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(VENICE COMMISSION)

TÜRKIYE

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

**ON THE DRAFT AMENDMENTS TO THE PENAL CODE REGARDING
THE PROVISION ON “FALSE OR MISLEADING INFORMATION”**

**Issued pursuant to Article 14a
of the Venice Commission’s Rules of Procedure**

On the basis of comments by

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Venice Commission, Member Iceland)
Mr Tomáš LANGÁŠEK (Substitute member, Czech Republic)
Ms Deirdre KEVIN (Expert, DGI)**

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I. Introduction

1. By letter of 14 September 2022 the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) requested an urgent opinion of the Venice Commission on the draft amendments to the Turkish Penal Code introducing a provision on “false or misleading information”, (see CDL-REF(2022)039).
2. Ms Herdis Kjerulf Thorgeirsdottir (Vice-President of the Venice Commission, Member Iceland), Mr Tomáš Langášek (Substitute member, Czech Republic) and Ms Deirdre Kevin (Expert, DGI) acted as rapporteurs for this urgent opinion.
3. Due to time constraints, it was not possible to travel to Türkiye. On 26 and 27 September 2022, the rapporteurs and Ms Martina Silvestri of the Secretariat held online meetings with the two political parties belonging to the majority (AK, MGHP), three political parties in the opposition (CHP, HDP, İYİ), as well as with representatives of the civil society. The Commission is grateful to the Council of Europe Office in Türkiye for their support and to all the interlocutors for their availability.
4. This opinion was prepared in reliance on the English translation of the draft amendments provided by the Turkish authorities. The translation may not accurately reflect the original version on all points.
5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings, as well as the written observations of the Turkish authorities submitted on 6 October 2022 (CDL-REF(2022)043). It has been issued in accordance with the Venice Commission's protocol on the preparation of urgent opinions (CDL-AD(2018)019) on 7 October 2022 and will be presented to the Venice Commission for endorsement at its 132nd plenary session (Venice, 21-22 October 2022).

II. Scope of the opinion

6. On 27 May 2022, a Legislative Proposal on Amendment to the Press Law and Some Other Laws (hereafter: the "Draft Law"), initiated by Türkiye's governing Justice and Development Party (AKP) and Nationalist Movement Party (MHP - that is a member of the Republican Alliance), was published on the Grand National Assembly's (GNAT) website. As outlined in the Information Note of the Draft Law (CDL-REF(2022)039), the latter was communicated to the Speaker's Office of the GNAT, who submitted it to the relevant parliamentary committees (i.e. Committee on Justice Commission and Committee on Digital Channels) on 26 May 2022. Following its adoption by the Committee on Justice (primary committee), a report was disseminated to the members of the GNAT at the end of June and the Draft Law is now expected to be discussed following the start of the new legislative year on 1 October 2022.
7. The Draft Law contains amendments to: (i) the Press Law (e.g. including online news websites within the scope of the Press Law along with the printing and publication of printed works), (ii) Law no. 5953 on Governing the Relations between Employers and Employees in the Profession of Journalism, (iii) the Electronic Communications Law (by introducing the concept of Over the Top OTT services for the first time), (iv) Law No. 5651 (also known as the Internet Law), by introducing several significant obligations and liabilities on social network providers, and (v) the Turkish Criminal Code (by introducing a new crime titled public dissemination of information misleading the public).
8. The present opinion, as per the request by PACE, focuses on article 29 of the Draft Law which would amend the Turkish Criminal Code by adding a provision (Article 217/A) that, in the official translation provided by the Turkish authorities on 26 September 2022, reads as follows:

“Publicly disseminating misleading information*Article 217/A*

- (1) *Those who publicly disseminate misleading information, exclusively to cause public concerns, fear or panic, regarding the country’s internal and external security, public order and general well-being in a way conducive to disturbance of the public peace shall be sentenced to a penalty of imprisonment of a term of one to three years.*
- (2) *Should the perpetrator commit the offense by concealing his/her real identity or within the framework of the activities of an organisation, the sentence to be imposed in accordance with the paragraph one shall be increased by half.”*

9. However, on Friday 7 October, the Turkish authorities have provided a new translation, which reads as follows:

“Overtly Disseminating False Information to Mislead the Public*ARTICLE 217/A*

- (1) *Any person who overtly disseminates false information contrary to the facts about the internal and external security, public order, and public health, with the motive exclusively to create distress, fear, and panic among public and in a manner conducive to disturb public peace, shall be sentenced to imprisonment from one to three years.*
- (2) *If the offence is committed by concealing the true identity of the perpetrator or as part of the activities of an organized group, the penalty outlined in the preceding paragraph shall be increased by one-half.”*

10. Nevertheless, the official text registered in Parliament¹, seems to read as follows:

“Publicly disseminating information misleading the public*Article 217/A*

- (1) *Any person who publicly disseminates false information about the country's domestic and foreign security, public order and general health, with the sole aim of creating anxiety, fear or panic among the public and in a manner that is liable to disturb public peace, shall be punished by one to three years of imprisonment.*
- (2) *If the offense is committed by concealing the true identity of the perpetrator or within the framework of an organisation's activities, the punishment mentioned-above is increased by one half.”*

11. The General Justification to the draft Law (CDL-REF(2022)038), provided as an informal translation) explains the motives and aims of the newly adopted piece of legislation. In a nutshell, the drafters seem to be concerned with negative externalities of the digitalization, notably of the internet and social media usage. They refer to “new social problems, personality disorders, or psychological illnesses”, “sociological and legal problems for people or violations of their personal rights”, and the possibilities for “malignant users to perform illegal business and actions by

¹ Last visited on 7 October 2022: <http://www2.tbmm.gov.tr/d27/2/2-4471.pdf>

concealing their identities”, or “to create and share illegal content under false names and accounts, to swear, slander, defame or insults individuals of different political thought, religion, nation or who are considered as rivals and to create a ground for hate and discrimination”.

12. The declared purpose of the draft is thus the protection of individuals whose constitutional rights have been violated through these negative phenomena, in particular the right to respect for their human dignity, the right to respect for privacy and family life, the protection of their personal data, freedom of access to information, etc. As reported in the comments submitted by the Turkish authorities on 6 October 2022, “[t]he aim of the Legislative Proposal is to prevent the spread and sharing of untrue, misleading and false information”. With reference to the interference by this kind of regulation with other fundamental rights, notably the freedom of expression, the General Justification refers to the positive obligation of the state “to take a regulatory role in which fundamental rights and freedoms are protected while also securing freedom of expression.” The drafters also mention similar regulatory measures adopted in some European countries (Germany, France, England), the United States, and the European Union “Digital Services Act” (DSA) and the “General Data Protection Regulation” (GDPR).

III. Comparative analysis

13. In the comments provided by the Turkish authorities on 6 October 2022, the declared “main goal is to prevent the spread of fake, untrue, baseless, and false information designed to create a specific perception, and ensure that anonymous accounts can be associated with real persons”. This reflects what is reported in the General Justification of the Draft Law, where the authors indicate that it is designed to protect Turkish citizens’ rights online while combating “disinformation” and “illegal content” produced by “false names and accounts”, and claim that the move falls in line with regulations in the United States and European countries such as Germany, France, and the United Kingdom.² These regulations were also mentioned, during discussions with national interlocutors, as having been examined in the context of development of the proposal.

