

# ■ Yearbook 12 2010

THE REPRESENTATIVE ON FREEDOM OF THE MEDIA

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Organization for Security and Co-operation in Europe (OSCE)  
Wallnerstrasse 6  
A-1010 Vienna, Austria  
Tel number +43-1-51436-6800  
Fax number +43-1-51436-6802  
e-mail [pm-fom@osce.org](mailto:pm-fom@osce.org)  
[www.osce.org/fom](http://www.osce.org/fom)

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The OSCE Representative on Freedom of the Media

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# Preface



## By Kanat Saudabayev

It is a pleasure to introduce readers to the 2010 Yearbook of the OSCE Representative on Freedom of the Media. It was a landmark year for the OSCE, not only because it marked the 35th anniversary of the signing of the Helsinki Final Act and the 20th anniversary of the adoption of the Charter of Paris for a New Europe, but also successful Chairmanship of Kazakhstan in this international organization. After an 11-year break, Kazakhstan managed to convene the OSCE Summit, on the initiative of the President Nursultan Nazarbayev, on 1-2 December in Astana. The OSCE participating States adopted Astana Commemorative Declaration, in the centre of Eurasia, which ushered in a new, historic stage in building a community of truly comprehensive and indivisible security across the Euro-Atlantic and Eurasian areas.

I am pleased to have worked with Representatives Miklós Harasti and Dunja Mijatović during the 12th year of the Representative's Office, which coincided with the Kazakh OSCE Chairmanship. The Chairmanship is satisfied that the Office has been represented with strength and vision by both Representatives. Throughout its Chairmanship, Kazakhstan gave full support and assistance to this important Institution. The Representative plays an essential role in the functioning of the OSCE, providing early warning of serious violations of the participating States' media-freedom commitments. However, the Representative does much more than that. Throughout the year, the Representative identified several issues affecting freedom of expression and free media and provided excellent advice and guidance on those issues, inter alia, on the safety of journalists, on the need to decriminalize defamation, and on the demand for democracies to allow free access to information to their citizens, as well as several issues affecting new media, including Internet regulation and switchover from the analogue to digital broadcasting.

We live on the precipice of a new information age. Technological advances provide nations across the OSCE region to enjoy unparalleled opportunities to share news and opinions. How this technology is utilized may, in large part, determine the advancement of free, democratic and pluralistic societies from Vancouver to Vladivostok.

In this Yearbook you will receive a detailed and comprehensive account of the Representatives' activities throughout the year. Highlighted, in addition to the early-warning interventions on the issues affecting the state of free media in the participating States, are the numerous times the Representative provided

essential expert assistance to governments and journalistic community in several areas, including legislative drafting and reform, professional development of journalists and key advice on cutting-edge technology.

The Kazakh Chairmanship believes the Representative plays an essential role in assuring that the participating States not only live up to their commitments but also prepare their citizens for the challenges of the future.

The Yearbook provides a wide spectrum, both in geographic and thematic terms, of issues that face us all. It is an interesting read and important review of that which has been accomplished and what is needed to be done.

*Kanat Saudabayev is the Secretary of State of the Republic of Kazakhstan. In 2010, he was the Minister of Foreign Affairs of the Republic of Kazakhstan and served the OSCE Chairman-in-Office.*



## Foreword





## By Dunja Mijatović

This Yearbook is the chronicle of my first 10 months as the Representative on Freedom of the Media, as well as the last two months of my predecessor, Miklós Haraszti. He spent six important years as the Representative, fully carrying out the mandate of this Office – the defence of media and free expression across the OSCE region. His dedication and service deserves high praise.

In 2010 this Office intervened more than 75 times in matters relating to the Mandate declared in 1997. This issues addressed concerned more than half of the participating States. Monitoring the conditions for media in participating States continues to be the primary duty of this Office. Providing the Permanent Council with the necessary information on violations of media-freedom commitments continues to be the core of my work.

As we enter 2011, problems continue to plague our region. Participating States, both east and west of Vienna, fail to fulfil their free-media commitments. The problems vary in scope and substance but the theme is common – media is under attack, as are individuals' right to express themselves without fear.

In many participating States, the media is under attack both literally and figuratively. Recorded violence against journalists, including homicides, continues with a vengeance while those responsible for the crimes often walk away without punishment. Putting an end to this wave of terror is the responsibility of all of the participating States and this Office intends to lend its full support for rational efforts to make it safe to work as a member of the media.

While perhaps the most pressing need, violence is not the only issue this Office faces. The panoply of actions taken by governments to curb free media and freedom of expression is impressive in number and scope.

Criminalizing writing and speaking is still common. Though progress is being made with some states' legislatures, far fewer than 20 of the 56 participating States have stricken arcane and brutal criminal defamation laws from their books. In many participating States, those laws are used to lock away those who dare to criticize governments and their leaders.

Access to information in many states is considered by government authorities to be a privilege doled out rather than an inherent right of their citizens. Indeed, in some cases, the disclosure of government-held information is made a criminal

offence – and the charges are supported by flimsy “anti-terrorism” arguments.

Prosecutors and courts continue to believe that a journalist’s confidential sources – the backbone of investigative reporting – are free game to be plucked from notebooks, computers and other storage devices, often under threat of physical harm.

While the move from analogue to digital broadcasting provides an unprecedented opportunity to allow residents true media pluralism, governments are in the process of adopting bad laws that will distort not only the market of those who can participate in the process but, ultimately, make pluralism a bad dream.

And across the OSCE region, governments on all levels are taking aim at the Internet and its relative freedom, imposing barriers to the transmission of information and ideas that could make a golden age of technology little more than a tarnished tin can holding little of interest or importance.

Not all of the news is bad.

Government officials at the highest level in some participating States finally acknowledged that it was time to get serious about tracking down and convicting perpetrators of crimes against the media. Three more participating States decriminalized defamation in 2010. In addition, legislatures or executive branches of government took advantage of the assistance offered by my Office which resulted in an increased number of legal reviews of pending and existing legislation being made available to participating States.

This Yearbook presents, in detail, the work of this Office in 2010. It includes summaries of matters in which I intervened, public statements made on issues of importance, legal reviews commissioned to provide individual participating States with expert advice on drafting and amending laws relating to their OSCE media commitments. It also notes this Office’s relations with other organizations through meetings and conferences and the various trainings held, supported or participated in.

I hope this Yearbook will be of interest to media professionals and scholars as well as the public at large, for the issues of free media are important to us all.



## Contributions



## Countering Terrorism while Protecting Freedom of the Media: A Crucial Balance for Governments<sup>1</sup>

*Roland Bless*

Since the terrorist attacks in the United States in 2001, many of the OSCE participating States have revised their legislation and policies relating to fighting terrorism. New laws have been adopted, old laws have been revised, and policies and practices have been changed. Most of these revisions have expanded the powers of governments to fight terrorism and related crimes.

As with all new legislation in democratic societies, a vigorous debate accompanied the legislative process, the core question of which concerned the extent to which new measures would undermine civil liberties, including freedom of expression and freedom of the media. The role of the Office of the OSCE Representative on Freedom of the Media is to help safeguard the right to free expression while striking a balance with the legitimate aims of governments to protect their citizens.<sup>2</sup>

Media professionals bear special responsibilities when addressing the question of terrorism, and must exercise care in the judgments they make. The spread of public terror depends largely on the images and messages carried by media reports. Even with objective reporting, this outcome may be unavoidable. But sensationalist reporting can contribute to terrorists' objectives. People who work in the media should be aware that terrorists try to use their channels in order to reach the widest possible audience and have the strongest possible impact on the public. The use of new media, in particular the internet, to raise funds and spread terrorist propaganda is well known.

However, instead of considering it a tool to assist terrorists in achieving their goals, free media itself is essential to fighting the threat. The media can help save lives by spreading information of public interest. It can show the true face of terrorism by engaging in investigative reporting. It can raise awareness of the danger of terrorism and of efforts to combat it. Finally, it can counter the

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<sup>1</sup> This article originally appeared in OSCE Yearbook 2010 published by the Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.)

<sup>2</sup> For a critical assessment of the effects of legislation on civil liberties, see David Banisar, *Speaking of Terror*, Council of Europe 2008, at: [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/fight\\_against\\_terrorism/3\\_codexter/working\\_documents/Speaking%20of%20Terror\\_full.pdf.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/3_codexter/working_documents/Speaking%20of%20Terror_full.pdf.pdf).

objective of terrorists – to destroy societies’ basic human rights, including the right of free expression.

## OSCE Commitments

The role of the Office of the OSCE Representative on Freedom of the Media is to ensure that the fight against terrorism is not used as a pretext to restrict media freedom.<sup>3</sup>

As a collection of democratic nations, the OSCE participating States must guarantee the security of their citizens, but they also must remain committed to universal rights, of which the right to free expression is the touchstone of all liberties.

As a result, governments must find a balance between ensuring the security of their people and protecting free expression. This need is well reflected in various international documents adopted by the OSCE participating States.

At the December 2001 Bucharest Ministerial Council, the participating States mandated the OSCE Representative on Freedom of the Media to: “co-operate in supporting, on request, the drafting of legislation on the prevention of the abuse of information technology for terrorist purposes, ensuring that such laws are consistent with commitments regarding freedom of expression and the free flow of information.”<sup>4</sup>

At the December 2002 Porto Ministerial Council, the participating States recognized “the positive role the media can play in promoting tolerance and understanding among religions, beliefs, cultures and peoples, as well as for raising awareness for the threat of terrorism”.<sup>5</sup>

They also agreed to combat hate speech and to take the necessary measures to prevent the abuse of the media and information technology for terrorist purposes, ensuring that such measures are consistent with domestic and international law and OSCE commitments.

As early as November 2004, the Representative on Freedom of the Media was specifically included to assist in monitoring laws that could infringe basic free-

3 For a comprehensive overview of media-related OSCE commitments, see: Organization for Security and Co-operation in Europe, Office of the Representative on Freedom of the Media (ed.), *Freedom of expression, Free flow of information, Freedom of Media: CSCE/OSCE Main Provisions 1975-2007*, Vienna 2007, at: [http://www.osce.org/publications/rfm/2008/03/30426\\_1084\\_en.pdf](http://www.osce.org/publications/rfm/2008/03/30426_1084_en.pdf).

4 Decision No. 1, *Combating Terrorism*, MC(9).DEC/1, The Bucharest Plan of Action for Combating Terrorism, Annex to MC(9).DEC/1, in: Organization for Security and Co-operation in Europe, Ninth Ministerial Council, 3 and 4 December 2001, MC.DOC/2/01, Bucharest, 4 December 2001, pp. 7-13, here: p. 12.

5 OSCE Charter on Preventing and Combating Terrorism, in: Organization for Security and Co-operation in Europe, Tenth Meeting of the Ministerial Council, 6 and 7 December 2002, MC.DOC/1/02, Porto, 7 December 2002, pp. 9-11, here: p. 11.



media commitments.

The OSCE Representative on Freedom of the Media will continue an active role in promoting both freedom of expression and access to the Internet and will continue to observe relevant developments in all the participating States. The Representative will advocate and promote OSCE principles and commitments. This will include early warning when laws or other measures prohibiting speech motivated by racist, xenophobic, anti-Semitic or other related bias are enforced in a discriminatory or selective manner for political purposes which can lead to impeding the expression of alternative opinions and views.<sup>6</sup>

Further, at the December 2004 Sofia Ministerial Council Meeting, participants issued a statement saying they “will exchange information on the use of the Internet for terrorist purposes and identify possible strategies to combat this threat, while ensuring respect for international human rights obligations and standards, including those concerning the rights to privacy and freedom of opinion and expression”.<sup>7</sup>

And, as the December 2006 Brussels Ministerial Council resolved, “remaining gravely concerned with the growing use of the Internet for terrorist purposes [...] reaffirming [...] the importance of fully respecting the right to freedom of opinion and freedom of expression [...] the Ministerial Council] invites participating States to increase their monitoring of websites of terrorist/violent extremist organizations and their supporters and to invigorate their exchange of information in the OSCE and other relevant fora on the use of the Internet for terrorist purposes [...] while ensuring respect for international human rights obligations and standards, including those concerning the rights to privacy and freedom of opinion and expression, and the rule of law”.<sup>8</sup>

The role of the OSCE Representative on Freedom of the Media is to carry out the mandate given it by the Bucharest Ministerial Council in 2001. Since that time, the Office has been monitoring new media laws and regulations relating to terrorism and has consistently reported examples of instances where new measures unduly restrict the rights to free expression and free media.<sup>9</sup>

6 Organization for Security and Co-operation in Europe, Permanent Council, Decision No. 633, Promoting Tolerance and Media Freedom on the Internet, PC.DEC/633, 11 November 2004.

7 Decision No. 3/04, Combating the Use of the Internet for Terrorist Purposes, MC.DEC/3/04 of 7 December 2004, in: Organization for Security and Co-operation in Europe, Twelfth Meeting of the Ministerial Council, 6 and 7 December 2004, MC.DOC/1/04, Sofia, 7 December 2004, p. 19 (emphasis added).

8 Decision No. 7/06, Countering the Use of the Internet for Terrorist Purposes, MC.DEC/7/06 of 5 December 2006, in: Organization for Security and Co-operation in Europe, Fourteenth Meeting of the Ministerial Council, 4 and 5 December 2006, Brussels, 5 December 2006, pp. 26-28, here: pp. 26-27 (emphasis added).

9 Published Reports of the OSCE Representative on Freedom of the Media to the Permanent Council can be found at: <http://www.osce.org/fom/documents.html?si=true&limit=10&grp=296>.

## New Challenges

The most significant challenge arises from the creation of new criminal penalties for speech that is seen to encourage terrorism, either directly or indirectly. Restrictions have expanded from existing prohibitions on incitement to much broader and less defined areas such as the “glorification” of and “apology” for terrorism.

Examples abound throughout the OSCE region. As stated in a Council of Europe report, laws in the United Kingdom prohibit the direct or indirect encouragement of terrorism. A relevant section states: “For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.”<sup>10</sup>

Similarly, the 2006 Anti-terror law in Russia criminalizes, as a terrorist activity, the “popularisation of terrorist ideas, dissemination of materials or information urging terrorist activities, substantiating or justifying the necessity of the exercise of such activity”.<sup>11</sup> Organizations, including media organizations that are found liable under the Act, can be liquidated. A second statute amended the mass media laws in 2006 to prohibit “distributing materials, containing public appeals to exercising terrorist activity or justifying terrorism publicly, other extremist materials”.<sup>12</sup> The law also prohibits journalists from discussing counter-terrorism operations. Other nations have adopted laws that go further, criminalizing not just incitement to terrorism but also statements and acts that may be considered to offend the victims of terrorists. Concerned about the proliferation of anti-terrorism laws, three international rapporteurs on Freedom of Expression (the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the Special Rapporteur on Freedom of Expression of the Organization of American States, OAS) adopted in December 2005 a Joint Declaration, which states that:

While it may be legitimate to ban incitement to terrorism or acts of terrorism,

<sup>10</sup> Terrorism Act 2006, section 1 para. 3, at: <http://www.legislation.gov.uk/ukpga/2006/11/section/1/enacted>.

<sup>11</sup> Federal Law No. 35-FZ, 6 March 2006, On Counteraction of Terrorism, Article 3 para. 2f, at: <http://www.legislationline.org/documents/action/popup/id/4365>.

<sup>12</sup> Law of the Russian Federation on Mass Media, as amended on 24 July 2007, Article 4, at: <http://www.russland.no/filestore/Massmedia.htm>.





States should not employ vague terms such as “glorifying” or “promoting” terrorism when restricting expression. Incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.”<sup>13</sup>

It is the duty of the OSCE Representative on Freedom of the Media to ensure the free flow of information, including information about terrorism issues. Freedom of expression and information encompasses the right of the public to be informed on matters of public concern, including terrorist acts and threats, as well as the response to them by states and international organizations.

Various reports and interventions show that the media have increasingly been placed under pressure in many jurisdictions, by means such as the detention and prosecution of journalists and the closure of newspapers. There have been several cases where new laws designed to protect national security have limited journalists’ ability to access information.<sup>14</sup> In the United Kingdom, Neil Garrett of ITV News was arrested in October 2005 and detained on several other occasions under the Official Secrets Act after publishing internal police information on the mistaken shooting of Jean Charles de Menezes in a counter-terrorism operation. The story revealed that the police had misled the public about de Menezes’ actions in an effort to deflect criticism.

Police were forced to pay damages after searching the office and home of the Northern Ireland editor of the Sunday Times in 2003. He had published a book that contained transcripts of phone calls illegally intercepted by security services. In November 2005, the government threatened to charge several newspapers with violating the Official Secrets Act if they published stories based on a leaked transcript of conversations between Prime Minister Tony Blair and President George Bush about the possibility of bombing Al Jazeera television’s premises in Doha and other locations.

In Canada, Ottawa Citizen reporter Juliet O’Neill was threatened in January 2004 with prosecution under the Security of Information Act, and her home and office were searched after the Citizen published an article in November 2003 on the controversial arrest and transfer to Syria of Maher Arar on allegations

<sup>13</sup> Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and People’s Rights Special Rapporteur on Freedom of Expression and Access to Information issued on 21 December 2005, at: [http://www.osce.org/documents/rfm/2005/12/18636\\_en.pdf](http://www.osce.org/documents/rfm/2005/12/18636_en.pdf) (emphasis added).

<sup>14</sup> Please refer to the Reports of the Representative for Freedom of the Media to the OSCE Permanent Council, cited above (Note 8); cf. also OSCE, The Representative on Freedom of the Media Miklós Haraszti, Access to information by the media in the OSCE region: trends and recommendations, Vienna, 30 April 2007, at: [http://www.osce.org/documents/rfm/2007/05/24250\\_en.pdf](http://www.osce.org/documents/rfm/2007/05/24250_en.pdf); and Banisar, cited above (Note 1).

of terrorism. The Ontario Court of Justice ruled in October 2006 that the Act violated the Canadian Charter of Rights and Freedoms.

These examples show the enhanced procedural powers that have been granted to governmental authorities to obtain information and discover journalists' sources through surveillance and searches.

In France, journalist Guillaume Dasquie was detained for two days in December 2007 after he published an article in *Le Monde* that quoted from French intelligence documents indicating that they were aware of plans to hijack aircraft prior to the September 11 attacks. The authorities demanded that he disclose the identity of sources or face charges of violating the state secrets law.

In Germany, echoing a similar case in the 1960s that led to major reforms and improvements in press freedom, Cicero magazine's offices and a journalist's home were raided and searched in 2004 after it published an article quoting a federal criminal police document on an Al Qaida leader. The Constitutional Court ruled in February 2007 that searches of newsrooms violated constitutional protections of freedom of the press. The court found that mere publication of a state secret without other evidence is not sufficient to accuse the journalist of violating state secret laws and that a search to identify a source was not constitutionally permissible.

## **The OSCE Representative's Statements**

The OSCE Office of the Representative on Freedom of the Media suggests there is a straightforward way to address the challenges posed by new measures designed to combat terrorism: encouraging media self-regulation. Effective media self-regulation would help promote respect for ethical standards for media professionals regarding terrorism and would prevent excessive intervention by states in regulating the media in that field.

The Media Self-regulation Guidebook published by the Representative's Office addresses the issue of terrorism: "Acts of terror should be reported accurately and responsibly. Special care must be taken with the wording, which should avoid praise for violent acts and eliminate terms that contain emotional or value judgments. [...] The journalist's goal remains the same as in reporting any story: to let the readers make their own judgment."<sup>15</sup>

<sup>15</sup> The OSCE Representative on Freedom of the Media, Miklós Haraszti, *The Media Self-Regulation Guidebook*, Vienna 2008, p. 26, at: [http://www.osce.org/publications/rfm/2008/04/30697\\_1117\\_en.pdf](http://www.osce.org/publications/rfm/2008/04/30697_1117_en.pdf).



Most of the codes of ethics of media self-regulatory bodies do not have a specific section dedicated to reporting terrorism. But the issue is addressed in other guidelines, including those relating to respecting the privacy and human dignity of victims, reporting accurately, using reliable sources, and similar provisions.

Public broadcasters carry more responsibilities and therefore frequently have detailed internal guidelines concerning reporting on terrorism. The BBC editorial guidelines, for instance, address the question of terrorism in a huge section on “War, terror and emergencies”. In France, the “Chartre de l’Antenne” also dedicates a section to “terrorism and hostages”.

The OSCE Office of the Representative on Freedom of the Media makes specific recommendations, including the following: Media should refrain from disseminating pictures or images of terrorist acts that violate the privacy and human dignity of victims; events must be covered accurately and impartially; reporting should be careful in its choice of terminology; the media should avoid contributing to the goal of terrorists by adding to the feeling of fear and terror; and the media should avoid a race for sensational news and images of terrorists’ acts.

These common-sense proposals will go a long way to ensuring that the rights of freedom of the media and free expression are not curtailed by efforts to curtail terrorists.

*Bless is the principle adviser to the OSCE Representative on Freedom of the Media.*





# The OSCE Representative on Freedom of the Media – an Intergovernmental Watchdog: an Oxymoron?<sup>1</sup>

By Ženet Mujić

## A. Introduction

Civil society and international media freedom advocates reacted with scepticism when, in 1996, Freimut Duve proposed to the Organization for Security and Co-operation in Europe (OSCE) the establishment of an office to observe and protect the professional freedom of journalism. Duve, a former journalist and German parliamentarian, was the chair of the Human Rights Commission of the OSCE's Parliamentary Assembly. He later became the OSCE's first Representative on Freedom of the Media (RFoM). The rationale behind placing such an office within the framework of an intergovernmental security organization was not only that press freedom was a cornerstone of human rights and that independent media were vital for building and sustaining democracy. Rather, the consequences of synchronized or controlled media in Europe's recent history had shown that press freedom, independent and pluralistic mass media, and freedom of expression are supporting pillars of a lasting security structure for every state.

However, the question remained: Wasn't governmental non-intervention the prerequisite for a truly independent office tasked with defending press freedom? How sincere would an effort by an intergovernmental body, by nation states be to draw up a firm and credible mandate for an institution that was to defend the states' fourth estate and especially given that all major media freedom advocacy bodies were non-governmental in nature for a good reason?

Twelve years after the creation of the post, in spring 2010, the term of the second Representative on Freedom of the Media, Miklós Haraszti, comes to an end. With over one decade of institutional history and after two Representatives, it is time to take stock of the results.

Section B outlines the history of the institution and its mandate. It presents the instruments with which the OSCE member states equipped the incumbent and also introduces the specifics of the nomination process leading to the

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<sup>1</sup> This article originally appeared in the European Yearbook on Human Rights 2010. Edited by Wolfgang Benedek, Florence Benoit-Rohmer, Wolfram Karl and Manfred Nowak Associate Editor: Matthias C. Kettmann

appointment of the RFoM. Section C. focuses on the fields of activity, the achievements reached over the last decade and the challenges the media face today. The fourth and final part (Section D) discusses future prospects.

## B. The Mandate

The way leading to the realization of an Office of Media Freedom was difficult and lengthy. The negotiations within the OSCE did not prove easy. They were dominated by the concern of duplicating already existing intergovernmental institutions, namely respective offices within the UN and the Council of Europe. During the Lisbon Summit of Heads of OSCE states in 1996, however, the member states unanimously declared that

[f]reedom of the press and media are among the basic prerequisites for truly democratic and civil societies. In the Helsinki Final Act, we have pledged ourselves to respect this principle. There is a need to strengthen the implementation of OSCE commitments in the field of the media, taking into account, as appropriate, the work of other international organizations. We therefore task the Permanent Council to consider ways to increase the focus on implementation of OSCE commitments in the field of the media, as well as to elaborate a mandate for the appointment of an OSCE representative on freedom of the media to be submitted not later than to the 1997 Ministerial Council.<sup>2</sup>

During the preliminary stages of drafting the mandate for the envisaged Representative on Freedom of the Media, the OSCE sought the assistance of nongovernmental press freedom organizations. Initial scepticism stemmed from the disappointment regarding the unmet expectation of civil society with regard to the UN Commission on Human Rights' Special Rapporteur on Freedom of Expression and Opinion, who was considered to mediate rather than to advocate. The final text of the mandate of the OSCE's Representative on Freedom of the Media, adopted on 5 November 1997 by the OSCE Permanent Council, however, proved to be incomparable to its UN counterpart and pioneering for an intergovernmental structure dating back to 1975. The first RFoM was appointed by the OSCE's foreign ministers during the Copenhagen Ministerial Council meeting and took office on 1 January 1998.<sup>3</sup>

The mandate and responsibilities of the post, the status of the incumbent and

<sup>2</sup> OSCE Lisbon Document 1996, Lisbon Summit Declaration, OSCE DOC.S/1/96, 3 December 1996, [http://www.osce.org/documents/mcs/1996/12/4049\\_en.pdf](http://www.osce.org/documents/mcs/1996/12/4049_en.pdf).

<sup>3</sup> OSCE Ministerial Committee, Decision on the Appointment of the OSCE Representative on Freedom of the Media, 18-19 December 1997, OSCE MC(6).DEC/1, [http://www.osce.org/documents/mcs/1997/12/4167\\_en.pdf](http://www.osce.org/documents/mcs/1997/12/4167_en.pdf)



the range of activities demonstrate the political far-sightedness of the OSCE's members and their understanding of the comprehensive post-Cold War security concept: "freedom of expression is a fundamental and internationally recognized human right and a basic component of a democratic society and [...] free, independent and pluralistic media are essential to a free and open society and accountable systems of government."<sup>4</sup>

The principal objective for the establishment of a media freedom office was to "strengthen the implementation of relevant OSCE principles and commitments as well as to improve the effectiveness of concerted action by the participating States based on their common values."<sup>5</sup> Furthermore, the member states confirmed, "that they will co-operate fully with the OSCE Representative on Freedom of the Media. He or she will assist the participating States, in a spirit of co operation, in their continuing commitment to the furthering of free, independent and pluralistic media."<sup>6</sup> Though couched in highly diplomatic language, this formulation recalls statutes of self-regulatory bodies within the media field. Indeed, one could argue that the OSCE members sought to foster politically binding media freedom commitments by institutionalizing them in this office and establishing an authority mandated to monitor adherence: an approach akin to national media accountability systems.

The then 54 OSCE foreign ministers consensually agreed to mandate a rapporteur on media freedom – independent of the OSCE's Secretariat and individual states and directly accountable to the organization's decision-making body, the Permanent Council – to monitor their countries adherence to media freedom obligations, to "observe relevant media developments in all participating States, [...] advocate and promote full compliance with OSCE principles and commitments regarding freedom of expression and free media."<sup>7</sup>

The main tasks of the RFoM are, firstly monitoring, early warning and rapid response in cases of serious breach of freedom of expression standards and "identified obstruction of media activities and unfavourable working conditions for journalists."<sup>8</sup> Secondly, assistance to participating states complements the core mission and is provided in the form of recommendations, legal assessments of media relevant (draft) legislation and projects aimed at developing an environment conducive to media freedom.

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4 Mandate of the OSCE Representation on Freedom of the Media, OSCE PC.DEC No. 193, 5 November 1997, PC Journal No.137, [http://www.osce.org/documents/pc/1997/11/4124\\_en.pdf](http://www.osce.org/documents/pc/1997/11/4124_en.pdf).

5 Ibid.

6 Ibid.

7 Ibid.

8 Ibid.

It was agreed that the office would be funded by the member states through the overall OSCE budget, thus ensuring financial independence.

