, their position, methods, and alike), 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 European Convention on Human Rights; principles of responsible media coverage may be defined in the self-regulations.”

CDL-AD(2018)024, Opinion on the Law on preventing and combating terrorism of the Republic of Moldova, §§70-72 and 87

[...] [Mass] liquidation of media outlets appears to have been unnecessary and unjustified by the “exigencies of the situation”. The Venice Commission reiterates its earlier observation about the permanent character of those measures. The temporary suspension of the activities of media outlets allegedly linked to the ‘Gülenist network’ would not be less effective and would be more consistent with the obligations of Turkey under the ECHR [...]. Other measures could also have been envisaged, such as the confiscation of particular issues of the newspapers or restrictions on the publication of specific articles.

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Moreover, one might discuss whether a legal entity as such can have a connection to a terrorist organisation (unless it is directly owned by members of the organisation or the organisation itself). In case there is a connection between an employee or a member of the editorial board of the legal entity and a terrorist organisation, the State has less intrusive means of intervention (i.e. criminal law, administrative sanctions, etc.), than the total closure of the legal entity.”

CDL-AD(2017)007, Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, §§51-52

“[...] From the text of the emergency decree laws it is not possible to learn what sort of danger the liquidation of media outlets was supposed to address. The existence of any potential threat, represented by the media outlets at issue, should be demonstrated with reference to some specific facts – for example, be inferred from the content of the specific previous publications of the media outlet concerned. [...] The Government’s decision to liquidate media outlets did not refer to any such specific factual elements. [...]

The Venice Commission does not assert that all closures of media outlets were unjustified. Some of those measures might have been justified by the “exigencies of the situation”, but the problem is that the closures were done directly by the decree laws and without individualized decisions based of verifiable evidence.”

CDL-AD(2017)007, Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, §§49-50

“[...] [Any] decision ordering the arrest and detention of a journalist, and especially prolonging such detention, should contain an assessment (at least precursory) of specific facts which reasonably demonstrate that the detention is necessary for the normal progress of the case and that other preventive measures (such as reasonable bail, for example) would not achieve this goal. The Venice Commission is particularly concerned by the collective arrests of the journalists after the declaration of the state of emergency. Issuing collective detention orders is an indicator that no meaningful assessment of risks individually posed by each arrested person has been conducted.”

CDL-AD(2017)007, Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, §§29-32

2. REGULATION OF THE MEDIA MARKET

2.1 OBLIGATION OF THE STATE TO PROVIDE CONDITIONS FOR A PLURALISTIC MEDIA MARKET

“Pluralism 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.”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §37 and §40

“Article 5, paragraph 2, of the Constitution provides that public associations shall have the right to use state mass media. However, this may not be interpreted to imply that they shall not be engaged in their own mass media activities. Such kind of State monopoly in the area of mass media would be contrary to Article 10 of the ECHR in conjunction with Article 11. [...].”

CDL-AD(2010)053rev, Opinion on the warning addressed to the Belarusian association of journalists on 13 January 2010 by the Ministry of Justice of Belarus, §67

“Developments in the area of new communication services may lead to the creation of dominant market positions. In respect of digital broadcasting, states are called upon to introduce rules on fair, transparent and non-discriminatory access to systems and services. [...].”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §60

“[...] [Where] one particular political group has so much political influence, media pluralism and independence of the journalistic profession need special measures of protection. [...] The specific political and economic context of the country must be taken into account (quasi-monopoly of the ruling coalition in the political sphere, powers and structure of the State regulatory bodies, size and the level of concentration of the media market etc.). [...].”

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, §15

2.2 EXTERNAL AND INTERNAL PLURALISM; MODELS OF PLURALISM

“*External* or structural pluralism may be distinguished from *internal* pluralism.

External pluralism relates to the plurality of actors that are active on a specific market. [...].

Internal pluralism refers to the obligation for the medias to provide for pluralism within their service. [...].

While external pluralism relates particularly to the private sector, internal pluralism has increasingly become associated with the public sector. [...].

In the context of external pluralism, restrictions on media ownership can preserve diverse ownership and contribute to diversity in output as long as consolidation or sharing of editorial content between owners of rival products is discouraged.

In relation to internal pluralism, instead, ownership restrictions are not sufficient to guarantee diversity of output reflecting different political and cultural views. Other policy instruments need therefore be used, in addition to ownership restrictions, to encourage internal pluralism.

In the Commission's opinion, internal pluralism must be achieved in each media sector at the same time: it would not be acceptable, for example, if pluralism were guaranteed in the print media sector, but not in the television one."

CDL-AD(2005)017, Opinion on the compatibility of the laws "Gasparri" and "Frattini" of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§41-47

"Three basic models for delivering media plurality and diversity of media content can be distinguished.

The Pure Market Model is based on the premise that the free operation of supply and demand provides access to the media for all 'voices' which can pay for it [...].]This model naturally favours concentration of capital and ownership in the media.

The New Media Model is based on the view that the profusion of channels created by new technologies encourages senders to seek profitability by identifying media market niches and serving audiences neglected by other media. [...].

The Public-Policy Model assumes supplementing the market model by means of public intervention into its operation so as to promote pluralism. [...]."

CDL-AD(2005)017, Opinion on the compatibility of the laws "Gasparri" and "Frattini" of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§48-51

2.3 "ANTI-TRUST" MEASURES; CONFLICTS OF INTEREST

2.3.1 Defining and limiting the market share of one single media company

"The Commission agrees [...] that digitalisation will lead to an increase in the number of channels [...].

[...] [However] many of the newly available channels are likely to have very small audience shares [...]. [...] [Therefore], [...] the threshold protecting media pluralism, as measured by 20 percent of channels, is not in itself a clear indicator of market share.

Neither is this threshold an unambiguous indicator of balance and pluralism in the television and radio market as a whole. Larger companies will enjoy greater purchasing power in a wide range of activities such as programme acquisitions, and will enjoy significant advantages over other

national content providers. They can also enjoy an unlimited share of the audience, if this scheme is put in place.

Ultimately, the measure of concentration based on share of channels or programme output cannot [...] be useful for assessing the position of a company in the national radio and television markets.”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§88-91

“The Commission agrees [...] that the concept of the SIC [(SIC is a concept of an ‘integrated communications system’, coined to establish a revenue threshold for the purposes of media concentration measures and including a wide range of media – print media, broadcasting media, cinema, advertisement etc.)] reflects a current trend: different media markets are indeed likely to converge someday to form a single market. [...]

[...] [Nevertheless,] it is highly unlikely that this convergence will happen entirely in the foreseeable future and it is unlikely that it will have any significant impact on the current situation. It therefore considers that the SIC should not be used to replace, already at this stage, the ‘relevant market’ criterion.

[...]. An individual company could have extremely high degrees of revenue shares in individual markets, whilst at the same time remaining below the 20 percent threshold for the whole sector.

In conclusion, the Commission considers that without other indicators such an audience share threshold and a ‘relevant market’ indicator, the thresholds provided [...] [by the law] are largely redundant as indicators of diversity.”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§95-97, and §106.

2.3.2 Defining affiliation of media companies with public officials

“The Frattini Law concerns conflict of interest between government office and professional and entrepreneurial activities. It is deemed in particular to provide an adequate solution to the situation of potential conflict of interest in which the current Prime Minister finds himself, he being the owner (but not the manager) of extensive media interests [...].

The Law only declares a general incompatibility between the management of a company and public office, not between ownership as such and public office.

Yet, in Italy this appears to be the most important aspect of conflict of interest [...]. The Frattini Law, therefore, should offer an adequate solution to this problem.

It is true that Section 3 paragraph 2 refers to ‘a specific, preferential effect on the assets of the office holder or of his spouse or relatives up to the second degree, or of companies or other undertakings controlled by them to the detriment of the public interest’.

However, the need for such effect to be ‘specific’ and ‘to the detriment of the public interest’ makes the burden of proof a very heavy one, and renders this provision difficult to apply in practice.”

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CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§233 and §§237-240

“[...] [The] OECD Council Recommendation foresees a wide range of obligations, including: divestment or liquidation of the interest by the public official; recusal of the public official from involvement in an affected decision-making process; restriction of access by the affected public official to particular information; assignment of the conflicting interest in a genuinely ‘blind trust’ arrangement; resignation of the public official from the conflicting private-capacity function and/or resignation of the public official from the public office in question.

None of the kind is foreseen in the Frattini Law.

The Commission considers that entering the political arena is the free choice of each individual. It entails prerogatives and duties. Public office carries with it some incompatibilities and limitations. Provided that these are reasonable, clear, foreseeable and do not undermine the very possibility of access to public office, it is open for each individual to decide whether or not to accept them. The mere possibility of suffering some financial loss should not be, in itself, a reason to exclude an activity from the list of activities incompatible with public office.”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§ 243-244 and §251

2.4 CONTENT OF PUBLIC BROADCASTING: NEUTRALITY, QUALITY, DIVERSITY

“Public broadcasting is a public service. Public broadcasters have obligations ranging from the provision of a universal service, to some form of social representation, to the provision of a wide range of quality programmes. In return, they enjoy a privileged access to resources and facilities.

Public service broadcasting must be free from the constraining forces of the state and, on the other hand, enjoy autonomy and independence from the market place. [...] [It] is typically universal in terms of content and access; it guarantees editorial independence and impartiality; it provides a benchmark of quality; it offers a variety of programmes and services catering for the needs of all groups in society and is publicly accountable. [...].”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§52 and 54

“Balanced and neutral news reporting is, indeed, a commendable professional standard for every journalist. Furthermore, it is perfectly legitimate to require that ‘media system on the whole’ is organised in such a manner as ‘to provide credible information, quickly and accurately’ [...].

However, it is questionable whether ‘balance’ should become an enforceable legal obligation of every particular media taken alone. The norms under consideration create a very complex obligation on the media and lack precision. How can information be ‘balanced’? One can understand balance of opinion, but information (facts) needs to be thorough and accurate, not ‘balanced’. How quickly has the ‘balance’ to be achieved when the programme is a ‘series of programmes regularly shown’? Should the ‘balance’ be assessed in quantitative or more in qualitative terms? In addition, ‘facts’ cannot always be clearly distinguished from ‘opinions’; after

all, it is difficult to imagine an anchor-man not using any adjective, while every adjective gives a flavour of an ‘opinion’ to a statement of fact. In sum, the vagueness of the terms employed in two acts may turn those provisions into a tool of suppression of the free speech [...].”

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, §§49-50

“The Venice Commission recommends amending the Media Act so as to permit individual public service media to choose its own news sources, or even set up its own newsroom. There should be no monopoly of news provision by a body with a politically-appointed director.”

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, §90

2.5 INTERNAL ORGANISATION OF THE PUBLIC BROADCASTING COMPANIES

2.5.1 Composition of the public broadcasters’ boards

“[...] [The] Media Act does not secure pluralistic composition of the bodies supervising the PSM [(public service media)]; its provisions enable the ruling party/coalition to ensure the loyalty of the Media Council, of the MTVA and of the BoT, and, through them, to control finances and personnel of the public broadcasters. This creates space for covert intrusion into the journalistic freedom in the public media sector – an intrusion which is not always possible to discern, because it does not manifest itself as formalised orders and sanctions, and which cannot therefore be prevented by means of judicial review.

[...] [There] is no common European model of public media sector governance. Thus, it is up to the Hungarian authorities to develop a legislative framework which would secure pluralism within the PSM supervising bodies and sufficient independence of the public broadcasters. However, as a result of such reform the structure of bodies governing the PSM sector should be simplified, the influence of the ruling party in the process of appointment of members of the PSM supervising bodies and PSM executives should be reduced, and a fair representation of all important political, social and relevant professional groups within those bodies must be secured.”

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, §§86 and 88

“The Commission recalls that one of the most typical features of the public broadcasting service is that it should operate independently of those holding economic and political power. [...]

The Commission observes that, should the interest in the purchase of RAI shares [in the process of privatisation] be indeed low, the Minister of Economy will retain some control of the Board of Governors. There is also the possibility that the Governors representing the private shareholders will belong to the political parties of the majority. [...]

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§162 and 168

2.5.2 Economic independence of public service media

2.5.2.1 Funding of the public broadcasters²

“Methods of funding RAI (setting the level of the licence fee for only a year; possible contracts with public authorities for paid services) are not fully consistent with Recommendation No. R(96) 10 on the Guarantee of the Independence of Public Service Broadcasting, which states in its Appendix that:

- the decision-making power of authorities regarding funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the PSB organisation; [...]
- payment of the contribution or licence fee should be made in a way which guarantees the continuity of the activities of the public service broadcasting organisation and which allows it to engage in long-term planning; and
- the use of the contribution or licence fee by the public service broadcasting organisation should respect the principle of independence and autonomy.

In more general terms, with reference to the privatisation of RAI, the Commission recalls the dilemma between the pure market model and the public-policy model.

The Commission also wishes to refer to the warning which AGCOM has recently issued with reference to the circumstance that RAI, as a stock company, will be under great pressure to maximise the advertising income, which will interfere with the achievement of the public-policy aims. [...] [The] privatisation does not appear suitable to ensure that RAI will efficiently carry out its public-policy tasks and at the same time efficiently compete with other operators [...] in the area of advertising revenues.

AGCOM has indeed pointed to the solution in force in the UK, where the Public Broadcasting Service is publicly owned and financed by licence fees, while commercial operators, including public ones, are financed through advertising.”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§170-173

2.5.2.2 Funding of the printed press

“Several governments have introduced financial subsidies for newspapers, in the form of either direct subsidies, [...] or establishment grants, or indirect subsidies in the form of value-added tax concessions, [...]. Several European states levy a tax on advertising, and some of them link it to funding a press subsidy scheme.

The Italian government takes certain measures in support of the printed press. Financial subsidies are granted, upon request, to those newspapers which declare to be the official papers of a political party. These subsidies allow certain newspapers with low advertising resources to survive.

Support for the press industry is also set out in Article 25 (6) of the Gasparri Law, which provides that ‘at least 60 percent of the overall budget set aside by a public administration office or public body or public limited company for the purchase of advertising space for institutional

² See also below the “Advertising” Section

communication on means of mass communication, each financial year, must be used for daily newspapers and magazines.’