14. A brief compilation of relevant measures taken by other European countries on the matter is provided below:

Germany

15. In 2017, the legislature introduced an “Act to improve law enforcement in social networks” - NetzDG. The law aims to require social networks to deal more quickly and more comprehensively with complaints, in particular from users, about hate speech and other criminal content. The law focuses on the obligations of social media platforms to deal with hate speech and other criminal content, to provide for a system of complaints to be used by users to identify illegal content, to remove content, to make public reports regarding the complaints and the handling of complaints. The NetzDG has been widely criticised by various Human Rights Organisations, whereby it can set a dangerous precedent for other governments looking to restrict speech online by forcing companies to censor on the government’s behalf.³ The NetzDG was updated in 2021 to oblige providers to introduce an effective and transparent procedure for reviewing decisions on the removal or blocking of access to content.

The NetzDG contains no provisions regarding criminal prosecution of individuals disseminating “false or misleading information”. In addition, the Act specifically does not apply to “*Platforms offering journalistic or editorial content for which the service provider itself is responsible*” (section 1- Scope of the Act).

France

² Based on an unofficial translation of the GENERAL JUSTIFICATION of the law, CDL-REF(2022)038.

³ Germany: Flawed Social Media Law: <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law>

16. In July 2019, the French Parliament adopted a bill to combat online hate speech.⁴ The law required Internet platforms and search engines to remove or block illegal content within 24 hours of it being reported, or risk a fine of up to EUR 1.25 million. This included content that infringes human dignity, condones crimes, or constitutes the provocation of and incitement to hatred, violence or insults on grounds of origin, race, religion, sexual orientation or gender identity. It also included sexual harassment, child pornography and content related to the procuring or trafficking of human beings.⁵ The law also required (as in the case of the NetzDG) that platforms have to appoint a legal representative in France. There should be mechanisms for flagging illegal content. The Conseil Supérieur de l'Audiovisuel (CSA, media regulatory agency) was responsible for regulating platforms in relation to hateful content and had the ability to fine the platforms. The law was ultimately blocked by the Constitutional Council on 18 June 2020.⁶ The legislature has since enacted further provisions but more aligned with the forthcoming Digital Services Act of the European Union (see below). It has also, in the fight against hate speech, given the Tribunal Judiciaire de Paris (Paris judicial court) jurisdiction to deal with Internet-based psychological and sexual harassment of a discriminatory nature that is committed on French soil and reported online.⁷ Again, in the French case, there are no provisions with regard to criminal prosecution of individuals disseminating “false or misleading information”.

17. In 2018, the French National Assembly adopted the Law against the manipulation of information. Under the new law, an emergency procedure can be used to stop the dissemination, during election campaigns, of “inaccurate or misleading allegations or statements likely to affect the sincerity of the vote” when they are “disseminated on a massive scale in a deliberate, artificial or automated manner via an online public communication service”. The law subjected digital platforms to new obligations concerning cooperation (to combat “fake news”) and transparency. For example, those “whose activity exceeds a certain number of connections on French soil” will be required to “provide users with accurate, clear and transparent information about the identity of any natural person, or the name, headquarters and purpose of any legal entity, or of that on whose behalf it is acting, that pays the platform to promote information linked to a debate of general public interest”. On 15 May 2019, the CSA recommended that platform operators put in place a number of practical measures designed to improve the fight against the dissemination of fake news. It also set up an internal committee of experts on online misinformation. Such measures include: reporting systems; the processing of information; quantitative aspects; the transparency of algorithms; existing fact-checking partnerships or initiatives; how to deal with sponsored content, etc. In particular, the CSA asked the operators how they defined the content of information linked to discussions of general public interest. The platforms were also asked how they “ensure that the measures are applied in conformity with the freedom of expression and communication.”⁸

United Kingdom

18. The current version of the United Kingdom Online Safety Bill, according to the description on the government website: introduces new rules for firms which host user-generated content, i.e. those which allow users to post their own content online or interact with each other, and for search engines, which will need to minimize the presentation of harmful search results to users. All platforms in scope will need to tackle and remove illegal material online, particularly material relating to terrorism and child sexual exploitation and abuse. Platforms likely to be accessed by

⁴ Proposition de loi visant à lutter contre les contenus haineux sur internet, https://www.assemblee-nationale.fr/dyn/15/textes/15t0310_texte-adopte-seance#

⁵ See: IRIS 2019-8:1/20. [FR] National Assembly adopts online hate speech bill. <https://merlin.obs.coe.int/article/8651>

⁶ See: IRIS 2020-8:1/22. [FR] Constitutional Council blocks online hate law <https://merlin.obs.coe.int/article/8972>

⁷ Decree No. 2020-1444 of 24 November 2020 pursuant to Article 15-3-3 of the Code of Criminal Procedure Bill strengthening respect for the principles of the Republic: https://www.assemblee-nationale.fr/dyn/15/dossiers/respects_principes_republique?etape=15-AN1-DEPOT

See details here: IRIS 2021-2:1/9. [FR] Fight against online hate speech addressed again in bill “strengthening respect for the principles of the Republic” <https://merlin.obs.coe.int/article/9094>

⁸ See IRIS 2020-4:1/5. [FR] CSA sends platforms a questionnaire to combat manipulation of information. <https://merlin.obs.coe.int/article/8832>

children will also have a duty to protect young people using their services from legal but harmful material such as self-harm or eating disorder content. Additionally, providers who publish or place pornographic content on their services will be required to prevent children from accessing that content. The largest, highest-risk platforms will have to address named categories of legal but harmful material accessed by adults, likely to include issues such as abuse, harassment, or exposure to content encouraging self-harm or eating disorders. They will need to make clear in their terms and conditions what is and is not acceptable on their site and enforce this. These services will also have a duty to bring in user empowerment tools, giving adult users more control over whom they interact with and the legal content they see, as well as the option to verify their identity.⁹

19. The Online Safety Bill also aims to tackle misinformation and disinformation. A duty of care will require platforms to have robust and proportionate measures to deal with harms that could cause significant physical or psychological harm to children, such as misinformation and disinformation about vaccines. Platforms will also need to address in their terms of service how they will treat named categories of content which are harmful to adults, likely to include “false or misleading information”. This will mean all companies will need to remove illegal content, for example where this contains direct incitement to violence; and services accessed by children will need to protect underage users from harmful disinformation; and services with the largest audiences and a range of high-risk features will be required to set out clear policies on harmful disinformation accessed by adults. The regulatory framework will also include additional measures to address disinformation, including provisions to boost audience resilience through empowering users with the critical thinking skills they need to spot online falsehoods, giving Ofcom (the communications regulatory authority) the tools it needs to understand how effectively false information is being addressed through transparency reports, and supporting research on misinformation and disinformation.¹⁰ In addition, the Bill does not apply to journalistic content: “A free press is one of the pillars of our democratic society. The new legislation has been designed to safeguard access to journalistic content. News publishers’ websites are not in scope of online safety regulation.”¹¹ Finally, the Bill contains no provisions with regard to criminal prosecution of individuals disseminating “false or misleading information”.

European Union

20. With regard to actions at the EU level, the **Digital Services Act**, which was approved by the European Parliament on 5th July 2022,¹² aims to modernize the rules of e-Commerce Directive in relation to illegal content, and to address transparency of advertising and disinformation online. The Act introduces rules for internet intermediary services depending upon the nature of their services. All intermediary services should provide public details of a contact point. They should include Terms and Conditions (T&C) for their users, and they must provide annual reports on the activities related to content moderation. In addition, hosting services (cloud and webhosting) have the above obligations – plus – requirements to establish mechanisms whereby they can be notified regarding illegal content. They must provide users with reasons for removal of content. Online platforms (online market places, APP stores, collaborative economy platforms, social media platforms) have all of the above obligations plus requirements such as establishing a complaint and redress mechanism and engaging in out-of-court settlement; engaging with trusted flaggers with regard to notification of illegal content; introducing measures to deal with abuse of

⁹ See the detailed description here: UK Government - Policy paper Online Safety Bill: factsheet. Updated 19 April 2022: <https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet#what-the-online-safety-bill-does>

¹⁰ See the detailed description at: UK Government - Policy paper Online Safety Bill: factsheet. Updated 19 April 2022: <https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet#what-the-online-safety-bill-does>

¹¹ Ibidem

¹² COM(2020) 825 final - Proposal for a Regulation of the European parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0825&from=en>

their notification systems; these services (and particularly in the case of online market places and e-commerce), should verify the credentials of third party suppliers; they must provide transparency of online advertising; and they must report criminal offences.