## B 1. Instruments of the RFoM

The mandate holder's own international esteem and level of reputation coupled with the option to go public about possible threats to media freedom represent the foremost instruments at the RFoM's disposal.<sup>9</sup>

All mechanisms – a) the possibility and in fact requirement to address questions, recommendations or warnings regarding media freedom to OSCE states; b) the prescribed cooperation with state and non-governmental actors; c) the possibility to “collect and receive information on the situation of the media from all bona fide sources”<sup>10</sup> (including media themselves); and d) the authorization to receive suggestions for fostering compliance with relevant OSCE commitments from civil society – all these instruments would have a much lower impact had the OSCE not agreed that the RFoM was to “be an eminent international personality with long-standing relevant experience from whom an impartial performance of the function would be expected [and who is] guided by his or her independent and objective assessment regarding the specific paragraphs composing this mandate.”<sup>11</sup>

It is this obligation to independently assess not only any given media situation or possible violation of human rights but also to define the most appropriate ways of addressing media freedom issues and of suggesting remedies – irrespective of any preferences by OSCE member states – that empowers the office of the RFoM. The RFoM is thus not confined to a simple data collection function, providing information services for the OSCE's participating states. Within the structure of the organization, it represents an autonomous institution with inherent powers and authority to not only assess and enquire, but also to remind Participating states and follow up on its recommendations.

Unlike the OSCE High Commissioner on National Minorities, whose approach and indeed strength is silent diplomacy, the RFoM has the authority and in fact the duty to go public in order to warn of serious instances of non-compliance

9 The first RFoM, Freimut Duve, held the post from 1997 until 2003. He is a well known publisher-journalist and parliamentarian who focused on the defence of human rights. Duve received the Hannah Arendt Award for Political Thinking in 1997. Miklós Haraszti, in office from 2004 until 2010, is a Hungarian writer, journalist and human rights advocate who co-founded the Hungarian Democratic Opposition Movement. In 1980, he became editor of the samizdat publication *Beszédo*. After the collapse of the Iron Curtain, he took part in the roundtable on free elections and became member of the Hungarian parliament.

10 Mandate of the OSCE Representation on Freedom of the Media, OSCE PC.DEC No. 193, 5 November 1997.

11 *Ibid.*





with the commitments.

One venue of the RFoM's public arena is the theatre of international community, that is, the audience of diplomats. Regular reports, usually impatiently and sometimes anxiously awaited by the participating states, are presented to the Permanent Council and made publicly available. They include an account on the watchdog's communication exchange with OSCE participating states and the office's projects and activities. They also point out the state of affairs of media freedom concerning any particular media freedom dimension (defamation, media regulation, public service broadcasting, violence against journalists, etc.)<sup>12</sup>. More visibly and not less importantly, the RFoM has also the power to issue – at its own discretion – public statements and press releases on media freedom violations as they occur. While the main addressees of the regular reports are clearly the fifty-six OSCE participating states, the public statements are meant for and reach a much wider audience, which includes civil society and media themselves in the respective states and beyond. Compared to the regular reports, public statements have a different impact and objective: the aim of the former is to inform governments and to recommend certain action to them, whereas the latter's is to fulfil the early-warning function fundamental to the post by making the issue a topic of the state's political process and raising the awareness of its civil society.<sup>13</sup>

So-called “assessment visits” paid to any given OSCE participating state by the RFoM combine both of these approaches. They are well-prepared series of meetings with major stakeholders: government officials, representatives of civil society, and media professionals. Assessment visits are generally concluded with press conferences and followed by a comprehensive written report, which is then presented to the OSCE Permanent Council and also made publicly available.<sup>14</sup>

Only by being mandated to revert to the public via both, the government and the civil society, can the RFoM comply with the mandate's specific request to “concentrate [...] on rapid response to serious non-compliance with OSCE principles and commitments.”<sup>15</sup>

## **B 2. Independent Intergovernmental Function**

The intergovernmentally agreed independent nature of the RFoM's post and mandate relies on three main elements: the nomination process of the

<sup>12</sup> See RFoM's regular reports to the OSCE Permanent Council, <http://www.osce.org/fom/documents.html?lsi=true&limit=10&grp=296>.

<sup>13</sup> See RFoM's press releases, <http://www.osce.org/fom>.

<sup>14</sup> See RFoM's country reports, <http://www.osce.org/fom/documents.html?lsi=true&limit=10&grp=295>.

<sup>15</sup> *Ibid.*

officeholder, the above-mentioned option to go public, and the autonomous character of the institution.

Although they are not laid out in detail, the nomination, selection and appointment processes of the RFoM are rather simple. Due to the OSCE's consensus principle,<sup>16</sup> inherent in all decision-making procedures, the appointment procedure is, however, lengthy and characterized by intense behind-closed-doors negotiations – not uncommon for international organizations. The appointing authority is nominally the Ministerial Council that follows the recommendation of the country holding the Chairmanship. It is also the Chairman-in-Office who formally initiates the nomination and selection procedure, ensures consensus and recommends a candidate.

Reaching political consensus on a candidate – someone who meets the criteria of being an eminent international personality with extensive experience in the field of media or human rights advocacy and at the same time is acceptable to all fifty-six member states – is comparable in difficulty to the political negotiations involved in drafting the mandate. Indeed, the transition from Freimut Duve to Miklós Haraszti was anything but smooth. For months, the OSCE participating states could not agree on a candidate leaving the office in a limbo, without a voice and thus toothless for several weeks. With Haraszti leaving the post in mid-March 2010 and a successor having been recommended for appointment only at the beginning of March<sup>17</sup>, there was concern that this scenario might reoccur. Such a situation would have inevitably weakened an otherwise strong and well-respected institution.

Having said this, a candidate on whom political consensus eventually could be reached profits from a robust mandate that is protected by the same consensus requirement. Any decision made by consensus has the advantage of having had all OSCE members agree to it. Contrary to (qualified) majority voting, no participating state can claim to have been in opposition. In the case of the RFoM, the incumbent is thus able to perform the tasks independent of any outside influence or obstruction.

As indicated above, the RFoM's option to issue public statements lies at the core of the post's political independence and is its mightiest tool. The defence

<sup>16</sup> Consensus is not defined as unanimity, but as the absence of any significance disagreement.

<sup>17</sup> On 4 March 2010, the OSCE Permanent Council adopted a decision recommending to the OSCE Ministerial Council the appointment of the next Representative of Freedom of the Media. This decision was made adopted through a so-called silence procedure which ended on 10 March 2010, Haraszti's last day in office: Rather than having actively to agree to the appointment of the next RFoM, the recommended candidate was to be considered appointed if no participating state disagreed within the set period. On 11 March 2010, the Chairperson of the Permanent Council announced that Ms Dunja Mijatovic was appointed the new and third Representative. See Permanent Council Decision No. 928 of 4 March 2010, [www.osce.org/pc/documents.html?lsi=true&limit=10&grp=336](http://www.osce.org/pc/documents.html?lsi=true&limit=10&grp=336), and OSCE Ministerial Council Decision MC.DEC/1/10 of 10 March 2010.



of media freedom and the protection of the right to freedom of expression by definition need to be placed in the public sphere. Public, pluralistic debate cannot develop behind closed doors and by means of silent diplomacy. The RFoM also depends on the public as a channel through which to exert influence. The incumbent is free to publicly and prominently pin-point shortcomings of a country's media freedom situation and to urge government's and law-enforcement agencies to change their course of action. The RFoM's tasks also include calling on politicians to respect the right to freedom of expression and to refrain from exercising influence on public media, and reminding public officials that they have to tolerate a higher degree of criticism by the media. The RFoM shares this privilege only with the OSCE Office for Democratic Institutions and Human Rights (ODIHR) located in Warsaw.

Neither the Permanent Council, due to the consensus principle, nor the OSCE Secretariat, due to its rather supportive and neutral role, nor the OSCE field missions, due to the fact that they generally operate based on an invitation by the host country, have the possibility to function with such transparency in reaching out to the wider public: the media's audience and readership.

Only in very grave circumstances is it imaginable that the Permanent Council would reach consensus to jointly issue a public statement of concern. As a rule, it is the country holding the Chairmanship and setting the overall political agenda that has the right and the duty to be in the public spotlight. The OSCE field missions, unless placed under an UN mandate as is the case with the OSCE field missions in Kosovo and in Bosnia and Herzegovina, depend on the agreement of their host country. Over-critical and unfavourable public statements bear the risk of deteriorating or freezing political relationships and stalling democratization and security reforms.

The consensus principle in the OSCE also means that every participating state has de-facto a veto right – making it technically almost impossible to reach an agreement on criticizing a situation in any country without the consensus of that particular country.<sup>18</sup>

What distinguishes the RFoM from non-governmental media freedom advocates

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<sup>18</sup> At the 1992 CSCE Council Meeting in Prague, the Ministers decided to adopt the "consensus-minus-one" principle. Article IV, para. 16, allows that "appropriate action may be taken by the Council or the Committee of Senior Officials, if necessary in the absence of the consent of the State concerned, in cases of clear, gross and uncorrected violations of relevant CSCE commitments" (OSCE Prague Document on Further Development of CSCE Institutions and Structures, Prague Meeting of the CSCE Council, 30-31 January 1992, p. 17, [http://www.osce.org/documents/mcs/1992/01/4142\\_en.pdf](http://www.osce.org/documents/mcs/1992/01/4142_en.pdf)). This "consensus-minus-one" mechanism was used only once in the history of the CSCE/OSCE against a participating state: on 8 July 1992, Yugoslavia was suspended from the OSCE for its involvement in the conflict in Bosnia and Herzegovina.

is his/her ability to operate in the public arena beyond the confines of behind-the-scene negotiations (its most powerful instrument). The participating states let the media freedom watchdog decide when, how and to what extent to intervene, while they simultaneously oblige themselves to cooperate. Also, the RFoM is free to decide whom to address: the governments, individual politicians or the public at large. The range of addressees of the message, the level of criticism, the directness of the recommendation – all of these elements are adjustable and can be ‘customized’ depending on the intended aim and recipient.<sup>19</sup>

Furthermore, by being able to reach out to both politicians and the public, by being obliged by the mandate to closely work with both governments and the civil society, the RFoM constitutes the juncture in a triangular-structure where civil society, media and governments are brought together on disputed or controversial issues. Each conference, each seminar organized by the RFoM forces public officials and media professionals to constructively and jointly analyze their mutual relationship, media policies and practice, media legislation, etc. A boycott by one or the other side is highly unlikely since it would damage their credibility.

The third pillar of the institution’s independence is represented by the autonomous character of the office of the RFoM. While being bound to the general OSCE rules and regulations, covering financial and administrative areas, the office is financed by the overall OSCE budget: the consensus budget is composed of contributions from all participating states, and is approved as a whole and not along individual budget lines. The RFoM is free to propose the size of the budget, to set the office’s multi-year policy as well as the annual strategy and to prioritize activities or areas of involvement anytime at its own discretion. OSCE member states may and do suggest projects or fields of activities; however, the final decision as to the ‘if and how’ remains the sole responsibility of the RFoM.

### C. Fields of Activity, Achievements and Challenges

The office of the RFoM operates both vertically and horizontally: vertically, by

<sup>19</sup> RFoM’s press release of 8 February 2010 on Kazakhstan “misuse of libel laws to muzzle the press” illustrates an example of the effectiveness of the office’s intergovernmental character: on 1 February, the Almaty district court had ordered the seizure of the print runs of five independent newspapers. All papers had published letters by an exiled government minister who accused Timur Kulibaev, the President’s son-in-law, of corruption. The court also banned any reports “damaging the honor and integrity” of Kulibaev. Only hours after the RFoM voiced criticism in a press release of 8 February 2010, the same court not only reversed the ruling but also dismissed Kulibaev’s defamation lawsuit against the five independent papers. See OSCE media freedom representative criticizes ‘misuse’ of libel laws to muzzle the press in Kazakhstan, Tajikistan, and Hungary, OSCE RFoM Press Release, 8 February 2010, [http://www.osce.org/fom/item\\_1\\_42678.html](http://www.osce.org/fom/item_1_42678.html). See also Kazakh Court Overturns Media-Criticism Ban, Radio Free Europe/Radio Liberty, 9 February 2010, [http://www.rferl.org/content/Kazakh\\_Court\\_Overturns\\_Media\\_Criticism\\_Ban/195279.html](http://www.rferl.org/content/Kazakh_Court_Overturns_Media_Criticism_Ban/195279.html).



observing each OSCE country's security situation for journalists, its media framework and media structures regardless of the medium (print, radio-television, new media); horizontally, by analyzing thematic pillars of free media across the OSCE, including the state of public service broadcasting, access to information regimes, defamation provisions, and the free flow of information on the Internet.<sup>20</sup>

The RFoM refrains from comparing the situation in one country with the situation in another country or establishing ranking systems, but rather measures development and progress against universal standards and OSCE commitments.

During its mere twelve years of existence, the office, through its two Representatives, managed to help the participating states to cover a significant distance on their road towards implementing and fulfilling today's media freedom standards.

At first, Freimut Duve's biggest success was, however, the respect he and the new institution gained amongst civil society and international media advocates. It was Duve's personal dedication with which he shaped and interpreted the office's mission and his steadfastness with which he pursued the defence of media freedom and freedom of expression that made his tenure so effective.<sup>21</sup> Within a few years he managed to establish friendly, professional, and moreover durable relationships with all major media advocacy bodies, turning the office into an established and esteemed partner regardless of its intergovernmental character and the initial scepticism it was confronted with.

It was also under Duve that the first declaration of the three international rapporteurs on freedom of expression was issued, establishing a new international mechanism. For the first time, in November 1999, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE RFoM and the Special Rapporteur on Freedom of Expression of the Organization of the American States got together to issue a joint declaration recalling freedom of expression as a fundamental and internationally recognized human right and stressing the indispensability of independent and pluralistic media for a free society and accountable governments.<sup>22</sup>

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20 For more information on the RFoM's activities see the web site: <http://www.osce.org/fom>.

21 See also Christiane Hardy/Rebecca Law (eds.), *Letter to a Man of Letters. A Tribute to Freimut Duve, Essays in Honour of Freimut Duve on the Occasion of the End of his Tenure as the first Representative for Freedom of the Media*, Vienna 2003.

22 *International Mechanisms for Promoting Freedom of Expression: Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression*, 26 November 1999, [http://www.osce.org/documents/rfm/1999/11/198\\_en.pdf](http://www.osce.org/documents/rfm/1999/11/198_en.pdf).

Every winter since then, the three rapporteurs would meet again to issue a declaration focusing on particular threats to freedom of the media. In December 2006, the group was extended to include the new Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights and, in February 2010, after having warned of numerous threats to media freedom and having suggested remedies to existing shortcomings, the four international watchdogs issued their latest declaration commemorating the tenth anniversary and identifying ten key challenges to freedom of expression in the next decade.<sup>23</sup>

What had started successfully under Duve's tenure was continued and extended during Haraszi's term. This is valid also for the assistance provided to those participating states that, after the fall of the Iron Curtain, found themselves in a changed socio-political system and were slowly moving from state media structures to a system of pluralistic, independent and critical media. Particularly between 1999 and 2003, the office was essential in supporting the countries of Southeast Europe in the transition from state to public broadcasting. While many countries have completed this transition, some other states have yet to fully complete the public service broadcasting reform and, moreover, to identify appropriate mechanism of independent financing.<sup>24</sup>

The completion of the transition process from state to public service broadcasting could be described as moving eastwards. However, it was the former socialist countries that assumed the leading role in decriminalizing defamation. Under Haraszi's tenure, the office embarked on a long-term lobbying project aimed at removing criminal libel provisions in the OSCE area, on one hand, and strengthening voluntary self-regulation systems, on the other. Bosnia and Herzegovina, Estonia and Georgia, followed by Croatia, the former Yugoslav Republic of Macedonia and Serbia, were the first new democracies to reform their libel provisions and decriminalize and 'deprisonize' defamation – with most of the established democracies in the OSCE area keeping these obsolete provisions on the statute books. It was also thanks to Haraszi's persistence over the years that in 2009, the parliaments of Ireland, Romania and the United Kingdom decided to follow suit and removed libel as a criminal offence, thus strengthening the right to freedom of expression and freeing the media from chilling effects.

<sup>23</sup> International Mechanisms for Promoting Freedom of Expression: Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS 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, 2 February 2010, [http://www.osce.org/documents/rfm/2010/02/42638\\_en.pdf](http://www.osce.org/documents/rfm/2010/02/42638_en.pdf).

<sup>24</sup> The new EU member states and some EU candidate countries have successfully completed the transition to public service broadcasters. Sustainable financing mechanisms have to be implemented for the public broadcasters in Albania, the former Yugoslav Republic of Macedonia and Kosovo. The reform and unification of the public broadcasting system in Bosnia and Herzegovina has stalled and it remains fragmented along ethnic lines.



Despite these remarkable achievements, the media situation in the OSCE area has seen some worrying developments over the last few years. More, not fewer, journalists have lost their lives in the course of their duty. Violence against journalists is increasing in Southeast Europe and parts of Central Asia.<sup>25</sup> In some of the countries of the European Union, politicians and public officials are trying to silence critical journalists and media outlets by demanding exorbitant financial damages in civil defamation lawsuits, thus ignoring the core function of media as a fourth critical pillar of any democratic state. Across the OSCE, countries, in an attempt to enforce national security or copyright legislation, are restricting the free flow of information and freedom of expression on the Internet. Commercial pressure on media and journalists is also a challenge which can be observed in many if not all OSCE participating states.

#### D. Outlook

The above mentioned ten key challenges to freedom of expression, jointly outlined by the four rapporteurs on freedom of expression in their tenth anniversary declaration of early 2010, distil the most serious challenges, all affecting areas indispensable for a politically and financially independent, free, and safe media environment.<sup>26</sup> The prospects are not encouraging.

The universality of international human rights standards, also in the context of the OSCE and its media freedom commitments, is being questioned. During its 2009 Chairmanship, Greece – in an attempt to further OSCE media freedom commitments and develop stronger tools for the RFoM – proposed to adopt a decision on “fostering freedom of the media and enhancing pluralism” at the 2009 Ministerial Council Meeting. After lengthy discussions, many objections and several revised and (in the course of negotiations) softened draft versions, two Central Asian member states could not agree on adopting the following main points: guaranteeing free flow of information on the Internet, preventing media concentration and state ownership of broadcast media, combating of violence against journalists, and the encouraging of media to establish self-regulatory mechanisms. By objecting to subscribe to these four pillars of a free media framework, the countries in fact questioned the very structure and basic prerequisite of a true democracy.

25 See also the annual press freedom indices of Freedom House, <http://www.freedomhouse.org/template.cfm?page=251&year=2009>, and Reporters without Borders, <http://www.rsf.org/en-classement1003-2009.html>.

26 International Mechanisms for Promoting Freedom of Expression: Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS 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, 2 February 2010, [http://www.osce.org/documents/rfm/2010/02/42638\\_en.pdf](http://www.osce.org/documents/rfm/2010/02/42638_en.pdf).

Politicization of media and attempts by politicians and governments to manage or control freedom of expression and the free flow of information always have and will continue to represent the foremost threat to free media, particularly public service media. Existing governmental or political ownership of media, stalled privatization processes of media, or attempts by politicians to exercise influence over editorial content, financing, advertising, or regulatory aspects are cases in point.

Related to the politicization of media are efforts to legislate or enforce (by law, fear or violence) “neutral” speech irrespective of the public interest, by banning speech which disrespects the reputation of public officials or the state, statement of opinions, and articles that criticize ideologies, religions or schools of thought.

The attempt to monopolize media does, however, not come from governments alone. The increasing commercial pressure to which media are exposed, the battle for advertisers, readers and audience shares, as well as the industry’s evolving fight over the Internet supremacy, have led to a rising media concentration. With the development of multi-media and new media platforms, concentration is no longer the simple merger or grouping of media outlets. Media concentration in the information society also means the combination of information, telecommunication, software, and web technologies under one roof – it means the controlling of communication channels, the collection, storage, evaluation, and selling of data of media consumers for either commercial or political purposes.

While traditional and independent print and broadcast media are the fourth estate of a democratic society, monopolized and commercially instrumentalized online media and the Internet might fall victim to the same industry that helped develop and foster it.

It remains to be seen whether some governments’ attempts to control, guide, filter, or silence debate and criticism, and to restrict freedom of expression, will be a political feature only or whether and to what degree information and software corporations will follow suit.

*Mujić is a Senior Advisor to the OSCE Representative on Freedom of the Media*









## **The use of wiretaps by and against journalists in Europe: a threat to press freedom?**

*By Adeline Hulin*

Wiretapping is internationally recognized as an intrusion into a person's private life. Those intrusions are thus limited by regulations which vary from one country to another. Usually, interceptions of telecommunications are restricted to cases involving serious crimes and require the approval of an independent judge prior to the installation of hacking devices. Despite restrictions, eavesdropping remains widespread and is at the heart of media-freedom discussions in recent years.

### **Wiretapping legal restrictions**

In 2010, the most heated debates on the topic took place in Italy, pitting the media against politicians. To better understand the dispute, it is essential to recall the Italian context regarding wiretapping. In Italy, according to available figures, more than 100,000 taps are authorized every year by the Justice Ministry. This figure makes this country the leader in using electronic devices for criminal investigations. Not surprisingly, Italy is also the country where most scandals and corruption are revealed by journalists who obtained information from taps. In order to curb that trend and better protect privacy, the government has been supporting reforms in the legal system. But Italian journalists have strongly opposed the so-called "gag-law" which, according to them, would prevent reporting information of public interest. Indeed, the draft law provides for prison sentences when publishing any information obtained through illegal electronic surveillance.

The Representative on Freedom of the Media consequently supported the Italian media community and opposed the draft law, saying in a public statement that "journalists must be free to report on all cases of public interest and must be able to choose how they conduct a responsible investigation". In order to guarantee that media perform their important watchdog function on behalf of the public, it should be up to them and not up to the authorities to decide if the public interest to know something outweighs the need to keep the privacy of the people tapped. In the particular case of Italy, it appears that even if there have been

excessive use of information gleaned from wiretaps by some newspapers, to stop getting access to the transcripts of phone taps would harm press freedom.

Similar dispute took place in Czech Republic when the so-called “muzzle law” went into effect on 1 April 2009. The law banned journalists from publishing the contents of police wiretaps or any information about the tapping of phones by the police. The law came following the publishing of wiretaps by journalists revealing incidents of corruption. Amendments to the new law provide for prison sentences up to five years and fines up to €200,000 if a journalist discloses wiretapped conversations. The law does not contain an exception for disclosure of information of public importance. Also, the law does not differentiate between the liability of officials responsible for the leak, and the liability of others, including journalists, who merely passed on or published the information in question. As a result, a group of Czech senators have asked the Constitutional Court to consider whether the law violates the Czech constitution.

### **Wiretapping ethical restrictions**

More recently, the discussions around wiretapping referred to the daily work of journalists and the way they can obtain information for their readers. At a time when new technologies are becoming more and more sophisticated and affordable, intercepting electronic communication is also getting easier for journalists. In that context, most journalism codes of ethics reflect the fact that using clandestine listening devices in order to get information can only be justified when it is in the public interest and when the material can not be obtained by other means.

In 2010, the use of wiretaps by journalists made the front page of media outlets in the United Kingdom. After the revelation of serious allegations that the News of the World had hacked into phones of cabinet ministers and high profile figures, the practice has been loudly denounced. In July 2011 the scandal exploded following reports estimating that about 4,000 mobile phones may have been hacked, including those of victims of crimes and terrorism as well as of families of soldiers killed in Iraq or Afghanistan. As a consequence, Rupert Murdoch, the owner of News of the World, decided to close the newspaper and an inquiry into breaches of media ethics was launched by the government.

In this affair, the role of the self-regulatory body – the Press Complaint Commission – has been roundly criticized for its lack of power to prevent such practices because of its close relationship with the industry. The existing Code of Practice which states “the press must not seek to obtain or publish



material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by unauthorized removal of documents, or photographs; or accessing digitally-held private information without consent”<sup>1</sup> was, indeed, totally disregarded by some members of the journalism profession.

The scandal did expose the corruption and, importantly, the inability of law-enforcement officials to adequately investigate a case that had been the subject of press reports for years. Today it is essential that the government inquiry should not lead to passing new laws that could restrict media freedom. However, ensuring journalists are aware of ethical guidelines on how to obtain information is crucial to restore and maintain media credibility.

### **Wiretapping use to curb the protection of journalists’ confidential sources**

The discussions about wiretapping eventually relate to media freedom when governments use secret listening devices to spy on journalists. This has proved to be a subtle and ingenious technique of the authorities to bypass the journalists’ right to keep sources confidential. A scandal was revealed in 2006 in Germany, proving that the German secret services had intercepted, particularly during 2002 and 2005, communications of key German journalists researching the activities of the secret services, most probably hoping to uncover internal leaks. If such practice has been strongly condemned in Germany, it has been allowed elsewhere. In the Netherlands an appeals court in September 2006 approved the tapping telephones of De Telegraaf journalists who had revealed that a criminal kingpin was obtaining confidential information while still in jail.

Such a decision could only be compatible with Article 10 of the European Convention on Human Rights because of an overriding public interest. Indeed, since 1996 in *Goodwin v. United Kingdom*, the European Court of Human Rights ruled that violation of protection of sources is an interference with freedom of expression. Without such protection, sources may be deterred from assisting the press to report on matters of public interest.

In that regard, the OSCE Representative on Freedom of the Media is defending the fact that protecting sources is one of the basic conditions for press freedom and that this protection should not be undermined by the use of legal or illegal surveillance.

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<sup>1</sup> UK PCC Code of Practice [http://www.pcc.org.uk/assets/111/Code\\_of\\_Practice\\_2011\\_A4.pdf](http://www.pcc.org.uk/assets/111/Code_of_Practice_2011_A4.pdf)

*Adeline Hulin is project co-ordinator for the Office of the OSCE Representative on Freedom of the Media.*









## Controlling the uncontrollable?

*By Ženet Mujić and Deniz Yazici*

The increasingly universal society we live in today entails many advantages and opportunities one could only dream of just over a decade ago. We live in an affluent era of technological prosperity hopefully leading to a truly global society yearning for education and knowledge; to engage in a “trade of knowledge” if you will.

The Internet is increasingly the structure of choice to facilitate real-time exchange of information beyond borders and boundaries; yet there is much apprehension over its content.

Gradually, in trying to keep up with these technological developments, the vast majority of the OSCE participating States have enacted various legal provisions to regulate illegal or unwanted content on the Internet. This attempt to govern or even control the availability and dissemination of online materials is perceived as a direct reaction to, among others, cybercrime, content harmful to minors, as well as international threats, including terrorist propaganda.

Some nations see the intricacies of the Internet development as very problematic, provoking unfeasible attempts to manage all consequences it brings with it, – actions reminiscent of Goethe’s “These Spirits that we’ve cited, our commands ignore”.

Having said this, it is important to note that the inclination toward regulation of the Internet might have a very legitimate purpose. However, it can also impede the free flow of information and on an individual’s right to freely receive and disseminate information. Another important aspect concerns what is understood as ‘net neutrality’. The Internet is naturally a democratic entity; it cannot discriminate, for instance, between legitimate speech and criminal content. The Internet’s original architecture treats all data equally, regardless of its content, origin or destination.