The Commission finds that these measures are undoubtedly positive and constitute a good contribution to media pluralism.”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§178 and §§184-186

2.6 MEDIA REGULATORY BODIES: THEIR COMPOSITION, MANDATE, AND PROCEDURES

“An Appendix [to the CM Recommendation No. R (96) 10 stipulates] that ‘the legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy’. [...].

The role of the parliamentary commission in programme matters [...] might also be problematic in this respect. The Commission recalls that the Appendix to Committee of Ministers’ Rec. (2000)23 [...] provides that in order to preserve the editorial independence of the public broadcasting service, regulatory authorities should not exercise *a priori* control over programming.”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§148 and 150

“[...] [A] parliamentary component in the public broadcasters’ boards of directors exists not only in Italy, but also in other European countries. [...].

This parliamentary role, however, should mainly concern the establishment of guidelines and the solution to certain problems of public opinion, and should not be extended to interfere with the editorial work of the broadcaster or even with the appointment and dismissal of journalists.”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§152-153

“[Under the Hungarian law] [members] of the Media Council must receive the support of a qualified majority in Parliament to be elected. In normal circumstances, the purpose of imposing an obligation for a qualified majority is to ensure cross-party support for significant measures or personalities. However, where the super-majority requirement is introduced at the initiative of a political group having that supermajority, this rule, instead of ensuring pluralism and political detachment of the regulatory body, in fact ‘cements’ the influence of this particular group within the regulatory body and protects this influence against changing political winds. [...].

[The Venice Commission recommends that] a system reflecting political diversity in relation to the composition of the Media Council might be considered as an option, in order to ensure that all major political parties and social groups have fair representation there. [...] An element of self-governance should be introduced into the composition of the Media Council. If the media community and the telecommunication industry, through self-regulating bodies or otherwise, delegate representatives to the Media Council, it would make this body more politically neutral

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and would increase public trust in its independence. Civil society groups could also participate in this process. It is important that the representatives of the civil society and the media sector who are delegated to the Media Council are selected in a transparent and fair procedure and that the bodies delegating them do not have strong financial, institutional or other ties with the Government or the Media Council itself.

The status, powers and the manner of appointment of the President of the Authority/Chairperson of the Media Council should also be reconsidered. Thus, it would be advisable to reduce his/her term of office and remove some of his/her appointing powers in respect of the major decision-makers of the regulatory structures. The President of the Republic, before making the appointment of the President of the Authority, might be required to conduct mandatory formal consultations with the opposition and media community. [...] It is suggested that the President of Hungary might be given a real veto power on the candidate proposed by the Prime Minister. Or, even better, the Chairperson of the Media Council might be elected by other members of the Council from their own ranks.

More generally, the powers which are now concentrated within the Media Council or in the hands of its Chairperson might be divided amongst several autonomous bodies. In particular, it concerns the powers of the Media Council vis-à-vis public service broadcasters [...]. Ideally, the President of the Media Authority should not be the same person as the Chairperson of the Media Council, not least because the work of the Media Authority is largely devoted to the telecommunications sector, whereas the Media Council is essentially related to broadcasting content matters.”

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, §64, and §§70-72

“[...] Journalist associations provide the paradigm for self-regulation of journalists and set the framework of ethical rules that journalists must respect when they seek to reveal the truth.”

CDL-AD(2010)053rev, Opinion on the warning addressed to the Belarusian association of journalists on 13 January 2010 by the Ministry of Justice of Belarus, §58

“[...] [In] order to address the problem of malicious or irresponsible media behaviour on the internet, the Venice Commission encourages the Albanian authorities to support the setting-up of an effectively functioning and independent self-regulatory body involving all relevant stakeholders of the media community and capable of ensuring an effective and respected system of media accountability in the online media field through self-regulation. [...]”

CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, § 72

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

[...] [There] is a widespread perception that the AMA [(the Albanian media authority)] lacks independence. All members of the AMA have a clear political affiliation, with members proposed by the ruling party/coalition having a slight majority in this body [...]. [...] In the Albanian context, in which there is a widespread distrust vis-à-vis the AMA when it comes to its independence, to

have representatives of the media community and the civil society not directly affiliated with main political forces, could be one step to enhance the independence of this body.

Second, it is unclear whether members of the AMA and of the Complaints Committee [(an adjudicatory body created under the AMA)] are sufficiently independent from the big media industry or other corporate control, by virtue of the rules on incompatibilities and the conflict of interest. [...] [The] incompatibilities and conflict of interest criteria defined in Article 7 now appear to be solely applicable to the AMA, but not to the Complaints Committee. Moreover, it is for the AMA to develop the applicable rules for selection of the Complaints Committee [...]. It is questionable whether the AMA (in the current context, due to its strong political affiliation) should be given the power to develop those rules. It would be more appropriate, in the Albanian context, to fix the ineligibility/conflict of interest rules in the law itself.

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

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

CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, §§34-37

2.7 LICENSING, DISTRIBUTION OF BROADCASTING FREQUENCIES, ACCREDITATION ETC.

“In the case of *Groppera Radio AG and others v. Switzerland*, the [European] Court held that the power of the domestic authorities to regulate the licensing system may not be exercised for other than technical purposes and not in a way which interferes with freedom of expression contrary to the requirements of the second paragraph of Article 10.”

CDL-AD(2016)011, Turkey - Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication ("the Internet Law"), §91

“Under Article 6A(10), Internet service providers which are not members of the Union of Access providers, may not operate. [...]

[...] [The] compulsory membership of the Union for the access providers may also be seen as a ‘license’ in order for the access providers to operate. [...]

As mentioned above, the only function of the Union is the dissemination of access-blocking orders to its members [...]. [...] The question is whether the mere provision of information to access providers about an access-blocking decision may be considered to have sufficient ‘technical

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aspects' justifying a compulsory membership to the Union [...]. [...] The Commission believes that in order to be in conformity with the democratic necessity and proportionality requirements [...] the compulsory membership under Article 6A(10) should be justified with further technical reasons [...].”

CDL-AD(2016)011, Turkey - Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication ("the Internet Law"), §§87, 90, 92

“The accreditation scheme on the basis of the mass media law in Belarus does not ensure that there will be no arbitrary exclusion from access to journalism. Even if it did, the issue of licensing journalists remains a very controversial one.

[...] [By] placing the BAJ [(Belorussian Association of Journalists)] under the obligation to ensure that all membership documents issued to BAJ members which display the word ‘PRESS’ and ‘PRESS REPUBLIK OF BELARUS’ are withdrawn, and see to it that they cannot be used in the future, the warning has infringed upon the right of the BAJ and its members to freedom to receive and impart information and ideas as guaranteed in Article 19 of the ICCPR and Article 10 of the ECHR.”

CDL-AD(2010)053rev, Opinion on the warning addressed to the Belarusian association of journalists on 13 January 2010 by the Ministry of Justice of Belarus, §§86-87

3. DEFAMATION, INSULTS, DISCLOSURE OF PERSONAL INFORMATION

3.1 DIFFERENT FACETS OF “PRIVACY”

“The right to ‘privacy’ is nowadays acknowledged everywhere as a basic principle, that covers various, quite distinct fields; its definition in different jurisdictions varies. ‘Privacy’ is often invoked in respect of the protection against interception of private communications – by phone, post, internet or otherwise. Sometimes ‘privacy’ is referred to in order to protect one’s dignity or reputation. This concept has been used as a reference for the right not to have certain information of personal character disclosed or, conversely, to have access to certain information. Privacy may also relate to certain intimate practices which the government should not interfere with (like sexual practices). The list of situations where the right to ‘privacy’ may be invoked is large and expanding.”

CDL-AD(2016)008, Opinion on the law on the protection of the privacy and on the law on the protection of Whistleblowers of “The former Yugoslav Republic of Macedonia”, §33

“At the international level ‘honour and reputation’ are regarded as a human right. Article 17 of the International Covenant on Civil and Political Rights (ICCPR) explicitly protects ‘honour and reputation’, which are distinct from ‘privacy’.”

CDL-AD(2014)040, *Amicus Curiae* Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased, §13

“[...] [In] addition to the primarily negative obligation on the State to abstain from arbitrary interference in the exercise of the right to private and family life, there are also positive obligations to ensure effective respect for the private life, in particular the right to protection of one’s reputation [...]”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §16

3.2 BALANCING FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVACY – GENERAL PROVISIONS

“[...] In defamation cases the protection of one’s reputation must be weighed against the wider public interest in ensuring that people are able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. Furthermore, [...] the protection of Article 10 applies not only to information or ideas that are favourable and inoffensive but also to those that offend, shock or disturb the State or a sector of the population.”

CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, §31; see also CDL-AD(2015)015, §25, CDL-AD(2013)038, §23 and CDL-AD(2008)026, §43

“The prohibition of defamation raises the issue of the appropriate balance to be struck between freedom of expression, as protected by Article 10 ECHR, and the right to respect for private and family life, as protected by Article 8 ECHR. Freedom of expression carries with it duties and

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responsibilities which are of particular significance when the reputation of a named individual and the ‘rights of others’ are at risk.”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §13; see also CDL-AD(2013)024, §§23 and 54

“[The provisions of the law] create an impression that the ‘personality rights’ of individuals have always to prevail over the freedom of the press. However, this interpretation is incorrect: it is up to the court to balance competing interests and decide which of them prevails in the specific circumstance of the case: the freedom of speech or any private interest which that freedom may affect. So, it is wrong to categorically assert that such speech is always inadmissible. [...]”

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, §26; see also CDL-AD(2016)008, §22

3.3 DEFAMATION CASES AND FREEDOM OF EXPRESSION

3.3.1 General description of the test to be applied in defamation (and alike) cases

“What appears clearly missing from the text of Article 2.1.1 is that defamatory statements must be false or untrue. In established human rights case law, defamation is seen as the act of making untrue/inaccurate statements of facts about another person, affecting his/her reputation. The [European] Court has held that truth should be a defence to a charge of defamation. [...]”

CDL-AD(2013)024, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, §66

“[...] The Venice Commission considers that the right to reply should be applicable only to untrue factual information which damages someone’s reputation, and not critical opinions which cannot give rise to the right to reply [...]”

CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, §49

“What sort of defamatory statements amounts to an interference with the ‘private life’ is discussed in the Court’s case-law. Thus, in the case of *Karakó v. Hungary* the Court held that the Convention protects, through Article 8, ‘core’ aspects of one’s reputation; it gives protection from ‘factual allegations [...] of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant’s private life’ and not merely on ‘the external evaluation of the individual’. Whatever this ‘threshold’ may be, it is clear that the ECtHR recognizes the right to ‘reputation’ and derives it from the concept of private life.”

CDL-AD(2014)040, *Amicus Curiae* Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased, §16

“[...] Where free speech [...] comes into conflict with the right to private life [...] the ECtHR has set forth the following main criteria for the balancing exercise:

- Contribution to a debate of general interest. The statements made in the course of a political debate as a fair comment on matters of public interest enjoy maximum protection under the Convention. Very strong reasons are required to justify restrictions on political speech. The penalization of a media outlet, publishers or journalists solely for being critical of the government or the political system espoused by the government can never be considered to be a necessary restriction of freedom of expression;
- The public status of the person subjected to criticism. Someone who is active in the public domain must have a higher tolerance of criticism. The limits of acceptable criticism are wider with regard to politicians acting in their public capacity. Public figures are also those who are using public resources, are influential in the economic sector or play a role in public life;
- Prior conduct of the person who is the subject of criticism. There should be a reasonable connection between known facts about the behaviour, views, attitudes etc. of the person who is the subject of criticism and the negative opinion/value judgment about that person;
- The truth defence (where the speech contains factual statements);
- Content, form and the consequences of the publication. The mere fact that forms of expression are considered to be insulting is not sufficient to justify the imposition of penalties. However, the intensity of the speech and its effects on the reputation of the person concerned are a factor to be taken into account.

This list is not exhaustive; in assessing whether the right balance between reputation interests and the freedom of speech has been struck, the Court assesses other relevant factors, for example, the severity of the sanction imposed on the author of the defamatory statement. In the context of the present case the fact that it was the head of State or Government who made a statement, accusing hereby, allegedly falsely, the dead person of a serious crime, might be relevant to assess the impact ('consequences') of the statement."

CDL-AD(2014)040, *Amicus Curiae* Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased, §23; see also CDL-AD(2013)038, §17, CDL-AD(2014)040, §23, and CDL-AD(2016)008, §§20-21

"All the judgements which are reproduced in the Annex provide examples of how other European Courts deal with this balancing of all factors in a specific case in order to determine whether a person who has made a defamatory factual allegation which he or she cannot prove to be true nevertheless is free to do so. Attention is drawn in particular to the list of factors in the Reynolds decision by the British House of Lords [...]:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

10. The circumstances of the publication, including the timing.”

CDL-AD(2004)011, *Amicus Curiae* Opinion on the relationship between the Freedom of Expression and Defamation with respect to unproven defamatory allegations of fact as requested by the Constitutional Court of Georgia, §12

“The test proposed by the Court is not a categorical one: in other words, the various elements should be assessed to come to a correct result. [...]

It is difficult, if not impossible, to measure *in abstracto* the relative weight of each element of the test applied by the Court. However, it would be fair to say that when the publication concerns serious matters of public interest, other considerations generally will be of less importance. [...]”.

CDL-AD(2016)008, Opinion on the law on the protection of the privacy and on the law on the protection of whistleblowers of “The former Yugoslav Republic of Macedonia”, §§22-23

3.3.2 Truth defence and the obligation to verify factual allegations; distinction between value judgments and facts

For more information about this topic see also Section 7.3 below

“[...] The ‘public interest’ safeguard afforded by Article 10 [of the ECHR] to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.

In its case law, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The Court has held that the requirement to prove the truth of a value judgment is impossible to fulfil [...]. Where a statement amounts to a value judgment, proportionality of the interference may depend on ‘*whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive*’.

