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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION
ON PROPOSED CHANGES TO RECOMMENDATION R(99)15
ON MEDIA COVERAGE OF ELECTION CAMPAIGNS

on the basis of comments by

Mr Owen MASTERS (Expert)
Ms Herdís THORGEIRSDÓTTIR (Substitute member, Iceland)

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I. *Introduction*

1. In March 2007 the Group of specialists on human rights in the information society (MC-S-IS) asked the Venice Commission to participate in its work on the revision of the Recommendation (99) 15 on media coverage of election campaigns and to provide an opinion focussing on the role played by the electronic media in election campaign coverage. Following this request Mrs H. Thorgeirsdóttir (substitute member of the CDL, Iceland) and Mr O. Masters (expert) provided the group of experts with their written comments. On 29 - 30 March 2007, Mrs Thorgeirsdóttir attended the meeting of MC-S-IS which took place in Strasbourg and took part in the discussions on the amendments to the above-mentioned recommendation.

2. The following draft opinion was elaborated on the basis of comments provided by Mrs Thorgeirsdóttir and Mr Masters and adopted at the ... plenary session of the Venice Commission (Venice,).

II. **New challenges to the role of media in the modern society.**

3. The Venice Commission has emphasized the need to afford the press all the safeguards it needs to carry out its role as the public watchdog.¹ The democratic role of the media **is increasingly called into question in the process of globalization** and concentration leading to the growth of multinational, including European media and communications groups. This situation, as noted by the Committee of Ministers in a declaration in January 2007, is fundamentally changing the media landscape where “*media concentration can place a single or a few media owners or groups in a position of considerable power to separately or jointly set the agenda of public debate and significantly influence or shape public opinion, and thus also exert influence on the government and other state bodies and agencies.*”

4. The Venice Commission has been asked to comment on the proposed amendments to Recommendation No. R (99)15 of the Committee of Ministers to member states on **measures concerning media coverage of election campaigns**. With regard to the fundamental role of the media in achieving the objectives which the Council of Europe is based on, e.g. democracy, rule of law and human rights, there are various considerations to be looked at in the context of securing responsible journalism in all news media during election periods.

5. In the opinion of the Commission two major sets of principles should be strongly reaffirmed. The first group is related to the freedom of expression as a fundamental right in general and the second group linked to particular rights and the role of media during the election campaigns.

6. In respect of the universal right to freedom of expression the participatory rights could be defined as follows:

1. The right of voters to be informed on the political alternatives in order to make an informed choice.
2. Candidates and political parties having the right to communicate their platforms and their views, and they should have the right of access to all forms of media.
3. The media must have the freedom to spread information, and inform the public without interference by government, business, or commercial interests.
4. The increasing role of the internet in the electoral process should be addressed, particularly in respect of election campaign blackout, and dissemination of opinion polls.

¹ *Jersild v. Denmark*, 23 September 1994, Series A no. 298; *Bladet Tromsø and Stensaas v. Norway* [GC], 20 May 1999, RJD 1999-III, p. 289, § 59.

5. The freedom of access and the provision of electoral information through the Internet, regardless of frontiers
7. The role and rights of the media in elections could be elaborated along the following lines:
 1. The media must have the freedom to inform the public, and to cover all relevant issues of the election.
 2. The definition of mass media could be more precise.
 3. Information for the public should be professional, correct, balanced, and provided in a transparent manner.
 4. Journalists must be protected from harassment, intimidation, violence, and attack which could encourage self-censorship by journalists.
 5. Possible regulations concerning paid political advertising.
8. Widely the media landscape is politicized and journalists struggle for professionalism in an environment where they are poorly trained, often badly paid and even subject to intense pressure from owners, powerful business groups in society, political factions and religious groups. The perception is that reporters are in a weaker position during election periods and that external forces are more encroaching during such periods has a point. The struggle for political power is, however, not confined to clearly defined circles.

a) The freedom of the media to inform the public, and to cover all relevant issues of the election