States’ legislative responses, however, often lead to contradictory regulatory practices. How to deal with content that is legitimate in one country but not in another? Which legislation to apply, in the case of a defamation lawsuit, for

example, the laws of the country where the content is hosted, where it was uploaded or downloaded or where it is managed? Different countries have passed different legislation to address these issues. National laws and cultural values conflict with the global nature of the Internet and its content.

As a result, online journalists and media face many obstacles and uncertainties when doing their jobs. Furthermore, due to social developments and expansions of the web (i.e. social media or Web 2.0), such predicaments are applicable to journalists and civil society representatives, and also to a growing number of Internet users or “netizens.”

The complexity and flexibility of the Internet, its rapid advancement, and its uncontrollability due to its egalitarian nature is of concern to many; leading to the impression that the prevailing legislation designed to apply to “old media” is not adequate to regulate online content.

### **The high time for an OSCE Internet Study**

The Office of the OSCE Representative on Freedom of the Media has been monitoring attempts to regulate the Internet. The Office has commissioned an increasing number of legal reviews on the topic during the past few years. While quantifying the amount of adopted legal provisions might be straightforward, it is becoming more challenging to analyse the effect laws and regulation have on the free flow of information.

In order to determine their effect and to maintain a more coherent overview of such multifaceted regulatory developments and to give the participating States the opportunity to map their own Internet related legislation, the Representative’s Office embarked on an OSCE-wide Internet regulation study. It is the first of its kind, assessing more than a quarter of the world’s countries. The project entails a comprehensive survey of existing legislation and practices related to the free flow of information and freedom of expression on the Internet.

The study on Internet regulation published in July 2011 pursues three main objectives. First, it provides a general overview of universal legal provisions related to free expression and the free flow of information on the Internet. The study also assesses existing national regulations and pertinent practices in all 56 OSCE participating States in light of the OSCE media freedom commitments, Article 10 of the European Convention on Human Rights and other relevant international standards.



Along with stimulating debate and exchange of views and practices, the study will be used to generate ideas on how to best implement The Office's recommendations on free expression and free media on the Internet across the OSCE region.

### **Sparking debate on Internet governance**

Beyond the technical aspects of research, the study is meant as a basis to address the scope of Internet freedom. To this end and taking the findings of the study into account, the office plans various activities from awareness-raising to the promotion of best practices.

The Internet is a powerful tool that connects people and links citizens with governments, enabling increased dialogue and a more robust participatory democracy. It is an indispensable component of the free flow of information. One of the key tasks for the Representative is to raise awareness of the importance of free expression on the Internet in order to reduce and eliminate obstacles, including online censorship and over-regulation. The hope is, of course, that countries refrain from adopting regulations that run contrary to OSCE commitments.

Another key area for the Representative is to foster debate among governments, civil society, media and industry on various facets of Internet freedom matters through the organization of roundtables, conferences and training events. Such dialogue is a means to engage in effective implementation strategies and best practices.

### **A common good of Internet freedom**

In accordance with the report on Internet regulation there have been several substantial recommendations that have been exposed in respect to Internet freedom. The results of the study allowed the Office to formulate some policy recommendations and identify key needs where countries might require assistance.

First, it is crucial that Internet regulation policies conform to OSCE commitments; the promotion of pluralism being the key indicator of its effectiveness. National laws also ought to be in alignment with existing international human rights principles, especially freedom of expression and privacy of communications. Furthermore, content-based restrictions must only be initiated by a state if it

corresponds, democratically, to a “pressing social need” and is in the general public interest.

Access to the Internet is a basic requirement to partake in the Information Society; access is therefore de rigueur to ensure freedom of expression and the right to receive and disseminate information regardless of geography and politics. Often this fundamental human right is impeded by blocking access to websites. Although some advocate blocking certain criminal online content, it is not a viable solution to counter criminal use of the Internet. Not only does it fail to solve the problem, it could also harm communities by preventing them from being part of a global society.

The Office’s Internet regulation study, has already gained much international interest and recognition. Inspired by its concept, the Open Society Institute and the Center for Studies on Freedom of Expression and Access to Information at Palermo University in Buenos Aires, Argentina, have started a similar survey across Latin America. It is hoped, this “chain reaction” will lead to harmonized methodologies and therefore globally comparable databases and also to a common understanding of there being no alternative to a free Internet.

The Internet, as the first truly global medium, is the embodiment of the aforementioned commitments. Hence, it is essential that governments refrain from over-legislating the content of the Internet and maintain its original nature and objective; making it accessible to all, non-discriminatory in terms of content supervision and free.

*Mujić is Senior Advisor and Yazici is a Research Assistant at the Office of the OSCE Representative on Freedom of the Media*



## Mandate



## **Decision No. 193: Mandate of the OSCE Representative on Freedom of the Media**

PC.DEC No. 193

5 November 1997

137th Plenary Meeting

PC Journal No. 137, Agenda item 1

1. The participating States reaffirm the principles and commitments they have adhered to in the field of free media. They recall in particular that freedom of expression is a fundamental and internationally recognized human right and a basic component of a democratic society and that free, independent and pluralistic media are essential to a free and open society and accountable systems of government. Bearing in mind the principles and commitments they have subscribed to within the OSCE, and fully committed to the implementation of paragraph 11 of the Lisbon Summit Declaration, the participating States decide to establish, under the aegis of the permanent Council, an OSCE Representative on Freedom of the Media. The objective is to strengthen the implementation of relevant OSCE principles and commitments as well as to improve the effectiveness of concerted action by the participating States based on their common values. The participating States confirm that they will co-operate fully with the OSCE Representative on Freedom of the Media. He or she will assist the participating States, in a spirit of co-operation, in their continuing commitment to the furthering of free, independent and pluralistic media.
2. Based on OSCE principles and commitments, the OSCE Representative on Freedom of the Media will observe relevant media developments in all participating States and will, on this basis, and in close co-ordination with the Chairman-in-Office, advocate and promote full compliance with OSCE principles and commitments regarding freedom of expression and free media. In this respect he or she will assume an early-warning function. He or she will address serious problems caused by, inter alia, obstruction of media activities and unfavourable working conditions for journalists. He or she will closely co-operate with the participating States, the Permanent Council, the Office for Democratic Institutions and Human Rights (ODIHR), the High

Commissioner on National Minorities and, where appropriate, other OSCE bodies, as well as with national and international media associations.

3. The OSCE Representative on Freedom of the Media will concentrate, as outlined in this paragraph, on rapid response to serious non-compliance with OSCE principles and commitments by participating States in respect of freedom of expression and free media. In the case of an allegation of serious non-compliance therewith, the OSCE Representative on Freedom of the Media will seek direct contacts, in an appropriate manner, with the participating State and with other parties concerned, assess the facts, assist the participating State, and contribute to the resolution of the issue. He or she will keep the Chairman-in-Office informed about his or her activities and report to the Permanent Council on their results, and on his or her observations and recommendations.
4. The OSCE Representative on Freedom of the Media does not exercise a juridical function, nor can his or her involvement in any way prejudice national or international legal proceedings concerning alleged human rights violations. Equally, national or international proceedings concerning alleged human rights violations will not necessarily preclude the performance of his or her tasks as outlined in this mandate.
5. The OSCE Representative on Freedom of the Media may collect and receive information on the situation of the media from all bona fide sources. He or she will in particular draw on information and assessments provided by the ODIHR. The OSCE Representative on Freedom of the Media will support the ODIHR in assessing conditions for the functioning of free, independent and pluralistic media before, during and after elections.
6. The OSCE Representative on Freedom of the Media may at all times collect and receive from participating States and other interested parties (e.g. from organizations or institutions, from media and their representatives, and from relevant NGOs) requests, suggestions and comments related to strengthening and further developing compliance with relevant OSCE principles and commitments, including alleged serious instances of intolerance by participating States which utilize media in violation of the principles referred to in the Budapest Document, Chapter VIII, paragraph 25, and in the Decisions of the Rome Council Meeting, Chapter X. He or



she may forward requests, suggestions and comments to the Permanent Council, recommending further action where appropriate.

7. The OSCE Representative on Freedom of the Media will also routinely consult with the Chairman-in-Office and report on a regular basis to the Permanent Council. He or she may be invited to the Permanent Council to present reports, within this mandate, on specific matters related to freedom of expression and free, independent and pluralistic media. He or she will report annually to the Implementation Meeting on Human Dimension Issues or to the OSCE Review Meeting on the status of the implementation of OSCE principles and commitments in respect of freedom of expression and free media in OSCE participating States.
8. The OSCE Representative on Freedom of the Media will not communicate with and will not acknowledge communications from any person or organization which practises or publicly condones terrorism or violence.
9. The OSCE Representative on Freedom of the Media will be an eminent international personality with long-standing relevant experience from whom an impartial performance of the function would be expected. In the performance of his or her duty the OSCE Representative on Freedom of the Media will be guided by his or her independent and objective assessment regarding the specific paragraphs composing this mandate.
10. The OSCE Representative on Freedom of the Media will consider serious cases arising in the context of this mandate and occurring in the participating State of which he or she is a national or resident if all the parties directly involved agree, including the participating State concerned. In the absence of such agreement, the matter will be referred to the Chairman-in-Office, who may appoint a Special Representative to address this particular case.
11. The OSCE Representative on Freedom of the Media will co-operate, on the basis of regular contacts, with relevant international organizations, including the United Nations and its specialized agencies and the Council of Europe, with a view to enhancing co-ordination and avoiding duplication.

12. The OSCE Representative on Freedom of the Media will be appointed in accordance with OSCE procedures by the Ministerial Council upon the recommendation of the Chairman-in-Office after consultation with the participating States. He or she will serve for a period of three years which may be extended under the same procedure for one further term of three years.
  
13. The OSCE Representative on Freedom of the Media will be established and staffed in accordance with this mandate and with OSCE Staff Regulations. The OSCE Representative on Freedom of the Media, and his or her Office, will be funded by the participating States through the OSCE budget according to OSCE financial regulations. Details will be worked out by the informal Financial Committee and approved by the Permanent Council.
  
14. The Office of the OSCE Representative on Freedom of the Media will be located in Vienna. Interpretative statement under paragraph 79 (Chapter 6) of the Final Recommendations of the Helsinki Consultations.



PC.DEC/193  
5 November 1997  
Annex

By the delegation of France:

“The following Member States of the Council of Europe reaffirm their commitment to the provisions relating to freedom of expression, including the freedom of the media, in the European Convention on Human Rights, to which they are all contracting parties.

In their view, the OSCE Representative on Freedom of the Media should also be guided by these provisions in the fulfilment of his/her mandate.”

Our countries invite all other parties to the European Convention on Human Rights to subscribe to this statement.

Albania  
Germany  
Austria  
Belgium  
Bulgaria  
Cyprus  
Denmark  
Spain  
Estonia  
Finland  
France  
United Kingdom  
Greece  
Hungary  
Ireland  
Italy  
Latvia  
Liechtenstein  
Lithuania  
Luxembourg  
Malta  
Moldova  
Norway  
Netherlands

Poland  
Portugal  
Romania  
Slovak Republic  
Slovenia  
Sweden  
Czech Republic  
Turkey

[[http://www.osce.org/documents/pc/1997/11/4124\\_en.pdf](http://www.osce.org/documents/pc/1997/11/4124_en.pdf)]



Decision No. 1/10

Appointment of the OSCE Representative on Freedom of the Media

The Ministerial Council,

Recalling Permanent Council Decision No. 193 of 5 November 1997 on establishing an OSCE Representative on Freedom of the Media,

Considering that, according to Ministerial Council Decision No. 1/07, the term of office of the current Representative on Freedom of the Media, Mr. Miklós Haraszti, will expire on 10 March 2010,

Expressing its gratitude to the outgoing Representative on Freedom of the Media, Mr. Miklós Haraszti,

Taking into account the recommendation of the Permanent Council,

Decides to appoint Ms. Dunja Mijatović as Representative on Freedom of the Media for a period of three years with effect from 11 March 2010.

[[http://www.osce.org/documents/mcs/2010/03/43089\\_en.pdf](http://www.osce.org/documents/mcs/2010/03/43089_en.pdf)]

## Declarations



## International Mechanisms for Promoting Freedom of Expression

### Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade

*The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information,*

*Having* met in Washington on 2 February 2010, with the assistance of ARTICLE 19, Global Campaign for Free Expression and the Centre for Law and Democracy;

*Recalling and reaffirming* our Joint Declarations of 26 November 1999, 30 November 2000, 20 November 2001, 10 December 2002, 18 December 2003, 6 December 2004, 21 December 2005, 19 December 2006, 12 December 2007 and 10 December 2008;

*Emphasising*, once again, the fundamental importance of freedom of expression - including the principles of diversity and pluralism - both inherently and as an essential tool for the defence of all other rights and as a core element of democracy;

*Recognising* that many important gains have been made over the last ten years since our first Joint Declaration was adopted in November 1999 in terms of respect for freedom of expression, including gains in respect for the right to information and considerable growth in access to the Internet;

*Concerned* that at the same time enormous challenges still exist in giving full effect to the right to freedom of expression, including restrictive legal regimes, commercial and social pressures, and a lack of tolerance of criticism on the part of the powerful;

*Noting* that some of the historic challenges to freedom of expression have still

not been addressed successfully, while new challenges have arisen due to technological, social and political developments;

*Aware* of the enormous potential of the Internet as a tool for realising the right to freedom of expression and to information;

*Cognisant* of the efforts by some governments to restrict the Internet, as well as the failure to recognise the unique nature of this medium, and emphasising the need to respect freedom of expression and other human rights in any efforts to apply legal rules to it;

*Stressing* that, while the last ten years have witnessed impressive growth in global efforts to protect and promote freedom of expression, far more attention needs to be devoted to this effort, by governments and other official actors, by human rights and other civil society organisations, and in international cooperation;

*Welcoming* the impressive development of international standards regarding the promotion and protection of freedom of expression over the last ten years by international bodies and civil society actors;

*Adopt*, on 3 February 2010, the following Declaration on Ten Key Threats to Freedom of Expression:

### **1. Mechanisms of Government Control over the Media**

Government control over the media, an historic limitation on freedom of expression, continues to be a serious problem. Such control takes many forms but we are particularly concerned about:

- a. Political influence or control over public media, so that they serve as government mouthpieces instead of as independent bodies operating in the public interest.
- b. Registration requirements for the print media or to use or access the Internet.
- c. Direct government control over licensing or regulation of broadcasters, or oversight of these processes by a body which is not independent of government, either in law or in practice.
- d. The abuse of State advertising or other State powers to influence editorial policy.
- e. Ownership or significant control of the media by political leaders or parties.
- f. Politically motivated legal cases being brought against the independent



media.

- g. The retention of antiquated legal rules – such as sedition laws or rules against publishing false news – which penalise criticism of government.

## **2. Criminal Defamation**

Laws making it a crime to defame, insult, slander or libel someone or something, still in place in most countries (some ten countries have fully decriminalised defamation), represent another traditional threat to freedom of expression. While all criminal defamation laws are problematical, we are particularly concerned about the following features of these laws:

- a. The failure of many laws to require the plaintiff to prove key elements of the offence such as falsity and malice.
- b. Laws which penalise true statements, accurate reporting of the statements of official bodies, or statements of opinion.
- c. The protection of the reputation of public bodies, of State symbols or flags, or the State itself.
- d. A failure to require public officials and figures to tolerate a greater degree of criticism than ordinary citizens.
- e. The protection of beliefs, schools of thought, ideologies, religions, religious symbols or ideas.
- f. Use of the notion of group defamation to penalise speech beyond the narrow scope of incitement to hatred.
- g. Unduly harsh sanctions such as imprisonment, suspended sentences, loss of civil rights, including the right to practise journalism, and excessive fines.

## **3. Violence Against Journalists**

Violence against journalists remains a very serious threat with more politically motivated killings of journalists in 2009 than in any other year in the past decade. Particularly at risk are journalists reporting on social problems, including organised crime or drug trafficking, voicing criticism of government or the powerful, reporting on human rights violations or corruption, or reporting from conflict zones. Recognising that impunity generates more violence, we are particularly concerned about:

- a. A failure to allocate sufficient attention and resources to preventing such attacks and to investigating them and bringing those responsible to justice when they do occur.
- b. The lack of recognition that special measures are needed to address these attacks, which represent not only an attack on the victim but also an attack

on everyone's right to receive information and ideas.

- c. The absence of measures of protection for journalists who have been displaced by such attacks.

#### **4. Limits on the Right to Information**

Over the past ten years, the right to information has been widely recognised as a fundamental human right, including by regional human rights courts and other authoritative bodies. Laws giving effect to this right have been passed in record numbers and this positive trend continues, with some 50 laws having been passed in the last ten years. However, major challenges remain. We are particularly concerned about:

- a. The fact that a majority of States have still not adopted laws guaranteeing the right to information.
- b. The weak laws in place in many States.
- c. The massive challenge of implementing the right to information in practice.
- d. The lack of openness around elections, when the need for transparency is particularly high.
- e. The fact that many intergovernmental organisations have not given effect to the right to information in relation to the information they hold as public bodies.
- f. The application of secrecy laws to journalists and others who are not public officials, for example to impose liability for publishing or further disseminating information which has been leaked to them.

#### **5. Discrimination in the Enjoyment of the Right to Freedom of Expression**

Equal enjoyment of the right to freedom of expression remains elusive and historically disadvantaged groups

– including women, minorities, refugees, indigenous peoples and sexual minorities – continue to struggle to have their voices heard and to access information of relevance to them. We are particularly concerned about:

- a. Obstacles to the establishment of media by and for historically disadvantaged groups.
- b. The misuse of hate speech laws to prevent historically disadvantaged groups from engaging in legitimate debate about their problems and concerns.
- c. The lack of adequate self-regulatory measures to address:
  - i. Underrepresentation of historically disadvantaged groups among mainstream media workers, including in the public media.
  - ii. Inadequate coverage by the media and others of issues of relevance to

- historically disadvantaged groups.
- iii. The prevalence of stereotypical or derogatory information about historically disadvantaged groups being disseminated in society.

## **6. Commercial Pressures**

A number of commercial pressures pose a threat to the ability of the media to disseminate public interest content, which is often costly to produce. We are particularly concerned about:

- a. Growing concentration of ownership of the media, with serious potential implications for content diversity.
- b. Fracturing of the advertising market, and other commercial pressures, leading to cost-cutting measures such as less local content, cheap, shallow entertainment and a decrease in investigative journalism.
- c. The risk that the benefits from the switchover to digital frequencies will go largely to existing broadcasters, and other uses such as telecommunications, to the detriment of greater diversity and access, and public interest media.

## **7. Support for Public Service and Community Broadcasters**

Public service and community broadcasters can play a very important role in providing public interest programming and in supplementing the content provided by commercial broadcasters, thereby contributing to diversity and satisfying the public's information needs. Both face challenges. We are particularly concerned about:

- a. The increasingly frequent challenges to public funding support for public broadcasters.
- b. The fact that many public broadcasters have not been given a clear public service mandate.
- c. The lack of specific legal recognition of the community broadcasting sector in licensing systems which are based on criteria that are appropriate to this sector.
- d. The failure to reserve adequate frequencies for community broadcasters or to establish appropriate funding support mechanisms.

## **8. Security and Freedom of Expression**

The notion of national security has historically been abused to impose unduly broad limitations on freedom of expression, and this has become a particular problem in the aftermath of the attacks of September 2001, and renewed efforts

to combat terrorism. We are particularly concerned about:

- a. Vague and/or overbroad definitions of key terms such as security and terrorism, as well as what is prohibited, such as providing communications support to terrorism or extremism, the 'glorification' or 'promotion' of terrorism or extremism, and the mere repetition of statements by terrorists.
- b. Abuse of vague terms to limit critical or offensive speech, including social protests, which do not constitute incitement to violence.
- c. Formal or informal pressures on the media not to report on terrorism, on the grounds that this may promote the objectives of terrorists.
- d. Expanded use of surveillance techniques and reduced oversight of surveillance operations, which exert a chilling effect on freedom of expression and undermine the right of journalists to protect their confidential sources.

## **9. Freedom of Expression on the Internet**

The significant potential of the Internet as a tool to promote the free flow of information and ideas has not been fully realised due to efforts by some governments to control or limit this medium. We are particularly concerned about:

- a. firewalls and filters, as well as through registration requirements.
- b. State interventions, such as blocking of websites and web domains which give access to user-generated content or social networking, justified on social, historical or political grounds.
- c. The fact that some corporations which provide Internet searching, access, chat, publishing or other services fail to make a sufficient effort to respect the rights of those who use their services to access the Internet without interference, for example on political grounds.
- d. Jurisdictional rules which allow cases, particularly defamation cases, to be pursued anywhere, leading to a lowest common denominator approach.

## **10. Access to Information and Communications Technologies**

While the Internet has provided over a billion people with unprecedented access to information and communications tools, the majority of the world's citizens have no or limited access to the Internet. We are particularly concerned about:

- a. Pricing structures which render the poor unable to access the Internet.
- b. A failure to roll out connectivity the 'last mile' or even further, leaving rural customers without access.
- c. Limited support for community-based ICT centres and other public access



options.

- d. Inadequate training and education efforts, especially among poor, rural and elderly populations.

***Frank LaRue***  
***UN Special Rapporteur on Freedom of Opinion and Expression***

***Miklos Haraszti***  
***OSCE Representative on Freedom of the Media***

***Catalina Botero***  
***OAS Special Rapporteur on Freedom of Expression***

***Faith Pansy Tlakula***  
***ACHPR Special Rapporteur on Freedom of Expression and Access to Information***





# 12th Central Asia Media Conference

## Access to information and new technologies

**Dushanbe, Tajikistan**  
**25-26 May 2010**

### DECLARATION

The Twelfth Central Asia Media Conference, organized by the Office of the OSCE Representative on Freedom of the Media in cooperation with the OSCE Office in Tajikistan, and with the assistance of the other four OSCE field operations, was held on 25-26 May 2010 in Dushanbe, Tajikistan.

Media professionals and governmental officials from all five Central Asian states - Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan - attended the conference to discuss the latest media developments in Central Asia with international experts. International experts and a journalist from Afghanistan also participated at the conference.

The specific focus of this year's conference was access to information and new technologies, including the international standards on access to information, Internet development and regulation, access to information in Central Asia and particularly the problems that societies in the region are facing in this regard.

#### ***The Conference:***

1. Welcomes the fact that all Central Asian states sent participants, both civil society activists and government representatives, acknowledging the importance of regional cooperation in the field of media.
2. Reaffirms the importance of the right of all persons to request and receive information that is held by government agencies and calls on the authorities to respect that right.

3. Media representatives exercise the same right as all persons. Collectively, they do so in the public interest.
4. Notes the importance of the right of access to information to ensure public participation in decision-making process and to promote public trust in authorities.
5. Calls on governments to facilitate the freer and wider dissemination of information, including through modern information and communication technologies, so as to ensure wide access of the public to government information.
6. Reiterates that access to government-held information should be the rule and limitations to this right the exception. Such limitations shall be clearly defined by law and only as needed to preserve legitimate vital interests such as national security and privacy. The application of restrictions should be on a case-by-case basis subject to both harm and public interest tests and explicitly stipulated in the law.
7. In this respect, urges Governments not to prosecute or imprison journalists for holding or publishing classified information when its publishing is of public interest.
8. Equally, public figures must be ready to be scrutinized by media. Therefore imprisonment for defamation can never be an adequate punishment for media professionals and civil damages should be proportionate. The conference urges Central Asia governments to free journalists currently held in prison on any charges related to their professional activities.
9. Encourages public agencies to make information available proactively and define minimum information that has to be made available by all public agencies on official websites and other means of public communication.
10. Points out that new technologies strengthen democracy by ensuring easy access to information and allowing members of the public actively to seek, access and impart information.
11. Calls upon state institutions with legislative competencies to refrain from adopting new legislation and /or amending legislation to restrict the free flow of information on the Internet.





12. Emphasizes that the Internet offers unique opportunities to foster the free flow of information, which is a basic OSCE commitment, and governments should use the Internet to facilitate wider access to information and promote government services on-line (e-government).

Dushanbe, 25-26 May 2010





## 7th South Caucasus Media Conference

### Access to information and new technologies

**Tbilisi, Georgia**  
**11-12 November 2010**

### DECLARATION

The 7th South Caucasus Media Conference, organized by the Office of the OSCE Representative on Freedom of the Media, with the assistance of the OSCE Offices in Baku and Yerevan, was held on 11-12 November in Tbilisi, Georgia.

Media professionals, civil society representatives, and governmental officials\* from Armenia, Azerbaijan and Georgia attended the conference to discuss media developments in their respective countries with international experts.

The focus of this year's conference was access to information and new technologies, including international standards on access to information, Internet development and regulation, and access to information and the free flow of information in the South Caucasus.

#### ***The Conference:***

1. Welcomes the fact that members of the media, civil society and government representatives from Armenia, Azerbaijan and Georgia took part in the conference, acknowledging the importance of regional co-operation in the field of media.
2. Reaffirms the importance of the right of all persons, including media representatives, to request and receive information that is held by government agencies, as stipulated by the access to information laws in force in Armenia, Azerbaijan and Georgia, which comply with international

standards.

3. Calls on authorities to respect the right of people's access to government-held information in all forms in which it may exist; and to commit to better implementation of their access to information legislation.
4. Draws the attention of the governments of Armenia, Azerbaijan and Georgia to the fact that journalists and media exercise the right of access to information similarly to all other persons. Media, including bloggers and citizen journalists, do so on behalf of their audiences and in the public interest, and should never be discriminated against in the processing of their information requests, which should be responded to rapidly and fully in compliance with the deadlines stipulated in their respective laws.
5. Notes the importance of the right of access to information to ensure public participation in the decision-making process and promote public trust in authorities.
6. Calls on governments to facilitate, without discrimination, the freer and wider dissemination of information, including the use of modern technologies, including the Internet, to ensure wide access by the public to government-held information.
7. Encourages public agencies to make as much information available proactively, for example, on their websites, to pre-empt potential requests and thereby save processing costs. Government bodies should be required by law to publish proactively information about their structures, functions, activities, budget, rules, guidelines, decisions, procurement, staff contact details and duties, and other information of public interest on a regular basis in formats including the use of ICTs and in public reading rooms or libraries to ensure easy and widespread access.
8. Reiterates that access to government-held information should be the rule. Notes that limitations on access should be the exception, and should be clearly defined by law and applied only as needed to preserve legitimate, vital state interests such as national security.
9. Urges governments not to prosecute or imprison journalists for possessing or publishing classified information when the publication is



deemed to be in the public interest, following best international practices and relevant jurisprudence, including by the European Court of Human Rights.

10. Recognizes that new technologies strengthen democracy by ensuring easy access to information and allowing the public actively to obtain and impart information. Calls upon governments to ensure and promote easy access to new technologies, by, inter alia, liberalizing telecommunication markets.
11. Emphasizes that the Internet offers unique opportunities to foster the free flow of information, which is a basic OSCE commitment, and encourages governments to use the Internet to facilitate wider access to information and promote government services online. Calls upon law-making institutions and agencies to refrain from adopting measures that restrict the free flow of information on the Internet.
12. Urges the Government of Azerbaijan to decriminalize defamation and ensure the appointment of an independent Information Ombudsperson, who will perform an impartial oversight function over the implementation of the 2005 Law on obtaining information, as stipulated by this law.
13. Encourages judicial bodies and official information holders in Armenia and Georgia to take into consideration opinions of their Ombudspersons more systematically when reviewing cases of appeals against denied access to official information.