21. What are known as Very Large Online Platforms (the VLOPs, for example Amazon, Google and Facebook etc.) have additional obligations. They need to establish risk management procedures and to have a compliance officer. These companies must carry out risk auditing and be publicly accountable for their actions to reduce risk. They have to introduce transparency with regard to their recommendation systems and provide user choice regarding access to information. In addition, they need to share data with authorities and with vetted researchers.

22. The Act defines illegal content as: *“information, irrespective of its form, that under the applicable law is either itself illegal, such as illegal hate speech or terrorist content and unlawful discriminatory content, or that relates to activities that are illegal, such as the sharing of images depicting child sexual abuse, unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, the non-authorized use of copyright protected material or activities involving infringements of consumer protection law”*.¹³

23. The Digital Services Act does not include “false or misleading information” in the definition of illegal content. This proposal is complemented by the strengthened **Code of practice on disinformation**.¹⁴ The Code brings together a diverse range of stakeholders who sign up to precise commitments relevant to their field. Such commitments include demonetising the dissemination of disinformation; guaranteeing transparency of political advertising; enhancing cooperation with fact-checkers; and facilitating researchers access to data.

24. In November 2021, the European Commission published the Proposal for a Regulation on the transparency and targeting of Political Advertising,¹⁵ which introduces: (a) harmonised transparency obligations for providers of political advertising and related services to retain, disclose and publish information connected to the provision of such services; (b) harmonised rules on the use of targeting and amplification techniques in the context of the publication, dissemination or promotion of political advertising that involve the use of personal data.

Sweden

25. Certain acts that are related to the “dissemination of propaganda” are criminalized in Criminal Code chapter 18, section 5. This provision reads as follows: *“A person who exercises unlawful coercion or makes an unlawful threat with intent to influence the formation of public opinion or infringe freedom of action within a political organisation or a professional or business association, and thereby endangers freedom of speech, assembly or association, is guilty of an offence against civil liberties and is sentenced to imprisonment for at most six years”*.¹⁶ Thus, only disinformation which is accompanied by unlawful coercion or an unlawful threat (both in themselves criminal offences) would be criminalized.

26. In addition, accepting remuneration from foreign sources to spread propaganda is also a crime, namely Criminal Code chapter 19, section 13: *“A person who receives money or other property from a foreign power, or from someone abroad who is acting to benefit a foreign power, to influence public opinion on a matter concerning any of the foundations of the country’s form of*

¹³ Ibidem, Recital 12.

¹⁴ The 2022 Strengthened Code of Practice on Disinformation: <https://ec.europa.eu/newsroom/dae/redirection/document/87585>

¹⁵ Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising. COM/2021/731 final: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0731&from=EN>

¹⁶ Swedish Criminal Code: <https://www.government.se/4a4563/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf>

government or on a matter of significance to the country's security that is subject to decision by the Riksdag or the Government by publishing or disseminating written documents or in some other way, is guilty of accepting foreign assistance and is sentenced to imprisonment for at most two years".¹⁷ This offence requires the covert receiving of funds from a foreign power to influence public opinion, not generally, but only in relation to a small number of issues of central importance to the foundations of Swedish government or national security. To date, no prosecutions have been brought for either of these offences.

Greece

27. Article 191 of the Greek Penal Code was last amended in 2021 by Article 36 of law 4855/2021. The article reads as follows: "*Whoever in public or via the Internet disseminates or spreads in any way false news that is capable of causing concern or fear to citizens or to shake public confidence in the national economy, the country's defense capability or public health shall be punished by imprisonment for at least three (3) months and a fine. If the act was committed repeatedly through the press or through the Internet, the culprit is punished with imprisonment of at least six (6) months and a fine. The same penalty shall be imposed on the real owner or publisher of the instrument with which the acts of the previous paragraphs were carried out*".¹⁸ The pandemic and the need to efficiently face anti-vaccine propaganda were at the time the reasons invoked by the Government for the change. Article 191 was sharply criticized not only by journalist's unions, but also by constitutional scholars.¹⁹ The new article has not been enforced to this day in areas other than the COVID 19 pandemic.

Russia

28. As concerns false information, on 18 March 2019 the Code of Administrative Offences was amended by Federal Law no. 28-FZ which created a new offence of deliberately spreading untrue information, commonly referred to as "fake news". Paragraph 9 of Article 13.15 of the Code of Administrative Offences was added to read as follows:

"Dissemination through the media and ICT networks, of socially important information known to be untrue [заведомо недостоверная общественно значимая информация] under the guise of reliable reports which has created a risk of causing damage to life or health of individuals or property, instigating mass disorders, undermining public security, interfering with, or preventing, the operation of critical infrastructure, transport links, social services, credit institutions, power plants, industrial or communication facilities ... shall be punishable by an administrative fine of between 30,000 and 100,000 Russian roubles [approximately 390 and 1.200 euros at the time]...". Thus, the provision is limited to spreading untrue information, and the sanction is a purely administrative offence. It is worth noting that the European Court of Human Rights has communicated a case to the Russian authorities that is currently pending.²⁰

29. Moreover, a new law tasking social media companies with finding and removing "illegal content" – called the "Social media self-censorship law" which came into force in February 2021– has been seen as creating a dangerous precedent. Prior to this legislation, Russia adopted the so-called "Sovereign Internet law" passed in 2019, which allows the government to cut off the Internet completely from traffic outside Russia "in an emergency". It requires Internet service providers to install software that can "track, filter and reroute internet traffic". Such technology allows the state telecommunications watchdog (the *Roskomnadzor*) "to independently and extrajudicially block access to content that the government deems a threat". The technology could also allow it to slow down specific internet services without the users' knowing (including Youtube

¹⁷ Ibidem.

¹⁸ Informal translation. Link to Greek language version: <https://www.lawspot.gr/nomikes-pliροφοries/nomothesia/poinikos-kodikas-nomos-4619-2019>

¹⁹ See among others N. Papaspyrou's article, only in Greek : https://theartofcrime.gr/wp-content/uploads/2021/11/4_PAPSPYROU_TERYXOS_11.pdf

²⁰ ECtHR, [Avagyan v. Russia \(no. 36911/20\) PENDING](#)

and FB).²¹ The Social media self-censorship law requires platforms with more than 500,000 users to proactively find and block “illegal” material. This also includes material deemed to be “harmful or obscene”, furthermore calls to public disorder, extremism and participation in unsanctioned rallies. Before the new law came into effect, the *Roskomandzor* submitted removal requests to the platforms with evidence that the content violated the law. The new law places the burden directly on the tech companies.

30. Beyond the European framework, new Decree-law No. 54 of 2022 issued on 13 September 2022 in **Tunisia** includes a provision, Article 24, that stipulates that “*anyone who deliberately uses information and communication networks and systems to produce, promote, publish, transmit or prepare false news, statements, rumours or documents that are artificial, falsely attributed to others with the aim of attacking the rights of others, harming public security or national defence, or spreading terror among the population shall be punished by imprisonment for five years and a fine of 50,000 dinars (EUR 15,000).*”

The same penalties as those prescribed in the first paragraph shall be imposed on anyone who deliberately uses information systems to disseminate fabricated news, documents containing personal data or attribution of untrue matters with the aim of defaming others, discrediting or harming them materially or morally, or inciting to attack them or inciting hate speech.