9. As the Recommendation R (99)15 stresses that the fundamental principle of editorial independence of the media assumes special importance in election times some salient points with regard to this objective must be recalled:
10. In the case-law of the European Court of Human rights **political debate** enjoys the highest protection under Article 10. In the case of *Thorgeirson v. Iceland*, the European Court of Human Rights rejected the Icelandic government's contention that political discussion concerned mainly high politics; it also covered other matters of public concern.² In March 2002 the Court made clear that the scope of political debate and public matters includes corporate matters. When the ties between political and business activities overlap it may give rise to public discussion – even when writings in the press are based on slim factual bases.³ Strasbourg jurisprudence attaches **particular importance to the duties and responsibilities of those who avail themselves of their right to freedom of expression, 'and in particular journalists'**.⁴ Investigative journalism has become recognized as one of the main tools in fighting corruption although resistance of the established media in this matter may create difficulties due to the enduring and strong ties with political and corporate power.⁵ Any interference with journalistic effort to reveal corruption in high places is acknowledged by the Court as requiring strict scrutiny. The Committee of Ministers called attention to the role of journalism in fighting corruption in a recommendation in 2000: '[C]orruption represents a serious threat to the rule of law, democracy, human rights, equity and social justice; it hinders

² *Thorgeirson v. Iceland*, 25 June 1992, Series A no. 239, § 64.

³ *Dichand and Others v. Austria*, application no. 29271/95, judgment of 26 February 2002, § 52.

⁴ *Jersild v. Denmark*, 23 September 1994, Series A no. 298, § 31; *Unabhängige Initiative Informationsvielfalt v. Austria*, application no. 28525/95, judgment 26 February 2002, § 43.

⁵ H. Thorgeirsdóttir, *Journalism Worthy of the Name. A Human Rights Perspective on Freedom within the Press*, Lund University 2003.

economic development and endangers the stability of democratic institutions and the moral foundations of society'.⁶

11. It is recommended that the fundamental principle of **editorial independence** is scrutinized from the above principles applying to all news media. With regard to substantial **distinctions between media types** and their subsequent regulatory options the Venice Commission has recommended that the distinct treatment of journalism depending on type of medium, i.e. regulation of broadcasting and hands off policy in case of printed press deserve closer scrutiny.⁷

12. In the light of the above-mentioned approach the revised text of the Recommendation R(99)15 on media coverage of election campaigns could be adapted to the current situation in Europe and the **new emerging media environment**. The proposal⁸ to **broaden the definition of the media concept** for the purposes of this Recommendation seems consistent with the evolution in the media environment without advocating a new functionality for the media.

13. It is also important that the principles of fairness, balance and impartiality in the coverage of election campaigns by the media should apply to all types of political elections taking place in member States, that is presidential, legislative, regional, **local elections and, where practicable political referenda**.

b) Definition of media.

14. The definition of media set forth in the proposed amendments is worthy of support: "The term media refers to all forms of communication to the general public which involve a minimum level of defined editorial responsibility over the content itself or its presentation irrespective of the technology used for delivery. This includes newspapers, periodicals, radio, television and online equivalents using new communication services."⁹

15. The status of individual bloggers, who are either guest bloggers with news organizations or newspapers might be clarified in this respect. While some blogging is journalism, much of it is not and does not aim to be. Many bloggers are however motivated in the same way as journalists contributing to the public discourse. Individual bloggers may have a great impact on the public discourse by their regular contribution. The Committee of Ministers' Recommendations No. R (94) 13 on **measures to promote media transparency** is recalled in this context – in order to identify third parties who are exerting influence on the political process, e.g. guidelines on specific measures which may guarantee media transparency in the press sector.

16. At the same time in "General provisions" of the Recommendations it could be useful to be more precise as to the persons protected by its provisions by amending the existing text in a following way (proposed changes appear in bold):

*"Public authorities should refrain from interfering in the activities of **journalists and other media personnel** with a view to influencing the elections. Public authorities should take appropriate steps for the effective protection of **journalists and other media personnel** and their premises, as this assumes a greater significance during elections. At the same time, this protection should not obstruct them in carrying out their work."*

⁶ Recommendation No. R (2000) 10 of the Committee of Ministers to Member States on codes of conducts for public officials (Adopted by the Committee of Ministers at its 106th session on 11 May 2000).

⁷ **CDL-AD(2004)047.**

⁸ Group of specialist on Human Rights in the Information Society (MC-S-IS).

⁹ As suggested by the Group of specialists on human rights in the information society (MC-S-IS).

c) Information for the public should be professional, correct, balanced, and provided in a transparent manner.

17. The Committee of Ministers has emphasized that the **right of reply** is an appropriate remedy in the new online environment as well as the traditional media – enabling natural and legal persons to correct inaccurate facts or contested information. It is acknowledged that the right of reply can be assured not only through legislation, but also through co-regulatory or **self-regulatory** measures.¹⁰ In principle the right of reply should be available during the election campaign period.