\* This Declaration was discussed in the presence of government officials, some of which pointed out that they were not mandated to endorse the text.

Tbilisi, 11-12 November 2010

# **Regular Reports to the Permanent Council**



# Regular Report to the Permanent Council

4 March 2010

## INTRODUCTION

This report is my last as the Representative on Freedom of the Media. Not even this occasion can tempt me into assessing the media-freedom situation on a scale from pessimistic to optimistic, neither in the whole OSCE region nor on a state-by-state basis. Of course, you can follow in this report the summary of the instances when my Office intervened.

As it has been during my entire tenure, the period since my last report in October 2009 has been one of mixed results for the cause of media freedom.

However, I must ring an alarm at the dramatic deterioration of the safety of Kyrgyzstan's journalists. The cold-blooded execution in December of Gennady Pavlyuk, an opposition journalist, lured by the perpetrators into the neighbouring Kazakhstan, as well as the numerous other cases of violence, show all signs of an organized campaign with the goal of intimidation.

In January, Moldomusa Kongantiev, Minister of the Interior of Kyrgyz Republic, stated in Parliament that 31 attacks on journalists have been reported to the Ministry since 2005. But almost even more alarming than that terribly high number is that the official was ready to ascribe only one of all murders to motives tied with the journalists' professional activities.

A further bad signal about the stance of the authorities was the outrageous sentence given in the case of journalist Almazbek Tashiev. Several policemen in Osh were seen to beat him to death in July of last year. However, in February, only two of them were convicted; they were set free.

The OSCE commitments oblige all participating States to provide safety to journalists, not just for the sake of justice but also for the sake of democracy, which becomes an empty name without fearless fact-finding and discussion by the media. Kyrgyzstan is now yet another nation where violence against

free media and civil society is rampant while there is practically no political engagement to address the problem, let alone eradicate it. As the bitter lesson learned already by Russia demonstrates, impunity breeds further violence, and practically blesses the most brutal type of censorship without saying so.

I believe the OSCE is entitled to see a transparent investigation into the death of Pavlyuk to be carried out by Kyrgyz and Kazakh authorities, jointly or separately.

Excellencies,

Six years ago, when I was chosen to hold this position, I commenced my work with the resolve that I will implement the mandate by being geographically blind, while, of course, not problem-blind.

The greatest challenge has been upholding the very notion of universal standards. Media-freedom problems are not only omnipresent, they perpetually re-emerge. Having said that, it is unfortunate that in the second decade of OSCE's existence, the universality of the commitments has been questioned by several participating States. That has put the institution I am heading – as well as the other human rights activities of this great organization – into a difficult position.

I have never expected overnight improvements. The notion of universal commitments may be well served by slow progress. But the commitments come under pressure when participating States act to preclude, rather than include, media diversity, free expression and access to information in their societies.

These six years in the job have only strengthened my conviction about how indispensable international scrutiny is for the fate of human rights. The more we believe that democracy ultimately only can be accomplished by people who live in their own country, the more essential it is for the international community to give unconditional and public support to the actual human beings who have decided to be those internal carriers of our common values and goals.

The states that dismiss international co-operation and scrutiny in issues of human rights as “intrusion into internal affairs” are doing so not because they feel restricted in their efforts at delivering those rights but because their restrictions on those rights are being questioned.

The co-operation between my Office, the participating States and the OSCE institutions and field presences has led to the two main achievements of this Institution.





One is the rescuing of many victims of violations of the right to free expression from deterioration of their situation, and in several cases, successes in guarding their right to personal safety and even their lives. Unfortunately, the nature of this life-saving function of our Institution precludes measuring, while the memory of victims who could not be saved looms large in our conscience.

The other achievement also resists easy measuring. This Office has no legal power, except that it is mandated by the participating States to ask questions, suggest solutions and request replies. Its greatest power, however, is its authority to notify the public about these co-operative exchanges and, thereby, involve civil society in the debate. That element helps make the free-speech commitments an interaction of all players in the democratic process. Introducing concerns and solutions into the national debates have been the most rewarding moments in my work.

Excellencies,

I would like to express my gratitude for your and your predecessors' personal support during my tenure. I am glad that Ambassador Maria-Pia Kothbauer is still serving as she had assisted the Dutch and the Bulgarian Chairmanships to select me the Representative.

I also would like to thank the Kazakh and all previous Chairmanships, and personally Secretary General Marc Perrin de Brichambaut. He marvellously understood and supported our mission. I believe our Institution has accomplished quite a scope of activities with funds of well under 1 per cent of OSCE's budget, and that is possible only because all departments of the Secretariat have assisted us in many ways.

Special thanks go to OSCE's field missions. My gratitude also goes to the members of the media of the participating States, and all those activists working to promote civil society and the cause of media freedom.

Finally, I also would like to thank the team at the Representative's Office that has worked hard and ably during these years. Two of them, Joanna Jinks, Senior Administrative Assistant, and Senior Adviser Ana Karlsreiter, have been with this institution for the entire time of my mandate.

I hope that my successor will be able to build on what we have achieved. Proud that all the candidates nominated for the post have been experts who have co-operated with my Office, I am sure that my successor will continue to advocate

for freedom of speech for all citizens and for all journalists in the OSCE region.

The candidate slated for consensus, Dunja Mijatović, deserves the support of all of you, ladies and gentlemen. And that support can be best embodied by governmental adherence, in each of our nations, to our founding conviction that peace and security never will be lasting without free media.



## Issues Raised with the Participating States

### Azerbaijan

I am following the case of young video bloggers Adnan Hajizade and Emin Milli. **On 11 November**, I wrote to Elmar Mammadyarov, Minister of Foreign Affairs, to express my strong objection to the sentencing to two and two-and-a-half years, respectively, of the critically minded journalists. They were convicted for alleged hooliganism, in a case where, in fact, they were the victims of an attack.

Their appeal has been postponed on several occasions since December. I hope the appeal will not only set the two bloggers free but also will acquit them. Their first-instance sentences confirmed Azerbaijan's continued prosecution of journalists based on dubious non-journalism charges.

Along with Milli and Hajizade, imprisoned remain Eynulla Fattulayev, editor of defunct newspapers Realny Azerbaijan and Gündalik Azərbaycan, who is serving a eight- and one-half year sentence, and Ganimat Zahidov, former editor of Azadliq, who is in jail serving a 4-year sentence. Both were convicted based on trumped-up charges in violation of OSCE commitments on press freedom.

**On 30 December**, I condemned claims by Azerbaijan prison officials that Fatullayev had been found in possession of heroin during a 29 December search.

On 3 February, the Baku Police issued a statement claiming that traces of heroin, amphetamines and a hypnotic benzodiazepine known as Flunitrozepam had been found in Fatullayev's blood.

I consider these steps as a provocation aimed at smearing his reputation and pre-empting the European Court of Human Rights' expected verdict on violations of human rights that occurred during Fatullayev's prosecution.

This month marks the fifth anniversary of Elmar Huseynov's murder. The editor-in-chief of the weekly newspaper Monitor was gunned down in the staircase of his apartment building in 2005. As of today, not a single suspect has been apprehended.

I still hope that, as President İlham Aliyev once pledged, all those involved in Huseynov's murder will be soon brought to justice.

I welcome the fact that Azerbaijan is considering decriminalizing libel. This Office stands ready to assist Azerbaijan in its reform efforts in this area.

## **Belarus**

**On 27 January**, in a letter I asked Minister of Foreign Affairs Sergei Martynov to provide me with more information on recent amendments to the proposed law "On Executive and Investigative Activities" concerning Internet service providers and web sites.

The amendments reportedly give the Presidential Administration powers to intercept e-mails, conduct online investigations and allow government agencies to close web sites deemed extremist.

On 1 February, another piece of internet legislation, the decree "On measures to improve the use of the national segment of the Internet" was signed by President Alexander Lukashenko.

My Office commissioned a legal analysis that was submitted to the Belarusian authorities. The study reports welcome facts. Several provisions envisioned in the draft of the decree were not included in the final version. These were the possibility to block web sites by the authorities, mandatory hosting of Belarusian web sites by Belarusian providers and making Internet service providers responsible for information available on the Internet.

Regarding the future implementation of the decree, several recommendations were made by the expert in accordance with the OSCE commitments.

I hope that these suggestions will be taken into consideration when developing further legislation which concerns the Internet in Belarus.

My Office will continue to assist Belarus with its media law reforms. Together with the authorities in Minsk, it could organize a roundtable on the developments in the field of Internet legislation.

For more details please see Legal reviews.

## **Bosnia and Herzegovina**

**On 23 December**, together with three representatives of the international community, I wrote to the Council of Ministers of Bosnia and Herzegovina. The letter to Nikola Špirić, Chairman of the Council of Ministers, was co-signed by the Acting Head of the OSCE Mission to Bosnia and Herzegovina, Vadim Kuznetsov; the High Representative and EU Special Representative, Valentin



Inzko and the Acting Head of the European Union Delegation to BiH, Boris Iarochevitch.

The letter urged the government to refrain from undermining the independence of the Communications Regulatory Agency (CRA) by interfering with its composition. The Council had ordered the Ministry of Communications to draw up new appointment procedures for the CRA Council which would ensure a composition along ethnic and territorial criteria.

We cautioned that the Law on Communications should not be reinterpreted to include appointment criteria other than those stated in the law, which are the integrity, knowledge and professional merit of appointees.

We also urged the Council of Ministers to finalize the process of appointing a General Director of the CRA, which has been pending for more than two years, and has hampered the functioning of the Agency.

This joint letter is part of an inter-agency effort, initiated by my Office, aimed at eventually placing the media-freedom dimension higher on the EU's list of priorities in Bosnia and Herzegovina.

For more information, see my July 2009 Report to the Permanent Council.

## **Bulgaria**

**On 7 January**, I wrote to then-Minister of Foreign Affairs Rumiana Jeleva, seeking information about the murder of Bobi Tsankov, an author and journalist, who covered organized-crime issues. Tsankov was shot in downtown Sofia on 5 January. Law enforcement authorities have charged a man with his murder. Tsankov is the second journalist murdered while covering organized crime. Georgi Stoev was killed in April 2008 under similar circumstances.

On 2 March, I was pleased to receive the update of Minister of Foreign Affairs Nikolay Mladenov with the assurance that the authorities are actively working on the cases. I hope to soon receive news of specific results.

## **Canada**

**On 26 February**, I wrote to the Canadian authorities asking for information about the progress of the investigation into the 21 February vandalizing of the office of the Uthayan newspaper in Scarborough, Ontario. This attack followed a threatening phone call to Logan Logendralingam, editor of the newspaper, and

was allegedly conducted with the intention of intimidating him from reporting on dissenting voices in the Tamil community of Canada.

## **Cyprus**

**On 12 January**, I wrote to Cypriot authorities to express concern and request updates on the investigation into the murder of Andis Hadjicostis. The chief executive officer of Dias Media Group and the most influential publisher on the island was shot outside his home in Nicosia on 11 January.

I hope that the murder and its motives will be thoroughly and promptly investigated and that all of those responsible – both the executioners and masterminds – will be brought to justice.

## **France**

**On 14 January**, I welcomed a new law that strengthens protection for journalists' sources.

The law allows journalists to keep their sources of information confidential even in courts. Exceptions can be made when a "preponderant need of public interest" can be shown and "the measure is strictly necessary and proportionate to the pursued legitimate aim". I welcomed this because confidentiality of sources is a precondition for strong investigative journalism in the service of democracy. France already had some safeguards in place, but the new law now also protects the media against the use of warrants to obtain names of sources.

## **Georgia**

**On 19 to 20 November**, I visited Georgia on the occasion of our Sixth South Caucasus Media Conference. See Visits below.

I noted with satisfaction that two years after the closure of Imedi TV in 2007, criticized by my Office at that time, diversity in the television media is advancing in Georgia. I welcomed the access for satellite use granted to the oppositional channel Maestro TV, and preparations to start a parliamentary and discussions channel in February 2010, as well as the growing number of invitations to all political forces to talk shows on private channels.

**On 19 January**, I welcomed the adopted reform of Public Service Broadcasting. The Parliament amended the Law on Broadcasting, which now stipulates that annual funding of the Georgian Public Broadcaster should be at least 0.12 per cent of the country's gross domestic product. Georgia had a similar automatic



system until 2008, with 0.15 per cent of GDP guaranteed as the broadcaster's revenue. Prime-time advertisements are banned on Georgian public television, except during sport events.

## **Germany**

**On 2 December**, I wrote to Sabine Leutheusser-Schnarrenberger, Minister of Justice, and asked her to approach the judiciary for a clarification on whether the composition of the public-service broadcaster's (ZDF) boards and their role in the appointment of the editorial management are in line with the Constitution.

My request came after the ZDF administrative board refused to re-nominate the broadcaster's editor-in-chief.

**On 18 January**, I received an answer from the Justice Minister, assuring of the importance to secure the independence of public-service broadcasting in Germany. Members of the Parliament have initiated a motion the aim of which is to have the Constitutional Court assess the constitutionality and, thus, independence of the underlying legislation on public-service broadcasting.

## **Hungary**

**On 5 February**, I wrote to Minister of Foreign Affairs Péter Balázs concerning a civil libel lawsuit won by Former Prime Minister Viktor Orbán. The plaintiff sued not only a politician for defamation, but also a newspaper, Népszava, which reported on the publicly made statement. The newspaper was ordered to share the damage award.

This ruling runs against international standards that prohibit holding media liable for publishing statements or quotes from identified sources or for reporting about events with sources identified.

Although the Civil Code currently allows for such punishment, changes to the Code which would protect the media in cases such as this already have passed Parliament. The measure awaits only the signature of the President for the changes to become law. I hope that this case raises attention to the need to carry out this long-overdue reform.

## **Iceland**

I am following a legislative proposal, currently under review in the Icelandic Parliament, which in an unprecedented way aims at strengthening freedom

of expression and the media by incorporating all best practices from across the OSCE region. Its goal is to strengthen access to information provisions, whistleblower and source protections, and to exempt intermediaries, such as Internet service providers, from content responsibility.

Should Iceland adopt the envisaged legal provisions, it will be the first participating State improving its media governance by combining all available best practices.

## **Ireland**

A new Defamation Act went into effect at the first of the year, which I welcomed **on 12 January** because it officially decriminalized libel. But I also had to criticize the law because it introduced a new libel provision keeping blasphemy a criminal offense, even if removing imprisonment as a sanction.

Ireland and the United Kingdom are the first nations in Western Europe to drop libel and defamation as a criminal offense, allowing it solely as a civil-law issue. I believe this reform should be adopted by more countries that still treat media mistakes a crime, thus exerting a chilling effect on critical journalism. Most EU member countries have stopped using criminal libel provisions in their laws, following the jurisdiction of the European Court of Human Rights.

However, I believe maintaining blasphemy as a crime, defined as making statements that are “grossly abusive or insulting in relation to matters held sacred by any religion” is a step backwards. The provision is actually contrary to Ireland’s stance in the UN Human Rights Council, where it has consistently voted against motions to make defamation of religion a crime.

I called upon authorities to repeal the provision as quickly as possible.

## **Kazakhstan**

I was disappointed to learn that on 8 December, President Nursultan Nazarbaev signed the law “On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan concerning protection of the rights of citizens to privacy”. Earlier, **on 2 November**, when the draft law was being examined by Parliament, I addressed the Kazakh authorities, recommending they drop the proposed five-year prison term for publishing information related to the private life of individuals. Unfortunately, the law retains this severe punishment without any waiver for public-interest issues.





I am monitoring the case of Ramazan Yesergepov, the editor of the newspaper Alma-Ata Info. To my regret, on 14 December, the Jambyl regional court upheld the three-year prison sentence. A year has passed since Yesergepov was detained for disclosing internal documents of the Kazakh National Security Committee (KNB) in an article that criticized KNB actions against a company. Yesergepov has submitted an appeal to the Supreme Court.

This Office will continue to follow the case, as media-freedom standards disapprove of punishing journalists for publishing leaked documents, especially without examining the public-interest merits of the publication.

I was pleased that on 9 February, the Almaty Medeu district court reversed its ruling of 1 February that banned media outlets from carrying any reports that could “damage honor and dignity of Timur Kulibayev”, a well-known public figure. Earlier, **on 4 February**, I wrote to Minister of Foreign Affairs Kanat Saudabayev, when the court ordered the seizure of all print runs of Respublika, Golos Respubliki, Kursiv, Kursiv-News and Vzglyad, in which letters sent to the country's authorities by exiled former government minister Mukhtar Ablyazov had been published. The letters contained accusations of corruption against Kulibayev.

The Office also is following the case of the murder of Gennady Pavlyuk, a leading journalist from Kyrgyzstan. He died on 22 December, a week after he was thrown from an upper-story window of an Almaty apartment building. I hope that Kazakh authorities, together with their Kyrgyz counterparts, will ensure a transparent investigation of this cruel execution.

See Kyrgyzstan for more details.

## **Kyrgyzstan**

**On 9 November**, I wrote to the State Minister of Foreign Affairs Kadyrbek Sarbaev expressing my concern about the murder on 4 November of Seyitbek Murataliev, editor of the newspaper Jylan, and the attack against Osh Shamy deputy editor-in-chief Kubanychbek Joldoshev, whom unidentified assailants had beaten a few days earlier. Since then, Joldoshev has moved to another region for safety reasons.

**On 22 December**, I again had to address Kyrgyz authorities over the continuing wave of intimidation and violence against journalists. I raised several cases.

On 15 December, two men wearing police uniforms attacked Aleksandr

Yevgrafov, a correspondent for the Russian BaltInfo news agency in Bishkek. The journalist believes that the attack is related to his coverage of political developments in Kyrgyzstan.

On 16 December, staffers of the Osh Shamy newspaper received an automatic-rifle bullet and threatening notes.

In my letter, I expressed particular concern with the case of the murder of Gennady Pavlyuk, the director-general of the Bely Parokhod Internet newspaper and media collaborator with Kyrgyzstan's Ata-Meken opposition party. On 16 December, Pavlyuk was found at the foot of an Almaty apartment building with his hands and feet bound with tape. Pavlyuk died in hospital on 22 December.

Unfortunately on 10 February the Kyrgyz Ministry of Interior stated that it could not interfere with the investigation carried out by Kazakh authorities and could only provide legal support. The OSCE is entitled to see a transparent investigation of the death of Pavlyuk to be carried out, jointly or separately, by Kyrgyz and Kazakh authorities.

In the same letter, I expressed regret that on 9 December the Supreme Court of Kyrgyzstan refused to order a new probe into the investigation of 2007 killing of Siyosat reporter Alisher Saipov. I still hope that all those involved in Saipov's murder will be brought to justice.

**On 9 December**, I received a response to my request for information about the attack on Abduvakhab Moniev, editor-in-chief of the pro-opposition Achyk Sayasat. He was beaten by four unidentified men in Bishkek on 5 June. I was informed that the authorities launched an investigation into the case. Alarming is the fact that two weeks prior to the attack, police seized several thousand copies of the newspaper and prevented its distribution.

On 25 February, an outrageous judgment was rendered in the case of murdered journalist Almazbek Tashiev, a case mentioned in a previous report. Tashiev died on 12 July 2009 from injuries suffered in an attack by several police officers. The Nookat district court in Osh sentenced the two police officers charged to a 5-years sentence without jail time, along with a two-year probationary period, in essence setting the killers free. These men were uniformed officers who are supposed to protect, not attack, journalists. This practical acquittal was handed down amid a shocking wave of violence against journalists.

The recent wave of attacks and threats has turned into a dangerous trend that must be stopped immediately by the authorities. The government must publicly



acknowledge that violence against members of the media is not crime as usual and should not go unpunished. Impunity leads to further violence.

## **Moldova**

I visited Moldova on 26 November to assess the media situation after a new government took office. I observed somewhat more pluralism in media compared to findings in my report on Moldova in 2004. Even as I sensed resistance from the new opposition to allow for more impartiality in media matters, it is important that, reacting to this, the current political leadership seeks to establish balance by adhering to internationally accepted standards of media governance.

I recommended that an agreement be reached about mutually acceptable guarantees of media independence. The continuing media reform should enforce the transparency of media ownership; revise the restrictive law on state secrets adopted by the previous government and improve access to information for journalists.

I welcome the February election of well-known civil society media experts to the top management positions in Teleradio Moldova. Among other changes, Angela Sirbu, the former director of the Independent Journalism Centre was elected Director of TV Moldova-1, and Alexandru Dorogan, the former head of Association for Electronic Press became the new Director of Radio Moldova. I hope that these personnel changes will soon lead to the needed reform of the Moldovan Public Service Broadcaster.

This Office will continue to stand ready to assist Moldova in its legal reform efforts, but no law is good enough without a willingness to co-operate among the political forces in the country.

For more details please see sections Visits and Legal reviews.

## **Russian Federation**

I very much regret the final outcome of the Magomed Yevloyev murder case in Ingushetia. The owner of the then-opposition information web site [ingushetiya.ru](http://ingushetiya.ru), Yevloyev was shot in a police car on 31 August 2008, minutes after being arrested. Authorities claim the death was accidental. On 11 December 2009, an Ingush trial court sentenced the police officer who killed Yevloyev to two years in a colony settlement on negligent homicide charges. On 2 March, the Supreme Court of Ingushetia ruled that the convict should serve his sentence

out of prison. This decision sets a dangerous precedent as it fuels the sense of impunity felt by those who kill journalists.

**On 18 December**, I wrote to Foreign Minister Sergei Lavrov raising cases of prosecution of investigative journalists.

In November, a Kazan trial court sentenced Irek Murtazin to 21 months in a colony settlement, or corrective labor colony, on defamation and other charges. The accusations stemmed from an investigative book, newspaper articles and blog entries, in which Murtazin criticized Mintimer Shaimiyev, the then-president of the Republic of Tatarstan.

Aygul Makhmutova, the chief editor of a small Moscow community newspaper, was convicted in two separate trials on counts of fraud, extortion and assault, and is serving a cumulative five-and-one-half year sentence in a colony settlement. On 4 December, a higher court acknowledged legal flaws and scrapped one of the two verdicts. However, Makhmutova remains in custody to serve her first sentence.

In his response, which I received on 3 February, Minister Lavrov's spokesperson, Andrei Nesterenko, said that Makhmutova had not been convicted for her professional activities. With regard to the first case, Nesterenko said the office of Tatarstan's chief prosecutor had been asked to consider my viewpoint in the run-up to Murtazin's appeal trial. However, on 15 January the Supreme Court of Tatarstan already had upheld the sentence.

On January 27, Moscow's Perovo district court sentenced independent journalist Aleksandr Podrabinek to pay World War II veteran Viktor Semyonov 1,000 rubles (approximately 23 euros) in damages for an article he contributed to the Yezhednevny Zhurnal online newspaper in September 2009. In this article, Podrabinek criticized those who claim a monopoly on Soviet history.

Although the fine imposed on Podrabinek is 500-times smaller than the damages demanded by Semyonov, I regret that the court agreed with the defamatory character of his comments and ordered the journalist to recant two sentences of his article.

Russian authorities recently reported progress in the investigation of the assassination of human rights lawyer Stanislav Markelov and Novaya Gazeta correspondent Anastasia Baburova. They were gunned down in Moscow on 19 January 2009. Two suspects arrested in December 2009 reportedly confessed to their involvement. I welcome these developments and my Office looks forward



to receiving updates on the case.

Two more pieces of good news are worth mentioning. On 9 February, Chechen President Ramzan Kadyrov announced his decision to call off his defamation lawsuits against Memorial Chairman Oleg Orlov, Moscow Helsinki Group Chairwoman Lyudmila Alekseyeva and the Novaya Gazeta newspaper. As mentioned in my previous report, **on 28 October**, I wrote to Foreign Minister Sergei Lavrov to convey my concerns regarding these criminal proceedings. They stemmed from comments Orlov had made about Kadyrov in July 2009, following the abduction and assassination of Memorial worker Natalya Estemirova. Orlov said he believed Kadyrov was politically responsible for the climate of fear and insecurity that prevailed in Chechnya.

I also welcome the fact that in January the Russian government rejected a May 2009 proposal by two prominent members of the United Russia ruling party to criminalize “falsification of history.” The proposal would have punished statements questioning the role played by the Soviet Union during World War II and in its immediate aftermath with a prison term of up to five years. President Dmitry Medvedev had made it known that he was not in favour of the proposal and I hope that no further attempt to criminalize historical debates will be made.

## **Slovenia**

**On 15 February**, in a letter to Foreign Minister Samuel Žbogar, I expressed my concern over criminal defamation charges filed by a Slovenian prosecutor against Finnish journalist Magnus Berglund. In a TV programme aired by Finland’s public service broadcaster, YLE, and re-broadcast by RTV Slovenia, Berglund alleged that then-members of the Slovenian Government had accepted bribes from a Finnish defence contractor.

The criminal charges are based on the 2008 Criminal Code which I had criticized in May 2008. The Code not only fails to decriminalize defamation, but also extends liability for it to editors, publishers and printing companies

See my Report to the Permanent Council of 27 November 2008.

In my letter to Minister Žbogar, I asked him to initiate a reform of Slovenia’s criminal defamation provisions. I also criticized former Prime Minister Janez Janša for using the same case to file civil defamation charges against Berglund demanding 1.5 million euros in damages. I hope that the court will take international standards and OSCE commitments into account, including the obvious public interest in corruption inquiries; the need for proportionality in civil

finer; as well as the fact that politicians should tolerate a higher level of criticism than ordinary citizens.

## **Spain**

**On 19 January**, I welcomed the step taken to de-commercialize TVE, the public-service broadcaster. In exchange for removing advertising, the reform guarantees several sources of funds, including taxes levied on frequency users, commercial broadcasters and telecommunications operators.

This reform also strengthens the public-service media's ability to perform their duties free of commercial and political pressure. Early results of advertising-free programming are encouraging. According to a study cited by El Pais, in the first ten days after the ban took effect, general audience share jumped from 16 to 20 per cent and prime time viewing increased from 22 to 30 per cent.

**On 20 January**, I wrote to the authorities to express my concern over the recent sentencing of two Internet journalists for "revealing secret information".

On 23 December, Daniel Anido, the director of the online radio Cadena SER, and Rodolfo Irago, its news director, received suspended jail sentences and were ordered to pay approximately 140,000 euros of damages. The journalists were convicted for posting on the web in 2003 a list of alleged irregular members of the conservative Popular Party.

Spain acknowledges that criminalization of publication of leaked documents by journalists restricts investigative reporting. I believe this standard should be applied to all media. No journalist, whether online or not, should be punished for publishing information that the public has a legitimate interest to know about.

## **Tajikistan**

**On 4 February**, I expressed my concern to Minister of Foreign Affairs Hamrokhon Zarifi about a recent spate of lawsuits against independent newspapers that threaten the very existence of the publications.

On 29 October, a Dushanbe district court ordered the newspaper Paykon to pay an extortionate amount of 49,000 euros in damages to a government agency, Tajikstandard, for allegedly damaging its reputation. The newspaper had published an open letter to the Tajik President written by a group of entrepreneurs alleging wrongdoings by Tajikstandard.



On 26 January, the Ministry of Agriculture filed suit against the newspaper Millat demanding 163,000 euros in damages for an article that alleged corruption in the Ministry.