The penalties prescribed shall be doubled if the targeted person is a public official or quasi-official.”²²

31. In **conclusion**, from the analysis above, the European countries cited as inspiration for criminalising “false or misleading information” have not actually done this, but rather introduced obligations on internet platforms regarding illegal content. While other countries introduced laws on disinformation in the context of Covid-19, these have been highly criticised by international organisations, in particular international human rights organisations.²³

IV. Analysis

32. European governments and institutions are playing the principal role in the democratic world in seeking to develop content rules for the internet and social media. The Parliamentary Assembly of the Council of Europe itself recommended Member States to propose adequate measures to counteract the phenomena of disinformation, propaganda and fake news.²⁴ However, there are also serious risks. Although online disinformation has admittedly become a legitimate global concern, “steps against disinformation would be tricky, a potentially disruptive force for free expression [and] everyone’s right to ‘seek, receive and impart information and ideas of all kinds.’”²⁵ Solutions to disinformation can easily lead to censorship and constraints on legitimate

²¹ <https://cepa.org/russias-social-media-self-censorship-law-is-misguided-and-the-west-must-avoid-making-the-same-mistake/>

²² Article 24 of the Decree-law No. 54 of 2022. Unofficial translation.

²³ The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression noted in 2020 that disinformation is an “extraordinarily elusive concept to define in law”, and is “susceptible to providing executive authorities with excessive discretion to determine what is disinformation, what is a mistake, what is truth” ([Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression 2020](#), para. 42). In relation to the tackling disinformation regarding Covid-19, the European Commission [stated](#) that laws which define these crimes in “too broad terms” and with “disproportionate penalties attached” can lead to “self-censorship, raising particular concerns as regards freedom of expression.” Indeed, such laws may also raise obstacles to the free flow of information, and freedom to provide services. In April 2020, the Council of Europe’s Commissioner for Human Rights has [voiced](#) concern over certain measures to tackle disinformation having been used as a “pretext to introduce disproportionate restrictions to press freedom,” and measures to combat disinformation “must never prevent journalists and media actors from carrying out their work or lead to content being unduly blocked on the Internet”.

²⁴ PACE [Resolution 2212 \(2018\)](#). The protection of editorial integrity.

²⁵ KAYE, David. *Speech Police: The Global Struggle to Govern the Internet*. Columbia Global Reports (June 3, 2019), p. 94.

content.²⁶ And the most problematic response to disinformation is its direct criminalization: “History is filled with examples of regimes that apply criminal provisions to quash dissent and criticism, including against journalists and human rights defenders.”²⁷

33. The United Nations and Council of Europe and other international bodies are not blind to the perils of the criminalization of certain categories of speech, especially the false or misleading speech. The Venice Commission already referred²⁸ to the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, stating that “general 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”.²⁹

34. As a preliminary remark, the Venice Commission notes the existence of several, significantly different “official” translations of the same text. The two official versions (of 26 September and of 7 October 2022) refer to two different concepts, the first criminalising “misleading information”, and the other sanctioning “false information to mislead”. In addition, in the official text registered in the Turkish Parliament, the term “information misleading the public” is used in the title (which is technically part of the provision) and the term “false information” is employed in the body of the text. This confusion, which also emerged during the online discussions, is a matter of concern.

35. Taking into consideration this confusing situation, the Venice Commission will refer to both terms (“misleading information” and “false information”), distinguishing its assessment when and if appropriate.

A. Threats to freedom of expression and the safeguards of Article 10

36. The provision under consideration – the criminalisation of the dissemination of “false or misleading” information – amounts to an interference with the freedom of expression, which is protected by Article 10 ECHR which reads:

Article 10 of the Convention – Freedom of expression

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

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

37. Under the settled case-law of the European Court of Human Rights (the Court), any interference with the freedom of expression - should it not violate Art. 10 of the Convention - must

²⁶ Ibidem, p. 92.

²⁷ VERMEULEN, Mathias. *APC ISSUE PAPER. ONLINE CONTENT: TO REGULATE OR NOT TO REGULATE. IS THAT THE QUESTION?* p. 5. <https://www.apc.org/en/pubs/online-content-regulate-or-not-regulate-question>

²⁸ Venice Commission, Joint Report of the Venice Commission and of the Directorate of Information Society and Action against Crime of the Directorate General of Human Rights and Rule of Law (DGI), on Digital Technologies and Elections, [CDL-AD\(2019\)016](#), para. 90.

²⁹ Adopted by The United Nations, Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information

42. According to the information provided to the Venice Commission, no definition of “false or misleading information” is provided in the Turkish law.

43. The Turkish authorities informed the Commission that the decision as to whether a content entails misleading, false information will be taken by the courts, which will avail themselves of expert witnesses. The Commission notes in this respect that there are no criteria in the law against which the expert witnesses could make this assessment objectively and consistently.

44. In this respect, the Venice Commission observes that the Information note provided by the Turkish authorities on 26 September 2022, paragraph 5 states: “The [...] Legislative Proposal aims in general to [...] grant authority to the Information and Communication Technologies Authority to make the necessary regulations and take the relevant measures regarding these services, make a definition of the offence “publicly disseminating information to mislead the general public” set out under the category of “Offences Committed Against Public Peace” in the Turkish Penal Code to take actions against disinformation, and make sure that publicly disseminating misleading information in a way to cause disruption in public peace is designated as an offence.” The extent of the actual power delegated to the Information and Communication Technologies Authority, notably whether it would be tasked with defining the criteria for assessing the authenticity of information with a view to applying Article 217/A of the criminal code, remains unclear. Regulatory agencies frequently develop bylaws and regulations (in the area of the rights and obligations of providers of audio-visual media and of electronic communications services and of telecommunications services). However, granting a national regulatory authority the power to develop criminal law and the power of “designating actions as a criminal offence” is not an approach in line with any European standards.

45. The Venice Commission is therefore of the view that the criteria to assess the authenticity of the information be included in the law.

46. Moreover, it is necessary to stress that the provision in question, irrespective of its wording, should be limited only to statements of facts and not to value judgements (as expressions of an opinion). The latter cannot be tested as true or false (requirement to prove their truth undoubtedly violates Art. 10 of the Convention).³⁴

47. In addition, the wording “publicly disseminating” (or “overtly disseminating”³⁵) is very broad and can apply to a variety of circumstances, both online and offline, that may vary from a public statement in the context of a conference to a “like” or “retweet” in the virtual world. The border between public and private spheres in the online environment is blurred. Does a post on Facebook accessible only to one’s *Facebook friends* amount to “public dissemination”? Or does an unsolicited e-mail sent to a specific e-mail address meet the public dissemination condition? It should also be clarified whether the draft provision should be applied to anyone who enables the “false or misleading information” to spread amongst broader public, for example by sharing such content (and if so, in which way – is simply sharing a hyperlink without additional information also ‘dissemination’?) or even “liking” it³⁶, or only to those who directly create (write, say, draw, record) such content and make it available to the public with or without certain access restriction (and to what extent).

³⁴ ECtHR, [Turhan v. Türkiye](#), 19 May 2005, no. 48176/99, para. 24, or [Jerusalem v. Austria](#), 27 January 2001, no. 26958/95, para. 43.

³⁵ The comments submitted by the Turkish authorities on the 6 October 2022 further elaborate as follows: “Besides, the linguistic differences emerge in the use of “publicly” and “overtly.” To elaborate, “overtly” denotes that the intention is to influence public with the aim of disseminating information to anyone regardless of their status. However, “publicly” means that the action occurred in a place open to public irrespective of any other elements. Thus, the motive of the actor, varies considering the explanations mentioned afore.”