18. With regard to the proposed general provisions concerning **professional and editorial standards of the media** the subsequent considerations apply.

19. The Venice Commission has emphasized that media in modern societies is subject to the interaction of legal regulation, control of the market and the **struggle of self-regulation** in this relationship. With regard to analysis of journalistic conduct the focus is first and foremost on the right (and duty) to impart information and ideas of all kinds; the law regulating journalism and the potential extent of public interference to restrict or enhance this right; the impact of the economic logic for the privately owned media and the capacity of journalists to live up to the role imposed on them in jurisprudence.¹¹

20. The duty of the press (in the traditional sense, both broadcasting and printed media) is to serve the public interest by adequately informing everyone. A constant thread running through the Court's case-law is the insistence on the essential role of a free press in ensuring the proper functioning of democracy.¹² **Journalists' rights to report free of official intimidation¹³ are recognized as part of the corollary right of the public to receive a quality information.** The Court has reiterated the general principle in Article 10 case law that, "whilst the mass media must not overstep the bounds imposed in the interests of the protection of the reputation of private individuals, it is incumbent on them to impart information and ideas concerning matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them."¹⁴

21. While the media can be held liable if journalists cross the boundaries set out in paragraph 2 of Article 10 such as hurting the rights and reputations of others, there are no sanctions or remedies in cases where the print media ignores its positive duties of imparting to the public all matters of general interest.¹⁵ The positive requirements are usually not entrenched in legal codes and it is hence difficult to show how they can be violated or brought under review of the exception to the right.

¹⁰ Council of Europe Committee of Ministers Recommendation (2004)16 on the right of reply in the new media environment; Resolution (74) 26 on the right of reply – position of the individual in relation to the press; Recommendation No. R (99) 15 on measures concerning media coverage of election campaigns.

¹¹ H. Thorgeirsdóttir, *Journalism Worthy of the Name. A Human Rights Perspective on Freedom within the Press*, Lund University 2003.

¹² *Pedersen and Baadsgaard v. Denmark*, judgment 17 December 2004, § 71.

¹³ Cf. The German Federal Constitutional Court ruled (27 February 2007) that journalists cannot be legitimately accused of betrayal of state secrets for publishing classified information obtained from informers. The decision was made in the context of a legal case prompted by the police searching the offices of German political monthly *Cicero* in Potsdam near Berlin, in September of 2005.

¹⁴ *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III.

¹⁵ **CDL-AD(2004)047.**

22. As evident from Article 10 jurisprudence the public watchdog duties apply to all media while in the case of broadcasting there are rules on fairness, impartiality, accuracy, right of reply. The printed press is to less stringent regulation. The Court has reiterated *with regard to the “duties and responsibilities” which journalists undertake, that the safeguard afforded by Article 10 in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.*¹⁶

23. Journalists relying on their codes of ethics are able to regulate their conduct from the perspective of the negative duty not to cross the boundaries of harming the rights or reputations of others. The codes of ethics of many journalists' associations contain both publicity rules and rules of integrity where rule number one is to seek the truth and report it. Giving readers and the audience a coherent picture of the political and economic landscape may require more than ethical considerations. The protection of political speech under Article 10 entails the obligation of authorities to take into consideration the need to afford journalists adequate protection in this respect.

24. In this respect some the recommendation concerning the broadcast media could be completed with the following (proposals in bold):

*“2. News and current affairs programmes and their audiovisual on line equivalents
Where self-regulation does not provide for this, member States should adopt measures whereby public and private broadcasters, during the election period, should in particular be fair, balanced and impartial in their news and current affairs programmes and their audio visual online equivalents, including discussion programmes such as interviews and debates, which should guarantee equality of opportunity to all contestants.*

3. Free airtime for political parties/candidates on public broadcast media, and where provided, on privately owned media.”

d) Journalists must be protected from harassment, intimidation, violence, and attack which could encourage self-censorship by journalists.”

25. Journalists are in a position to abuse their scope under self-regulation. If journalists withhold information for fear of external pressures they are restricting the imparting process protected under Article 10 (1). It is the member states' responsibility to ensure effective respect for the rights guaranteed under Article 10.

26. Measures to protect the media at election time entail in the unrevised Recommendation No. R(99)15 the principles of non-interference and secondly **the duty to protect journalists** and other media personnel against attacks, intimidation or other *unlawful pressures* on the media. What constitutes *unlawful pressures* needs clarification in light of the Venice Commission recommendation that the interaction of legal regulation with **market regulation** must be taken into consideration (cf. Above § 6).