On 29 January, three newspapers, Aziya Plus, Farazh and Ozodagon, were sued by two judges of the Supreme Court and a judge from a Dushanbe City Court, demanding the unprecedented sum of 900,280 euros in damages for reprinting public accusations brought against them by a lawyer.

I consider these lawsuits to be dangerous attempts at censorship. Additionally, if the enormously high damages are collected, these newspapers will have to go out of business.

International standards require that libel suits against the media always should take into account the public nature of the person or entity being written about; only natural persons should be allowed to claim compensation for damage to their honor or dignity; the damages claimed should be proportional to the harm caused; media should not be held liable for accurately reporting statements of identifiable persons.

## Turkey

**On 22 December**, I condemned the killing of Cihan Hayirsevener, chief editor of the newspaper Guneş Marmara'da Yasam. Hayirsevener was shot by an unknown assailant on 18 December, while on his way to the office. The editor previously had received death threats related to his articles about a local corruption case.

On 23 December, the authorities arrested three people on suspicion of murder and one has confessed to the crime. I look forward to receiving updates on the on-going investigation.

**On 18 January**, on a visit in Turkey upon the invitation by several universities and the Ankara Bar Association, I asked the authorities to bring the country's Internet law in line with OSCE commitments and international standards on freedom of expression. In its current form the law limits freedom of expression and severely restricts the citizens' right to access information.

My request followed a recent report commissioned by my Office, showing that approximately 3,700 websites are currently blocked in Turkey, including YouTube, GeoCities and other major global sites. The system of blocking access to web sites paralyzes access to numerous modern file sharing or social

networks.

I presented the report at Bilgi University in Istanbul, Ankara State University and at the International Law Congress of the Ankara Bar Association on 13 and 14 January.

The report has been distributed to the Delegations in January, and is available at [www.osce.org/fom](http://www.osce.org/fom).

## **United Kingdom**

**On 17 November**, I commended the United Kingdom for becoming the first Western European participating State of the OSCE to officially decriminalize defamation.

This Office has long insisted that laws that criminalize speech have a chilling effect on journalists. Although these obsolete provisions have not been used in Western Europe for decades, their existence has served as justification for states unwilling to stop the practice.

## **Uzbekistan**

**On 19 November**, I wrote to the Minister of Foreign Affairs, Vladimir Norov, as I have several times, asking for the release of Dilmurad Saiid, an independent journalist, who was sentenced to 12- and one-half years in prison for alleged extortion and forgery of documents and seals.

**On 1 February**, in another letter to the Foreign Minister, I expressed concern that on 7 and 9 January, six independent reporters presently or formerly affiliated with foreign-based media outlets were summoned for questioning to the Office of the Tashkent Prosecutor.

In the same letter I raised the case of Hayrullo Khamidov, the deputy editor-in-chief of the Champion sports newspaper and a former religion commentator for the Tashkent-based Novruz radio station. Khamidov was detained on 21 January and charged with violating legislation relating to religious organizations.

I also expressed my disappointment with the fact that imprisoned journalists Dilmurod Saiid and Solijon Abdurakhmanov were not pardoned nor had their sentences reconsidered, despite my numerous interventions on these two cases and assurances given to me by Uzbek officials that the cases would be handled in a humanitarian way.





On a positive note, I was glad to learn that on 10 February, Umida Akhmedova, an internationally acclaimed independent photojournalist, was free to leave the court room under an amnesty law. I nevertheless call for her complete acquittal to avoid a further public campaign against Akhmedova currently taking place in the Uzbek media. Akhmedova had been indicted for insulting and defaming the Uzbek people and their traditions in a book of photographs and a documentary film she authored in 2007 and 2008, respectively.

I hope that like Akhmedova, Saiid, Abdurakhmanov and other imprisoned journalists will be amnestied soon, and criminalization of the work of the media will stop.

## **European Union**

We have followed as relevant for media freedom the European Parliament's approval, on 24 November, of a major overhaul of EU telecom rules aimed at boosting the rights of European mobile phone and Internet users and protection against access restrictions.

Main rules adopted concerning Internet access safeguards:

- Authorities will no longer be able to cut off Internet services to users without providing evidence of illegal downloading or other activity.
- Internet users who are breaking the law cannot be cut off without due process, including the users' rights to defend themselves.

These rules come at a time when the UK, the Netherlands and Spain are trying to present legislation similar to France's "Hadopi-law," which orders Internet service cut off to users caught in multiple unauthorized downloads of copyrighted materials.

## **PROJECTS AND ACTIVITIES SINCE THE LAST REPORT**

### ***Joint Declaration of Global Free Expression Mandates on 10 key challenges of our time***

**On 4 February**, together with freedom of expression rapporteurs of the United Nations, the Organization of American States and the African Commission on Human and Peoples' Rights I released a declaration on the 10 key challenges facing freedom of expression in the next decade.

"The Declaration on Ten Key Threats to Freedom of Expression" was adopted

at a joint meeting held the same day in Washington with the assistance of the media freedom group Article 19: Global Campaign for Free Expression, and the Centre for Law and Democracy.

"Enormous challenges still exist in giving full effect to the right to freedom of expression, including restrictive legal regimes, commercial and social pressures, and a lack of tolerance of criticism on the part of the powerful," the four rapporteurs said.

The declaration comes at a time when the free press faces a severe safety crisis as governments fail to address unabated violence against journalists. More and more countries introduce restrictive Internet regulations that endanger the freedom of the global medium.

In many post-Soviet countries, the greatest structural challenge to media freedom comes from total government control over television content.

The 10 threats listed in the four representatives' declaration are:

- Governments continue to exert direct or indirect control over the media;
- Laws criminalizing journalistic errors such as defamation, insult, or slander remain in force in most countries;
- Violence against journalists remains widespread, and several governments fail to address it adequately;
- Limits continue to be imposed on the right to information, including through the application of secrecy laws to journalists and others who are not public officials;
- Restrictions to the right to freedom of expression still exist for historically disadvantaged groups;
- The growing concentration of ownership, the fracturing of the advertising market, and other commercial pressures threaten the ability of the media to disseminate public interest content;
- Public broadcasters do not enjoy sufficient financial support, while many of them have not been given a clear public service mandate;
- Security concerns and vaguely worded definitions of what constitutes terrorism or extremism are often used to limit critical or offensive speech;
- Some governments are trying to control or limit the Internet, including through the use of jurisdictional rules that allow cases, particularly defamation cases, to be pursued anywhere;
- A majority of the world's population still have no or limited access to the Internet.



The signatories were:

The UN Special Rapporteur on Freedom of Opinion and Expression, Frank LaRue

The OSCE Representative on Freedom of the Media, Miklos Haraszti

The Organization of American States Special Rapporteur on Freedom of Expression, Catalina Botero

The African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression, Faith Pansy Tlakula.

### ***Guide to digital switchover***

My Office commissioned a guide to assist participating States to deal with the challenges of the digital switchover and its media freedom implications. The study was prepared by two leading international experts.

The document, attached to this report and downloadable at [www.osce.org/fom](http://www.osce.org/fom), details what a digitalization plan should contain, who should be involved in the process, what legal provisions are needed to allow and encourage digitalization and how to manage the process. It also analyzes how a country's authorities, together with other sectors of society, can manage the digitalization process in order to avoid negative consequences and promote positive aspects of digitalization, such as increased media diversity and plurality.

Furthermore, it addresses the relevant political issues related to the switchover, including the obligations of democratic states such as market regulation, entry into the market of digital television and the advantages and disadvantages of economic support to broadcasters and consumers.

## **LEGAL REVIEWS**

### **Belarus**

The Office has commissioned a legal analysis of the decree "On measures to improve the use of the national segment of the Internet" signed by President Alexander Lukashenko on 1 February 2010.

According to the analysis, several positive elements were incorporated into the draft, including the following:

- Information on state bodies and other public organizations will be more accessible to citizens (including journalists), as the decree envisions

responsibility of such organizations to publish information concerning their activities on their websites.

- Copyrights on the Internet will be protected.
- Internet service providers will have to undergo state registration merely in a declarative manner.
- Internet service providers will not be held responsible for the information available on the Internet.

In light of these advantageous provisions of the decree, much depends on how they will be implemented. The employed legal instrument should exclude the danger of limiting freedom of the Internet in Belarus.

The main concerns expressed by the expert are the following:

- The law obliges owners and administrators of Internet clubs and cafes to carry out identification of their visitors, keep their records and store their personal data. The same rule of identification applies to technical means of Internet service users used to connect to Internet access.
- It is unclear who and how will determine the essence of information in relation to which a request to limit access has been received. The definitions of types of harmful information under Belarusian legislation allow for legal ambiguity of categories.
- In the event of failure to comply with an order by a relevant body to liquidate violations or to suspend Internet services, the responsibility for content is transferred to Internet service providers, owners and administrators of places of collective Internet use.

The list of information which must be displayed on the websites of state bodies and other public organizations is quite limited.

- The law requires information and materials of a media outlet disseminated via the Internet to include hyperlinks to the original information source. This is an additional requirement placed on editorial boards, which cannot be applied in the event if the original source is not an Internet source.

In view of the abovementioned concerns, and the decree's deadline for the implementation rules by 1 May 2010, the following recommendations were made by the expert in accordance with the OSCE commitments regarding freedom of the media:

- Abolish mandatory identification of Internet service users and their technical means used to connect to the Internet.



- Clarify the meaning and procedure of introducing limitations and bans on spreading illegal information.
- Clarify the scope of responsibility of Internet service providers in the event of failure to comply with an order by a relevant body to liquidate violations or to suspend Internet services.
- Envision requiring state bodies and other public organizations to publish information not only on their activities, but also information which results from these activities.
- Abolish the requirement to include hyperlinks to the original information source in materials of a media outlet disseminated via the Internet.

## **Moldova**

My Office commissioned a legal review on the proposed amendments to the Broadcasting Code of the Republic of Moldova, submitted to the Parliamentary Committee on Mass Media and the Ministry of Foreign Affairs on 4 November.

The legal review presented the following recommendations in order to bring the Broadcasting Code in line with OSCE commitments and international standards:

- The broadcast regulator (existing or new) should not have such extensive powers over the public service broadcaster that it interferes in the daily management of the broadcaster. The proposed amendments must be changed to address this.
- Before a new regulatory body is established, the reasons for the alleged lack of independence and professionalism of the previous system need to be carefully analyzed. Otherwise, the new regulation will be plagued by the same problems.
- In case it is decided that the creation of a new regulatory body is the most practical way to deal with these problems (rather than to reform existing standards), the law needs to distinguish the respective role of the new system from remaining elements of the previous regulatory code to avoid overlap and confusion.
- While it is regrettable if the special majority has to be abolished in order to be in accordance with the Constitution, possibilities for a constitutional amendment should be investigated.

My Office stands ready to continue assisting Moldova with the reform of its media legislation and strengthen the efficiency of the regulator and the independence of the public service broadcaster.

## Turkey

In December, my Office commissioned a legal review of Law No. 5651, entitled “Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication”, widely known as the Internet Law of Turkey.

I presented the report at the International Law Congress of the Ankara Bar Association, at Bilgi University in Istanbul, and at the Ankara State University on 13-14 January 2010. Following my visit to Turkey, I also published the report on my Office’s web site.

The legal review offers recommendations on how to bring the law in line with international standards protecting freedom of expression. The aim of the survey is to provide a useful tool for the Turkish authorities in their efforts to reform the much-debated legislation.

Since May 2007, the law has served as the basis of a mass blocking of websites in Turkey. The enactment of this law followed concerns about defamatory videos available on YouTube involving the founder of the Turkish Republic Mustafa Kemal Atatürk, combined with concerns for the availability of content that is deemed bad, such as child pornography.

Through December 2009, access to approximately 3,700 websites has been blocked under the law. This includes access to a considerable number of foreign web sites, including prominent sites such as YouTube, Geocities, DailyMotion, and Google. Similarly, web sites in Turkish, or addressing Turkey-related issues, have been subjected to blocking orders since the law went into effect. This is particularly prevalent in news sites dealing with south-eastern Turkey, such as Özgür Gündem, Keditör, and Günlük Gazetesi. However, Gabile.com and Hadigayri.com, which combine to form the largest online gay community in Turkey with approximately 225,000 users, also were blocked. Access to popular web 2.0-based services such as Myspace.com, Last.fm, and Justin.tv have been blocked on the basis of intellectual property infringement.

Article 8 of the law includes the blocking measures. Under Article 8(1), access to web sites are subject to blocking if there is sufficient suspicion that certain crimes are being committed on a particular web site. The eight specific crimes of Article 8 are encouragement of and incitement to suicide, sexual exploitation and abuse of children, facilitation of the use of drugs, provision of substances dangerous to health, obscenity, gambling, and crimes committed against Atatürk. The Article 8 blocking provisions are also applicable with regard to



football and other sports-betting web sites and web sites that enable users to play games of chance through the Internet which are based outside the Turkish jurisdiction without having valid permit.

The legal review provides an analysis of the following:

- The implementation and application of Law No. 5651,
- Analysis of the current legal provisions under Law No. 5651,
- Analysis of the Law's application by the courts and by TIB,
- Assessment of related Internet website blocking statistics,
- Identification of the legal and procedural defects of Law No. 5651, and
- An assessment with regard to Article 10 of the European Convention on Human Rights.

Following the publication of the review, I raised attention to the fact that even if some of the content that is deemed “bad” such as child pornography, must be sanctioned, the law is unfit to achieve this. Instead, by blocking access to entire web sites from Turkey, it paralyzes access to numerous modern file-sharing or social networks. By doing so, it not only limits freedom of expression, but severely restricts the citizens' right to access information

Therefore, the study concluded that the government should urgently bring Law No. 5651 in line with OSCE commitments and other international standards on freedom of expression, independence and pluralism of the media and the free flow of information. If kept in its present form, the law should be abolished.

I hope that the Turkish authorities soon will remove the blocking provisions that prevent Turkish citizens from being part of today's global information society.

### ***South Caucasus Media Conference***

**On 19 and 20 November**, in the absence of an OSCE field presence, I hosted the sixth South Caucasus Media Conference in Tbilisi, Georgia. Journalists, authorities and education experts from Armenia, Azerbaijan and Georgia discussed journalist education in the region and challenges journalism still faces.

The conference's statement also urged all three countries of the region to enforce ownership transparency in the media, and to issue further television licenses in order to make the media fully pluralistic.

The conference has greeted positive media developments, such as the encouraging signs of media pluralism and independence in Georgia, as well as

Azerbaijan's plans to decriminalize defamation. At the same time, the fact that Azerbaijan has still not released imprisoned journalists remains a point of great concern.

I want to thank the countries that have contributed generously to the conference, including Austria, Belgium, Germany, Sweden and the United States.

### ***Training activities***

**In October and November 2009**, my Office together with Unesco and the South East European Network for Professionalization of Media organized national roundtable discussions on media self-regulation and newsroom ombudsman mechanisms in seven South East European countries and Turkey.

Around 280 media professionals, experts, publishers and regulators attended the roundtables held in **Skopje, Dubrovnik, Istanbul, Sarajevo, Pristina, Novi Sad, Tirana, and Podgorica.**

The goal of the project was to support the establishment of effective and functioning self-regulatory mechanisms, and to create a network of interested and expert contributors.

### ***Visits and participation in events***

**Between 19 and 20 November**, while I hosted the sixth South Caucasus Media Conference in Tbilisi, Georgia (see above), I also had meetings with local partners to discuss the media situation in Georgia.

I met Giorgi Bokeria, the First Deputy Foreign Minister of Georgia, and David Darchiashvili, the Chairman of the Committee on European integration of the Parliament of Georgia. I also met former Education Minister professor Ghia Nodia, and Georgian journalists from both print and broadcast media.

**On 25 November**, I visited Moldova. My visit was initiated by Ambassador Philip Remler, the Head of the OSCE Mission to Moldova, and Kalman Mizsei, EU Special Representative for Moldova.

I held meetings with Acting President and Parliamentary Speaker Mihai Ghimpu, as well as Corina Fusu, the Chair of the Media Commission of the Parliament, Deputy Foreign Minister Andrei Popov, Mark Tkachuc, the Advisor to the President of the Communist Party and Gheorge Gorincioi, the Chairman of the Audiovisual Co-ordination Council. I also met representatives of international





organizations and foreign embassies.

**From 29 November to 2 December**, I attended the Ministerial Council Meeting in Athens, Greece.

**On 2-3 December**, my Office participated in a country visit to Serbia organized by the International Press Institute and the South East European Media Organisation (SEEMO). Meetings were held in Belgrade and Novi Sad with representatives of the Serbian government and more than 50 representatives of leading media companies and journalists' associations. The visit's focus was the controversial Law on Public Information and its possible implications on the free flow of information in Serbia.

**On 8 December**, my Office chaired a meeting in Sarajevo, Bosnia and Herzegovina with the aim of creating a joint OSCE, OHR, EU working group. The goal of the working group is to establish a coherent international mechanism, which would jointly advocate for and assist in finalizing the long-overdue implementation of media reforms in Bosnia and Herzegovina.

Due to the missing full implementation of media legislation, Bosnia and Herzegovina's public service broadcasting sector remains highly fragmented along ethnic lines. Also, the independence of the broadcast regulator has been challenged repeatedly by ad-hoc amendments to existing legislation.

**On 10 December**, I attended a PASOS international conference, "Return to Europe" – Reflections After 20 Years of Democratic Renewal, in Prague.

**On 13-14 January**, I visited Turkey upon the invitation of the Ankara Bar Association and several universities. In my speeches I raised attention to the dangers of the Internet Law of Turkey, and asked the authorities to bring the law in line with OSCE commitments and international standards on freedom of expression.

**On 27 and 28 January**, upon the invitation from the Council of Europe's Parliamentary Assembly, I addressed the Assembly's debate on freedom of the media. The debate was based on the report presented by Andrew McIntosh, the Chair of PACE Committee on Culture, Science and Education.

Following the debate, a recommendation to the Council of Ministers on Respect for Media Freedom was adopted: <http://assembly.coe.int/ConsultationNews.asp?idNews=5235>

During the visit, I met with CoE high officials, including Secretary General Thorbjorn Jagland, PACE President Mevlüt Çavusoglu, and Human Rights Commissioner Thomas Hammarberg.

**On 18-19 February**, my Office participated in a workshop organized by the Network for Reporting on Eastern Europe in Berlin, Germany. The event discussed difficulties journalists face when using access to information laws.

**On 22-23 February**, my Office attended a self-regulation conference in Istanbul, Turkey. Organized by Unesco, the conference concluded a joint project, conducted in cooperation with my Office, to support the establishment of effective self-regulatory mechanisms in South East Europe and Turkey.

***Planned activities for the next reporting period***

As in previous years, this Office is planning to hold its two annual media conferences, financed by extra-budgetary contributions: the South Caucasus Media Conference and the Central Asia Media Conference.

I therefore would like to thank those Delegations who have already indicated their financial support to the two events and also encourage other Delegations to consider supporting the conferences.







# Regular Report to the Permanent Council

29 JULY 2010

## INTRODUCTION

Mr. Chairman, Excellencies,  
Ladies and Gentlemen,  
Dear Colleagues,

I am honoured to have the opportunity to address you today and to present to you my first regular report since I was appointed on 11 March as the OSCE Representative on Freedom of the Media.

Needless to say, it is not only an honour, but foremost a great responsibility for me to lead this intergovernmental media freedom monitoring Office. The very fact that 56 participating States agreed to a set of commitments to uphold and foster media freedom is a remarkable achievement. It emphasizes the core values upon which the OSCE is based. It also distinguishes our Organization from other organizations and NGOs active in the human dimension.

But, in my humble opinion, this is not enough. The simple existence of this unique Office is not enough if we want to ensure better implementation of existing OSCE media commitments. Many argue that media freedom is in decline across the OSCE region. In some aspects, I can subscribe to that. However, what has been achieved since 1975 is by all means not small; on a global scale it is even exceptional. Holding ground and defending that which already has been achieved is a requirement of the moment. But it is also the right moment to move forward toward better implementation. Allow me to return to this topic later.

For my first Report I have decided not to single out in this Introduction particular cases in which I have intervened. The Report speaks for itself. I look forward to your comments, positive I hope, but I also welcome differing views and criticism. I have decided to focus more on my views and plans for the future of the Office. I am aware of the fact that my task today is not an easy one. I would like to underline several significant matters in this Report that in my view deserve a mention in this Introduction.

The current situation in Kyrgyzstan is now the focus of many OSCE structures.

Restoring stability in this participating State is a priority and I hope it will be achieved soon. My mandate urges me to view Kyrgyzstan from a long-term perspective. I believe that the events of the past months, as tragic and painful as they were, have provided a unique opportunity to improve, among other things, the media-freedom situation. The new Government has signalled that it is ready to engage in improving the working conditions for journalists and the media. During my meeting with President Otunbayeva last week, I proposed that, at this early stage, all political parties and candidates agree to a charter in which they promise to let media do their work. A new nationwide commitment to the independent work of media should also set the stage for the upcoming election campaign, when reporting by media is crucial for citizens to make informed choices.

I look forward to continuing a dialogue with the Kyrgyz authorities to further improve the media-freedom situation. Freedom of the media is a key component to guaranteeing stability and peace and my Office will continue our involvement in order to assist Kyrgyzstan in all matters of importance.

On 19 July, I was deeply saddened by the murder of journalist Socratis Giolias and urged the authorities of Greece to carry out a rapid and thorough investigation into this crime. Giolias was the administrator of the most popular political and social blog in Greece, *Troktiko (Rodent)*, and the information director of radio station *Thema 98.9*.

While I condemned this horrid crime against free speech and democracy, I was pleased to see the Greek Government act quickly to investigate this murder and inform me – several times within the first days after the tragedy – about the progress of the investigation. The Government assured me that it takes a most resolute stance on crimes against journalists. I hope that my co-operation with all the participating States will develop in the same spirit.

Finally, I would also like to commend Armenia for decriminalizing defamation. My Office reviewed this forward-looking proposal before the National Assembly in Yerevan adopted the law on 18 May. The President signed the bill into law on 15 June.

By decriminalizing libel and insult, Armenia has made a significant step forward to support freedom of expression. It has become the 11th OSCE participating State to do so. I hope that this number will grow in the near future.



Additionally, allow me to mention that I already have received invitations from the Governments of Albania, Belarus, Tajikistan, Turkmenistan and Ukraine to visit their countries. I thank these Governments for the co-operative spirit in which the invitations were extended. I plan to visit all five countries in the near future.

You will learn from the Activities section of this Report that my initial period in office exposed me to a heavy dose of OSCE activities, mostly due to the robust agenda the current Chairmanship is pursuing. The Corfu Process and the Informal Ministerial Meetings were precious occasions for me to get acquainted with the review process the OSCE is undertaking and also meet with representatives of the participating States. Apart from this, my appointment raised a great deal of interest by NGOs and the international press and exposed this Office to the public even more than in the past. All of this calls for a greater involvement from all of us in order to be able to show the work we do in a more transparent way and ultimately to present results to the outside world.

My decision was to fully dedicate this starting period to the needs of participating States and OSCE events. This period was interesting, challenging and a necessary exercise in order for me to get a clear picture and to assess the situation so I can present my Report to you and to formulate my strategy for the future of this Office, of course bearing in mind the mandate I have.

The main *modus operandi* to fulfil my mandate is known to all of you. I will assist participating States to implement the commitments that they undertook in a better way. I will evaluate needs and point out possible problems in order to determine what the participating States need to do to foster media freedom. Let me assure you that, in exercising my mandate, I will not hesitate to knock on your doors to remind you of your media-freedom obligations. I will do that because, by appointing me, you asked me to do so. I also will do it for the sake of maintaining the professionalism, transparency and credibility of my Office and the OSCE as a whole.

Allow me to emphasize two outstanding features of the OSCE organizational set-up that are key for protecting and developing media freedom:

1. The Office's independence. I perceive it as a sign of strength that 56 participating States not only agree to uphold media-freedom commitments, but also create an instrument to remind themselves of their obligation to comply with them. However, just having an Office is not enough. Only combined with your assistance, co-operation and active involvement, can my Office's work live up to your high expectations. I will deeply respect this fact when exercising my function. With this in mind, let me note that my

interventions are meant to assist; to support reform, and to bring national legislation and practices in line with the commitments. The implementation, however, largely remains the responsibility of the participating States. The role of my Office is to remind the participating States of their commitments and to offer assistance whenever required.

2. Public statements and transparency. Everything affecting the world of media is, by definition, public. Quiet diplomacy is therefore only one of many forms of intervention available to me. However, my mandate also empowers me to make public statements. I will use this effective instrument to make all layers of our societies aware of risks to media freedom in the participating States. I see this as key in assisting governments and civil society, including the media, to remedy media-freedom problems. This will strengthen their own significant efforts to improve.

I am fully aware that my Office cannot fulfil these tasks on its own. Close co-operation with other international organizations, media-freedom advocacy groups and “think tanks” is therefore essential for us. Promoting “best practices” brings results only if it is perceived with a will to learn from the others and constantly improve. I will remain vigilant to ensure that the existing “bad practices” or outdated laws in some participating States are not used by others as pretexts for avoiding improvement.

### ***Tasks and Challenges ahead for my Office***

Although the challenges and dangers that journalists face in our countries may differ from region to region, one sad fact holds true everywhere: The freedom to express ourselves is questioned and challenged from many sides. Some of these challenges are blatant, others concealed; some of them follow traditional methods to silence free speech and critical voices, some use new technologies to suppress and restrict the free flow of information and media pluralism; and far too many result in physical harassment and deadly violence against journalists. We regularly receive reports of threats, intimidation, administrative harassment (registration and re-registration requirements, alleged tax violations, cancelled contracts for printing or distribution of papers and the like).

### ***What is to be done?***

Authorities have yet to understand that media are not their private property and that journalists have the right to scrutinize those who are elected; those who voluntarily chose to represent citizens and to be in the public light. Violence against journalists equals violence against society and democracy and should





be met with harsh condemnation and prosecution of the perpetrators. There is no true press freedom as long as journalists have to fear for their lives while performing their work.

The OSCE commitments oblige all participating States to provide safety to these journalists. Combating violence and harassment against media professionals will be high on my agenda and I will do my best to pursue this goal with the mandate I am given and with all professional tools at my disposal.

- Monitoring and early warning, our core function, will remain the top priority of my Office.
- Fostering pluralism, which is the very essence of democratic societies and is fundamental for ensuring that citizens make informed choices, especially during elections, also is a priority.
- My Office will continue to observe and comment on widely applied practices of legal persecution based on “media-freedom-unfriendly” laws. These include sanctions for defamation, libel and insult; criticism of the powerful; coverage of “taboo topics” such as declaring certain events or personalities off limits for reporting; or even the outright framing of journalists on fabricated charges.
- In the area of electronic media, big issues which will have my Office’s attention include the digital switchover in broadcasting and matters related to New Media, including the Internet, blogging, citizen journalism and the like. New technologies demand new approaches to safeguarding the OSCE media-freedom commitments.

Needless to say, all societies recognize that free expression has its limits. We should not tolerate those who incite others to violence, engage in and promote child sexual abuse and exploitation, terrorism and human trafficking. We should recognize the legitimate role of government to take steps to protect privacy, personal data and the ownership of intellectual property. However, legal frameworks, needed as they are to protect these rights, should be designed in a manner that furthers freedom and should not go beyond what is necessary in a democratic society.

Most of these challenges are not new, but some are, especially those generated by technological changes.