In principle, the burden of proof lies with the author. Yet, the proof of the truth should not be imposed on the author of the offence as an obligation in cases where it is impossible for him/her to prove the truth or unreasonable efforts would be needed on his/her part, while the plaintiff has access to relevant facts. As concerns the media, in *McVicar v. UK*, the Court recalled that ‘*special grounds were required before a newspaper could be dispensed from its ordinary obligation to verify factual statements that were defamatory of private individuals*’.

Likewise, the Court’s case law has firmly established, as part of the ‘public interest’ defence, the right of the public to receive information and ideas of all kinds, even if sometimes not entirely confirmed. In addition, the Court held that, in the context of public interest debate, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §§24-27; see also CDL-AD(2013)024, §§98-99, and CDL-AD(2020)013, §49

“[...] [There] may be situations where a journalist deliberately distorts the intercepted conversation, or maliciously misrepresents its content. Such abuses should be punishable; the freedom of the press should not cover false factual assertions made maliciously or with reckless disregard to the truth. [...] [It] should be the professional duty of a journalist to verify, by taking

reasonable steps, the authenticity of any material s/he intends to publish. Such verification may include, for example, contacting the persons concerned by the conversation and asking their comments.

That being said, the veracity of the published material does not appear to be the main concern of the Privacy Law. From its text it is clear that it was not supposed to combat malicious or reckless behaviour of journalists. The Law rather deals with publication of true materials which may be, despite their truthfulness, detrimental to somebody's privacy. Publication of such audiotapes is akin to a publication of a true photograph. Such audiotapes, if published, may destroy reputation, cause moral suffering, perturb family relations etc. but not because they are untrue.

The Venice Commission subscribes to the opinion expressed by the US Supreme Court that 'state action to punish the publication of truthful information seldom can satisfy constitutional standards'. If the purposes of the law is to deal with the honest public disclosure of authentic materials – or materials which are on the face authentic [Footnote 31: Not necessarily 'true'; the journalist may not be required to prove the truthfulness of his assertion beyond reasonable doubt in each case; a more relaxed test is usually applied to verify whether the journalist acted professionally and did all that could be reasonably expected from him in the circumstances to check the accuracy of the information] – which are of public interest, their publication cannot be banned solely because it may harm somebody's reputation. Damage to reputation is a relevant argument, but it is not sufficient – the law must also take into account other elements related to the content of the information [...]."

CDL-AD(2016)008, Opinion on the law on the protection of the privacy and on the law on the protection of whistleblowers of "The former Yugoslav Republic of Macedonia", §§45-47; see also CDL-AD(2013)038, §§36-42

3.3.3 "Public interest" and "public figure" criteria

"Political speech enjoys special protection due to its social dimension. [...]."

CDL-AD(2010)053rev, Opinion on the warning addressed to the Belarusian association of journalists on 13 January 2010 by the Ministry of Justice of Belarus, §58

"In its case law, the Court has consistently applied the notion of a high tolerance threshold for criticism directed to politicians [...]. [...] [The] limits of acceptable criticism are wider as regards public or political figures than as regards a private individual. In a democratic society, the government's action must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. [...]."

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §20; see also CDL-AD(2013)024, §28

"The Venice Commission also recalls that the concept of 'private life' is applied differently to private persons, on the one hand, and politicians on the other hand, who 'inevitably and knowingly lay themselves open to close scrutiny of their words and deeds by journalists and the public at large, and they must consequently display a greater degree of tolerance' [...]. The limits of acceptable criticism are accordingly wider as regards a politician as such. By contrast, the status of an ordinary person 'enlarges the zone of interaction which may fall within the scope of private life'."

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CDL-AD(2016)008, Opinion on the law on the protection of the privacy and on the law on the protection of whistleblowers of “The former Yugoslav Republic of Macedonia”, §24; see also §48 of this opinion and CDL-AD(2013)038, §20

“Obviously, politicians, prominent business people, high ranking civil servants, members of royal families, famous athletes and celebrities, fall under the scope of public figure. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts. [...]”

CDL-AD(2013)024, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, §78; see also CDL-AD(2009)010, §26

“[...] [As] to the insults containing profanity uttered against the President of the Republic and the members of his family are concerned, with – according to the authorities- no critical content, a clear distinction should be made between criticism and insult. If the sole intent of any form of expression is to insult the President, amounting to wanton denigration or gratuitous personal attack, a proportionate sanction would not, in principle, constitute a violation of the right to freedom of expression. Nevertheless, the Venice Commission is struck by the prison sentences and the arrests and detentions on remand of individuals for having insulted the President. Although the expressions may contain swear words, the arrest of a 16 years old boy at his school for insulting the President and the prison sentences pronounced by courts [...] are very likely to create a chilling effect on society as a whole and cannot be considered proportionate to the legitimate aim pursued, i.e. protecting the honour and dignity of the President.”

CDL-AD(2016)002, Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, §68; see also §126

3.3.4 Sanctions for defamation

See Section 5.1 below

3.4 PUBLIC DISCLOSURE OF CLASSIFIED MATERIAL, PRIVATE CONVERSATIONS AND PERSONAL INFORMATION

3.4.1 Disclosure of classified material

“A state must be able to keep certain information secret, and to protect this secrecy with both administrative mechanisms and the criminal law. Secrecy can however also hide incompetence, ulterior motives and corruption. Secrecy moreover makes life easier for state authorities, in that it shields them, and their policy-making, from scrutiny from citizens and the media. State authorities are thus continually tempted to keep information secret and to over-classify information.”

CDL-AD(2008)008, Opinion on the Law on State Secret of the Republic of Moldova, §5; see also, mutatis mutandis, CDL-AD(2012)023, §63

“It might be legitimate to keep secret certain technical aspects of the anti-terrorist operation while the crisis is on-going in order not to jeopardise the operations. However, the authorities should not be tempted nor allowed to use secrecy rules to keep their actions from public scrutiny. It is the main role of journalists, as ‘public watchdogs’, to reveal unjustified or unlawful actions and it is a right of the public to be informed about them.

Limitations on media coverage are easier to justify if they are narrowly tailored: they should be of a short duration, be applied to a limited geographical zone, and relate to tactical aspects of the on-going counter-terrorist operation and similar ‘secret’ information. [...] The blanket prohibition of taking interviews is also problematic (since not every interview will disclose to the terrorists sensitive information).”

CDL-AD(2018)024, Opinion on the Law on preventing and combating terrorism of the Republic of Moldova, §§66 and 67

3.4.2 Disclosure of unlawfully intercepted private conversation

“[The] Law introduces a criminal liability for disclosure of the unlawfully intercepted material. One may conclude that an absolute ban, contained in Article 4 p. 2, might be justified on the sole ground that the material has been obtained in blatant violation of the secrecy of private communications. [...].

The question is, however, whether this reason – namely the unlawful origin of those recordings - is a relevant and sufficient argument to justify the ban. The ECtHR case-law under Article 10 does take into account the method by which the information has been obtained. [...].

However, it is not necessarily a sufficient argument. The interest of the population to know certain information of public interest may override a legal duty of confidence [...].

There is no doubt that the practice of illegal wiretapping by law-enforcement services should be combatted. [...] For instance, in some jurisdictions materials obtained as a result of illegal wiretapping cannot be used in criminal proceedings as evidence. Such rule is supposed to discourage such kind of behaviour of the law-enforcement. However, this logic is not applicable here. The aim of the Privacy Law is different: it is not supposed to deter future wrongs but its purpose is to deal with something which has already happened.

It is perfectly legitimate to try to identify and punish those persons who ordered or carried out illegal wiretapping. [...]

[However, the Privacy Law] may be applied to law-abiding journalists who have received information allegedly obtained in breach of the law but who themselves had not been responsible for the unlawful interceptions. [...] [If] there is a proof that the journalist acted as a criminal associate of those ‘unscrupulous actors’, such behaviour may be considered as not being ‘in accordance with the tenets of responsible journalism’.

However, in the very specific situation which the Privacy Law is supposed to address, it would be reasonable to assume good faith of the journalists. [...] Moreover, punishing journalists would not deter future illegal wiretappings, since, as noted above, the Privacy Law only concerns those wiretappings which had already taken place. The Venice Commission is not called upon to formulate a general rule on whether or not it is legitimate to prevent journalists from publishing unlawfully obtained materials. However, in the circumstances in which the Privacy Law has been adopted, the Venice Commission does not support the idea of sanctioning journalists for

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publication of materials solely because those materials have dubious origin. The task of a journalist should be limited to assessing whether the material contains matters of public interest and therefore deserves to be published, and whether its publication may cause serious damage to some other legitimate interests, like, for example, privacy”

CDL-AD(2016)008, Opinion on the law on the protection of the privacy and on the law on the protection of Whistleblowers of “The former Yugoslav Republic of Macedonia”, §§36-42

3.4.3 Disclosure of highly personal information

“[...] It thus appears that the Law is mostly concerned with the disclosure of information about some very intimate aspects of private and family life. This is a reasonable reading; protection of such information from disclosure is a legitimate aim for the State to pursue. The question, however, remains, what are the limits of ‘privacy’ so understood.

As noted above, Article 4 p. 2 prohibits *any* public disclosure of such private information. This approach is incorrect. [...].

[...] Certain information may be both ‘personal’ and, at the same time, important for public discussion [...].

From this perspective, [...] it would be more appropriate – given the specific circumstances of the wiretapping scandal – to rely on the opposite presumption, namely that the conversations involving public figures do contain elements representing public interest. Journalists should therefore be allowed to publish such information. Exceptions from this rule may exist, but they should always be formulated as exceptions, not as a general rule.

[...] [The] Privacy Law might be amended to require the journalists to take certain practical steps in order to set apart the information which may be made public from the information that should be kept undisclosed. [...] It should be a duty of the journalist to avoid such ‘collateral damage’ and thus to exclude those elements of personal information which do not concern public figures and do not touch on the matters of public interest. [...]”

CDL-AD(2016)008, Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of “the former Yugoslav Republic of Macedonia”, §§49-50 and §§52-54

“In *Digital Rights Ireland v Minister for Communications & Others*,³⁰ the Court of Justice of the European Union (CJEU) examined the compatibility of the European Directive on data retention with Article 7 (‘Respect for private and family life’) and Article 8 (‘Protection of personal data’) of the EU Charter of fundamental rights. [...]

Those data, taken as a whole [emphasis added] may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.

Thus, according to the CJEU the disclosure of that kind of information, given its cumulative effect, clearly constitutes an interference with privacy, protected by Article 7 of the Charter. In that case

the CJEU annulled the EU Directive on data retention, and several courts in the EU countries have followed, stressing the need for improved controls over metadata collection.³¹

The ECtHR also interprets the applicability of Article 8 of the ECHR to such kind of data quite broadly. The use of information relating to the date and length of telephone conversations and in particular the numbers dialled can give rise to an issue under Article 8 as such information constitutes an ‘integral element of the communications made by telephone’. Furthermore, systematic collection and storing of data by security services on particular individuals, even without the use of covert surveillance methods, constituted an interference with these persons’ private lives.”

CDL-AD(2016)012, Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts of Poland, §§27-30

“Modified Article 32 Section VII is aimed at protecting personal data. Personal data protection is a legitimate concern and its elevation as a constitutional matter is a positive development. However, this norm should not prevent collection and disclosure of data on ‘private life’ of public figures, within the limits set by the ECtHR case-law under Article 10 of the European Convention. Further, collection and systematisation of data (by the State and private actors) should be possible for other legitimate purposes. It should be recalled in this respect that there is a certain tendency to accept that the right to receive information as element of the right of freedom of expression implies in principle the right of access to information of the administration - information which must be made public at a specific request and subject to the usual grounds of limitation.”

CDL-AD(2016)029, Opinion on the draft modifications to the Constitution of Azerbaijan submitted to the Referendum of 26 September 2016, §38

3.4.4 Whistle blowers

“The Whistleblowers Law provides protection to persons who – in good faith – want to disclose a wrongdoing ‘that violates or threatens public interest’ which they discover in their workplace. In essence the Whistleblowers Law creates an exception from the legal duty of confidentiality, which in normal circumstances is binding on every employee. [...] Under certain conditions [...] the whistleblowers are entitled to make public disclosures.

A legal framework for the protection of whistleblowers is nowadays in operation in many countries. Disclosures that for a long time have been considered as unlawful or morally suspicious have found legal protection. The Macedonian Whistleblowers Law follows this trend and is largely inspired by the Council of Europe *acquis*. [...].”

CDL-AD(2016)008, Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of “the former Yugoslav Republic of Macedonia”, §§59-60

“[...] The Venice Commission stresses that the whistleblower should not be required to *prove* [...] that the information disclosed is perfectly accurate; however, s/he may be required to show that the information s/he disclosed was at least *prima facie* credible. [...].

The next question is to what extent the ‘good motives’ of the whistleblower should be decisive for giving him/her protection under the Law. [...]

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[...] [Although] the motive of the whistleblower is an element to assess, the fact that the disclosure was driven by wrong motives does not (completely) remove the protection which the 'public interest' may grant to such disclosure. [...]. *Mala fides* disclosures may still serve a good and important cause *while bona fides* does not guarantee a positive contribution to the public interest."

CDL-AD(2016)008, Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of "the former Yugoslav Republic of Macedonia", §§71-73

"[...] [It] is reasonable to make public disclosures permissible only under certain specific conditions. However, [...] the Law puts the bar too high. [...]"

[...] [It] is difficult to accept that gross human right violation [...] cannot be a sufficient justification for public disclosure. The same concerns serious allegations of corruption, electoral fraud, etc.

Furthermore, to be able to proceed with the public disclosure, under the Law, the whistleblower is required to demonstrate that 'the evidence of [the unlawful] activity may be imminently destroyed' [...]. But not in every serious case there is a risk of destruction of evidence. [...] [This] condition is very difficult to satisfy and should be removed as a *sine qua non*.

Finally, Article 6 p. 3 defines three additional obligations for the whistleblower making protected public disclosures: to respect the presumption of innocence, to respect the right to protection of personal data, and not to threaten the course of ensuing court proceedings. These three additional obligations may have a chilling effect on those wishing to make public disclosure.