³⁶ For “liking” as a form of expression see ECtHR, [Melike v. Turkey](#), 15 June 2021, no. 35786/19.

48. Some interlocutors have explained that the sentence “exclusively [or “with the motive exclusively”, or “with the sole aim”] to cause public concerns, fear or panic” is meant as a safeguard requiring a specific intent of the perpetrator.³⁷ However, the Commission notes that if, on the one hand, this can be praised for restricting the applicability of the provision, on the other hand it may bring to the paradox that a similar conduct with a different aim, for example making profit, would not qualify as a crime even though it may produce the same effect.

49. The effort to prosecute and punish dissemination of “false or misleading information” is limited only to certain categories of information, in particular information concerning “country’s internal and external security, public order and general well-being [or “public health” or “general health”]”.³⁸ Limiting the scope of the criminalization is undoubtedly a step in the right direction. However, these notions are abstract categories fit to be used in the wording of statutes of highest legal force (such as constitutions, bills of fundamental rights and freedoms and international conventions). At lower levels of a hierarchical legal order, such as in ordinary statutes like the Penal Code, these broad notions risk becoming catch-all formulas that can cover any content, any information pertaining to public sphere and would require more precise drafting for the sake of the foreseeability of their application. Therefore, these limitations are illusory in reality.

50. The phrasing “in a way conducive to disturbance of [or “in a manner that may disturb”] the public peace” also raises several concerns. It is unclear whether it refers to an abstract danger, the likelihood to disturb, or a concrete risk requiring the prove of actual and intensive harm in public peace. Following the meeting with the authorities, what seems most alarming is that a public protest may be considered in itself a disturbance of public peace. Irrespectively, the questions relating to the scope and nature of the audience (i.e. recipients of “false or misleading information”) are also of utmost concern.

51. In this context, the question of liability of the journalist quoting someone else’s statement is particularly important. It has to be stressed that *“news reporting based on interviews or declarations by others, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of ‘public watchdog’. The punishment of a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to the discussion of matters of public interest, and should not be envisaged unless there are particularly strong reasons for doing so. (...) A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas”*³⁹. Another important question is whether intermediaries (internet service providers, ISPs) and social media platforms might “disseminate” “false or misleading information” in the meaning of the draft provision (and if so, under what circumstances). With respect to the principle of legal certainty, those questions should

³⁷ The comments submitted by the Turkish authorities on the 6 October 2022 report the following: “The removal of “the pure intent” from the translation of the text has caused a radical difference in the legal interpretation of the draft agreement. Investigation of “the pure intent” in the field of penal law, lessens the scope of the punishability of the offense. In other words, the offense cannot be committed involuntarily. “The pure intent” covers only “create distress, fear, and panic among public,” which denotes that any attempts to make profit or defaming someone etc. shall not be qualified as a crime.”

³⁸ The comments submitted by the Turkish authorities on the 6 October 2022 also remarks that: ““Contrary to the facts about the internal and external security’ and ‘regarding the country’s internal and external security’ have also two different meanings. In the formal text, the object of the crime is understood as ‘Information that contrary to facts.’ On the other hand, the informal version of the text, the object of crime can easily be understood as ‘any information irrespective of its motive and aims regarding internal and external security of Türkiye can be qualified as crime. The draft law does not seek to attain this objective and this line of reasoning is beyond the laws’ purpose.” The draft law amendment focuses on the very actual dangers to public order, society peace and cohesion, and fundamental human rights. Thus, to act in accordance with necessities in a democratic society, the draft law aims at protecting legal interest and fundamental rights of society.”

³⁹ ECtHR, [Kuliś v. Poland](#), 18 March 2008, no. 15601/02, para 38, [Thoma v. Luxembourg](#), 29 March 2001 no. 38432/97, para. 64, or [Saygılı and Falakaoğlu v. Turkey](#), 21 October 2008, no. 39457/03, para. 23.

be answered directly in the law. Moreover, it would prevent excessively broad application of the law that would violate Art. 10 of the Convention.

52. Finally, paragraph (2) of the draft article increases the sanction by half when it is perpetrated “within the framework of the activities of an organisation”. The sentence does not specify whether this refers to a “criminal” organisation or any other form of association. The Venice Commission takes notes of the comments provided by the Turkish authorities on 6 October 2022, indicating that the term refers to “terrorist organisations”. The Venice Commission is therefore of the view that this should be explicitly mentioned in the text of the law.

53. The Venice Commission further notes that the interlocutors who met with the rapporteurs during the online meetings referred to and used these concepts in a very confused and ambiguous manner.

54. The Venice Commission is therefore of the opinion that in order for Article 217/A to meet the first Article 10 criterion of “provided for by the law”, its scope of application should be clarified through the use of clearly defined terms.

C. Pursuant to a legitimate aim

55. In the Commission’s view, in the light of the General Justification, draft Article 29 pursues the legitimate aims of prevention of disorder, protection of national security, of health and of rights of others, in line with Article 10 para. 2 ECHR.

56. The Venice Commission acknowledges that information disorder (misinformation, disinformation and malinformation) is indeed one of the important issues of these days since online internet platforms have become wide-open channels for private and public debate. Hatred and other harmful speech are spreading through them with the help of manufactured amplification.⁴⁰ The spreading of “fake news” has reached new dimensions – in terms of impact, speed and volume – with the expansion in the use of ICTs and in particular with the growing access to the internet.⁴¹

57. The Venice Commission also acknowledges that there is globally a need to tackle the serious problems of disinformation campaigns, with presumed impact on election results and subsequently on governments and the constitutional order of states,⁴² especially in cyberspheres.⁴³

D. Necessary in a democratic society

58. With regard to the “necessity of the interference in a democratic society”, it should be established whether there is a “pressing social need” and, in addition, whether the interference is “proportionate to the legitimate aim pursued”. States have a certain margin of appreciation in

⁴⁰ KAYE, David. *Speech Police: The Global Struggle to Govern the Internet*. Columbia Global Reports (June 3, 2019), p. 14.

⁴¹ APC – Association for Progressive Communications: Disinformation and freedom of expression. Submission in response to the call by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression for contributions to the annual thematic report to be presented to the Human Rights Council at its 47th session in June 2021. <https://www.apc.org/en/pubs/disinformation-and-freedom-expression-submission-response-call-un-special-rapporteur-promotion>

⁴² See for example, Venice Commission, [CDL-AD\(2019\)016](#), Joint Report of the Venice Commission and of the Directorate of Information Society and Action against Crime of the Directorate General of Human Rights and Rule of Law (DGI), on Digital Technologies and Elections, para. 99.