But these challenges must not become an excuse for governments to systematically violate the rights and privacy of those who use the Internet for satire or criticism.

My Office is currently working on the compilation of the first comprehensive

matrix on Internet legislation which will include an overview of legal provisions related to freedom of the media, the free flow of information and media pluralism on the Internet in the OSCE region.

If we look at freedom of the media from a typical cross-dimensional angle, it is a cornerstone upon which society is built. Not only does it directly affect other human rights issues, such as elections and minority concerns, it also plays a crucial role in debating hard-core security matters and new threats to security linked to transnational threats. If we touch upon issues like migration or climate change or transnational threats, including terrorism, a meaningful debate without free and independent media is unthinkable.

Freedom of the media concerns arise in most OSCE participating States. They only manifest themselves differently. My guiding principle is to observe the issues based on the seriousness and the scope of problems, rather than on their geographic origin. Please, do not get me wrong, this is not about me: Representatives come and they go but this Office, with all the values and past achievements, should stay. This Office is one of the mirrors this Organization has to the outside world.

I kindly ask for your support, in the true spirit of the OSCE. I would like to see an issue of one participating State become that of others. My Office will continue to compile facts, trends and cases in an impartial manner. For me, one thing is already crystal clear: Without your active support and involvement none of these plans will be fulfilled. This Office was created by you and is for you to shape. It is up to all of you to choose the path this Office should take going forward, while all the time preserving its core values: neutrality, transparency and professionalism. Above all else, we must continue to recognize the importance of free media to free societies. Those values never should be underestimated.

## **Issues Raised with the participating States**

### **Albania**

**On 28 June**, I addressed Albanian authorities regarding the so-called Pango defamation case. In a letter to Ilir Meta, Minister of Foreign Affairs, and Bujar Nishani, Minister of Justice, I expressed concern about the decision of a Tirana District Court to order Top Channel TV to pay €400,000 in moral damages to former Minister of Tourism, Ylli Pango, for airing on 4 March 2009 secretly filmed footage which allegedly showed the minister requesting favours in return for a job in his ministry. This led to Pango's dismissal from office.

I reminded the authorities that the media's watchdog role in any truly democratic



society demands investigative journalism and that damages awarded in any case should be proportionate to the actual harm caused and the economic situation of the media concerned and should not lead to a chilling effect on reporting.

On 16 July, during the Informal Ministerial Meeting in Almaty, I had the opportunity to meet Minister Meta and to bring to his attention once again the above-mentioned case. The Minister kindly agreed to convey my letter to President Bamir Topi who, according to the Constitution of Albania, chairs the High Council of Justice. During the meeting, I offered my Office's full support in assisting Albania with the reform of its legal media framework by providing legal reviews on relevant media legislation.

## Armenia

**On 31 March**, I forwarded to Nerses Yeritsian, Minister of Economy, an analysis of the "Concept Paper on Migrating to Digital Radio and Television Broadcasting in Armenia" written by two international experts my Office had commissioned. In my letter, I pointed to the shortcomings our experts found in the Concept Paper and recommended that public discussions involving all stakeholders be held on those issues. (See Legal Reviews)

I was pleased that the Armenian authorities followed my suggestion and, together with the OSCE Office in Yerevan, organized a public discussion on 18 May. This event was a great opportunity to make my first visit to Armenia. On 18 May, I was received by President Serzh Sargsyan and discussed with him Armenia's ongoing media reforms, including the move from an analogue to a digital broadcasting system and the current amendments to the law on Television and Radio Broadcasting.

I also met with National Assembly Deputy Chairman Samvel Nikoian, Minister Yeritsian, Deputy Foreign Minister Arman Kirakossian and the President of the National Commission on Television and Radio, Grigor Amalian. During all my meetings with the Armenian authorities, which were held in a very open and constructive manner, I stressed that, in order to ensure broadcast pluralism, tender procedures should be made public well in advance and the digital switchover should be carried out in a transparent manner.

I was pleased that my visit coincided with the adoption of amendments to the civil and criminal codes, and to the code of criminal procedure, which partially decriminalize defamation. I was also pleased to learn that legislators took into consideration many of the recommendations that were contained in the legal analysis of the proposed amendments I had forwarded to them on 12 April. I commended the National Assembly for decriminalizing defamation by adopting

the amendments to the Criminal Code on 18 May.

On 20 May, the National Assembly voted to amend an existing, related law on Television and Radio Broadcasting. My Office quickly reviewed the proposed changes to this law. While some of my Office's concerns were addressed during the National Assembly hearings that followed the first vote, the amended law was passed in a final reading on 10 June.

**On 15 June**, I issued a public statement in which I regretted the fact that the new legislation failed to ensure broadcast pluralism. Shortcomings include a limit to the number of broadcast channels; a lack of clear rules for the licensing of satellite, mobile telephone and online broadcasting; the placement of all forms of broadcasting under a regime of licensing or permits granted by a national regulatory agency; the granting of authority to the courts to terminate licenses based on provisions in the law that contain undue limitations on freedom of the media; and a lack of procedures and terms for the establishment of private digital channels.

Much to my regret, President Sargsyan on 17 June signed the bill into law. I sincerely hope that, as I was assured, work on this important piece of legislation will continue this fall.

On a positive note, I welcome the fact that on 15 June President Sargsyan signed the amendments to the Criminal Code, making Armenia the 11th participating State to decriminalize defamation. I hope that other OSCE participating States follow the example of Armenia and intensify efforts to decriminalize speech offenses.

## **Azerbaijan**

**On 25 March**, I wrote to Foreign Minister Elmar Mammadyarov to welcome President Ilham Aliyev's decision to pardon Ganimat Zahidov, chief editor of the newspaper Azadliq. Zahid served half of the four year-prison term he was sentenced to after being convicted on questionable criminal charges.

All my subsequent interventions focused on the three remaining jailed journalists and bloggers.

**On 22 April**, I publicly called upon Azerbaijani authorities to comply with a judgment of the European Court of Human Rights holding that journalist Eynulla Fatullayev had been wrongfully sentenced to eight-and-a-half years in jail in 2007 and should be immediately set free. The editor-in-chief of the now-closed



independent Russian-language weekly, *Realny Azerbaijan*, and the Azeri-language daily, *Gündalik Azərbaycan*, was sentenced in 2007 on charges of defamation, incitement to ethnic hatred, terrorism and tax evasion. On 15 July, Azerbaijan appealed to the Grand Chamber of the European Court of Human Rights.

**On 15 June**, I wrote to President Aliyev asking him to secure the release of Fatullayev and two video bloggers – Emin Abdullayev (*Milli*) and Adnan Hacizade – who are serving two and two-and-a-half years in jail, respectively, on charges of hooliganism and inflicting light bodily injuries. An appeals court in March upheld both sentences.

On 6 July, a district court in Baku sentenced Fatullayev to an additional two-and-a-half years in a maximum security prison colony on highly questionable drug-possession charges. On the same day, I publicly condemned this new sentence which, in my view, shows that Azerbaijan is unwilling to fulfil its OSCE media-freedom commitments.

My Office will continue to closely monitor the Fatullayev case and will continue to insist that this journalist, as well as the two video bloggers, be set free.

## **Belarus**

**On 25 March**, I wrote to Belarusian authorities to express concern about intimidation by law-enforcement authorities of Natalia Radina, editor of *Charter97*, Irina Khalip, Minsk correspondent of *Novaya Gazeta* and Svetlana Kalinkina and Marina Koktysh of *Narodnaya Volya*. In connection with the so-called “hunting case”, offices and homes of the journalists were raided and work equipment and materials were confiscated. During the search in the office of *Charter97*, the website’s editor, Natalia Radina, was assaulted.

**On 6 May**, I addressed Sergey Martynov, Minister of Foreign Affairs, on the same matter. I also made a public statement on 10 May expressing regret that pressure against the above-mentioned members of the media had increased.

In the same letter to the Minister, I also raised concern about the criminal defamation investigation, under Article 188 of the Criminal Code, launched against *Charter97*. The defamation case was based on users’ comments posted on the *Charter97* website in February 2009 in response to the article that it reprinted from *Sovetskaya Byelorussiya*, an official state newspaper.

Additionally, I was disappointed that the implementing guidelines to the Presidential decree “On Measures to Improve the Use of the National Segment of

the Internet" were adopted without prior consultation and assistance previously offered by my Office.

The Permanent Delegation of Belarus to the OSCE has forwarded to my Office a non-paper "On measures to improve the use of the national Internet segment in Belarus and the existing international practice in this sphere". The document refers to regulatory measures in other participating States which are believed to be similar to the new Belarusian provisions. My Office is currently studying the document.

During the Informal Ministerial Meeting in Almaty, I spoke with Minister Martynov. We discussed the cases mentioned above and the developments regarding the new Internet legislation. I was pleased to receive an open invitation to visit Belarus and the assurances of the authorities to hold a round table on the Internet. I look forward to visiting Minsk.

### **Bosnia and Herzegovina**

I was concerned to learn about an instruction issued on 5 March by Milorad Dodik, the Prime Minister of Republika Srpska, in which he calls upon all of the entity's public institutions to cut their co-operation with the public service broadcaster RTVFBiH after airing an allegedly wrong portrayal of the entity's governmental actions.

The instruction was directed at governmental and administrative bodies, public enterprises and schools and instructs these institutions to reject any requests for interviews or information coming from RTVFBiH and to cut any advertising agreements with the public service broadcaster, which effectively leads to media censorship. This development comes despite the assurances received by my predecessor, Miklós Haraszti, after his visit to the country in February 2007 following a governmental boycott of the public broadcaster BHRT. Haraszti was told that incidents like these would not become normal behaviour toward public media.

I fully support the reaction of the OSCE Mission to Bosnia and Herzegovina, emphasizing that public broadcasters must not be exposed to any political pressure or limitations on media freedom. Grievances of any kind should be settled through legal or self-regulatory mechanisms.

On 1 April, I received a letter from Valentin Inzko, High Representative and EU Special Representative for Bosnia and Herzegovina, informing me about the continuing deterioration of the country's media situation and the increasing



political pressure exerted on media in the run-up to the general elections this autumn. Inzko also referred to the above-mentioned instruction issued by Dodik and the increased verbal attacks against RTVFBiH journalists as a consequence of this instruction.

In my reply of **14 April**, I reiterated my Office's readiness to support an EU-led approach by the international community which would send the necessary signal to the political elite to more strongly support media freedom in Bosnia and Herzegovina.

I proposed a high-level meeting with representatives of the international community, preferably under the auspices of the EU, the OSCE and the OHR, to finalize and endorse media-freedom recommendations as a joint international mechanism. These recommendations could provide the EU with specific benchmarks for progress on media legislation and ensure the independence of media institutions as part of the EU Partnership conditionality.

On 16 July, I learned that the government of Republika Srpska, upon a public invitation for bids for public media support, had distributed significant amounts of money to media outlets in the entity. The allocation of funds, however, was approved before the deadline for submission of bids had passed. While governmental support to media, particularly in times of financial hardship, is not uncommon, procedures need to be transparent and allocation of funds criteria-neutral to ensure that media remain independent of governmental influence.

I was concerned to learn that on 21 July the highest authority of the Islamic Community of Bosnia and Herzegovina, Reis-ul-Ulema Mustafa effendi Cerić, proposed the creation of a separate public television channel in the Bosnian language. This proposal was prompted by a television presenter's use of a Croatian word in a news summary. The public broadcasting service in Bosnia and Herzegovina is composed of one BiH-wide channel and two entity television stations, together serving a population of four million people. The establishment of any additional public television stations along ethnic lines bears the risk of further fragmenting the already divided media landscape in Bosnia and Herzegovina. I urge the authorities to complete the reform of the public broadcasting system and fully implement the appropriate legislation.

## **Canada**

**On 12 May**, in a letter to Canadian authorities, I welcomed a Supreme Court ruling that confirmed, for the first time, the right of journalists to protect their confidential sources. However, I noted the limits of that ruling which obliges

media in each case to prove that the public interest of preserving the anonymity of sources outweighs the interest of society in investigating a crime.

On 21 May, I received an answer from the Delegation of Canada indicating that my letter had been forwarded to the relevant authorities in Ottawa who should provide me with a review and an explanation of the judgment. I look forward to receiving the reply.

**On 5 July**, I wrote again to Canadian authorities to express concern about reports of mistreatment of some journalists covering the Group of 20 Summit in Toronto on 26-27 June. I considered the incidents regrettable as most of these people were clearly identified as journalists. I hope that an investigation into the matter has been launched and I encourage police and journalists' associations to discuss these issues jointly.

## **Estonia**

**On 25 March**, I sent a letter to Urmas Paet, Minister of Foreign Affairs, and Ken-Marti Vaher, Chairperson of the Legal Affairs Committee of the Riigikogu (Parliament), to enquire about a draft law on the protection of journalists' confidential sources, which was being considered by the Riigikogu. I was informed that the draft might allow too many exemptions to the journalists' right not to disclose the identity of their sources.

I received responses from the Estonian authorities: on 6 April from Rein Land, Minister of Justice and the author of the draft, on 7 April from the Minister of Foreign Affairs and on 20 May from the Chairperson of the Legal Affairs Committee. My correspondents assured me that Estonia was committed to adopting a law in line with international standards. I was informed that a working group representing Estonian media and other stakeholders was established to discuss the initiative.

## **France**

On 5 July, President Nicolas Sarkozy nominated a new head of the public service broadcaster, France Television, following a new selection procedure approved in March 2009 as part of a reform of audiovisual laws.

Although this nomination by the President comes with extensive approval guarantees by the regulatory authority and requires approval by three-fifths of the relevant Parliamentary Commission, I would like to restate that it is the position of my Office that the presidential nomination of the head of a country's public





service broadcaster is an obstacle to its independence and contradicts OSCE commitments.

This concern was already expressed by my predecessor, Miklós Haraszti, in a letter sent to the President on 16 December 2008.

## **Georgia**

**On 15 March**, I publicly called upon Georgia's broadcasters to abide by ethical standards of journalism and cautioned them against spreading false information that may impact media freedom and security. My first intervention as Representative was prompted by a hoax report aired by Imedi TV stating that President Mikheil Saakashvili had been assassinated and that Russian troops were advancing toward Tbilisi. This report, which carried no clear warning that it was fictitious, spread panic among the Georgian public. While condemning Imedi TV's irresponsible approach, I commended Georgia's National Communications Commission for swiftly reacting to the controversial television report. I also offered to assist Georgia in enhancing and strengthening its self-regulation mechanisms.

**On 16 April**, while in Tbilisi on the occasion of a media-freedom conference, I met Davit Bakradzet, the Speaker of Parliament, Dimitri Shashkin, Minister of Education and Science, David Jalagania, Deputy Foreign Minister, Akaki Minashvili, Chairman of Committee on Foreign Affairs of the Parliament, Irakli Chikovani, Chair of the Georgian National Communications Commission, and representatives of the media community of Georgia.

During my meetings, I welcomed the positive steps that Georgia has already undertaken, especially regarding decriminalization of defamation and the financing of the Public Service Broadcaster, but I also expressed my hope that the reform process will continue. I encouraged the Head of the National Communications Commission to consider issuing new broadcast licenses with national coverage even before the digital switchover in 2015. I was pleased to learn that Georgia is currently drafting legislation regarding transparency of media ownership.

I have taken note of the fact that Parliament on 2 July voted to write off the debts of all national and regional television stations. I hope this measure will be implemented for the benefit of all broadcasters, regardless of their political affiliations, thus contributing to enhanced media pluralism.

I was pleased to hear that, following my suggestion, the Georgian National

Communications Commission already has lodged an application to become a member of the European Platform of Regulatory Authorities. For more information on EPRA see <http://www.epra.org>.

## **Germany**

**On 6 May**, I wrote to Sabine Leutheusser-Schnarrenberger, Minister of Justice, to express appreciation and support for her recent legislative proposal to strengthen media freedom in Germany by better protecting journalists' confidential sources. I would be pleased to see Germany joining the list of OSCE participating States that have adopted a shield law for investigative journalists and wished her success in this important endeavour.

I welcome the fact that on 25 March the ZDF-Staatsvertrag, the public service broadcasting law establishing a second German public broadcaster, was taken to the country's highest court to assess its constitutionality and accordance with freedom of the media principles. This move came after the refusal of ZDF's administrative board on 27 November 2009 to re-nominate the broadcaster's editor-in-chief.

In a letter to Leutheusser-Schnarrenberger, my predecessor, Miklós Haraszti, had asked the authorities to approach the judiciary for a clarification on whether the composition of the administrative board and its role in the appointment of the editorial management of the ZDF was constitutional.

## **Greece**

**On 19 July**, I wrote to Greek authorities condemning the murder of journalist Socratis Giolias and asked for a rapid and thorough investigation into the matter.

Giolias was shot on 19 July in front of his home in Athens by unknown assailants. He was a well-known investigative journalist, the administrator of the most popular political and social blog in Greece, "Troktiko" (Rodent), and the information director of radio station Thema 98.9. As the motives of his killing are still not fully clear, I asked the Greek authorities to ensure that his murder is investigated rapidly and thoroughly, and the public is kept up to date about developments. I also recalled the recently adopted Oslo Declaration by the Parliamentarians of the 56 OSCE participating States, which emphasizes the unique and vital role of investigative journalism in strengthening democracies and calls upon participating States to vigorously prosecute all of those responsible for the murder of investigative journalists.



I was very much encouraged by, and thankful for the genuine co-operation that the Greek Delegation has had with my Office in providing all available information on this case. I was pleased to see the swift reaction of the authorities in condemning this horrendous murder, starting the investigation quickly and stressing that they will not tolerate free speech to be terrorized or intimidated.

On 28 July, I received from the authorities the latest updates on the investigation. I hope that the perpetrators will be soon brought to justice.

**On May 7**, in a letter to Greek authorities, I indicated that my office has been monitoring the case of Tele Radio, the oldest minority radio station in the region of Xanthi, which broadcasts in Turkish. In November of last year, the station received an official warning from the National Broadcasting Council stating that the main broadcasting language should be Greek. In case of non-compliance the Council said it could take further and harsher measures against the station. The warning was based on a law that requires a high capital investment, manpower and Greek-language skills to be considered for a license. My Office has been promoting the reform of the law since it was passed in 2007.

I was reassured by the Permanent Mission of Greece that there has been no follow-up to the warning against Tele Radio and that no restrictions have been imposed on other minority radio stations.

## **Hungary**

**On 23 June**, I wrote to the Hungarian authorities asking them to halt the draft media legislation that was to be voted on in Parliament at the end of June and start public consultations involving all stakeholders to modify the draft laws. The proposed media package could breach OSCE standards guaranteeing freedom of expression and freedom of the media, and its adoption could lead to all broadcasting being subordinated to political decisions.

On 22 July, I received the detailed reply from the authorities regarding the principles upon which the amendment to Article 61 of the Constitution and the modifications of the media law have been based.

On 23 July, I was sorry to hear that the Hungarian Parliament had adopted parts of the media package. As a result, two new bodies were established, the National Media and Telecommunications Authority and the Media Council, which is the new licensing body supervising both private and public broadcasting. Based on the new law, the president of the Authority and the president of the Media Council will be the same person, nominated by the Prime Minister for

nine years, and the Parliament will nominate, with a two-thirds majority that the government possesses, the members of the Council and the public-service broadcasting board. The opposition parties, the Association of Hungarian Journalists and other stakeholders have voiced their concern regarding the constitutionality of the new laws.

In the coming weeks, my Office will commission a detailed expert legal review of the drafts of the media package that are still awaiting adoption later this year. I hope that the recommendations of the review will be taken into consideration when finalizing these draft laws.

## **Iceland**

**On 17 June**, the Parliament unanimously passed a resolution that requires the government to draft media regulations to strengthen the protection of journalists' sources, shield reporters from foreign libel judgments, boost access to information provisions and exempt intermediaries, such as Internet service providers, from content responsibility. If passed, these measures would become the world's strongest protection for free speech and journalism. I therefore warmly welcome this step and will follow with great attention the drafting of these proposals and ultimately their adoption.

## **Italy**

**On 15 June**, I called on lawmakers to drop a draft law on electronic surveillance and electronic eavesdropping passed by the Senate on 10 June. This law could seriously hinder investigative journalism by criminalizing the publishing of documents related to court proceedings, police investigations or leaked wiretapped materials before the beginning of a trial. I underscored that the draft law in its current form contradicts OSCE commitments, especially as it prohibits the use of certain confidential sources and materials which may be necessary for meaningful investigative journalism in the service of democracy.

This appeal followed several interventions by my Office, the last one being a letter on 4 June to Renato Giuseppe Schifani, President of the Senate, as the bill reached the Senate for discussion. In this letter, I requested amendments to the bill in accordance with the recommendations of my Office sent to him in a letter dated 23 June 2009 from my predecessor, Miklós Haraszti. On 30 June 2009, my predecessor received an answer that the Senate president was not able to comment on the law as the bill had not reached the Senate at the time.

On 20 July, amendments improving the bill were introduced by the government



and so far have been approved by the Justice Committee of the lower house of Parliament. Changes include the authorization to publish transcripts of a criminal investigation before the beginning of a trial when considered relevant by investigating magistrates. I welcome this step and will continue to closely monitor the matter.

## **Kazakhstan**

**On 23 April**, I wrote to Kazakh authorities drawing attention to several developments concerning the Internet in Kazakhstan. I welcomed the annulment of a requirement that Kazakh websites be hosted by servers within the country. I also requested information on the purpose of and operating methods of the newly established Computer Emergency Response Team (CERT) within the Ministry of Information and Communication. As well, I asked that authorities resolve issues relating to the interruption of service to certain websites, including the Internet forum of the independent newspaper, Respublika, and YouTube.

**On 28 April**, I addressed the 9th Eurasian Media Forum in Almaty. During my speech, I publicly raised the case of the journalist Ramazan Yesergepov, editor of the newspaper Alma-Ata Info, who was sentenced on 8 August 2009 to three years in prison after being convicted of disclosing internal documents of the National Security Committee in an article that criticized its actions. I also expressed my concern about the reported blocking of websites and the problem that the newspaper Respublika is experiencing to find a printing house for its editions.

On 6 May, I received a response from the Kazakh authorities. I was informed that Respublika newspaper's Internet forum and YouTube were again accessible to users in Kazakhstan and that the resources were inaccessible due to technical problems and not to intrusion from the authorities. As for CERT's mandate, I was assured that limitation of Internet access or law-enforcement activities against Internet resources are not among the tasks of the Team.

**On 30 June**, at the OSCE High-Level Conference on Tolerance and Non-Discrimination, I had the opportunity to meet the OSCE Chairperson-in-Office, H.E. Kanat Saudabayev, Secretary of State and Foreign Minister. I brought to the attention of the Chairperson-in-Office the case of the imprisoned journalist Ramazan Yesergepov. I reiterated that citizens should have access to government-held information of public interest and journalists should not be criminalized for breach of secrecy. Only those whose job descriptions contain the duty to protect sensitive information should be liable to justice in cases of breach of secrecy. I expressed my hope that, although the Supreme Court refused a re-

examination of the court proceedings, Yesergepov would be freed soon. During the meeting, I also once again expressed concern over reports on blocking of several independent websites.

During my visit in Astana I also met with Nurai Urazov, Vice Minister of Information, and Dulat KUSDAVLETOV, Vice Minister of the Ministry of Justice. I discussed the ongoing media legislative reform process, including both recently adopted legislation and that being drafted. I was told that Kazakhstan is planning to draft legislation on Access to Information and that decriminalization of defamation is still on the agenda of the authorities. I offered my Office's support in this important endeavour.

**On 5 July**, I wrote to Minister Saudabayev summarizing all the issues raised during my visit to Almaty.

At a press conference during the Informal Ministerial Meeting in Almaty, I once again, this time publicly, raised the above-mentioned issues. I also expressed my concern about the consequences of the recently adopted Leader of Nation law may have on media freedom and investigative journalism in the country.

I look forward to continue my constructive dialogue with the Kazakh authorities on media freedom related issues. My Office stands ready to support Kazakhstan's media legislation reform.

## **Kyrgyzstan**

**On 16 March**, in a letter to Kadyrbek Sarbaev, then Minister of Foreign Affairs, I expressed concern over several negative developments that led to serious infringements on media pluralism in the country. I raised the issues of the removal of Radio Free Europe/Radio Liberty (RFE/RL) from air, inaccessibility of some Internet sites, the seizure of the opposition newspaper, Forum, and an assault against Abduvahab Moniev, the editor-in-chief of the opposition website Press.kg. I requested that RFE/RL be allowed back on air and asked authorities to conduct investigation and resolve the situation.

In a public statement **on 7 April**, I called on Kyrgyz authorities to restore access to information in Kyrgyzstan and allow journalists to report on the situation in the country, so citizens could receive full-coverage of the events taking place in their country.

Since events of 6-8 April, my Office has carried on an intensive dialogue with the authorities in order to assist them in restoring media freedom in the country. **On**



**19 April**, I made a public statement acknowledging the first steps of the Kyrgyz Provisional Government to restore media freedom and calling for further media reform. I also welcomed the return of RFE/RL programs back on air after having been suspended since October 2009.

**On 12 May**, I welcomed the efforts of the Kyrgyz Provisional Government to restore public service broadcasting and offered my support on this initiative and other media reforms as needed. In addition, on the same day my Office offered Kyrgyz authorities a legal analysis of the Decree on public broadcasting adopted by the Kyrgyz Provisional Government on 30 April. (*See Legal Reviews*)

**On 2 June**, in a letter to Rosa Otunbaeva, then the Chairperson of the Kyrgyz Provisional Government, I welcomed the ongoing efforts to restore media freedom in the country and offered suggestions regarding the kind of assistance my Office can offer to improve the media situation in the country.

Specific forms of offered assistance included:

- Continuing legal support,
- Facilitation of the discussion of the role of independent media and public service broadcasting and a national multi-partisan platform regarding the role of media,
- Introduction of safety practices for media professionals, including fluorescent vests that visibly distinguish journalists on duty and a free-media hotline for journalists to report cases of intimidation or violence against them,
- Assistance with identification of the partner organizations to conduct professional training for public service broadcasting staff.

On 22 June, I was pleased to receive a swift response from now-President Otunbaeva and was informed that ensuring the safety of journalists, promoting universal standards of free press and restoring the media system in the country are important goals for the government. I was also happy to learn that my suggested ways of assistance were considered positively and were seen as important ones.

**On 19 July**, during my first visit to Kyrgyzstan, I was received by President Otunbayeva. I once again welcomed her pledge to continue to support and further develop media freedom in Kyrgyzstan. During the meeting, I stressed the urgent need for a quick reform of the Public Service Broadcaster, particularly in light of the upcoming October parliamentary elections. Free, fair and credible election results are only possible if every citizen can be well informed and has access to sufficient information representing a diversity of views. Therefore, I expressed hope that the Observation Board of the public service broadcaster

would be appointed as soon as possible so that it can start its important work. During the meeting, I also raised the issue of protecting journalists and explored possibilities to assist in developing a training strategy that could be offered to journalists in Kyrgyzstan.

I look forward to continuing my dialogue with the Kyrgyz authorities to further improve the media freedom situation. Free media is a key component to guaranteeing stability and peace.

## **Latvia**

**On 20 April**, I wrote to Latvian authorities expressing concern and asking for additional information about the 16 April killing of Grigorijs Nemcovs, the founder and publisher of the regional newspaper Million and owner of a television station in Daugavpils.