[...] It is recommended that conditions for the protected public disclosure should include any of the three situations: (i) a previous unsuccessful internal/external disclosure, (ii) the non-existence of an internal/external disclosure mechanism or its inefficiency, (iii) the risk of concealment of the wrongdoing or escaping of liability by the culprits in case of an internal/external disclosure or the fear that the materials might be destroyed. [...]"

CDL-AD(2016)008, Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of "the former Yugoslav Republic of Macedonia", §§77-79 and §84

"[...] [Protection] provided by the Whistleblowers Law appears to be focused on the possible disciplinary sanctions against the whistleblower. This is in line with the approach of the Committee of Ministers [...]."

The next question is whether this protection should go beyond the disciplinary sphere and cover possible criminal sanctions arising from the disclosure, or any civil liability based on tort or a breach of contract. [...]"

That does not imply that the Whistleblowers Law should necessarily become a comprehensive code for all types of disclosures and provide defence against all types of legal sanctions. Probably, in respect of some specific types of disclosures (for example those related to State or military secrets) special rules must apply. However, the Law should be more specific about the 'protection' it gives to whistleblowers. [...]"

CDL-AD(2016)008, Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of "the former Yugoslav Republic of Macedonia", §§92-94

4. INFLAMMATORY SPEECH OR OBSCENITIES

“In certain jurisdictions content-based restrictions on speech are impermissible, unless, for example, they create a clear and imminent danger of unlawful violent action. Thus, the US Supreme Court draws a distinction between a mere general advocacy of violence and calls for a specific violent act. The former class of speech is protected by the First Amendment to the US Constitution, while the latter may be punishable.

The European approach is not so categorical. As such, content-based restrictions are not ruled out by Article 10 of the European Convention on Human Rights (ECHR) or Article 11 of the EU Charter of Fundamental Rights. Even more so, there are numerous international instruments which urge the States to take positive measures to combat hate speech or protect children against sexually explicit or violent media content.”

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, §§20-21

4.1 SEDITIOUS SPEECH

“[...] Advocating for the amendment of the Constitution through legal means could be viewed, [under the domestic law at issue], as a violation of the constitutional order – yet, most often, it is an acceptable form of expression. In its opinion on the Romanian constitution the Venice Commission stressed that ‘in the absence 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’. In an opinion concerning the law of Azerbaijan on NGOs the Venice Commission held that ‘peaceful advocacy for a different constitutional structure [...] are not considered to be criminal actions, and should on the contrary be seen as legitimate expressions’.”

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, §23, with reference to CDL-AD(2014)010, §73 and CDL-AD(2014)043, §49; see also CDL-AD(2007)043, §10; CDL-AD(2012)016, §33

“[...] The legislation should make it clear that it is only the dissemination of materials concerning calls to participate in events of mass disorder where the material advocates acts of mass disorder or where the publisher knows that such acts are planned or will be carried out which should be prohibited.”

CDL-AD(2008)017, Opinion of the Draft Amendments to the Criminal Code of the Republic of Armenia, §14; see also §§16-17

“[...] [After] the declaration of the state of emergency many journalists had been prosecuted and placed in detention as members of various terrorist groups, exclusively on the basis of the content of their publications. The Government, in their Memorandum, argued, by contrast, that the journalists were detained not because they were journalists, but for being members of a terrorist organisation or for ‘making propaganda in favour of them’.

A 'verbal act' may be analysed from two points of view: as a self-sufficient ground for prosecution, or, alternatively, as auxiliary evidence that the person concerned is involved in another unlawful activity (for example, in the recruitment of new members to an illegal armed organisation). The line dividing these two aspects of 'verbal acts' is a fine one. The Venice Commission recalls that where the only evidence which led to the criminal conviction of the applicants for 'membership of' (or 'aiding and abetting') a terrorist organisation was the content of their public speech (in various forms), the ECtHR tended to consider those cases as falling within the ambit of Articles 9, 10 and/or 11 of the ECHR.

The Venice Commission cannot assert whether charges of 'membership' of a terrorist organisation (or similar charges), which often entail harsher sentences, are well-founded in each specific case. However, it reiterates that 'the expression of an opinion in its different forms should not be the only evidence before the domestic courts to decide on the membership of the defendant in an armed organisation'.

The Venice Commission stresses that the Penal Code of Turkey and the special anti-terror legislation have several specific provisions which permit to combat inflammatory or seditious speech, propaganda of terrorism, and other similar 'verbal act offences' (see, in particular, Articles 215, 216, 220 § 8, 217, 299, 300 and 301 of the Penal Code and Article 7 § 2 and Article 8 § 2 of the Anti-Terrorism Law no. 3713). Such verbal acts may be, in principle, legally reprehensible, and, in extremis, even criminally punishable. Still, a judge applying those specific provisions should be aware of their dimension under Article 10 of the ECHR. This awareness reduces the risk that acceptable forms of expression would be suppressed by means of the criminal law. By contrast, when the same publications are treated under the heading of 'membership' of a terrorist organisation, 'aiding and abetting' it, or acting 'on behalf of' it, the risk of unjustified interference in the freedom of speech is much higher.

In their later submissions the Government informed the Venice Commission that '[...] being punished for propaganda alone is not deemed sufficient to constitute the crime of membership to an organization'. This clarification is important and the Turkish authorities have to ensure that this approach is also reflected in the practical application of the Penal Code, and that 'verbal act offences' (related to different forms of expression of opinion) are clearly distinguished from the concepts of 'membership' in illegal organisations, aiding and abetting terrorism etc.

The Government also claimed that 'despite being journalists, many people who had an armed conflict with the security forces, threw Molotov cocktails to the police, slaughtered innocent people and planned terrorist activities, were identified along with the evidence'. Indeed, where a person who is a journalist by profession is involved in such acts, no Article 10 question arises, and such person may be legitimately prosecuted as a member of a terrorist organisation. However, the focus of the Venice Commission's attention is not on those situations, but on the cases where the 'membership' accusation is derived essentially from the substance of the publications of the person concerned.

The above does not mean that the Venice Commission uncritically approves the use of those specific provisions of the Penal Code which deal with 'verbal act offences'. Some of them are dangerously vague (which may raise an issue under Article 7 of the ECHR) or set excessively high penalties. [...] However, in the current context the first step to improve the situation with the journalistic freedom would be to construct the notion of 'membership' very narrowly. Radical dissidents and fierce critics of the regime may be sanctioned for exceeding the limits of permissible speech, notwithstanding the little scope under Article 10 § 2 of the Convention for restrictions on political debate, but at least they should not be placed on the same footing with the members of terrorists' groups. The Venice Commission thus considers that the 'membership'

concept (and alike) should not be applied to the journalists, where the only act imputed to them is the content of their publications.”

CDL-AD(2017)007, Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, §§66-72

4.2 HATE SPEECH AND ALIKE

“The Venice Commission stresses [...] that hate speech ‘is in contradiction with the Convention’s underlying values, notably tolerance, social peace and non-discrimination’ and, by virtue of Article 17 ECHR, may not benefit from the protection afforded by Article 10 ECHR.”

CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, §42; see also CDL-AD(2008)026, §56

“[...] [Where] speech incites to violence against an individual or a sector of the population, the State authorities enjoy a wider margin of appreciation 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, and may not contain hate speech or advocate unlawful violence. There are international documents which actively require the States to adopt measures, including measures under criminal law, to fight hate crime.”

CDL-AD(2015)004, Opinion on the draft Amendments to the Media Law of Montenegro, §12

“[...] [It] is doubtful whether every exercise of the freedom of speech aimed at ‘*violating the dignity of any ethnic, racial or religious community*’ is hate speech of the type mentioned. The terms used in the amendment have potential for such a wide scope of application that they lack the clarity and precision needed to be in compliance with the condition that a limitation of the freedom of speech has to be ‘foreseen by law’.”

CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, §52

“Criminalization of calls for violence does not raise any issue. By contrast, the notion of ‘hatred’ is more difficult to define. For the ECtHR, the freedom of expression covers not only inoffensive ideas that are favourably received by public, but those that ‘offend, shock or disturb the state or any sector of the population’. It is not always easy to say when an ‘offending’ or ‘shocking’ form of expression becomes ‘hate speech’; the ECtHR in such cases applied contextual and multi-factor analysis. While there is no simple definition of ‘hatred’, it should be distinguished from simple criticism of ideas or practices, shared by members of the protected group. [...]”

CDL-AD(2018)014, Opinion on the draft act amending the Constitution, on the draft act on the human rights and equality commission, and on the draft act on equality of Malta, §94

“The Venice Commission is of the opinion that in order to qualify ‘stirring up of social, racial, ethnic or religious discord’ as ‘extremist activity’, the definition should expressly require the element of violence. This would [...] more closely follow the general approach of the concept of ‘extremism in the Shanghai Convention.’”

CDL-AD(2012)016, Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation, §36; see also CDL-AD(2008)026, §21, and CDL-PI(2016)010, §40

“Negationism, in the sense of public denial of historical facts or genocide with a racial aim, is an offence in a few countries (Austria, Belgium, France, Switzerland). In other countries such as Germany, certain activity amounting to negationism may come within the definition of the offence of incitement to hatred.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §30

“When it comes to statements, certain elements should be taken into consideration in deciding if a given statement constitutes an insult or amounts to hate speech: the context in which it is made; the public to which it is addressed; whether the statement was made by a person in his or her official capacity, in particular if this person carries out particular functions. [...]

As concerns the context, a factor which is relevant is whether the statement (or work of art) was circulated in a restricted environment or widely accessible to the general public, whether it was made in a closed place accessible with tickets or exposed in a public area. The circumstance that it was, for example, disseminated through the media bears particular importance, in the light of the potential impact of the medium concerned. [...]

As concerns the content, [...] in a democratic society, religious groups must tolerate, as other groups must, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to incitement to hatred and does not constitute incitement to disturb the public peace or to discriminate against adherents of a particular religion.

It should also be accepted that when ideas which, to use the formula used by the Strasbourg Court, ‘do not contribute to any form of public debate capable of furthering progress in human affairs’ cause damage, it must be possible to hold whoever expressed them responsible. [...]”.

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §§69-70, 72, 76

“[...] [It] is often argued that there is an essential difference between racist insults and insults on the ground of belonging to a given religion: while race is inherited and unchangeable, religion is not, and is instead based on beliefs and values which the believer will tend to hold as the only truth. This difference has prompted some to conclude that a wider scope of criticism is acceptable in respect of a religion than in respect of a race. This argument presupposes that while ideas of superiority of a race are unacceptable, ideas of superiority of a religion are acceptable, [...].

In the Commission’s opinion, this argument is convincing only insofar as genuine discussion is concerned but it should not be used to stretch unduly the boundaries between genuine ‘philosophical’ discussion about religious ideas and gratuitous religious insults against a believer of an ‘inferior’ faith. On the other hand, it cannot be forgotten that international instruments and most domestic legislation put race and religion on an equal footing as forbidden grounds for discrimination and intolerance.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §§60-61

“Current Article 47 Section III prohibits hate speech which is defined as ‘propaganda provoking racial, national, religious discord and animosity’. The proposed modification supplements this definition with reference to ‘hostility based on any other criteria’. In principle, it is legitimate to combat hate speech; however, such an open-ended clause may justify far-reaching restrictions on freedom of expression, guaranteed by Article 10 of the ECHR. Hence, the choice of wording needs to be dealt with very carefully: not every statement which may arguably “provoke hostility or animosity” would amount to hate speech.[...]”

CDL-AD(2016)029, Opinion on the draft modifications to the Constitution of Azerbaijan submitted to the Referendum of 26 September 2016, §40

“[...] Article 33/1 (4) [...] specifies that [electronic service publication providers] ‘must not incite, enable incitement or spread hatred or discrimination on the grounds of race, ethnic background, skin colour, sex, language, religion, national or social background, financial standing, education, social status, marital or family status, age, health status, disability, genetic heritage, gender identity or sexual orientation’.

This provision prohibits hateful and discriminatory speech. While some grounds listed in this article are in line with general European and international standards on the prohibition of the hate speech, the Venice Commission is concerned that it is supplemented by a long list of other grounds for discrimination. Elements from this list may be used to block any critical remarks against public figures and/or suppress legitimate political debate on matters of public interests which may be perceived by some groups or individuals as ‘discriminatory’. For example, the correct English translation of the terms ‘financial standing’ was contested by representatives of the authorities [...]. This wording could lead to criticisms against the wealthiest or the most privileged in society [...]. Some other criteria are equally broad – thus, the reference to family and social status in the definition of discriminatory speech may be used to curtail criticism of people with family ties with oligarchs and politicians. It would be more prudent to use in the law a more narrow definition of hate speech – see, as an example, Appendix to Recommendation No. R (97) 20 of the Committee of Ministers to Members States on ‘hate speech’ (first paragraph, ‘Scope’).”

CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, §§ 47-48

4.3 OBSCENITIES AND OTHER “IMMORAL” FORMS OF EXPRESSION

“[...] [Reference] to ‘public morals’ is not precise enough to form a legal basis for such a severe interference as an *ex-ante* ban.

“[...] [Morality] is a quickly evolving concept and its content is often uncertain. Indeed, the requirements of morals, [...] ‘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’. 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’. 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.”

CDL-AD(2015)004, Opinion on drafts amendments to the media law of Montenegro, §§35-36

“[...] [A] humiliating statement, expressed in an obscene manner, sanctioned under Article 148, may still fall under ‘information and ideas which offend, shock or disturb’ protected by Article 10 ECHR according to the case law of Court. [...]”

CDL-AD(2013)024, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, §48

“The Venice Commission has learned that the term ‘obscenity’ [...] and the term ‘prostitution’ indicated in [...] [the Law], are given a broad interpretation by the peace judgeships and the Presidency of Telecommunications when blocking access to LGBT related websites, as websites defending LGBT rights or homosexual dating sites. [...] It has been claimed that, in practice, any web-site related to LGBT issues can be considered as ‘obscenity’ by the Presidency and the judges/courts. Without being in a position to assess the content of the above-mentioned websites and the individual decisions on blocking access, the Venice Commission reiterates that the broad interpretation of the crimes listed in Article 8, para. 1, as for instance ‘obscenity’, will first and foremost create a problem of foreseeability, since, to the knowledge of the Venice Commission, in the established case-law of the criminal courts in Turkey, mere sexual orientation or legitimate expressions of sexual orientation are not considered as ‘obscenity’ under Article 226 of the Criminal Code. [...]”