⁴³ TOMPROS, Louis W., CRUDO, Richard A., PFEIFFER, Alexis, BOGHOSSIAN, Rahel. *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-Alvarez, Social Media-Obsessed World*. 31 HarvJLTech 65 (2017) (Harvard Journal of Law & Technology Volume 31, Number 1 Fall 2017), p. 75-78; available at <https://jolt.law.harvard.edu/assets/articlePDFs/v31/31HarvJLTech65.pdf>.

assessing whether such a need exists; however, where freedom of the press is at stake this margin of appreciation is in principle restricted.⁴⁴ Thus, while acknowledging the States' margin of appreciation in assessing whether such a need exists, the Court may reject the arguments put forward in this connection.⁴⁵

1. Pressing social need

59. The Venice Commission is of the view that there may be, in principle, a pressing social need to regulate certain aspects of disinformation. It is not only the freedom to impart information of those who disseminate "false or misleading information" which is at stake – the freedom to receive information of those who receive "false or misleading information" should also be taken into account. The wide spread of "false or misleading information" may endanger important public interests (for example national security, public safety, public order or public health). In addition, "false or misleading information" can hardly contribute to any form of public debate.⁴⁶ Consequently, regulation of 'disinformation flow' does not as such violate Article 10 of the Convention, as long as it can be said that deliberate dissemination of "false or misleading information" is rather an abuse of freedom of expression and the right to impart information than its exercise (enjoyment). Also, the fact that Art. 10(2) emphasizes *duties and responsibilities* of those who exercise their freedom of expression should not be omitted from consideration. And, last but not least, it is the national legislator who chooses the method of regulation.⁴⁷

60. The Commission notes nonetheless that draft article 29 shows some similarities with standard penal offences against public order or false reporting provisions including false fire alarms, false reports of crime or false warnings of bomb plantings. During the online meetings, several interlocutors have confirmed that not only do such offences exist in the Turkish penal code, but that most aspects related to the dissemination of "false or misleading information" which may be harmful to the public are already covered by the Turkish legislation through other laws, such as the Law on Social Media, which requires intermediaries to block or remove content posted on their platform, or the Anti-Terror Law, that punishes offences to the public order and safety, including, and more harshly, when committed on behalf of a criminal group.

61. In light of the existence in the Turkish legal system of legislation⁴⁸ targeting the most dangerous aspects of "false or misleading information", so serious as to qualify as offence to national security, public order and safety, the Venice Commission considers that there is no pressing social need to introduce the criminal provision at stake, and further open the door to possible threats and arbitrary restrictions of freedom of expression. This conclusion holds even if some lighter forms of disinformation might not be covered by the already existing legislation.

2. Proportionality

⁴⁴ ECtHR, [Dammann v. Switzerland](#), 25 April 2006, no. 77551/01, para. 51

⁴⁵ See, for example, [Erikäinen and Others v. Finland](#), 10 February 2009, no. 3514/02, para. 71; [Fáber v. Hungary](#), 24 July 2012, no. 40721/08, para. 45.

⁴⁶ ECtHR, [Otto-Preminger-Institut v. Austria](#), 20 September 1994, no. 13470/87, para. 56.

⁴⁷ See, among many others, ECtHR, [Gorzelik and Others v. Poland](#), [GC], 17 February 2004, no. 44158/98, para. 67.

⁴⁸ Currently, the Turkish Criminal Code includes a range of provisions that address the crime of offences against the public peace, including Article 213 "Threat with the Intention of Causing Fear and Panic Among the Public", Article 214 "Provocation to Commit a Public Offence", Article 215 "Praising an Offence and Offender", Article 216 "Provoking public Hatred and Hostility towards a section of the public", and Article 217 "provocation to Disobey the Law". For these articles (and the proposed new provision 217a), a Common Provision Article 218 increases the penalties for the above where the offences defined in the aforementioned articles are committed through the press or broadcasting.

The Common Provision excludes the expression of thought in the form of criticism and the expression of thoughts which do not go beyond news reporting do not constitute an offence. In addition, the Criminal Code includes other provisions relating to the dissemination of false information such as Article 237 relating to Manipulation Prices, and Article 323 the Dissemination of false information in Wartime.

62. The assessment of the proportionality of a permissible restriction on the freedom of speech involves a profound inquiry whether there are less restrictive means and measures available to pursue the stipulated legitimate aims.

63. Criminalization of certain aspects of expression is not excluded *per se*. However, there is a very strong presumption against the regulation of expression with the means of criminal law. Involvement of this heavy weapon inevitably raises great suspicion, or even presumption that such a regulation be disproportionate. As concerns journalists and media actors, the Committee of Ministers stated in its Recommendation to Member States on the Protection of Journalism and Safety of Journalists and Other Media Actors⁴⁹ that “*the imposition of a prison sentence for a press offence is only permissible in exceptional circumstances, notably where other fundamental rights have been seriously impaired, for example, in the case of hate speech or incitement to violence*”.⁵⁰

64. The Court has placed an emphasis on the importance of using the least restrictive measure when addressing a pressing social need and considers that in order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned.⁵¹ In particular, the Court is especially attentive that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism.⁵²

65. The Venice Commission itself emphasized on several occasions 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.”⁵³ Yet there are other remedies, less restrictive than criminalization, to “false or misleading information”, especially on social media.

66. One of the famous rationales behind the freedom of speech is the theory of the marketplace of ideas where false speech can be tested and refuted. The marketplace model is particularly well suited for application to speech on social media.⁵⁴ “Rumours and lies propagated via social media are fleeting in time if not in reach. This is because social media acts also as a self-correcting (or ‘crowd-correcting’) network. Although social media allows rumours to spread ‘at great speed,’ it ‘has an equal and opposite power to dispel them’”.⁵⁵ The governments may exercise their “counter-speech” through public refutation of a false claim; by the very nature of social media, falsehoods can quickly and effectively be countered by truth, making the

⁴⁹ Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2016\)4](#), on the protection of journalism and safety of journalists and other media actors.

⁵⁰ See Venice Commission, [CDL-PI\(2020\)008](#), Compilation of Venice Commission Opinions and Reports concerning Freedom of Expression and Media, para. 4.2, citing [CDL-AD\(2015\)004](#), Opinion on the draft Amendments to the Media Law of Montenegro, para.12, or para. 5, citing [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, paras. 74-75: “... Instead of criminal sanctions, which in the Venice Commission’s view are only appropriate to prevent incitement to hatred, ...”.

⁵¹ ECtHR, [Glor v. Switzerland](#), 30 April 2009, no. 13444/04, para. 94.

⁵² ECtHR, [Bédat v. Switzerland](#), [GC], 29 March 2016, no. 56925/08, para. 79

⁵³ See Venice Commission, [CDL-PI\(2020\)008](#), Compilation of Venice Commission Opinions and Reports concerning Freedom of Expression and Media, para. 6, citing [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, paras. 64-66.

⁵⁴ TOMPROS, Louis W., CRUDO, Richard A., PFEIFFER, Alexis, BOGHOSSIAN, Rahel. *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-Alvarez, Social Media-Obsessed World*. 31 HarvJLTech 65 (2017) (Harvard Journal of Law & Technology Volume 31, Number 1 Fall 2017); available at <https://jolt.law.harvard.edu/assets/articlePDFs/v31/31HarvJLTech65.pdf>, p. 88.

⁵⁵ Ibidem, pp. 106 and 78, citing Jonathan Richards & Paul Lewis, *How Twitter Was Used to Spread — and Knock Down — Rumours During the Riots*, GUARDIAN (Dec. 7, 2011), <http://www.theguardian.com/uk/2011/dec/07/how-twitter-spread-rumours-riots>, [https://perma.cc/E8V6-XE9Q] (citing a *Guardian* & London School of Economics study of the 2011 London riots).

criminalizing of “false or misleading information” on social media not “actually necessary” to prevent alarm or inconvenience. In addition to individuals and organisations posting corrections, increasing number of websites and technologies exist to help prevent the spread of “false or misleading information” online.⁵⁶

67. The draft provision under consideration provides for a sanction of imprisonment – severe penalties from 1 to 3 years. The Turkish authorities, during the online meetings and in the comments submitted on 6 October 2022, declared that penalties of 1 to 3 years are “generally enforced in the form of supervision and oversight”. The Venice Commission takes note that under Turkish law convictions of less than three years do not normally result in imprisonment. It stresses nevertheless that, irrespective of actually being imprisoned, a criminal conviction is a serious matter which also affects the criminal record of a person with ensuing limitations and adverse effects.