27. The proposed amendments concerning media ownership by politicians conforms to the principle laid out in Article 10 (1) of the Convention, prohibiting public interference. With regard to the elaboration of that suggestion, e.g. that “politicians who own media themselves should under no circumstances abuse their power for political gain during electoral campaigns,” the positive duties on governmental authorities inherent in Convention jurisprudence must be recalled. The editorial independence of broadcasters is an area in which governments find

¹⁶ See *Goodwin v. the United Kingdom*, judgment of 27 March 1996, Reports 1996-II, § 39, and *Fressoz and Roire*, § 54. Italics added.

themselves confronted with a subtle, shifting synthesis between prohibited interference and compulsory intervention.

28. The Venice Commission has *recommended* that a. in light of the fact that the international legal standards are directed at regulating the behaviour of governments in relation to the media¹⁷ and b. that public authorities shall refrain from interfering in the workings of the media and c. when necessary shall impose positive measures to promote pluralism and to protect them from attacks or undue pressures,¹⁸ that the desired positive measures are clarified in relation to the objective and explicitly described with regard to feasible and realistic options that authorities can resort to in order to achieve this goal.

e) Possible regulations concerning paid political advertising

29. The Committee of Ministers Recommendation on the remit of public service media in the information society¹⁹ is recalled in this respect. There is an emerging consensus on the necessity of enhancing the role of public service broadcasting within the Member States of the Council of Europe due to ownership concentration on the media market.²⁰

30. With regard to measures concerning the broadcast media it must be recalled that the state is the ultimate guarantor of diversity of news and views in the media²¹ and according to Convention case law states cannot absolve themselves from responsibility by devolving authority to private bodies or individuals.²²

31. In this respect provisions concerning paid political advertising in print and electronic media might be completed in the following way (in bold):

*“In member states where political parties and candidates are permitted to buy advertising space for electoral purposes **in the publicly owned media, and where offered in the privately owned media**, regulatory frameworks should ensure that:*

- *the possibility of buying advertising space should be available to all contending parties, on **consistent and equal conditions, with equal rates of payment***
- ***Transmission times should be consistent, and programmed at equal times for all parties***
- ***Space provided in the print media should accord with the principle of equality of opportunity***
- *the public is aware that the message is a paid political advertisement.”*

32. At the same time Member States may consider introducing a provision in their regulatory frameworks to limit the amount of political advertising space which a given party or candidate can purchase.

III. Some considerations concerning the new communication services in particular

33. The new communication services have an important role in the modern society. New

¹⁷ **CDL-AD(2004)047** OSCE Guidelines Draft as of 8 June 2004, p. 5.

¹⁸ **CDL-AD(2004)047** OSCE Guidelines Draft as of 8 June 2004, p. 8.

¹⁹ Rec (2007) 3, adopted 31 January 2007.

²⁰ **CDL-AD(2004)047.**

²¹ *Informationsverein Lentia and Others v. Austria* (no. 1), judgment of 24 November 1993, Series A no. 276, p. 16, § 38.

²² *Costello-Roberts v. the United Kingdom*, 25 March 1993, Series A no. 247.

technologies provide a set of new opportunities to collect and disseminate information through different means. However, there is a need to adapt some of the rules existing for the more conventional providers of information to their specific needs which is a difficult task. However, some of the principles applied to these new communication services can be defined and resumed as follows:

- there should be no interference with the editorial independence of new communication services or their coverage of elections nor with the right to express any political preferences;
- when covering electoral campaigns new communication services owned by public authorities should do so in a fair, balanced and impartial manner, without discriminating against or supporting a specific political party or candidate;
- if such communication services owned by *public or private organisations* accept paid political advertising, they should ensure that such advertising is readily recognisable as such, and that all political contenders and parties requesting the purchase of advertising space are treated in an equal and non-discriminatory manner.

IV. Conclusions

34. Representatives of the Venice Commission had an opportunity to share some of the ideas and proposals expressed in the present opinion with the Group of specialists on human rights in the information society (MC-S-IS) during its meeting in Strasbourg on 29 – 30 March 2007.

35. The Commission hopes that the present opinion will be useful for the on-going work of the MC-S-IS on the amendments to the Recommendation (99) 15 on media coverage of election campaigns.