CDL-AD(2016)011, Turkey - Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication (“the Internet Law”), §47

5. SANCTIONS, REMEDIES AND PROCEDURAL ISSUES

“There exist several forms of sanction of freedom of expression, including:

- administrative fines;
- civil law remedies, including liability for damages;
- restraints on publication of periodicals, magazines, newspapers or books, or on art exhibitions;
- criminal sanctions, both fines and imprisonment.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §54

“[...] Instead of criminal sanctions, which in the Venice Commission’s view are only appropriate to prevent incitement to hatred, the existing causes of action should be used, including the possibility of claiming damages from the authors of these statements. This conclusion does not prevent the recourse, as appropriate, to other criminal law offences, notably public order offences.

Whether damage has been suffered and, if so, the extent of such damage, is for the courts to determine (including the matter of whether the action is possibly barred by parliamentary immunity). Courts are well placed to enforce rules of law in relation to these issues and to take into account the facts of each situation; they must reflect public opinion in their decisions, or the latter risk not to be understood and accepted, and to lack legitimisation.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §§74-75

5.1 SANCTIONS AND REMEDIES IN DEFAMATION CASES AND ALIKE

5.1.1 Criminal-law and other punitive sanctions (imprisonment, fines etc.)

“Remedies for defamation require the most careful scrutiny. They must take into account the specific circumstances of the case and any sanctions must bear a reasonable relationship of proportionality to the damage to reputation suffered. Excessive punitive measures should be avoided and the imposition of a prison sentence limited to exceptional circumstances.

[...] [In] regulating the exercise of freedom of expression in order to ensure adequate protection by law of individuals’ reputations, States should avoid taking measures that might deter the media from fulfilling their key role of reporting and alerting the public on matters of public interest.”

CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, §§38-39

“[...] [The] Venice Commission observes that the Criminal Code and the Civil Code of Albania already provide legal remedies against hate speech and defamation. Such cases fall within the competence of the public prosecutors and/or the relevant criminal and civil courts. The Commission believes that the draft amendments should explain how the “complaints procedure” (which is administrative in character) relates to any criminal and/or civil proceedings which may arise out of the same facts. More generally, laws regulating the media from the perspective of

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public law, especially administrative law, by means of an overseeing entity such as the [the regulatory authority] should primarily protect the public interest (for e.g. by means of protection from hate speech, protecting children, public order, etc.). On the other hand, protection of honour and dignity of individual private persons should be governed by private law, meaning that affected individuals would primarily demand protection (including any claims for financial indemnification) from civil courts.”

CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, §53

“The [European] Court has not proscribed criminal provisions on defamation. In its view, it remains open to the competent state authorities to adopt, where appropriate, even measures of a criminal law nature. The Court has however stressed the chilling effect of the mere fact that a sanction is of criminal nature and criticised the excessive use of criminal provisions.

The amendments proposed to the current legislation are aimed [...] at limiting the use of criminal sanctions for defamation, and introduce, as a notable positive step, the abolishment of imprisonment as a sanction for defamation. [...]”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §29 and §59; see also CDL-AD(2013)024, §40 and §57, CDL-AD(2015)015, §38

“[...] [The] severity of the sanctions provided for by the Italian provisions dealing with defamation [...] is a source of particular concern. It seems doubtful whether maximum prison sentences of up to one, two or six years and minimum sentences of six months under certain circumstances, are – except for the exceptional situations indicated by the Court – in line with the principle of proportionality as established by Article 10 case law. [...]”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §55

“The absence of upper limit for the financial penalties applicable for defamation published in the media should be reconsidered [...].

[...] Furthermore, according to the general principles set forth in the Criminal Code for the application of sanctions, in determining the amount of the fines, the judge, within the limits of discretion set by law [...], must take into account inter alia the gravity of the offence [...] as well as the economic situation of the offender and the effect of the pecuniary sanction [...]. Making explicit reference to the proportionality requirement in the provisions specifically dealing with defamation would nevertheless contribute to more adequately implementing the above guarantees.

Defamation directed to public institutions and agencies is, under the Bill, no longer punishable with higher levels of penalties. This is a very positive development which deserves to be commended. [...]”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §§56–57 and §63

“[...] There is no doubt that the maximum amounts of fines provided by the Media Act [for publication of illegal content (the maximum amount of the fine for a media service provider with significant market power is approximately 650,000 EUR, while the maximum amount of the fine

for an online press product is approximately 80,000 EUR)] are extremely high, even taking into account the size and the economic condition of the potential offender. [...]"

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, §38

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

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

As already underlined by the Venice Commission, the mere threat of application of heavy sanctions may have a chilling effect on journalists and media outlets. The average level of salaries in Albania is modest, by European standards. In such circumstances, it is likely that heavy fines, as provided by Article 133, would be beyond the means of many smaller EPSPs, and would eventually lead to the cessation of their activities. [...]

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

CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, §§63-66

5.1.2 Awards of damages and other forms of *ex-post* compensatory sanctions

"Civil defamation laws have a less chilling effect on freedom of expression than criminal laws, provided that the law is formulated in a way that excludes abuse by the authorities. Providing guarantees that those sued will be able to mount a proper defence is essential."

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §78

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“Damage awards applied in civil proceedings must take into account the specific circumstances of the case and bear a reasonable relationship of proportionality to the injury to reputation suffered. [...] [Excessive] financial compensations may have a ‘chilling effect’ on freedom of expression and lead to self-censorship. This chilling effect is highly problematic when it affects, in particular, those trying to shed light on corruption and abuse in high places. [...] It is, on the other hand, permissible to provide for specific obligations for the media, such as to correct a false statement, to give the complainant a right of reply or to publish a court judgment which finds a statement to be false.”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §32; see also: CDL-AD(2013)024, §43

“In its current form, the Press Law provides [...] for the proportionality principle in relation to the amount of the pecuniary redress that the injured person may claim in addition to compensation for damage under the Criminal Code [...]. However, no explicit reference is made to the economic situation of the defendant, which must be taken into account in any case as required by Article 133bis of the Criminal Code.”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §58; see also CDL-AD(2013)024, §§58 and 112

“[...] In principle, under the *domestic* constitutional provisions a State may well be required to provide an effective protection to the reputation of the deceased. However, compliance with this obligation does not necessarily require introducing private-law remedies for the defamation against dead people. Moreover, it is permissible to *deny certain types of remedies* as long this policy is aimed at avoiding interference with the right to freedom of expression or other equally important considerations. Article 6 of the Law on Freedom of Speech in the current context [(which denies the cause of action related to defending the reputation of the deceased)] may be regarded as deficient only if the scope of cases in which any effective remedy is denied is substantial and might apply in instances in which the harm to the deceased’s reputation is *especially severe*. States enjoy a wide margin of appreciation and it is up to them to choose the best means protecting ‘honor’ and ‘reputation’ best without, at the same time, encroaching on the freedom of speech.”

CDL-AD(2014)040, *Amicus Curiae* Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased, §67

“Article 33/1 (3) introduces a ‘right to correction and reply to information published through electronic publication’ and pursuant to Article 53/1 ‘any person whose individual reputation is directly affected by the publication of false or inaccurate information from the EPSP shall have the right to reply’. A legal obligation to publish a reply or a rectification may be seen as a normal element of the legal framework governing the exercise of freedom of expression. [...] At the same time, the restrictions and limitations of the second paragraph of Article 10 of the ECHR are equally pertinent to the exercise of the right to reply. It should be borne in mind that ensuring individual’s freedom of expression does not give private citizens or organisations an unfettered right of access to the media in order to put forward opinions. As a general principle, newspapers and other privately-owned media must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals. [...]”

CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, §49

5.2 SANCTIONS FOR HATE SPEECH

“Hate speech thus justifies criminal sanctions. Indeed, the pan-European introduction of sanctions against incitement to hatred has a very strong symbolic value, which goes beyond the objective difficulty of defining and prosecuting the crime of incitement to hatred. [...] [The ECtHR] has stated that [...] it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued’.

The application of hate legislation must be measured in order to avoid an outcome where restrictions which potentially aim at protecting minorities against abuses, extremism or racism, have the perverse effect of muzzling opposition and dissenting voices, silencing minorities, and reinforcing the dominant political, social and moral discourse and ideology.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §§57-58; see also §91

“The maximum prison sentence incurred for incitement to hatred varies significantly (from one year to ten years) among member states: 19 one year (Belgium, France, the Netherlands); eighteen months (Malta); two years (Austria, Cyprus, Czech Republic, Denmark, Georgia, Iceland, Ireland, Lithuania, Slovenia, Sweden); three years (Azerbaijan, Bulgaria, Croatia, Estonia, Hungary, Italy, Latvia, Moldova, Norway, Poland, Slovakia, Spain, Turkey); four years (Armenia); five years (BiH, Germany, Monaco, Montenegro, Portugal, Serbia, “the former Yugoslav Republic of Macedonia”, Ukraine); ten years (Albania). In all countries, a prison term is alternative to or cumulative with a pecuniary fine.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §40

5.3 SANCTIONS FOR DISCLOSURE OF PERSONAL OR CLASSIFIED INFORMATION

“[...] Errors are inevitable: journalists may exceed the boundaries of their freedom by publishing information which does not contribute to the public discussion in any meaningful way and which, at the same time, reveals very sensitive personal information.

[...] ‘Privacy’ is primarily a private interest, which may be effectively protected by private-law means. Although there is no common European standard on this issue, the Venice Commission considers that criminal sanctions for breaches of privacy by journalists should be avoided to the maximum extent possible. It is particularly worrying that the same criminal sanction may be applied for the ‘private disclosure’ [...], i.e. in the situations where the damage to privacy is admittedly minimal and the use of such serious means is clearly disproportionate. Criminal sanctions, and especially such serious sanction as imprisonment, should be applied only in extreme cases - for example, for malicious public disclosure of very sensitive personal data having no public interest whatsoever, leading to very grave and clearly perceptible consequences for the latter. And even the civil-law sanctions should be commensurate to the wrong done to the ‘victim’ or ‘protagonist’ of the publication and take into account the ‘public interest’ defence which may be forwarded by the journalist.”

CDL-AD(2016)008, Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of “the former Yugoslav Republic of Macedonia”, §§56-57

5.4 PRIOR RESTRAINTS, BLOCKING OF WEB-SITES, BANS ON PROFESSION, ETC.

“[...] [The] ECHR does not forbid prior restraints. 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. It, therefore, requires that the criteria for prior restraints be clearly indicated in the law and procedural safeguards help to avoid that 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.

[...] [The] Court has been extremely critical about banning individual journalists from the profession – even when such ban was temporary. 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.

[...] [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 ‘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.”

CDL-AD(2015)004, Opinion on drafts amendments to the media law of Montenegro, §§14-16, and §31; see also CDL-AD(2015)015, §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.

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.

Thus, temporary curtailment of operations of a media outlet may be possible where the repeated 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.

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).”

CDL-AD(2015)004, Opinion on drafts amendments to the media law of Montenegro, §§40-43

“[...] [The Law] 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. [...]”

CDL-AD(2015)004, Opinion on drafts amendments to the media law of Montenegro, §32

“The introduction, as ancillary penalty, of a prohibition from exercising the profession of journalist for one to six months [...] is problematic from the standpoint of the principle that the press must be able to perform the role of a public watchdog in a democratic society, and should be re-examined. As an alternative, the issue may be referred to the disciplinary bodies of the profession.”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §69

“The Parliamentary Assembly also adopted, on 29 January 2015, Resolution 2035(2015) on Protection of the Safety of Journalists and of Media Freedom in Europe, where it considered ‘*the generalised blocking by public authorities of websites or web services as a serious violation of media freedom, which deprives a high and indiscriminate number of Internet users of their right to Internet access*’.”

CDL-AD(2016)011, Turkey - Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication (“the Internet Law”), §14

“[...] [The] Law does not apply to material which has already been made public [...]. This is a reasonable approach, since any prohibition for further dissemination of materials which are already public would be useless and would not help achieving the main goal of the Law – protection of privacy interests.”

CDL-AD(2016)008, Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of “the former Yugoslav Republic of Macedonia”, §13

“[...] [Prior] restraints (which are aimed at suppressing future publications, broadcasts, etc.) call for the most careful scrutiny on the part of the ECtHR – it is very difficult to assess the “dangerousness” of a future speech and to conduct a meaningful balancing exercise [...]”

CDL-AD(2017)007, Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, §47

5.5 CLAIMANTS AND DEFENDANTS IN CASES RELATED TO FREEDOM OF EXPRESSION

“[...] [It] is essential to underline that it is the ‘author’ of the defamatory statement that should be held liable for untrue statements, if the journalist is only quoting the author. The Court has emphasized that to punish a journalist for assisting in the dissemination of statements made by another person in an interview, would seriously hamper the contribution of the press to discussion of public matters.

In relation to Articles 5.1.1 and 5.1.3, identifying journalists and editors as being liable for statements made in mass media or in material being subject of mass public dissemination, the law should place the primary legal liability in damages on the publisher who employs the journalist/editor, and who should bear all or most of the financial liability, as an incentive to ensure high journalistic standards in the media outlets.

Similarly, speech writers should not be made liable for the speech that a public figure is giving [...], and persons working in public administration should not be held liable for material ‘which is the subject of mass public dissemination’ [...]. If such material evidently contains errors, they should be corrected. [...] Primary liability should be imposed on the employing entity - state, municipal and other public authorities - for potentially ‘defamatory’ material prepared/published. It should also be made clearer in the text that the public body may be held co-responsible for a statement by an individual person only if the statement concerned was made in the exercise of a public function.”

CDL-AD(2013)024, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, §§89-91

“The Venice Commission is of the view that [...] the obligation of the newspaper/publisher/printer editor to supervise, in order to prevent breaches of the law, the content of the publication, including its presentation, as well as the related liability, are in compliance with the ECHR standards [...].

Similarly, under [...] [the Press Law], offences committed by means of the press, the owner of the publication and the editor are civilly liable, both mutually and jointly with the offenders.