68. At any rate, there are other alternatives to criminalization of speakers for their expression. Examples of such measures can be found in other countries, as shown in section III above, including those mentioned in the General Justification attached to the draft amendment. The governments may introduce regulations obliging social media platforms (such as Facebook, Instagram, Twitter or YouTube) to promptly remove upon complaint any illegal content (Germany). The authorities may impose an obligation of transparency on digital platforms: to give clear, correct and transparent information on their own identity and quality or of that of the third party for which it sponsors the content and to make public the amount received in exchange for sponsoring the content (France). In some countries, specialised units to combat information disorder have been or are being created, for example in the United Kingdom it was planned to set up a national security communications unit to tackle “fake news” disinformation, or in the Czech Republic, the Centre Against Terrorism and Hybrid Threats, part of the Interior Ministry, monitors threats directly related to internal security, including disinformation campaigns related to internal security. It also develops proposals for substantive and legislative solutions that it also implements where possible and disseminates information and spread awareness about the given issues among the general and professional public. Fact-checking has been developing in many countries and in some of them, networks of fact-checkers have been set up. Spain also established a special fact-checking unit during elections.⁵⁷

69. Listing these examples in this opinion must not be understood as the Venice Commission’s blanket approval of these measures.⁵⁸ Nevertheless, it is evident that there exist alternative, less intrusive measures designed to counter the information disorder which are considered by several other states to be effective.

70. The Venice Commission has therefore serious doubts regarding the necessity in a democratic society of the criminal response to “false or misleading information” envisaged with the draft amendment in question. In particular, the Commission is especially concerned with potential consequences of such provision, namely, (i) the chilling effect and the risk of self-censorship, notably (ii) in times of elections.

- a. The chilling effect, risk of self-censorship and the right to anonymity on the Internet

71. The Commission further notes that the incipit of draft article 29 refers to “those” (or “any person”) who publicly (or “overtly”) disseminate “false” (or “misleading information”). The draft

⁵⁶ Ibidem, p. 106.

⁵⁷ Venice Commission, [CDL-AD\(2019\)016](#), Joint Report of the Venice Commission and of the Directorate of Information Society and Action against Crime of the Directorate General of Human Rights and Rule of Law (DGI), on Digital Technologies and Elections, paras. 99-106.

⁵⁸ ECtHR, [Avagyan v. Russia \(no. 36911/20\) PENDING](#)

provision is therefore meant to apply to any individual, be it a journalist, a politician, an activist, a specialised professional, or the individual citizen. It also covers groups of individuals, organisations, media outlets, online platforms or other intermediaries.

72. In light of the above, the law as drafted will undoubtedly have a chilling effect on the work of media and journalists, and on individuals regarding their freedom of expression in the online world as well as offline.

73. The Court has repeatedly emphasised the role of the press as a “public watchdog” that is vital to democracy’s political process.⁵⁹ To be able to adhere to this role, it is essential for the press to make use of news reporting based on interviews or declarations by others, whether edited or not. The punishment of a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to the discussion of matters of public interest, and should not be envisaged unless there are particularly strong reasons for doing so.⁶⁰ A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas.⁶¹

74. The law (in reference to “any person”) may also produce a chilling effect on ordinary individuals that would be deterred from expressing any view or sharing news or other information online for fear of possible sanctions. Recent cases at the European Court of Human Rights indicate the already precarious position of individuals in Türkiye with regard to information shared on the internet.⁶²

75. The chilling effect of this draft provision with the heavy sanctions is likely to lead to widespread self-censorship in a country that is already struggling in an environment hostile to an open, robust public debate. In addition, the liability of online platforms and other intermediaries as major means of dissemination of information will inevitably amplify the impact of the (self-)censorship.

76. Moreover, the “limiting factors” that the Draft Law proposes, i.e., requiring a certain intent, that the information fall within certain subject matters, that it be in a way conducive to disturbing the public peace, do not provide any satisfactory safeguards against the chilling effect on

⁵⁹ ECtHR, [Jersild v. Denmark](#), 23 September 1994, no. 15890/89.

⁶⁰ See, for example, ECtHR, [Kuliś v. Poland](#), 18 March 2008, no. 15601/02, para. 38,

⁶¹ See, for example, ECtHR, [Thoma v. Luxembourg](#), 29 March 2001, no. 38432/97, para. 64, ECHR 2001 III

⁶² The Court held that there had been a violation of Article 5(1) (right to liberty and security) and a violation of Article 10 regarding the pre-trial detention of a singer and columnist because of tweets he posted on his Twitter account and articles and columns he wrote in the daily newspaper Meydan, criticising government policies. He was prosecuted for terrorism-related offences (case of [Atilla Taş v. Turkey](#), 19 January 2021, no. 72/17). The Court also held, unanimously, that there had been a violation of Article 10 (freedom of expression) following the dismissal of a contractual employee at the Ministry of National Education, for having clicked “Like” on various Facebook articles (posted on the social networking site by a third party). The authorities considered that the posts in question were likely to disturb the peace and tranquillity of the workplace, on the grounds that they alleged that teachers had committed rapes, contained accusations against political leaders and related to political parties ([Melike v. Turkey](#), 15 June 2021, no. 35786/19).

The Court also held that there had been a violation of Article 6(1) (right of access to a tribunal) and a violation of Article 10 regarding a criminal conviction for disseminating propaganda in favour of a terrorist organisation on account of two posts published on a Facebook account, as well as the rejection of an individual application to the Constitutional Court as being out of time. The Court considered that the domestic courts’ decisions failed to provide an adequate explanation of the reasons why the impugned contents had to be interpreted as condoning, praising and encouraging the methods [using] coercion, violence or threats implemented by the PKK in the context of their publication. It held that by convicting Mr Üçdağ on charges of propaganda in favour of a terrorist organisation for having posted controversial contents on his Facebook account, the domestic authorities had failed to conduct an appropriate balancing exercise, in line with the criteria set out in its case-law, between the applicant’s right to freedom of expression and the legitimate aims pursued ([Üçdağ v. Turkey](#), 31 August 2021, no. 23314/19).

journalists and private individuals who are still likely to self-censor for fear of possible criminal liability.

77. Another matter that raises concern is the increased maximum sentence “*if the offense is committed concealing the true identity of the perpetrator*” - in other words, when the “false or misleading information” is disseminated anonymously. It has to be pointed out that anonymity is an important aspect of free circulation of ideas on the internet.⁶³ The Declaration of the Committee of Ministers on Freedom of Communication on the Internet asks Member States to respect the will of users not to disclose their identity.⁶⁴ The fact that protection in this manner is not absolute and must be balanced against other rights and interest⁶⁵ does not mean that states can proscribe online anonymous expressions (for example by criminalizing such an activity). They can only ask (force) those who act anonymously to reveal themselves, if it is necessary for protection of others.⁶⁶ Accordingly, penalization of an anonymous expression (including more severe penalization than non-anonymous expression) appears to be in evident contradiction with one of the leading principles of online communication and Art. 10 of the Convention, as well.

78. In an atmosphere where there is prevailing self-censorship, where there is fear of the consequences of speaking up – being able to post anonymously is important. The Venice Commission has provided under Principle 6: Personal data need to be effectively protected, particularly during the crucial period of elections – that in line with the Venice Commission previous recommendations, it is necessary to affirm and protect the right to anonymity on the internet, regulate and strictly limit the creation and use of profiles. It is also essential to ensure easy access by users to their personal data in hands of the ISPs, including personal data for the information they reveal relating to political opinions in particular.⁶⁷

b. The strengthened importance of freedom of expression in times of elections

79. As described above, the criminalization of publicly disseminated information – vaguely described as “false or misleading”, is likely to have a chilling effect on the work of the media. The self-censorship may curb the information flow, the overall debate and significantly destroy the right of the public to receive information and ideas of all kinds – not least of relevance for the upcoming 2023 elections.