On 25 May, I received a response explaining the progress of the investigation into the crime and was assured that investigators swiftly reacted to this crime. I hope that the perpetrators soon will be brought to justice.

**On 20 May**, I wrote to Aivis Ronis, Minister of Foreign Affairs, expressing my concern about the 11 May search of the home and confiscation of a computer belonging to journalist Ilze Nagla of LTV's De Facto news show.

Nagla was the first journalist to break the news about a person who gained access to the protected server of Latvia's tax authority to copy tax declarations. The data revealed that board members of state-owned companies were receiving substantial bonuses in a time of austerity. Although the method used to obtain this information was illegal, the facts disclosed by the news show were not state secrets.

Investigators said they wanted to check Nagla's computer to determine if the reporter had the leaked data in her possession.

I offered the government some of my Office's essential recommendations on the protection of journalists' anonymous sources.

On 9 July, I received a detailed response from the authorities clarifying the circumstances of the case, including information regarding a court hearing on Nagla's complaint. The authorities assured me they reacted promptly in order to ensure that freedom of the media principles were observed in the handling of the matter.





## Russian Federation

**On 5 May**, I wrote to Russian authorities to express my concerns over a recent attack against Arkady Lander, the chief editor of Mestnaya, a Sochi-based newspaper known for its critical stance toward regional authorities.

**On 31 May**, I wrote to the authorities following a series of attacks against journalists in Daghestan, St. Petersburg, Tomsk and Krasnodar. I asked them to shed light on the fate of Aleksei Dudko, a blogger and former journalist who had been recently arrested in Moscow and charged with possession of drugs and explosives. Dudko, who was reportedly beaten during his arrest, claims the drugs and explosives law-enforcement officers say they found on him and in his apartment were planted. He links his arrest to his blogging activities.

The consolidated response I received on 17 June provided detailed information on the Dudko case and the criminal investigations that were launched in most of these recent cases of violence.

**On 15-16 June**, I travelled to Moscow to attend an international media conference and meet with government officials. During my talks with Deputy Foreign Minister Aleksandr Yakovenko I urged the government of the Russian Federation to tackle the unrelenting violence against journalists and decriminalize defamation. My meeting with Deputy Communications and Mass Communications Minister Aleksei Malinin focused on Russia's plans to switch to terrestrial digital broadcasting in 2015. I also discussed with Minister Malinin the possibility of the Russian Federation joining the European Platform of Regulatory Authorities.

**On 16 June**, while in Moscow, I welcomed the adoption, by the Supreme Court of the Russian Federation, of a landmark resolution that instructs lower courts how to interpret and implement the 1991 Media Law. The "Resolution on the Practical Judicial Implementation of the Law of the Russian Federation on Mass Media" refers Russian courts to the basic principles of the European Convention on Human Rights on Freedom of Expression and Freedom of the Media and to the principles of the 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe. This document is a commendable effort to bring Russian court practice in line with international media freedom standards.

On 6 July, the head of the Memorial human rights center, Oleg Orlov, was charged with criminal libel for his criticism of Ramzan Kadyrov, the President of the Republic of Chechnya. Although Kadyrov had earlier announced his decision

to call off all his pending defamation lawsuits, he reversed his decision in Orlov's case. Should criminal proceedings go further, Orlov would face up to three years in jail. I hope the charges will be dropped. In democratic societies the activities of government officials must be open to public scrutiny and I urge once again the Russian Federation to abolish its criminal defamation laws, which have a chilling effect on freedom of speech.

Earlier this month, both chambers of the Russian Parliament voted to amend the Code of Administrative Violations and the Law on the Federal Security Service (FSB). The Office of the Russian Human Rights Commissioner; the Presidential Council for the Promotion of Civil Society Institutions and Human Rights and civic rights defenders have all opposed the proposed changes, which aim to give the FSB enhanced prerogatives in the fight against terror. In addition, concerns remain over the possible implications these changes could have for media freedom. My Office will closely monitor the implementation of the legal changes and react accordingly.

## **Serbia**

**On 26 July**, I strongly condemned the brutal attack against Teofil Pančić, journalist of the weekly Vreme. Pančić, who is known for his critical columns against nationalism and sports hooliganism, was followed by two unknown assailants on to a Belgrade bus late in the evening of 24 July and beaten with a metal bar. He was rushed to the hospital and treated for a brain concussion. I welcomed the decision by the Government to make the solving of this case, as well as the general protection of journalists and media in Serbia, a priority. I look forward to receiving updates on the investigation.

I was pleased to learn that on 22 June, the Constitutional Court of Serbia unanimously rejected several amendments to the Public Information Act adopted on 31 August 2009 in a fast-track procedure. My predecessor, Miklós Haraszti, at that time voiced his concern as reported to you on 29 October 2009.

The Court found that some amendments to the Public Information Act violated Serbian and international standards, and objected to the provisions governing the founding and registration of media outlets and the proposed fines for violating them. My Office stands ready to assist the Government in reforming the Public Information Act in line with international standards and OSCE commitments.



## Spain

**On 11 June**, I wrote to Spanish authorities to draw their attention to the 1 June ruling of the European Court of Human Rights in the case of the journalist Jose Luis Gutiérrez who was found liable and fined by a Spanish court in 1997 for defaming the late King of Morocco, Hassan II. The ECHR ruled that the judgment against Gutiérrez violated Article 10 on the right to freedom of expression. In my letter, I called for the repeal of obsolete laws regarding defamation of public figures and suggested the authorities use this opportunity to adopt the most advanced international practices on defamation and repeal laws relating to criminal libel.

**On 19 July**, I received an answer from the authorities regarding the positive outcome in two cases raised by my predecessor, Miklós Haraszti, on 25 November 2009 and 20 January 2010. The authorities informed me that on 11 June an appellate court revoked the sentence against Daniel Anido, director of the online radio Cadena SER, and Rodolfo Irango, its news director, who were convicted in December 2009 and sentenced to suspended jail terms for “revealing secret information”. The authorities also informed me that on 7 July, a criminal court ruled that Antonio Rubio, Deputy Editor in Chief of the newspaper El Mundo, who was prosecuted for “discovering and revealing State secrets” was found innocent. I welcome these two rulings that recognize the important role of investigative journalism in revealing information of public interest.

## Tajikistan

**On 4 June**, in a letter to Hamrokohon Zarifi, Minister of Foreign Affairs, I raised three ongoing libel cases that were filed by public officials against five newspapers, Aziya Plus, Farazh, Ozodagon, Paykon and Millat, demanding extortionate amounts of compensation that could lead to bankruptcy and closure of the newspapers. I sincerely hope that the higher court will rule in favour of the newspapers to preserve the fragile pluralism of print media in Tajikistan. During the Informal Ministerial Meeting in Almaty, I spoke with Minister Zarifi and discussed with him the above-mentioned cases. I offered my Office’s support for the improvement of the legal framework for media in the country, especially in the field of decriminalization of defamation. I was pleased to receive an open invitation to visit Tajikistan to receive first-hand information on the media freedom situation in the country.

## Turkey

**On 26 March**, I wrote to the authorities regarding the high number of criminal

prosecutions against journalists in Turkey who cover issues of sensitive nature, including terrorism, noting that these judicial proceedings can threaten freedom of expression in the country.

I stressed that it is the media's task to inform the public on matters of public concern and governments should acknowledge the important public function of the media by ensuring the implementation of an appropriate legal and regulatory framework.

I recalled the December 2008 joint statement of my Office, the Special Rapporteurs on Freedom of Expression of the United Nations, the Organization of American States, and the African Commission on Human and Peoples' Rights, advocating that the criminalization of speech relating to terrorism should be restricted to instances of intentional incitement to terrorism. Vague notions, such as the glorification or promotion of terrorism or extremism, and especially the cases of repetition of statements by terrorists in the media, should not be criminalized.

I hope that this approach will be increasingly adopted in legislation and court practice in Turkey.

**On 20 April**, I wrote to the authorities requesting information on the death of Metin Alataş, an employee of the Kurdish Azadiya Welat newspaper. Mr. Alataş was found dead on 4 April, hung from a tree in Adana, in south-east Turkey. Previously he claimed he had been threatened, and he was attacked in December for distributing copies of the newspaper.

On 7 July, I received a reply from the authorities, informing me that the recently concluded criminal investigation pointed to suicide.

**On 18 June**, I asked the authorities to restore access to YouTube and other services offered by Google, and bring the much-criticized Law No. 5651, commonly known as the Internet Law, in line with international standards on free expression.

The June 2010 decision of the Turkish Telecommunications Communication Presidency to block access to dozens of Internet addresses related to YouTube and Google services resulted in several Google services becoming unattainable or access to them becoming very slow. This considerably limits freedom of expression and severely restricts the citizens' right to access information.

The alleged reason behind the block is an unsettled tax dispute between the



Ministry of Transport and Communication and Google, the owner of YouTube. The recent blocking is a worrying sign that, instead of allowing free access to the Internet, new ways have emerged that can further restrict the free flow of information in the country.

I also stressed in my letter that more than 5,000 websites have been blocked in Turkey during the last two years, and repeated my call to reform the Internet Law. I also referred to the legal review of the law commissioned by my Office in January, which is available on the website of the Office.

On 14 July, I received the letter of the authorities replying to my above concerns. I look forward to continuing the co-operation with Turkey on this issue as well.

## **Turkmenistan**

During the Informal Ministerial Meeting in Almaty, I met with Deputy Prime Minister and Foreign Minister Rashid Meredov. I welcomed the intention of the Turkmen government to allow private ownership of the media. I accepted an invitation to visit Turkmenistan to get acquainted with the media landscape in the country and explore ways of co-operation between the government of Turkmenistan and my Office.

## **Ukraine**

**On 1 April**, I wrote to Konstyantyn Hryshchenko, Minister of Foreign Affairs, to express concern about the attack on Vasyl Demyaniv, the editor-in-chief of the newspaper *Kolomoyskiy Visnyk*.

In a 22 July response, the authorities informed me that the police arrested a suspect who confessed to having attacked Demyaniv. I was also informed that the investigation established that the attack was not connected with Demyaniv's professional activities.

**On 22 April**, I wrote to President Viktor Yanukovich and on 23 April made a public statement welcoming the President's pledge to uphold media pluralism and honour OSCE media-freedom commitments.

I commended the new administration for its pledge to combat violence against the media as timely and expressed hope that it would translate into vigorous and resolute action to conclude the investigations into old and new cases of violence against members of the media, including the murder of *Ukrainska Pravda* journalist Georgiy Gongadze in 2000.

I also highlighted negative developments that could threaten media pluralism. They included the President's decision on 2 April to dissolve the national free speech commission, which was part of the presidential administration, and to change the legal status of the new head of the state television.

I offered Ukraine support for reform of the media law, including the adoption of laws on public service broadcasting, access to information, privatization of media and ownership transparency.

On 3 June, I received a letter from Minister Hryshchenko who, on behalf of President Yanukovich, invited me to visit Ukraine.

In my **16 June** letter to the Minister, I thanked him for the invitation and the opportunity offered to meet with the authorities and journalists to obtain first-hand information about the media-freedom situation. I also expressed concern about the developments regarding 5 Kanal and *TVi* television channels. I was informed that on 8 June a Kyiv court annulled the 27 January decision of the National Council for Television and Radio Broadcasting allocating broadcasting frequencies to the two channels. I viewed the 8 June decision as potentially negative for pluralism in Ukrainian broadcasting and requested additional information about these developments.

During the Informal Ministerial Meeting in Almaty, I discussed with Minister Hryshchenko my upcoming visit to Ukraine. I plan to travel to Kyiv in October in order to receive first-hand information on the developments mentioned above and on the overall media freedom situation in the country.

## **United States**

**On 9 June**, upon the invitation of the U.S. Helsinki Commission, I testified on threats to media freedom in the OSCE region. I used the opportunity to urge the adoption of a federal shield law in the United States. Such a provision is part of the Free Flow of Information Act of 2009, which passed the House of Representatives early in this session of Congress and currently awaits consideration by the Senate.

If passed, the Free Flow of Information Act would provide stronger protection to investigative journalists. Currently 36 U.S. states and the District of Columbia offer shield law protections. There are four states with some protection for journalists and 16 with no shield laws. I asked the Commissioners to continue their efforts to see the Act passed.



I was pleased to note that on the day of my testimony, Commission Co-Chairman Alcee L. Hastings presented my testimony to the U.S. Congress, where it was read into the Congressional Record. Representative Hastings also presented my plea in relation to the shield law to the Members of Congress. I hope to soon hear positive developments on this issue.

## **Uzbekistan**

**On 2 June**, I wrote to Vladimir Norov, Minister of Foreign Affairs, to express my concern over the imprisonment of journalist Hairullo Khamidov. On 27 May, Khamidov was sentenced to six years in prison on charges of associating with a radical Islamist group. Although the court proceedings were held behind closed doors, information made available to my Office indicates that Khamidov pleaded not guilty to the charges brought against him.

Khamidov was the deputy editor-in-chief of the *Champion* sports newspaper and a former commentator for the Tashkent-based *Novruz* radio station. In 2007, Khamidov's *Odamlar Orasida* newspaper was closed upon recommendations issued by the Uzbek Press and Information Agency.

In the same letter I raised the case of photographer and filmmaker Umida Akhmedova, who was found guilty of defaming the Uzbek people and its traditions by her photographs and a documentary film. Though she was amnestied by the court after the verdict was announced, Akhmedova now has a criminal record. I urged that she be completely exonerated of the charges because of the chilling effect not only on Akhmedova and other media professionals, but on freedom of expression grounds in general.

On 26 April, my Office received a letter from the authorities, restating the official view that Akhmedova's book and film constituted a violation of law. As my predecessor, Miklós Haraszti, did on many occasions, I call on authorities to release journalists Dilmurod Said and Solijon Abdurahmanov, who are serving twelve-and-a-half-year and ten-year prison sentences, respectively, on dubious charges. I also hope that cases of Khamidov and Akhmedova will be reconsidered by relevant authorities.

On a positive note, my Office, along with the OSCE Project Co-ordinator in Uzbekistan and Uzbekistan's National Association of Electronic Mass-Media, held a week-long television training course in Tashkent. (**See Projects**)

## **Co-operation with the OSCE Parliamentary Assembly**

**On 28 June**, I sent my Office's comments to João Soares, President of the OSCE Parliamentary Assembly, and Spencer Oliver, Secretary General of the OSCE Parliamentary Assembly, on the Draft Resolution on "The Protection of Investigative Journalists". We were glad to offer our comments to the Draft that was proposed by U. S. Senator Benjamin Cardin, the Vice President of the OSCE Parliamentary Assembly and the Co-Chairman of the U.S. Helsinki Commission.

**On 6-10 July**, at the Nineteenth Annual Session of the OSCE Parliamentary Assembly, the Parliamentarians of the 56 participating States unanimously adopted the Resolution. In a letter written to Senator Cardin **on 20 July**, I expressed satisfaction with the adoption of this important document and endorsed it.

## **PROJECTS AND ACTIVITIES SINCE THE LAST REPORT**

### **Visits and participation in events**

**On 16-17 March**, my Office briefed scholars at a meeting on "Roma and the media: countering prejudices and promoting tolerance" organized by ODIHR in Warsaw, **Poland**.

**On 24-26 March**, I was a lecturer in a Master Class in Broadcast Regulations for Elections organized by UNESCO and Albany Associates in Paris, **France**. See <http://www.albanyassociates.com/training/masterclass10.php>

**On 15-16 April**, I visited Tbilisi, **Georgia**, on the occasion of a conference promoting effective guarantees for freedom of expression in the South Caucasus, Moldova and Ukraine, organized by the Council of Europe.

**On 27-28 April**, I travelled to Almaty, **Kazakhstan**, to participate in the 9th Eurasian Media Forum. I took part in the opening session "Kazakhstan as chair of the OSCE: significance, expectations and opportunities" and in the session "Media Law and Media Freedom: Anxieties and Realities."

**On 3 May**, I participated in World Press Freedom Day events in Berlin, **Germany**, where the "The Legal Leaks Toolkit" was launched. The publication was prepared by Access Info Europe and Network for Reporting on Eastern Europe and funded by my Office. (**See Publications**) It is available at: [http://www.osce.org/publications/rfm/2010/05/43727\\_1462\\_en.pdf](http://www.osce.org/publications/rfm/2010/05/43727_1462_en.pdf)





I also used the visit for introductory meetings with the German Foreign Office and the head of the German Delegation to the OSCE Parliamentary Assembly.

**On 11 May**, I contributed to a conference titled “Independent media in Bosnia and Herzegovina under severe pressure” with an address given in *absentia*. The event was organized by the BH Journalists Association in Sarajevo, **Bosnia and Herzegovina**.

**On 13 May**, in Barcelona, **Spain**, I attended, for the last time, and chaired the 31st meeting of the European Platform of Regulatory Authorities. This provided the opportunity to celebrate the 15th anniversary of the establishment of EPRA which is the largest network of media regulators in the world (52 members from 43 states). On this occasion I decided to step down, in the middle of my second mandate as EPRA Chairperson, due to my recent appointment as the OSCE Representative on Freedom of the Media and my true wish to fully dedicate my efforts toward this new professional challenge and responsibility. My Office will, of course, continue to co-operate with EPRA and I will personally engage in exploring the possibility that the Representative’s Office becomes a standing observer of this platform, together with the Council of Europe and the European Commission.

**On 17-18 May**, I travelled to Yerevan, **Armenia**, on the occasion of a round table on Armenia's digital switchover, co-organized with the OSCE Office in Yerevan. The event brought together government officials, parliamentarians, as well as broadcasters, non-governmental organizations and international human rights organizations.

**On 18-19 May**, my Office participated in the OSCE Asian Partners for Co-operation conference in Seoul, **Korea**.

**On 25-26 May**, My Office and the OSCE Office in Tajikistan hosted the 12th Central Asia Media Conference in Dushanbe, **Tajikistan**.

**On 8 June**, my Office was invited to speak at a Balkans Forum meeting on the state of media freedom in South East Europe organized by the European Policy Center, a think-tank based in Brussels, **Belgium**.

**On 9 June**, I testified before the U.S. Helsinki Commission on “Threats to free media in the OSCE region” in Washington, D.C., **USA**. A text of the testimony is available at [http://www.osce.org/documents/rfm/2010/06/44433\\_en.pdf](http://www.osce.org/documents/rfm/2010/06/44433_en.pdf)

While in Washington I also met with U.S. Department of State officials Michael Posner, Assistant Secretary of the Bureau of Democracy, Human Rights and Labor, Nancy McEldowney, Principle Deputy Assistant Secretary of the Bureau of European and Eurasian Affairs and Anthony Pahigian, OSCE Coordinator. I also met with Catalina Botero, Special Rapporteur for Freedom of Expression of the Organization of American States.

**On 16-17 June**, my Office participated in a preparatory meeting on the human dimension for the incoming chairmanship in Vilnius, **Lithuania**.

**On 15-16 June**, I was invited by Mikhail Fedotov, secretary of the Russian Union of Journalists (SZhR), to address an international media conference. The conference was organized by the SZhR and the Moscow-based Center for Journalism in Extreme Situations to mark the 20th anniversary of the Russian Federation's 1991 Media Law. I also met with Deputy Foreign Minister Aleksandr Yakovenko and Deputy Communications and Mass Communications Minister Aleksei Malinin. I also attended a session of the Supreme Court, during which a resolution was adopted instructing lower courts how to interpret and implement the 1991 Media Law. My remarks are available at: [http://www.osce.org/documents/rfm/2010/06/44928\\_en.pdf](http://www.osce.org/documents/rfm/2010/06/44928_en.pdf)

**On 17 June**, I participated in an Expert Meeting on Human Rights and the Internet organized by the Swedish Ministry of Foreign Affairs, the Raoul Wallenberg Institute of Human Rights and Frank La Rue, the UN Special Rapporteur on the right to freedom of opinion and expression in Stockholm, **Sweden**.

**On 21 June**, my Office participated in the European Commission's consultations on the preparation of the EU's 2010 enlargement package in Brussels, **Belgium**.

**On 28 June**, my Office contributed to the civil society preparatory meeting ahead of the High level conference on Tolerance and Non-discrimination held in Astana, **Kazakhstan**.

**On 29-30 June**, I spoke at the High level conference on tolerance and non-discrimination in Astana, **Kazakhstan**. My introductory remarks to the session on the role of independent media in addressing manifestations of intolerance can be viewed at: [http://www.osce.org/documents/rfm/2010/06/45224\\_en.pdf](http://www.osce.org/documents/rfm/2010/06/45224_en.pdf)

**On 8-9 July**, I participated in Informal Discussions on Lithuania's preparations for the Chairmanship 2011 in Vilnius, **Lithuania**.



**On 16-17 July**, I participated in an Informal Ministerial Meeting in Almaty, **Kazakhstan**.

**On 19 July**, I visited Bishkek, **Kyrgyzstan**. I was received by President Rosa Otunbayeva and held meetings with media and civil society representatives.

## **LEGAL REVIEWS**

### **Armenia**

#### ***Analysis of the Draft Laws of Armenia amending defamation legislation***

My Office analyzed the draft laws of Armenia amending defamation legislation. The initial draft was commendable for the initiative to decriminalize libel and insult. The review also welcomed the intention to amend the civil law to balance the right of citizens to protect their reputation with the right to free expression.

Our assessment of the Civil Code amendments was positive overall: The draft contained some progressive provisions, including those regarding defences applicable in defamation cases. It also limited the scope of persons who can sue for insult and defamation, introduces a ceiling on pecuniary compensation and establishes a time limit for legal actions to be brought.

Still, our expert made several recommendations for improving the draft.

- Legal definitions in the text should be streamlined to recognise the defence of truth, the defence of opinion and the defence of reporting words of others explicitly.
- In terms of remedies handed down by courts in defamation cases, their purpose should be explicitly stated as the redress of harm to reputation. All remedies for damages should be based on the three-part test outlined in Article 10 of the European Court of Human Rights.
- The ceiling for pecuniary damages should be lowered significantly. Additionally, the burden of proof should rest with the plaintiff; and persons who are not authors of defamatory materials should be exempt from liability.

### **Belarus**

#### ***Implementing Guidelines to the Presidential Internet Decree in Belarus***

My Office commissioned a legal analysis of the implementing guidelines (by-

laws) adopted by the Government of Belarus to complement Decree No. 60 "On measures to regulate the use of the national segment of the Internet". This set of legal provisions entered into force on 1 July. I regret to note that the by-laws were adopted without a wide public discussion.

The expert who reviewed the guidelines found the following positive features of the new regulations:

- The new regulations oblige state bodies and organizations to publish information about their work on their websites.
- Internet service providers are not liable for contents of the information published on the Internet.

However, these positive features are outweighed by the following areas of concern:

- Mandatory identification of users of devices enabling Internet access and of users of Internet services (this would make the confidentiality of journalists' sources, as guaranteed by the media law, problematic, and therefore would seriously hamper investigative journalism);
- Vague definitions of limitations and bans on dissemination of illegal content and the way of their implementation;
- Vaguely defined liability of the provider of information on the Internet in cases of violation of an order from a respective body on rectifying established violations, or of the requirement to cease the provision of Internet services;
- The lack of an obligation for state bodies to inform the public on the Internet not only of their activities, but also of the information that was received or created as a result of such activities;
- The requirement to accompany information or media materials disseminated through the Internet with a hyperlink to the original sources or media, which published them earlier.

## **Kyrgyzstan**

### ***Analysis of the Decree "On Establishment of the Public Television and Radio Broadcasting in Kyrgyz Republic"***

My Office commissioned a legal analysis of the Decree adopted by the provisional government on 30 April "On Establishment of the Public Television and Radio Broadcasting in Kyrgyz Republic". I welcomed the fact that the new Statute of the Public TV and Radio Broadcasting Corporation resembles the Statute of the Kyrgyz Republic "On the National Radio and Television



Broadcasting Corporation”, which was adopted by the *Zhogorku Kenesh* on 8 June 2006 and signed into law on 2 April 2007.

I especially welcome several positive elements in the Decree and the Statute, namely:

- The mandate of the executive structure of the Public TV and Radio Broadcasting Corporation is efficient to ensure effective management and functioning of the national public service broadcaster;
- The commitment for impartial and diverse news reporting is legally stipulated;
- The provisions on advertising and sponsorship are in line with international standards.

According to the expert analysis, there is still room for improvement though, including:

- Remedying inconsistencies between provisions of the Decree and the Statute, as well as eliminating the duplication of some provisions with current legislation;
- Rectifying the absence of minimal standards of financing to ensure financial independence of the public broadcaster.

## **Moldova**

### ***Analysis of the Draft Law on Freedom of Expression of Moldova***

My Office commissioned a legal analysis of the draft law on Freedom of Expression of Moldova. The Parliament adopted the Law on 23 April.

The expert found the draft law commendable as a significant step toward the realization of the right to freedom of expression in Moldova.

The expert found, however, that the law could be further improved in the following areas which are particularly important from an OSCE media-freedom perspective:

- The Law should ensure that all restrictions on the right to freedom of expression fulfil the necessity requirement of the three-part test set by the European Court of Human Rights: The test requires that any restriction of freedom of expression must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest, and (3) must be necessary to secure this interest.

- The confiscation of copies of a publication or liquidation of media outlets should be allowed only as the last resort in response to extremely serious violations of the law.
- The regulation on the protection of confidential sources should be in full compliance with Council of Europe Recommendation R (2000)7.
- The regime of measures for ensuring legal action should be narrowly and more specifically defined.
- Defamation complaints made on behalf of the dead should not be allowed.

### **Internet-related activities**

My Office participated in five events related to freedom of expression on the Internet.

**On 16-17 June**, my Office participated in an expert event on ensuring and strengthening freedom of expression on the Internet, jointly organized by the Swedish Foreign Ministry, the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and Frank La Rue, the UN Special Rapporteur on the right to freedom of opinion and expression.

**On 8 July**, my Office participated in a similar event held in Paris, **France**, which was initiated by the Foreign Ministers of France and the Netherlands. Upon the invitation of the two participating States, government officials, NGOs, industry representatives and international organizations discussed how to ensure media pluralism and freedom of expression on the Internet and how to maintain the open and global character of this new media platform. The event was the first of a series. Follow-up meetings, which my Office will continue contributing to, will be held in the second half of 2010.

Active participation was also ensured for two ODIHR events, held on 22 March in Warsaw, **Poland**, and 10 May in Amsterdam, the **Netherlands**. The events, bringing together participating States, NGOs and the Internet industry, were dedicated to the topic of addressing manifestations of hate on the Internet and aimed at forming specific recommendations to effectively tackle online hate without infringing on the right to freedom of expression and media pluralism on the Internet. The ODIHR events directly resulted from the Athens Ministerial Council Decision 9/09 of December 2009 which mandated ODIHR to explore the issue of hate-inciting material on the Internet.

My Office also contributed to this year's forum on European Dialogue on Internet Governance, held from 29-30 April in Madrid, Spain. The EuroDIG was organized by the Council of Europe, the Swiss Federal Office of Communication and the



Spanish Internet Governance Forum. Issues discussed included, among others, the public and economic value of the Internet, principles of “network neutrality” and policies for an open Internet, as well as online content policies and the role and obligations of governments in (non-) regulation of the Internet.