The Venice Commission is of the view that, as an incentive to ensure high journalistic standards [...], defamation laws should place the primary legal liability in damages on the owner/publisher who employs the journalist/editor, who should bear all or most of the financial liability. This is of particular importance for journalists employed by less prominent media, for whom the threat of heavy fines and financial compensations has a greater deterrent. [...]”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §§49-51; see also CDL-AD(2008)026, §53

“The provisions of the proposed new Article 57 of the Criminal Code, dealing with the editors’ liability for defamation, raise several issues. [...] [Since] the amendment enables delegation by editors of their supervision duty, [...] [the] delegation of liability from editor to journalist may also have a chilling effect in the sense that journalists facing high fines will hesitate to practice investigative journalism which often evokes harsh reaction from those in power. The editor/newspaper should be liable for the act of a journalist doing his job in accordance with the ethics of journalism. The absence of any rationale for reducing the penalty for breach of Article 57 by one third ‘in all cases’ may be seen as arbitrary.”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §66

“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. [...]

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, 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.”

CDL-AD(2015)004, Opinion on drafts amendments to the media law of Montenegro, §§47-48; see also CDL-AD(2013)038, §§70-71

“The Venice Commission [...] reminds that according to the Declaration of the Committee of Ministers of the Council of Europe on Freedom of Communication on the Internet, ‘*[m]ember states should not impose on service providers a general obligation to monitor content on the Internet to which they give access, that they transmit or store, nor that of actively seeking facts or circumstances indicating illegal activity*’. In case the regulations mentioned in these provisions impose such a general monitoring obligation, this would not be a proportionate burden on the public use providers in the light of the standards set forth in the above-mentioned Declaration of the Committee of Ministers.”

CDL-AD(2016)011, Turkey - Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication (“the Internet Law”), §97

“[...] [It] is recommended to not exclude that a defamation claim may be brought by or on behalf of a group of persons whose reputation is attacked by the same defamatory statement/s.”

CDL-AD(2013)024, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, §85

“The suggestion [...] that statements about a dead person can be actionable at the suit of his/her relatives, if the statements cause damage to ‘their rights and interests’, is questionable in circumstances of public debate concerning public figures. [...] [A] right to sue in defamation for the reputation of dead people might be abused to prevent a robust public discourse related to historical events. Nevertheless, practices vary in Europe in this field. [...]”

CDL-AD(2013)024, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, §86

“Most common law countries, [...] typically deny a cause of action [in defamation cases] for relatives of the deceased. [...].

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In many countries belonging to the continental tradition the approach is different and the reputation of the deceased is deemed worthy of protection. [...].

[...] [I]t appears that recently the Court opened up a possibility for the relatives of a deceased person to claim that their rights had been affected by a defamatory publication concerning that person. That may lead to the appearance of a positive obligation of the State under Article 8 of the Convention to protect families of the deceased from the ‘secondary damage’ caused to them by a defamatory statement about him or her. That being said,

- this is a tendency which cannot yet be considered as ‘well-established case-law’; more explicit and affirmative findings of the Court are needed to conclude that Article 8 of the Convention requires the State to give legal protection to the reputation of a deceased;
- since there is no international consensus on that matter, the States enjoy a wide margin of appreciation in deciding how to defend the reputation of the deceased, if at all;
- in most cases the ‘reputation interest’ of the relatives would be very weak and the freedom of speech would prevail, especially where a lot of time has elapsed since the death of the person and the person whose reputation had been affected was a public figure or/and the matter discussed was a matter of public interest;
- the only exception from the above may arguably concern publications which occurred in the aftermath of the person’s death and which disrespected the dignity of the defunct and seriously hurt the feelings of the family in grief (‘the funerals period’ exception). However, with the passage of time those considerations also become less relevant.”

CDL-AD(2014)040, *Amicus Curiae* Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased, §§38, 45, and 60

“[...] Article 33/1 (1) requires the EPSP to identify itself, by making ‘easily, directly and permanently accessible to the general public at least the following information: a) the name of the service provider; b) the service provider’s head office or place of residence, his electronic mail address or website; c) the competent body of the service provider.’ [...] [This] provision is designed to prevent abuse of anonymity on the internet.

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

The ECtHR has also recognised the importance of anonymity for the rights to freedom of expression and privacy. As underlined by the ECtHR ‘anonymity has long been a means of avoiding reprisals or unwanted attention. As such, it is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the internet’. At the same time, the ECtHR clarified that anonymity on the internet, while an important factor, can be limited to protect the interests of the others, especially the vulnerable people. The Venice Commission subscribes

to this view – the right to anonymity should not be seen as absolute, and the ‘anonymity veil’ can be lifted in cases of serious abuses of the freedom of speech, such as, by way of example, hate speech or child pornography.

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

Finally, as regards the obligation to de-anonymise the [electronic publications service providers] it is questionable whether this measure will work in practice. In particular, it is unclear whether the [regulatory authority] will be able (legally and technically speaking) to verify whether the identification information provided by an [electronic publication service provider] is true.”

CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, §§42-46

5.6 PROCEDURAL GUARANTEES

“[...] [It] should be made clear in the law that the Media Council may use its powers to impose heavy sanctions (such as high fines or interruption of broadcasting, blocking of access etc.) 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 its publications repeatedly and seriously (both conditions should be satisfied) endangered public peace and order [...].”

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, §41

“[...] The Venice Commission is of the opinion that the power of the Presidency [(here - an administrative authority)] to give *ex officio* blocking orders without prior judicial review should be removed and as stressed above, the duty to carry out the balancing between the right to privacy and the freedom of expression should, in the case of a decision with such serious consequences, be incumbent primarily on a judge and not on an administrative body.”

CDL-AD(2016)011, Turkey - Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication (“the Internet Law”), §72

“The Commission observes that the administrative procedure was originally designed to monitor the implementation by the traditional media providers of their obligations as per their licence.

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

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

CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, §§54 and 56

"A new paragraph [...] 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.

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."

CDL-AD(2015)004, Opinion on drafts amendments to the media law of Montenegro, §§50-51

"[...] Immediate enforcement of a heavy fine or termination/suspension of broadcasting, even if it lasts several days only, may destroy the media outlet, especially now when traditional media are

so fragile economically. [...] [Decisions] of the Media Council which may have irreversible consequences for the continuous functioning of the media outlet concerned or the work of the journalists should not be enforceable immediately. The party affected by such grave measures should be given sufficient time to bring court proceedings, and the measure must remain suspended until the court itself decides on the issue of further suspension. Moreover, in all cases the courts should at any moment have the power to suspend the enforcement of all the sanctions, whatever is their degree and character.”

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, §44

“[...] Judicial review by the administrative courts of ‘lawfulness’ of the decisions of the Media Council should include not only the verification of the formal compliance of the measure with the Media Act, but also questions of proportionality of the contested measures.”

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, §45

“Concerning statements made on-line [...], as there is a clear move from print to Internet journalism, it is increasingly important that equivalent defences are provided in defamation laws to those who act, respectively, as mere conduits for the passage of information on the Internet or who host websites. It is also important that hosts are required to set up an effective (self-policing) notice and takedown procedure. Requiring a complainant to go to court to get an order for takedown does not sufficiently protect the right of the person defamed. In addition, this discourages Internet service providers from taking responsibility, once on notice, for the websites they host. More generally, though not legally binding on Azerbaijan, European Union Directive 2000/31/EC and the defences set out therein may be used as a helpful reference in establishing the defences available to the various forms of internet service providers. [...]”

CDL-AD(2013)024, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, §92

“One of the requirements of the principle of proportionality [in freedom of expression cases] is that the reasons given by the national authorities to justify restrictions to the right to freedom of expression should be relevant and sufficient. Furthermore, this is also a requirement of the principle of fair trial under Article 6 ECHR: judgments of courts and tribunals should give an adequate statement of the reasons on which they are based. A lower court should also give such reasons as to enable the parties to make effective use of any existing right of appeal. Some decisions of the peace judgeships which the Venice Commission has been able to see during the meetings in Ankara do not provide for any motivation and reasons to justify the interference with the right to freedom of expression. [...] The Venice Commission [...] reiterates the crucial importance of the statement of reasons in a court decision in order not only to respect the principle of proportionality under Article 10 ECHR, but also to satisfy the requirements of fair trial under Article 6 ECHR.”

CDL-AD(2016)011, Turkey - Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication (“the Internet Law”), §38

“First, [...] [the Law] does not provide for any notification procedure of the interested party about the procedure [...] [of access blocking as an ‘interim injunction’ ordered by the court in the course of the proceedings]. [...] [A] proper notification procedure should be put in place in order to give the content providers the opportunity to have knowledge of the blocking measure and of the reasons put forth by the authorities to justify the measure. [...] It is strongly recommended that the provision be amended to impose on the authorities the obligation to notify the interested party about the access-blocking measure and its reasons. [...].

Secondly, the lack of cassation appeal against the blocking-access measure [...] may be explained to the extent that the measure of access-blocking under Article 8(2) is only a ‘precautionary measure’ taken in the framework of criminal proceedings concerning the crimes listed [...] [in the Law]. At any rate, the competent criminal court, i.e. the trial court judge in criminal proceedings, should be empowered to review the necessity of maintaining the precautionary measure on access-blocking and to lift this measure immediately, if he/she considers that the measure is not necessary in order, for instance, to prevent any risk of irreparable damages pending substantial trial. [...] It is not acceptable that the decision taken by a peace judgeship as a ‘precautionary measure’ should be binding on the trial court judge in the substantive criminal proceedings. [...].

Concerning the *ex officio* blocking orders issued by the Presidency of Telecommunication under conditions indicated in Article 8(4), i.e. the content or hosting provider is located outside the country or the content of publications constitutes offences of sexual exploitation of children, obscenity and prostitution, the necessity of this provision is not clear to the Venice Commission. The access-blocking measure under Article 8 is a precautionary measure taken in the framework of a criminal case and it should be the role and responsibility of a judge to assess the necessity of this measure during the criminal trial. The reasons set forth under Article 8(4) do not justify the competence of an administrative body to issue *ex officio* blocking orders without prior judicial review. This competence of the Presidency should be repealed.”

CDL-AD(2016)011, Turkey - Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication (“the Internet Law”), §§51-53

“[...] [The] short time allowed to the peace judgeship to take a decision on access-blocking (24 hours under Articles 8A and 9; 48 hours under Article 9A), without holding a hearing (Article 9) and without any possibility of appeal before a higher court against the decision on access-blocking, cannot be considered as providing the necessary procedural guarantees in order to protect the right to freedom of expression on the Internet.

[...] [The] procedures should be amended profoundly in order to give the Internet provider sufficient time and facilities to defend itself and the judgeship sufficient time and possibilities to take a well-reasoned decision, and in particular the competence to hold a hearing in order to make an appropriate proportionality assessment on the necessity of the interference with the freedom of expression. [...].

More specifically, in case the autonomous character of those procedures should be maintained, an appeal before the Court of Cassation against the decision of access-blocking by the peace judgeship should then be available. It is true that, differently from Protocol No. 7 concerning criminal cases, Article 6 ECHR does not oblige States to institute a system of appeal courts and the right of appeal to a higher court is not laid down, and is also not implied, in Article 6.42 However, as the Venice Commission emphasised [in an earlier opinion], the highest courts’

guidance is very important for the lower courts in the interpretation and implementation of human rights standards in their case-law. It is evident that an appeal procedure before the Court of cassation, as the highest court, would provide for better guarantees to the interested parties compared to an appeal procedure before a same level judgeship. [...]"

CDL-AD(2016)011, Turkey - Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication ("the Internet Law"), §§60, and 62-63

"The Commission is especially concerned with the details of this [administrative] procedure [before the media regulator]. [...] [Any] person claiming to have been negatively affected by an electronic publication allegedly contravening to the requirements of Article 33/1 will be entitled to request the EPSP [(electronic publication service provider)] concerned the removal of the content. To assess and respond to such complaints the EPSPs will have only 72 hours. If the EPSP refuses to satisfy the complaint or does not respond within 72 hours, the claimant has the right to apply to the Complaints Committee which has also to review the complaint in a very short timeframe (72 hours). In certain circumstances, the EPSP may only have 48 hours to submit its defence to the Complaints Committee [...].

Decisions of the Complaints Committee are immediately executable. [...]

The procedure provided for in Articles 51/1 and 53/1 is an extremely rapid response mechanism. Normally, the assessment of content requires legal expertise and a complex balancing exercise between competing interests at stake. This raises issues of due process and puts an excessive burden on small EPSPs lacking the means and capacity to respond in such short period of time to complaints. Even though the law provides for a possibility of judicial review of such decisions, the Complaints Committee and the AMA will have an administrative discretion. Thus, the draft amendments give the AMA and the Complaints Committee an efficient but at the same time dangerous legal tool to regulate the Albanian sector of the internet."

CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, §§55, 56 and 58

6. FREEDOM OF EXPRESSION, RELIGIOUS FREEDOM AND BLASPHEMY

“[...] The absence of a uniform European concept of the requirements of the protection of the rights of others in relation to attacks on religious convictions broadens the Contracting States’ margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations: State authorities are therefore better placed than the international judge to appreciate what is ‘necessary in a democratic society’.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §51

“[...] [The ECtHR] has held that, in order to ensure religious peace, States have an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs. Respect for the religious feelings of believers can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration or offensive attacks on religious principles and dogmas; these may in certain circumstances be regarded as malicious violation of the spirit of tolerance, which must also be a feature of a democratic society.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §47

“The Commission considers that any difference in the application of restrictions to freedom of expression with a view to protecting specific religious beliefs or convictions (including as regards the position of a religious group as victim as opposed to perpetrator) should either be avoided or duly justified.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §82

“A new ethic of responsible intercultural relations in Europe and in the rest of the world is made necessary by the cultural diversity in modern societies, and requires that a responsible exercise of the right to freedom of expression should endeavour to respect the religious beliefs and convictions of others. Self-restraint, in this and other areas, can help, provided of course that it is not prompted by fear of violent reactions, but only by ethical behaviour.