80. The European Court of Human Rights has emphasized on many occasions (also with respect to Türkiye among others) that the freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the European Convention on Human Rights.⁶⁸ There is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest.⁶⁹ It is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. In the context

⁶³ “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”, ECtHR, [Delfi AS v. Estonia](#), [GC], 16 June 2015, no. 64569/09, para. 147.

⁶⁴ Council of Europe Committee of Ministers, Principle 7 of the [Declaration on Freedom of Communication on the Internet](#), adopted on 28 May 2003: *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.*

⁶⁵ *Ibidem*, para. 149.

⁶⁶ ECtHR, [K. U. v. Finland](#), 2 December 2008, no. 2872/02, paras. 47 and 49.

⁶⁷ Venice Commission, [CDL-AD\(2020\)037](#), Study - Principles for a fundamental rights-compliant use of digital technologies in electoral processes, para. 71.

⁶⁸ ECtHR, [Lingens v. Austria](#), 8 July 1998, no. 9815/82, para. 42.

⁶⁹ ECtHR, [TV Vest AS and Rogaland Pensjonistparti v. Norway](#), 11 December 2008, no. 21132/05, para. 59, citing for example Turkish cases [Sürek v. Türkiye](#) (no. 1), [GC], 8 July 1999, no. 26682/95, para. 61, [United Communist Party of Turkey and Others v. Türkiye](#), [GC], 30 January 1998, no. 19392/92, para. 45.

of election debates, the unhindered exercise of freedom of speech by candidates has particular significance.⁷⁰

81. Indeed, as the Commission has previously underlined, “the holding of democratic elections, hence the very existence of democracy, is impossible without respect for human rights, particularly the freedom of expression and of the press and the freedom of assembly and association for political purposes, including the creation of political parties. Respect of these freedoms is vital particularly during election campaigns. Restrictions on these fundamental rights must comply with the European Convention on Human Rights and, more generally, with the requirement that they have a basis in law, are in the general interest and respect the principle of proportionality. Clear criteria for balancing the competing rights should be set out in the legislation and effectively implemented through electoral and ordinary justice mechanisms”.⁷¹ “The protection of freedom of expression, opinion and information is essential for the democratic political process. In the case-law of the Court, the concept of democratic society is particularly relevant regarding the political deliberations preceding elections. The political discourse enjoys the highest protection extending to all individuals the right to participate in the debate. For this reason, the information flow is protected from both sides, that of imparting and receiving and not only vertically but also horizontally, i.e. between the network-users themselves.”⁷² The Commission has formulated the 1st principle as follows:

Principle 1

The principles of freedom of expression implying a robust public debate must be translated into the digital environment, in particular during electoral periods.

82. Thus, the chilling effect of the amendment to the Penal Code in the course of upcoming election campaign is in blatant contradiction to the quoted holdings of the Court. Although it may be possible, in principle, to seize the Constitutional Court of Türkiye to assess the constitutionality of the Penal Code amendment, if enacted, its judgment cannot be expected earlier than the elections take place. The harm to the exercise of freedom of speech before elections would be then irreparable even if the Constitutional Court of Türkiye later ruled on its unconstitutionality.

83. For all the reasons above, the Venice Commission is of the view that the interference with the freedom of expression which the draft provision under consideration would produce in Türkiye if enacted would neither be “necessary in a democratic society” nor proportionate to the legitimate aims of prevention of disorder and protection of national security, of health and of rights of others.

V. Conclusion

84. The Venice Commission has been requested by the PACE Monitoring Committee to prepare an opinion on the draft amendments to the Turkish Penal Code introducing a provision on “false or misleading information”.

85. The new draft article 217/A would expose persons found guilty of publicly disseminating “false or misleading information” to between one and three years in prison and would increase by half the penalty for offenders who hide their identity or act on behalf of an organisation. The draft provision is therefore meant to apply to any individual, be it a journalist, a politician, an

⁷⁰ ECtHR, [Orlovskaya Iskra v. Russia](#), 21 February 2017, no. 42911/08, para. 110: “... Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system... The two rights are inter-related and operate to reinforce each other: for example, freedom of expression is one of the ‘conditions’ necessary to ‘ensure the free expression of the opinion of the people in the choice of the legislature’. See also, [Mathieu-Mohin and Clerfayt v. Belgium](#), 2 March 1987, paras. 47, 54. See also [Magyar Kétfarkú Kutya Párt v. Hungary](#), [GC], 20 January 2020, no. 201/17, para. 100.

⁷¹ Venice Commission, [CDL-AD\(2019\)016](#), Joint report of the Venice Commission and of the Directorate of information society and action against crime of the Directorate General of Human Rights and Rule of Law (DGI) on the Use of digital technologies and elections, para. 142.

⁷² Venice Commission, [CDL-AD\(2020\)037](#), Study - Principles for a fundamental rights-compliant use of digital technologies in electoral processes, para. 47, Principle 1.

activist, a specialised professional, or the individual citizen. It also covers groups of individuals, organisations, media outlets, online platforms or other intermediaries.

86. The Venice Commission notes, first and foremost, that the draft provision constitutes an interference with the freedom of expression, which is protected by Article 10 ECHR, and assesses it against three criteria: (i) to be prescribed by law, (ii) to pursue at least one of the legitimate aims enumerated in Article 10(2) of the ECHR and (iii) to be necessary in democratic society and proportionate to the legitimate aim pursued.

87. Secondly, the Venice Commission is of the opinion that in order for Article 217/A to meet the first Article 10 criterion of “provided for by the law”, its scope of application should be clarified through the use of clearly defined terms. The confusion surrounding the meaning of the terms in the original version and in the different translations confirms that these terms are not “sufficiently clear”. The Commission is also of the view that the criteria to assess the authenticity of the information be included in the law.

88. Thirdly, the Venice Commission acknowledges that information disorder (misinformation, disinformation and malinformation) is indeed one of the important issues of these days and that there is globally a need to tackle the serious problems of disinformation campaigns, with presumed impact on election results and subsequently on governments and the constitutional order of states. The Commission therefore considers that the draft provision pursues a legitimate aim.

89. Fourthly, in light of the existence in the Turkish legal system of legislation targeting the most dangerous aspects of “false or misleading information”, so serious as to qualify as offence to national security, public order and safety, the Venice Commission considers that there is no pressing social need to introduce the criminal provision at stake, and further open the door to possible threats and arbitrary restrictions of freedom of expression. This conclusion holds, even if some lighter forms of disinformation might not be covered by the already existing legislation.

90. Fifthly, the Venice Commission recalls, in line with its previous recommendations, that it is necessary to affirm and protect the right to anonymity on the internet, regulate and strictly limit the creation and use of profiles. It is also essential to ensure easy access by users to their personal data in hands of the ISPs, including personal data for the information they reveal relating to political opinions in particular.

91. Lastly, it is evident that there exist alternative, less intrusive measures than criminalisation designed to counter the information disorder which are considered by several other states to be effective. The Venice Commission has therefore serious doubts upon the necessity in a democratic society of the criminal response to “false or misleading information” envisaged with the draft amendment in question.

92. Consequently, the Venice Commission is of the view that the interference with the freedom of expression which the draft provision under consideration would produce in Türkiye if enacted would neither be “necessary in a democratic society” nor proportionate to the legitimate aims of prevention of disorder and protection of national security, of health and of rights of others. In addition, the Commission is particularly concerned with the potential consequences of such provision, namely, the chilling effect and increased self-censorship, not least in view of the upcoming elections in June 2023.

93. The Venice Commission therefore recommends the Turkish authorities not to enact the draft amendment of Art. 217/A to the Turkish Penal Code.

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