This does not mean, however, that democratic societies must become hostage to the excessive sensitivities of certain individuals: freedom of expression must not indiscriminately retreat when facing violent reactions.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §§95-96

“[...] The right to freedom of expression implies that it should be allowed to scrutinise, openly debate, and criticise, even harshly and unreasonably, belief systems, opinions, and institutions, as long as this does not amount to advocating hatred against an individual or groups.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §49; see also CDL-AD(2015)015, §25

“The Commission does not consider it necessary or desirable to create an offence of religious insult (that is, insult to religious feelings) *simpliciter*, without the element of incitement to hatred as an essential component. Neither does the Commission consider it essential to impose criminal sanctions for an insult based on belonging to a particular religion. If a statement or work of art does not qualify as incitement to hatred, then it should not be the object of criminal sanctions.

It is true that penalising insult to religious feelings could give a powerful signal to everyone, both potential victims and potential perpetrators, that gratuitously offensive statements and publications are not tolerated in an effective democracy.

On the other hand, the Commission reiterates that recourse to criminal law, which should of itself be reserved in principle to cases when no other remedy appears effective, should only take place with extreme caution in the area of freedom of expression.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §§64-66

“It is true that the boundaries between insult to religious feelings (and even blasphemy) and hate speech are easily blurred, so that the dividing line, in an insulting speech, between the expression of ideas and the incitement to hatred is often difficult to identify. This problem however should be solved through an appropriate interpretation of the notion of incitement to hatred rather than through the sanctioning of insult to religious feelings.

[...] [It] must be possible to criticise religious ideas, even if such criticism may be perceived by some as hurting their religious feelings. Awards of damages should be carefully and strictly justified and motivated and should be proportional, lest they should have a chilling effect on freedom of expression.

It is also worth recalling that an insult to a principle or a dogma, or to a representative of a religion, does not necessarily amount to an insult to an individual who believes in that religion. The European Court of Human Rights has made clear that an attack on a representative of a church does not automatically discredit and disparage a sector of the population on account of their faith in the relevant religion and that criticism of a doctrine does not necessarily contain attacks on religious beliefs as such. The difference between group libel and individual libel should be carefully taken into consideration.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §§68, and 76-77

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“[...] [The] offence of blasphemy should be abolished (which is already the case in most European States) and should not be reintroduced.”

CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, §89; see also §92

7. PROFESSIONAL JOURNALISM

“The scope of Article 10 of the ECHR includes multiple activities relating to disseminating information by the means of print media. Not only the publication of information in print media by journalists or by publishers, but also the relationship between journalists and publisher, the general conditions of the journalist’s activity and the activity of the journalist him/herself are protected. In principle, Article 10 of the ECHR covers all fields of professional activities of a journalist, in particular the way how a journalist receives the information and how he/she arranges or modifies the information.”

CDL-AD(2010)053rev, Opinion on the warning addressed to the Belarusian association of journalists on 13 January 2010 by the Ministry of Justice of Belarus, §62

7.1. NOTION OF “PROFESSIONAL JOURNALISM”

“[...] The border between freelance and in-house journalism is blurred, and there is no particular reason why freelance journalists should be excluded from the general rule. Appendix to Recommendation No. R(2000)7 [...] [of the CM] defines ‘journalists’ 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’. Hence, although the employment relationship with a media outlet is the best proof that the person is a ‘journalist’, it is not the only possible proof. As explained by the authorities, Section 6 is interpreted as including freelance journalists, professional bloggers and alike; however, it should be more clear from the text of this provision.”

Footnote 43: “An important reservation is needed: indeed, protection of sources remains the privilege of professional journalists. Thus, as put by PACE, ‘the same relationship of trust does not exist with regard to non-journalists, such as individuals with their own website or web blog. Therefore, non-journalists cannot benefit from the right of journalists not to reveal their sources’. Bloggers may or may not be considered as professional journalists enjoying this privilege; however, in the modern times the distinction between journalist and non-journalist is a fine one and may require further development in case-law and legislation.”

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, §52, and footnote 43 to this paragraph

“[...] [The] mass media are not the only category that should be entitled to a high level of freedom of expression. Thus, persons who impart information and ideas on matters of public interest and contribute to the public debate on such matters, including members of campaign groups and elected representatives, should be allowed a high level of freedom of expression, including a certain degree of exaggeration and even provocation as long as they act in good faith and exercise due diligence in order to provide accurate and reliable information.”

CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, §37

“Both journalists who are members of BAJ [the Belorussian Association of Journalists], and journalists who are connected with legal persons operating in mass media according to the Mass Media Act, pursue journalistic activities. Both need to collect and receive information. The exercise of their activities can be carried out only or at least more easily by using a press card.

There might be a legitimate aim which the Republic wishes to pursue by restricting the distribution and use of press cards to only those who are established under the Mass Media Act, such as the need to establish State controlled Republic-level agencies in the sphere of mass media [...].

Nevertheless, there is no objective and reasonable justification for the discrimination between journalists set out in the warning. It would, for instance, be sufficient to distribute specified press cards to those journalists who are directly connected with legal persons operating in mass media under the Mass Media Act. Banning any reference to the word “PRESS” in press cards of other associations engaged in journalism cannot be regarded as proportionate.”

CDL-AD(2010)053rev, Opinion on the warning addressed to the Belarusian association of journalists on 13 January 2010 by the Ministry of Justice of Belarus, §§93-95

“ [... An electronic publication service provider is defined as] ‘a natural or legal person [...] which offers the service of [electronic publications] [...]. Electronic publications are defined as ‘editorially shaped web pages and/or portals containing electronic versions of written media and/or information from the media in a way accessible to the general public with the objective to entertain, inform and/or educate’ [...].

The Venice Commission considers that, for a start, the notion of “electronic publications” is too nebulously and broadly defined, therefore jeopardising clarity and foreseeability of the scope of application of the law. In particular, it is unclear whether individual bloggers, or people having personal pages on social network platforms (Facebook, Instagram, Twitter etc.) publishing information from the media will be covered by this definition. The information note [...] explains that ‘electronic publications managed by individuals which neither are editorially shaped nor aim at informing or entertain, or education of the general public are not included in this definition’. However, while the notion of ‘editorial shaping’ is in itself amorphous, it is also difficult to foresee what blog would actually be deemed not to be informing or entertaining or educating. [...].

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

CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, §§ 27 – 29

7.2 PROTECTION OF SOURCES

“[...] Only an overriding requirement in the public interest could justify interference with the protection of sources [...].”

CDL-AD(2013)024, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, §97

“[The Press Act] defines situations where journalists may be required to disclose their sources. In 2012, [...] this provision was amended, limiting the obligation for the journalists to reveal their sources only for the purposes of criminal proceedings and following a court order. [...] This development is positive: limiting the obligation of disclosure to criminal cases helps protecting investigative journalism. However, this limitation should follow clearly from the text of [the law]. [...]

The rule contained in [the law] needs to clarify what is meant by ‘justified [criminal] cases’ and ‘exceptional circumstances’. [...] According to the ECtHR ‘an order of source disclosure [...] cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest’. Not every criminal investigation automatically satisfies the criterion of ‘overriding requirement’. It should be open to the judge to refuse disclosure even if the investigation concerns a serious crime, or, where appropriate, to make a limited or qualified disclosure order so as to protect sources from being revealed to the maximum extent possible. [...].

In addition, in its Recommendation No. R(2000)7 [...] the Committee of Ministers expresses the view that disclosure may be ordered only where reasonable alternative measures to the disclosure do not exist or have been exhausted, and where the legitimate interest in the disclosure ‘clearly outweighs the public interest’. [...].”

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, §§53-56

“The second issue relates to the interception of communications of *other professionals* who also have the duty of confidentiality vis-à-vis their clients (such as doctors and mediators). The Venice Commission observes that, as in the case with lawyers and priests, nothing in the Polish law prevents the police from listening to such conversations, even if later the recordings cannot be introduced in evidence. Furthermore, under Article 19 para. 15h the court must allow recordings of such conversations as evidence ‘if it is necessary from the viewpoint of the justice system’ and if no other means of establishing the facts of the case were available.

The second part of this test (subsidiarity) is sound; however, the first part – the ‘necessity’ for the justice – is problematic. Any useful information shedding light on the circumstances of a case may be seen as ‘necessary from the viewpoint of the justice system’. However, if the usefulness of a wiretapped conversation is the only criteria for introducing it as evidence, ‘professional privilege’ becomes an empty word.

This is particularly important where the surveillance targets a journalist, since it may easily reveal his or her sources. [...] [The] ECtHR is ready to subject disclosure orders which may lead to the identification of the journalistic sources to the strictest scrutiny. Thus, there should be some form

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of heightened internal decision-making standard in such cases, where the journalistic freedom may be at issue. [...]

The Venice Commission considers that, in addition to preventing targeted interception of protected communications, the law should contain safeguards which give extra protection to such communications even when they have been accidentally intercepted. [...].

In sum, the Venice Commission recommends that the Polish legislator reflects on a more stringent rule which would, while respecting international human rights standards, describe the circumstances in which privileged professional communications could be secretly recorded and then introduced as evidence.”

CDL-AD(2016)012, Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts of Poland, §§81-85; see also CDL-AD(2016)011, §83

“Journalists are normally not obliged to reveal their journalistic sources, as the protection of these sources is one of the basic conditions for press freedom. Therefore, holding a press card is of particular importance to be able to receive information. Indeed, the journalist may not receive the same amount or quality of information from his/her sources if his/her identity as a journalist cannot be established.”

CDL-AD(2010)053rev, Opinion on the warning addressed to the Belarusian association of journalists on 13 January 2010 by the Ministry of Justice of Belarus, §§70

“[...] [The] law must specify that revealing of the identity of the whistleblower, even by a court decision, should be possible only in exceptional circumstances – for example, where the disclosure concerns a serious crime which cannot be investigated and prosecuted unless the whistleblower him/herself is called to testify. In this scenario the court may be required to take additional measures to protect the whistleblower against possible retaliations (for example, by using the status of an anonymous witness or otherwise). [...].

[...] Evidently, the question of disclosure of the identity of the whistleblower should be decided by the court with the participation of the former, so as to enable him/her to present his/her considerations on this matter.”

CDL-AD(2016)008, Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of “the former Yugoslav Republic of Macedonia”, §§87-88

7.3 ACCURATE INTERVIEWING AND REPORTING ON SOMEBODY ELSE’S STATEMENTS

“[...] [The law] should make clear [...] that the person interviewed is not permitted to prevent the publication or broadcasting of the interview for the sole reason that the changes [to the verbatim record of the interview] were made ‘to his detriment’, when the selected excerpts give an overall accurate presentation of what the person declared. The journalist must have the right to publish an interview if he/she believes that the text or footage to be published is accurate (without necessarily being ‘verbatim’), whereas the person interviewed must have the right of reply published with the same prominence or the right to sue the journalist *ex post facto* if he/she believes that the interview is substantially inaccurate and detrimental to his/her reputation, and it is up to the general reader (in the case of a right of reply) or to the court (in the case of legal action) to decide whether the journalist did his job professionally or not.”

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, §35

“Privileged statements [...] include republished statements that have not been refuted by the complainant. In essence the statement must be on a matter of public interest and republished by a journalist without adoption. Yet, the basis of the defence that the statements have not been refuted by the complainant may leave insufficient protection for the right to privacy. It is thus important that the journalist/publisher who cannot verify the truth of the statement acts responsibly by making clear that the defamatory allegations are not being adopted or agreed with.

In Article 10.3.3, the exception on liability for ‘dissemination of statements that mass media is not able to edit or is not obliged to edit due to technical or legal reasons’ is formulated in too vague and wide terms and is likely to discourage responsible broadcasting/streaming. The broadcaster must always seek to avoid unlawful defamatory statements being made in live broadcasts, for example by giving warnings to contributors before the live section of the programme or taking care over the questioning techniques of interviewers; or, if they are made, seek immediately to provide context and balance, for example by making clear that it does not stand by or adopt the statements or that there is no proof for them.”

CDL-AD(2013)024, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, §§105-106

7.4 RIGHT TO REPLY

“[...] It is, on the other hand, permissible to provide for specific obligations for the media, such as to correct a false statement, to give the complainant a right of reply or to publish a court judgment which finds a statement to be false.”

CDL-AD(2013)024, Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan, §43

“[...] The Venice Commission recalls that, as the ECtHR has held in the case of *Wegrzynowski and Smolczewski v. Poland*, rectification or an additional comment on the website may be a sufficient and adequate remedy, in which case the access-blocking/removal of content measure may be considered as disproportionate to the legitimate aims pursued by the restriction and thus constitute a violation of the freedom of expression. [...]”

CDL-AD(2016)011, Turkey - Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication (“the Internet Law”), §37

“Article 33/1 (3) introduces a ‘right to correction and reply [...]. A legal obligation to publish a reply or a rectification may be seen as a normal element of the legal framework governing the exercise of freedom of expression. [...] At the same time, the restrictions and limitations of the second paragraph of Article 10 of the ECHR are equally pertinent to the exercise of the right to reply. It should be borne in mind that ensuring individual’s freedom of expression does not give private citizens or organisations an unfettered right of access to the media in order to put forward opinions. As a general principle, newspapers and other privately-owned media must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals. [...]”

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CDL-AD(2020)013, Albania - Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, §49

8. ADVERTISEMENT

“Limits for advertising on television and on radio may pursue the aim of safeguarding the independence of broadcasting. [...].

[Public broadcasters] that rely heavily on commercial funding and have thus entered into direct competition with the commercial sector have become highly susceptible to the demands of advertisers and sponsors and their programme strategies are guided by the needs of advertisers and audience share, rather than the requirements of their obligations.”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§67 and 58

“[...] [There] is no European consensus on how to regulate paid political advertising in broadcasting.[...] In the opinion of the Venice Commission, [...] the ban on paid political advertisement unjustly penalises the opposition, secures media domination of the ruling majority, and reduces chances of political change.

[...] [This] measure may have a negative effect, albeit indirectly, on the quality of the media content and the diversity of the media market.”

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, §§100-101

“The Court acknowledged that powerful financial groups can obtain competitive advantages in the area of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials. It continued, ‘Such situations undermine the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive’. [...].”

CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §69

“[...] [The] Hungarian legislator should increase transparency of the procurement system for allocating the State advertisement budgets amongst media providers based on verifiable audience and distribution data, and extend this system to the companies where the State has a major shareholding”

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, §95

“[...] The prohibition of any political advertising in commercial media services, which are more widely used in Hungary than the public service media, will deprive the opposition parties of an important chance to air their views effectively and thus to counterweigh the dominant position of the Government in the media coverage.”

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CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, §45

9. FREEDOM OF EXPRESSION, JUDGES, PROSECUTORS AND COURT PROCEEDINGS

9.1 FREEDOM OF EXPRESSION OF JUDGES AND PROSECUTORS

“European legislative and constitutional provisions and relevant case-law show that the guarantees of the freedom of expression extend also to civil servants, including judges. But, the specificity of the duties and responsibilities which are incumbent to judges and the need to ensure impartiality and independence of the judiciary are considered as legitimate aims in order to impose specific restrictions on the freedom of expression, association and assembly of judges including their political activities.

However, the ECtHR has considered that, having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge calls for close scrutiny.”

CDL-AD(2015)018, Report on the freedom of expression of judges, §§80-81

“In the context of a political debate in which a judge participates, the domestic political background of this debate is also an important factor to be taken into consideration when assessing the permissible scope of the freedom of judges. For instance, the historical, political and legal context of the debate, whether or not the discussion includes a matter of public interest or whether the impugned statement is made in the context of an electoral campaign are of particular importance. A democratic crisis or a breakdown of constitutional order are naturally to be considered as important elements of the concrete context of a case, essential in determining the scope of judges’ fundamental freedoms.”

CDL-AD(2015)018, Report on the freedom of expression of judges, §84

“[...] [Fellow]-judges should only criticise decisions of their colleagues with caution, in order to maintain constructive and friendly working atmosphere [...].

[...] [It] is rather difficult to make the difference between what is and what is not ‘politics’. It is easy to accept that a judge should not be a member of a political party or speak publicly at political meetings (i.e. those which are organised by the political parties or their leaders or closely associated with them). It is reasonable to expect that a judge would avoid from publishing an article in support of a particular candidate at the elections. But what if a judge participates in an academic discussion regarding a reform of a particular State institution – does it amount to the involvement in ‘politics’ or not? Even defending constitutional values in a public statement may arguably be regarded as a political (yet loyal) statement. In any event, the total prohibition for a judge to express publicly his/her political views and beliefs must be reconsidered as it limits excessively the freedom of expression of judges.

Probably, the Draft Code should use another technique and rather give several examples of the most typical cases of ‘political involvement’ which a judge should avoid, while leaving a space for the participation of judges in academic and similar discussions. Such model is used by Article 21 in respect of statements which ‘criticise the laws and legal policy of the State’ but which, are, apparently, allowed as not being ‘political’. [...]

[...] Article 21 prevents judges from criticizing publicly the laws and legal policies of the State. First of all, every judge will inevitably have to interpret legal norms which are not clear or which contradict other norms. ‘Critical assessment’ of such norms which is a necessary part of the

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process of adjudication is perfectly admissible, and the Draft Code should expressly allow it (even when it is expressed in open procedural documents). As regards more abstract criticism, not connected to the adjudication of a specific case, indeed, the judge should speak with caution, especially when expressing him/or herself on a fora accessible to the general public (as opposed to more closed discussions amongst the professionals of the law; thus, the exception covering 'the scientific and practical conferences, round tables, seminars and other events of educational character', where it is possible for the judge to express critical views, is reasonable). However, judges should not be excluded from sharing experiences and giving voice to opinions on legislative matters. It may be particularly useful for the Government, within or before a legislative process, to invite judges to take part in a general discussion on legal matters at a conference or through submitted opinions (not just from courts as such or from courts presidents but also from individual judges)."

CDL-AD(2016)013, Republic of Kazakhstan - Opinion on the Draft Code of Judicial Ethic, §56, §§62-63 and §67

"Article 45 prohibits judges to be members of any party or "otherwise engage in political activities". While the first limb of the rule (not to be a member of a political party) is clear and legitimate (at least, this is a well-known practice in many European countries), the second limb is formulated too broadly. The same concerns Article 60 § 4, which inter alia requires the judge "to refrain from practicing any conduct that may leave an impression of being engaged in political activities". This is a very high standard, difficult to reach. As the Venice Commission held previously, 'it is rather difficult to make the difference between what is and what is not 'politics''.³⁷ There is no doubt that 'the right of political participation' of judges (essentially the rights guaranteed by Articles 10 and 11 of the ECHR) may be legitimately restricted. Thus, a judge may be required to carefully choose the forums where s/he speaks and the format of his public interventions. However, this rule should not prohibit the judge, as a legal expert, from expressing his views before a professional audience, in specialised journals etc., even if those views relate to policy issues."

CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §54

"Under the proposed new Article 9 (3) of Law no. 303/2004, judges and prosecutors 'are obliged, in the exercise of their duties, to refrain from defamatory manifestation or expression, in any way, against the other powers of the state - legislative and executive.'

According to the Venice Commission Report on freedom of expression of judges, based on a review of European legislative and constitutional provisions and relevant case law, freedom of expression guarantees also extend to judges. Moreover, in view of the principles of the separation of powers and the independence of the judiciary, permissible limits of a judge's freedom of expression call for closer scrutiny. As ruled by ECtHR, opinions expressed by judges on the adequate functioning of justice, which is a matter of public interest, are protected by the European Convention, '[...] even if they have political implications, and judges cannot be prevented from engaging in the debate on these issues. Fear of sanctions may have a discouraging effect on judges expressing their views on other public institutions or policies. This dissuasive effect is detrimental to society as a whole'.

Drawing on the ECtHR's case law on the matter, the Venice Commission points to the importance of a 'contextual' approach in defining those permissible limits. The wider domestic political, historical and social background is also of particular importance.

It is obvious that, as a key pre-requirement for recognising impartiality of judges and of the judiciary, in general, both judges and prosecutors have a duty of restraint, as part of the standards of conduct applying to them. As stated in the Opinion No. 3 on ethics and responsibility of judges of the Consultative Council of European Judges (CCJE), '[a] reasonable balance [...] needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties.' The European judges' body further specifies that, while necessary criticism of another state power or of a particular member of it must be permitted, 'the judiciary must never encourage disobedience and disrespect towards the executive and the legislature' (CCJE Opinion no. 18 on the position of the judiciary and its relation with the other powers of state).

In the CCJE's view, 'an equal degree of responsibility and restraint' is expected from the other powers of the state, including with regard to reasonable criticism from the judiciary. Removals from judicial office or other reprisals for reasonable critical expression towards the other powers of the state are unacceptable (reference is made to ECtHR *Baka v. Hungary*). More generally, unwarranted interferences should be solved through loyal cooperation between the institutions concerned and, in case of conflict with the legislature or the executive involving individual judges, an effective remedy (a judicial council or other independent) should be available

From this perspective, the new obligation imposed on Romanian judges and prosecutors appears to be unnecessary at best and dangerous at worst. It is obvious that judges should not make defamatory statements with respect to anyone, not only with respect to state powers. It seems unnecessary to specify this by law.

On the contrary, it seems dangerous to do so, especially as the notion of defamation is not clearly defined and this obligation relates specifically to other state powers. This opens the way for subjective interpretation: what is meant by 'defamatory manifestation or speech' for a member of the judiciary 'in the exercise of their duties'? What are the criteria to assess such conduct? What is, for the purpose of this prohibition, the meaning of the notion of 'power'? Does it refer to persons or to public institutions? What is the impact of the new obligation on the SCM task of defending judges and prosecutors, by publicly expressed statements, against undue pressure by other state bodies?

There are serious doubts as to how such a general restriction on magistrates' freedom of expression could be justified. At least from the point of view of necessity and legal clarity, the restriction may be seen as problematic under Article 10 ECHR. It should therefore be deleted."

CDL-AD(2018)017, Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy of Romania, §§123, 125-130, 132

"The latest amendments made to the draft Law also affect Article 45(6) on the incompatibility of interests and duties, which now provides that '6. An employee of the Prosecutor's Office, except for a person employed by a labour agreement, shall be prohibited from participation in gathering, organising or taking part in a strike' (changes in bold). Prosecutors have a duty of loyalty, which may be a good reason to restrict their freedom of expression and association, but the restrictions need to pursue a legitimate aim and constitute a proportionate response to a pressing need in order to be legitimate. If this is a blanket ban for prosecutors to participate in gatherings, this might not be the best solution, because there is a trend in reducing the traditionally accepted limits to fundamental rights in this respect – especially for blanket bans. A blanket ban should be replaced with appropriate and specific limitations."

CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts, §27

9.2 VERBAL ATTACKS ON JUDGES AND THE JUDICIARY

“With regard to the media criticism targeting judges, the Court, while stressing the need for an adequate balance between the public interest in the fair administration of justice and freedom of expression [...], has underlined that, as all other public institutions, courts are not immune to criticism and scrutiny, *‘be it in specialised journals, in the general press or amongst the public at large’*. The Court however recalled that, in view of its special role in the society, the judiciary must enjoy public confidence to be successful and, from this perspective, it may prove necessary *‘to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying’*.”

Therefore, a distinction needs to be made between the legitimate criticism related to the professional activities of judges, i.e. the reasoning in a judgment, with its wider limits, and defamatory accusations against individual judges or insult. Where criticism involves accusations of unlawful and abusive conduct by members of the judiciary, these should be supported by relevant evidence. Finally, in balancing the interests in place, the Court has paid particular attention to the media as a space for voicing criticism; it stressed that, in view of the larger audience, unfounded criticism of judges/other members of the judiciary in the media or leakage of non-public ‘court information’ to the media are likely to lead to more serious injury to the reputation of judges or other members of the judicial authority.”

CDL-AD(2013)038, Opinion on the legislation on defamation of Italy, §§21-22

9.3 PUBLICATIONS WHICH INTERFERE WITH THE NORMAL COURSE OF JUSTICE; TRANSPARENCY OF JUSTICE FOR THE MEDIA

“[...] [It] is important to underline that there are trials that are closed to the public, including the media. The courts should fulfil their duty and find a balance between protecting the conflicting rights of human dignity, privacy, reputation and presumption of innocence on the one hand and the freedom of imparting information on the other. For instance, publishing pictures, identification, or records of convicted minors must be prohibited at all times.”

CDL-AD(2009)055, Opinion on the Draft Law about obtaining information on activities of the Courts of Azerbaijan, §27

“[...] The principle of public proceedings means that citizens and the media should have access to courtrooms in which trials are held. However, there is a risk that the presence of TV cameras in the courtrooms could disturb the proceedings and influence the behaviour of the parties involved in the trial.

Where TV coverage of court proceedings is allowed, fixed cameras should be used and it should be possible for the presiding judge to decide on the conditions under which recording may be allowed. Presiding judges should also have the power to interrupt the recording at any time. Similarly, when making decisions, the opinion of the other parties involved should be taken into account.”

CDL-AD(2009)055, Opinion on the Draft Law about obtaining information on activities of the Courts of Azerbaijan, §§47-48

“[...] [The] condition that public disclosures [by whistleblowers] should not ‘threaten ensuing court proceedings’ is too vague. It is legitimate to prevent public disclosure in situations where the publication of certain sensitive information runs counter clearly identifiable interests of justice in a specific pending court case - for example, where the public disclosure may reveal the name of an anonymous witness. However, the fact that a disclosure relates a story which may later become an object of ‘ensuing’ court proceedings is not a sufficient argument to prevent its publication. The damage to the normal course of justice should be immediate, easily identifiable and serious enough to justify a ban on public disclosure. [...]”

CDL-AD(2016)008, Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of “the former Yugoslav Republic of Macedonia”, §83

“The idea of organising the relationship between prosecution and media is not itself a bad idea. However, the transmission of information should always be handled in a very cautious and restrained manner in order not to infringe upon the basic rights of privacy of individuals and their right to presumption of innocence. It is true that Article 6§2 of the European Convention on Human Rights cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary, if the presumption of innocence is to be respected.

[...] Legal safeguards are required which aim at preventing officials from making statements on the guilt of the accused and against a breach of the principle of the presumption of innocence when informing the media or other entities. The Commission recommends first that the rights to presumption of innocence and to privacy should be explicitly referred to in Article 12 which should state that the transmission of information by the competent authorities must not breach those rights.

[...] [It] would be important to provide in Article 12 for a judicial review of this type of information transmission. [...]

Moreover, the information may be transmitted to public authorities and to other persons ‘in duly justified cases’ (paragraph 1) and to the media ‘out of consideration for an important public interest’ (paragraph 2). The Venice Commission is of the opinion that in such an important matter as the transmission of information about the on-going prosecutions, which may jeopardize different rights including the right to presumption of innocence, the relevant provision should avoid using open wording which may be subjected to a large interpretation. The provision should clearly determine the persons to whom the information may be transmitted and under which conditions and such transmission should be subject to judicial control.”

CDL-AD(2017)028, Opinion on the Act on the Public Prosecutor's office of Poland, as amended, §§72, 74, 75, 80

“In short, a distinction should be made between alleging the guilt of a suspect on the one hand, and providing factual information to the public on the other hand. The proposed new paragraphs (3) and (4) of Article 4 CPC now prohibit both categories of statement, whereas international standards clearly only prohibit the first category. In view of the conditions, under Article 10 § 2 ECHR, to allow restrictions on the freedom of expression, including the right to ‘receive

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information', it is difficult to conclude, with all due consideration for the explanations provided by the Romanian authorities, that these provisions meet the "necessary in a democratic society" standard in the sense of the ECtHR case law.

The EU Directive 2016/343 specifies in a detailed manner, in Recitals (18) and (19), the acceptable exceptions on the obligation imposed upon public authorities not to refer to suspects or accused persons as being guilty, including when they provide information to the media; in addition, the Directive points to the importance of the proportionality and reasonability requirements in making exceptions to the above obligation, but also to the necessary balance between the due respect of the presumption of innocence of suspects and accused, and national law protecting the freedom of press and other media."

CDL-AD(2018)021, Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code of Romania, §§124 and 125

ANNEX

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