My Office has started a project to create a comprehensive research base on freedom of expression legislation applicable to the Internet. To this end, my Office commissioned the production of an OSCE-wide Internet regulation study which will result in the first comprehensive matrix on Internet legislation and provide an overview of legal provisions related to freedom of the media, the free flow of information and media pluralism on the Internet in the OSCE region. For this purpose, my Office will soon ask the participating States to provide information on their domestic legislation and pertinent practices related to media freedom on the Internet. The study is expected to be finalized in January 2011. A short report outlining the preliminary findings will be made available by the end of September 2010.

## **PROJECTS**

### **Baku seminar on government-media relations**

**On 19-20 April**, my Office conducted a two-day training seminar in Baku on government-media relations in a democratic society. The seminar was part of my Office’s training program that has already covered more than 10 OSCE participating States and attracted approximately 600 participants since 2005.

This was the third training event of this kind held in Baku, jointly with the OSCE Office. It looked into the Azerbaijani and international legal aspects of freedom of information and freedom of expression, including best practices in successfully managing government-media relations.

Sixteen heads of press and information offices of the ministries and government agencies, and 16 editors-in-chief of media outlets attended the training seminar.

### **Tashkent television training**

My Office recently co-organized a television training course in Tashkent in co-operation with the OSCE Project Co-ordinator in Uzbekistan and Uzbekistan’s National Association of Electronic Mass-Media (NAESMI). The training took place from 30 June through 5 July. It brought together 35 cameramen, editors and journalists from various Uzbek regional television stations. NAESMI already has expressed its desire for more advanced training in the future.

## **Co-operation with UNESCO on journalism education**

As a follow up to the 2009 Central Asia Media Conference devoted to journalism education, my Office and the UNESCO Almaty Cluster Office for Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan jointly supported a project to develop the Russian version of the *UNESCO Model Curricula for Journalism Education*. The curriculum focuses on practical skills and the role of journalism in society, business, politics, human development and other areas. The courses are designed to be adapted by universities and media organizations to meet national and local conditions.

The project, implemented by the Institute for International Journalism at Ohio University in the United States, involves compiling lists of Russian-language readings and resources for all courses, having the lists peer-reviewed by a panel of leading journalism educators and researchers, and working with journalism faculties and professional media trainers to incorporate courses into their programs.

## **Central Asia Media Conference**

During our 12th Central Asia Media Conference in Dushanbe on 25-26 May, I had the opportunity to meet many journalists, representatives of media organizations and public officials from Central Asia to discuss issues related to access to information, free flow of information on the Internet and general media developments in the region.

Journalists and representatives of governments and civil society from Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, as well as a journalist from Afghanistan, participated in the Conference. The two-day event provided a forum for discussion on media developments and challenges that journalists face in the region, with a focus on issues related to access to information and new technologies, including the Internet. Agenda topics included international standards on access to information, Internet development and regulation and access to information in Central Asia.

Conference participants adopted a declaration on access to information and new technologies in Central Asia, which is available in English and Russian at:

English version

[http://www.osce.org/documents/sg/2010/06/44316\\_en.pdf](http://www.osce.org/documents/sg/2010/06/44316_en.pdf)

Russian version

[http://www.osce.org/documents/sg/2010/06/44316\\_ru.pdf](http://www.osce.org/documents/sg/2010/06/44316_ru.pdf)





I called for more transparency and easier access to government-held information in my opening statement at the Conference. The full version of the speech is available at:

English version

[http://www.osce.org/documents/rfm/2010/05/44261\\_en.pdf](http://www.osce.org/documents/rfm/2010/05/44261_en.pdf)

Russian version

[http://www.osce.org/documents/rfm/2010/05/44261\\_ru.pdf](http://www.osce.org/documents/rfm/2010/05/44261_ru.pdf)

As in previous years, my Office holds two annual media conferences financed by extra-budgetary contributions. I would like to thank those Delegations that have provided financial support for the event in Central Asia: Sweden, the United States and Lithuania. The conferences provide a unique opportunity for participating States to engage in a constructive dialogue on media-freedom issues.

## **PUBLICATIONS**

### **Central Asia Media Conference**

As a follow up to the 11th Annual Media Conferences in 2009 my Office produced a book "Journalism Education – improvements of the quality of education and new technologies." The book compiles reports and papers of the international and national experts on the developments in journalism education and challenges that media professionals face in Central Asia.

The publication is available both in English and Russian at: [http://www.osce.org/fom/item\\_11\\_43018.html](http://www.osce.org/fom/item_11_43018.html)

### **The Legal Leaks Toolkit**

On 3 May in Berlin, I launched "The Legal Leaks Toolkit", a guide on how to access government-held information, on the occasion of the World Press Freedom Day.

The Legal Leaks Toolkit was prepared by the non-governmental organizations, Access Info Europe and Network for Reporting on Eastern Europe, with financial support from my Office.

The guide explains rules of access, appeal procedures and other important

aspects of access to information in the 45 OSCE participating States that have access to information laws.

The full text of "The Legal Leaks Toolkit" can be found at:  
<http://www.osce.org/item/43727.html?ch=1462>.

## **PLANNED ACTIVITIES FOR THE NEXT REPORTING PERIOD**

### **Bled Strategic Forum**

On 29-30 August, upon the invitation of the Slovenian Foreign Minister, I will attend the high-level Bled Strategic Forum in Slovenia titled "the global outlook for the next decade" and speak on the topic of the transformative power of the Internet. "*The Internet does Change Everything!*" <http://www.bledstrategicforum.org/>

### **International Press Institute address**

On 13 September, I will deliver the keynote speech at a Gala Dinner and Award Ceremony, to be held at City Hall on Monday, 13 September, during the IPI World Congress, Thinking the Unthinkable: Are We Losing the News? (Media Freedom in the New Media Landscape), in Vienna, honouring World Press Freedom Heroes. See more at:  
<http://www.freemedia.at/events/congress/>

### **Training for Moldovan Journalists on Internet Media**

My Office will organize, in co-operation with the OSCE Mission to Moldova, a seminar on Internet media in Chisinau in September. Twenty journalists from central and regional newspapers and broadcasters, including those from Gagauzia and Transnistria, will discuss the legal context, professional advantages and risks, as well as the sustainability of Internet media. This will help raise awareness in the local media community of the importance of new media, including social media, and offer practical solutions to challenges the Internet presents to small markets.

### **Internet Governance Forum**

I will participate in this year's Internet Governance Forum, to be held on 15-18 September in Vilnius, Lithuania, where my Office will organize jointly with the Council of Europe an open forum on how to balance the governing of hate speech with the right to freedom of expression and the free flow of information



on the Internet.

### **Reporters Without Borders**

On 6 October, I will participate in the Austrian chapter of Reporters Without Borders awards ceremony in Vienna.

### **Columbia University in New York**

Lecture on press freedom on 1 November.

### **7th Annual South Caucasus Media Conference**

My Office will organize the 7th Annual South Caucasus Media Conference on 11-12 November in Tbilisi, Georgia. This year's conference will discuss international standards and national developments in the area of access to information and Internet. It will feature topics which include legal developments related to access to information, Internet and the free flow of information and general media developments in the region.





## Regular Report to the Permanent Council

16 DECEMBER 2010

### INTRODUCTION

I am pleased to have this opportunity to address the Permanent Council on the heels of the OSCE Summit, which was so generously and capably hosted by the Kazakh Chairmanship.

I am aware that many had other expectations and aspirations for the Summit. But I am here to tell a different story.

Human rights issues and media freedom issues did not sidetrack the Summit. Indeed, the Summit was an endorsement of and a clear sign for OSCE Institutions such as my Office to redouble their efforts to engage with and assist the participating States in meeting their OSCE commitments.

Consider, if you will, Paragraph 5 of the Astana Commemorative Declaration, which, in part, states, “We stress the importance of the work carried out by the OSCE Secretariat, High Commissioner on National Minorities, Office for Democratic Institutions and Human Rights and [the] Representative on Freedom of the Media, as well as the OSCE field operations, in accordance with their respective mandates, in assisting participating States with implementing their OSCE commitments.”

To those of us who work in the media-freedom field of the human dimension, the Astana Summit is a landmark event. Why? Because the Summit participants, the participating States, in their tense negotiations that came down to the final hours, recommitted their nations to the fundamental principles that guide this Office.

And consider also the ringing words in Paragraph 6: “We reaffirm categorically and irrevocably that the commitments undertaken in the field of the human dimension are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned. We value the important role played by civil society **and free media** in helping us to ensure full respect for human rights, fundamental freedoms, democracy, including free and fair elections, and the rule of law.” [Emphasis added].

The Declaration reinvigorates this Office. It charts the road ahead and allows me to pursue the Mandate of my Office with even more determination – all in the spirit of the Astana meeting.

The Summit is a call to action to complete the still-unfinished work of the participating States to achieve the goals – the commitments – proclaimed during the past 35 years.

But let's be honest with each other. Dynamic words do not always translate into dynamic actions.

Just as the negotiators of the Helsinki Final Act agreed upon a “decatalogue” of principles, allow me to come to you today with 10 simple, straightforward principles, a decatalogue for free expression and media freedom, so to speak, which this Office will pursue with enthusiasm and a clear purpose in the coming years.

1. The OSCE sees itself as a club of democracies. Yet, year after year journalists are murdered across the OSCE region; others are beaten, harassed, threatened and assaulted. This violence must stop. It is the goal of this Office to assist participating States in whatever ways imaginable to reduce and eliminate violence against media. Simply put, to make the streets safe for reporters.
2. Only 11 of the 56 participating States have decriminalized defamation. Criminal statutes still are the most often used tool to punish and imprison journalists. Criminal libel must be abolished. Civil law provisions are sufficient to deal with cases where someone's reputation is damaged by media. My Office will continue to lend its support to all participating States working to make defamation a civil law matter.
3. When considering the role of media in the public debate, prison can never be a response to a manifestation of the human mind, be it written or spoken or in the form of satire or caricature. People should not be put in prison for expressing their views.
4. A major challenge of our time is safeguarding and fostering media pluralism. It is a particular challenge today as we still see government control of media outlets in some states while, in others, economic hard times are squeezing independent media. Because of these circumstances, editorial independence is undermined and economic independence is endangered. Governments are called upon to address both issues if free media are to

keep their role as a cornerstone of democracy.

5. Pluralism and the free flow of information are long-standing commitments within the OSCE. The Internet, as the first truly global medium, is the embodiment of these commitments. Hence, I call upon participating States to stop legislating the content of the Internet and to keep it free.
6. We are on the cusp of a technological revolution with the switch from analogue to digital terrestrial broadcasting. Governments should use this opportunity to foster pluralism in broadcast and thereby bring nationwide broadcast systems in line with their obligations under the OSCE commitments.
7. Technological advances may change how we send and receive information, but the commitments remain the same. Free expression and free media are at the heart of the OSCE corpus.
8. We often hear that the Representative on Freedom of the Media must be balanced. I disagree. Unbiased yes, but I have to point my finger to where the problems lie. Problems do not emerge according to some preordained, perfectly laid out grid. Problems usually start at the top – from governmental actions or inaction. My interventions cannot be called balanced. If I see a problem or a potential infringement of a media-freedom commitment, I call upon the relevant governments – regardless of where they sit in relation to Vienna.
9. The OSCE commitments are universally applicable to all 56 participating States. The tendency to apply them with the proviso “in accordance with national legislation and tradition” is undermining this universality. My role is to uphold the principle and to call for nations to adapt their laws to come into compliance with media-freedom commitments.
10. And, finally, it is essential to harness the momentum generated by the Astana Summit and move forward dynamically, as a group, to collectively reinforce the media-freedom commitments participating States have subscribed to over the past 35 years and roll them over into today’s reality.

The Astana Declaration is illustrative in showing the way forward when it states in Paragraph 1: “While we have made much progress, we also acknowledge that more must be done to ensure full respect for, and implementation of, these core principles and commitments that we have undertaken in the politico-military dimension, the economic and environmental dimension and the human

dimension, notably in the areas of human rights and fundamental freedoms.

It repeats the call in Paragraph 2: “We reiterate our commitment to the concept, initiated in the Final Act, of comprehensive, co-operative, equal and indivisible security, which related the maintenance of peace to the respect for human rights and fundamental freedoms...”

And again in Paragraph 7, when it states: “Respect for human rights, fundamental freedoms, democracy and the rule of law must be safeguarded and strengthened.”

Throughout the Declaration, the message rings clear: Commitment to and respect for fundamental freedoms guides this Organization today and into the future. I am honoured to take up that task when it comes to media-freedom issues.

Let me reassure you that the work of my Office is for the benefit of the participating States; we are here as a service to you. I hope that all the participating States would see this Office as an ally in the quest to meet their media-freedom commitments.

I would like to thank the government of Kazakhstan for its support during my first year in office. I also look forward to working with the Chairmanship of Lithuania in 2011. The incoming Chairmanship already has indicated that media freedom and, importantly, the safety of journalists, will be a priority.

I trust we will move forward from the impetus gained in Astana to see real progress in the coming year.

## **Issues Raised with the participating States**

### **Albania**

On 6 December I wrote to Foreign Minister Edmond Haxhinasta to express my concern about the assault on journalist Piro Nase of the daily *Panorama*. On 14 November Nase was beaten by two unknown assailants, suffering injuries to his head and face. The attackers reportedly also threatened the journalist by saying “Now, dare to write again what you have been writing, before, in that newspaper.”

Prior to that attack, Nase allegedly received verbal threats following the publication of an article on insufficient police action related to the cultivation of





illegal drugs in the town of Lazarat. I reminded the authorities that the safety of journalists and safe working conditions are indispensable for free media and for investigative journalism, indispensable for the public's right to know.

## **Armenia**

Following a meeting in May with President Serzh Sargsyan in Yerevan to discuss broadcast media reform, on 19 October I welcomed his initiative to create a working group to draft amendments to the new Law on Television and Radio Broadcasting. This working group held its first meeting on 13-15 October.

During the Astana Summit, I was once again given the opportunity to discuss the ongoing reforms with the President. Our discussion focused on the activities of the working group. I expressed hope that the law soon will be amended fully taking into account the recommendations of my Office and other international organizations.

## **Azerbaijan**

On 18 and 19 of November I welcomed the release of the jailed bloggers Adnan Hacizade and Emin Milli. Both were set free after serving more than half of the prison terms handed to them following controversial convictions on hooliganism and other charges. My Office will continue to monitor the two cases and I hope that the criminal record of the two bloggers will be expunged so they continue working without limitations.

I am encouraged by these developments and hope that, following this positive trend, the imprisoned editor, Eynulla Fatullayev, also will be released soon. On 11 November the Supreme Court of Azerbaijan upheld a European Court of Human Rights decision demanding Fatullayev's immediate release on the grounds that his right to freedom of expression had been violated and that he had been denied a fair trial. Fatullayev remains behind bars on questionable drug-possession charges that were leveled against him while he was already in jail.

I repeat my call on the Azerbaijani authorities to decriminalize defamation so that journalists can practice their profession freely without fear of imprisonment no matter how provocative, satirical or insensitive their expressed views.

I had the opportunity to meet with President Ilham Aliyev during the Astana Summit and discussed with him the above-mentioned issues and plans for my first visit to Azerbaijan early next year.

## **Belarus**

On 5 September I called for a thorough and independent investigation into the death of opposition website director Oleg Bebenin.

On 25-27 October I visited Minsk at the invitation of the Government. I participated in a round-table event on recently enacted measures regulating the Internet and held meetings with high-ranking officials, journalists and civil society representatives.

At the round table I raised concerns about some provisions of the new legislation, such as the requirement for mandatory identification of all users and the vaguely defined limitations and bans on illegal information. I called upon the Government not to draft or enact new legislation that would limit media freedom on the Internet.

During the discussion, however, I noted some positive signs, including the absence of politically motivated denials of website registration, as well as the lack of action on the requirement to create a list of websites to be blocked in public buildings.

I hope that any further attempts to regulate the Internet would be undertaken in close consultation with my Office, independent NGOs, media and the private sector.

On 26 October I met with Foreign Minister Sergei Martynov, Information Minister Oleg Proleskovsky, Vsevolod Yanchevsky, Aide of the President and Head of the Chief Ideological Department of the Presidential Administration, and Lidiya Yermoshina, Head of the Central Electoral Commission.

I was encouraged by the readiness of the officials to discuss the problems faced by independent media in an open and constructive manner. During my meetings I emphasized the need for pluralism in the media, as it is non-existent in broadcasting, restricted in the print media and vulnerable to interference on the Internet. I urged officials to lift all current administrative restrictions which have a chilling effect on independent media, including warnings that could lead to closures of newspapers. A mutual understanding was reached about the need to gradually overhaul media legislation so that it allows for more pluralism.

The Government can rely on my Office's assistance to reform media legislation, including amending the law on mass media and drafting laws on access to official information, privatizing state media and decriminalizing defamation.



On a related point, in my meeting with the Minister of Foreign Affairs in Minsk on 26 October I raised the issue of accreditation of foreign journalists as required by law. I shared with the Minister my concern that several media outlets, including Belsat and Radyo Racyja, had not been granted accreditation.

On 12 November I received a reply from the authorities explaining that national media legislation does not restrict the number of accredited journalists from individual media outlets. I was informed that Radio Racyja reporters were denied accreditation for the period of six months for previously working in Belarus without MFA accreditation, thus violating the Regulation on Accreditation of Foreign Media Reporters in Belarus. Finally, I was also informed that a request from Belsat, a Polish broadcaster producing programmes in Belarusian, to open an office in Belarus was denied. The stated reason is that a number of Belarusian citizens had been working in Belarus on behalf of Belsat without MFA accreditation.

Finally, on 13 December my Office was notified by the Delegation that the mandatory identification of customers at Internet cafes may be abolished in the near future. I am pleased that this change may take place, following, as it does, a suggestion I made during my trip to Minsk.

### **Bosnia and Herzegovina**

On 2 December my Office attended a joint OSCE, OHR and EU working group meeting in Sarajevo. The working group was established under my Office's auspices a year ago and aims to establish a coherent international mechanism to advocate for and assist in finalizing long-overdue media reform in Bosnia and Herzegovina. The working group agreed to coordinate their activities in the field of media advocacy and media reform and to identify future joint actions. Of particular concern is the blocked work of the Communication Regulatory Agency (CRA) and the incomplete public-service broadcasting system. Since 2007, the government has failed to nominate a director for the CRA. The government also has not made a decision on the nomination of two CRA Council members whose mandate expired in April 2009.

I am pleased to see that my Office's repeated calls for the European Union to place more emphasis on the media dimension when assessing Bosnia and Herzegovina's progress toward EU standards are reflected in this year's EU progress report and in the EU's active engagement in the inter-agency working group on the ground. For more information, see also the March 2010 and July 2009 Reports to the Permanent Council.

## **Canada**

On 2 August the Delegation of Canada responded to my 5 July letter regarding reports of mistreatment of media covering the G20 Summit in Toronto. I was told a “Commission for Public Complaint” against the Royal Canadian Mounted Police had been established to collect and investigate complaints against the police involved in the matter. I fully support this initiative and hope that the right of journalists to have access to and report about public demonstrations will be recognized.

At the Astana Summit I met with Peter Kent, Minister of State of Foreign Affairs. We discussed the activities of my Office and potential areas of co-operation.

## **Croatia**

On 12 August I addressed the authorities regarding an August 5 attack on a television crew of the public broadcaster HTV. The crew had covered the Victory Day celebrations in a small town. I welcomed the swift response and the Government’s claim that it had given priority to the investigation. Governments and law-enforcement agencies have an important role to play in countering negative attitudes against journalists. I reiterated that safe working conditions are essential for media to report freely. I was pleased to learn that four suspects have been identified.

On 3 November I was pleased to learn that after a nine-month trial six persons were convicted for the murder of Ivo Pukanić, the director of the weekly *Nacional*, and his marketing director, Niko Franjić. The six were found guilty by the Zagreb County Court and given prison sentences ranging between 15 and 40 years. Three persons (including one of the six convicted by the Zagreb court) are also on trial in Serbia for the same crime. Franjić and Pukanić, who was a well-known investigative journalist and reported on high-profile corruption cases, were killed on 23 October 2008 by a car bomb in front of the newspaper’s office. While the court identified and convicted the perpetrators, it was not able to determine who commissioned the killing.

## **France**

On 2 November I addressed authorities about reports of alleged mistreatment of some journalists covering street protests on 12 October. I welcomed the fact that an investigation into the case of Thierry Vincent, a reporter for *Canal Plus* and one of the allegedly mistreated journalists, had been launched by the police and



asked for additional information on the other cases.

I also mentioned that my Office was closely monitoring the lawsuit filed by *Le Monde* concerning an alleged violation of the law protecting journalists' confidential sources. According to the newspaper, the authorities used the intelligence services to identify one of the newspaper's sources in an alleged corruption scandal known as the 'Bettencourt' affair. I stressed the importance of a clarification to prove to the media community that a new law protecting journalists' sources, adopted in January 2010, provides sufficient guarantees for unhindered investigative journalism.

On 23 November I called upon the authorities to ensure that the theft of journalists' computers from four different locations is thoroughly and promptly investigated. On 7 October two computers were stolen from the office of the website *Mediapart*. On 21 October the computer of Herve Gattenot, an investigative journalist at *Le Point*, was stolen, while the same night the computer of Gerard Davet, an investigative journalist at *Le Monde*, was stolen from his home. Finally, on 20 November approximately 20 computers were stolen from the offices of the website *Rue89.com*. Although perhaps coincidental, the thefts create a chilling effect on investigative journalism.

On 3 December I received an answer indicating that my letter had been transferred to the relevant authorities.

On 10 December, I wrote to Bernard Accoyer, President of the French Assemblée Nationale, to raise concerns about problematic amendments of the draft "Loppsi 2" law which is now being debated in the Parliament. While I recognized the importance and legitimate duty of the State to better guarantee the internal security of the country, I stressed that this should not risk restricting freedom of expression, limiting the right to access government-held information or impeding the free flow of information on the Internet.

## **Georgia**

On 29 October I wrote to Davit Bakradze, Chairman of the Parliament, to welcome his recent call for new legislation on media ownership transparency. I raised this issue again with Bakradze when I visited Tbilisi on 11-12 November on the occasion of our 7th South Caucasus Media Conference. Our meeting took place on the day when a draft bill on the matter was introduced in Parliament. Ownership transparency is essential to foster genuine media pluralism and promote a competitive and vibrant media market, especially in the field of television broadcasting. I hope this initiative will help achieve this goal.

My Office is currently reviewing the draft law.

During my visit to Tbilisi I also met with then-First Deputy Foreign Minister Giorgi Bokeria to discuss joint project activities, including ways to raise public awareness about the Code of Conduct for Georgian Broadcasters so that this important document is fully implemented.

On 23 November I wrote to Foreign Minister Grigol Vashadze requesting additional information on a recent attack against Enri Kobakhidze, the director of the Telavi-based *Tanamgzavri* television station. I expressed hope that law enforcement agencies would thoroughly investigate this incident.

### **Germany**

On 23 September I wrote to Sabine Leutheusser-Schnarrenberger, Minister of Justice, to convey my concern over the conviction of two journalists, Arndt Ginzler and Thomas Datt, by a Dresden court for libelling two judges. In my letter, I indicated that the civil code provisions of German law were sufficient to redress moral harm done to individuals by offensive statements and that adequate compensation for damages caused could have been provided by using the “right of reply” mechanism granted by the national media self-regulatory body. I also suggested that German authorities start procedures to repeal laws relating to criminal libel, as is being done in an increasing number of countries throughout the OSCE region.

On 25 October I received a letter from the Justice Minister saying she could not comment on the pending judgment because of the principle of separation of executive and judicial powers. The Minister also said that legislative measures to reform criminal libel laws were not necessary since the German criminal code complies with international standards by providing sufficient guarantees to protect freedom of expression. I would like to recall that it has long been the position of my Office that criminal libel is not conducive to a free-media environment.

I also received an answer from the Justice Minister on 29 September regarding a letter sent on 6 May in which I expressed appreciation and support for her recent legislative proposal to strengthen media freedom by better protecting journalists’ confidential sources. She said she was seeking quick adoption of this legislation by the Bundestag and Bundesrat. I wish her success in this important endeavour and look forward to Germany joining the list of OSCE participating States that have adopted a shield law for journalists.



## Hungary

On 3 September I wrote to Minister of Foreign Affairs Janos Martonyi to present an expert legal analysis on the media legislation package introduced in Parliament last summer. I asked the Government to reconsider and amend the package, as it significantly contradicted OSCE standards of media freedom. I warned that if left unchanged, the legislation could seriously restrict media pluralism, curb the independence of the press, abolish the autonomy of public-service media and create a chilling effect on freedom of expression and public debate.

On 28 September I received a reply from Zoltan Kovacs, Minister of State for Government Communication, stating that the goal of the ongoing legislative changes is to strengthen guarantees of freedom of expression. The reply contained a detailed analysis of the legal review prepared by my Office.

On 21 October I replied to Minister Kovacs, stressing that my Office's legal review contains numerous elements that call for consideration in the ongoing reform. On 2 November the Parliament adopted the law with minor changes. In mid-November, the government appointed new heads to all public service media outlets. All new directors are the nominees supported by the governing party, Fidesz, which raises questions about the political independence of public service media.

My Office is monitoring the latest draft media law that is currently awaiting debate and adoption in Parliament. If left unchanged, the law will regulate the content of all media – electronic, print and online – based on identical principles, which runs against OSCE media freedom standards. It will also give unprecedented powers in content regulation to the newly established media authority. Among other restrictions, the draft would require all media (electronic, print and online) to be registered with the media authority; violations would be punishable by very high fines. There is an urgent need to develop procedures that would clarify key terms currently undefined in the draft.

I emphasize that regulating print media can curb media freedom and free public debate, which are indispensable elements of democracies. I also stress that regulating online media is not only technologically impossible but it exerts a chilling, self-censoring effect on free expression.

My Office continues to stand ready to assist the Government in its ongoing media reform.

## **Kazakhstan**

On 3 November I wrote to Foreign Minister Kanat Saudabayev to express concern about several negative developments in media freedom in Kazakhstan, including tax inspections of five independent newspapers, *Vzglyad*, *Azat*, *Algi*, *Golos respubliki* and *Moya respublika* and the Internet site *Stan.tv*, and the seizure of the bank account and confiscation of property of the newspaper *Uralskaya Nedelya*, which is on the brink of closure. I also once again expressed my hope that journalist Ramazan Yesergepov would be released from prison.

On 25 November I received a response to my letter from Konstantin Zhigalov, Special Envoy of the OSCE Chairperson-in-Office and Deputy Minister of Foreign Affairs, summarizing the actions of tax officials against the publications and emphasizing that tax inspections are carried out “regardless of the sphere of activity of the party being inspected, because payment of taxes, fees and other mandatory charges as maintained by law is a duty and obligation of everyone.”

Regarding *Uralskaya nedelya*, Deputy Minister Zhigalov indicated that collection actions were being carried out to satisfy a libel judgment against the newspaper won by a private company.

On another note, my Office is following the debate in Parliament on several media initiatives. It endorsed the “Opinion on the draft Law of the Republic of Kazakhstan on Access to Information,” prepared by ODIHR at the request of the Head of the Parliamentary working group responsible for drafting that law. The Opinion is available at ODIHR's legal database website: [www.legislationline.org](http://www.legislationline.org).

I hope that Kazakhstan will soon adopt a comprehensive law on access to information and also decriminalize defamation.

## **Kyrgyzstan**

On 30 July upon my return from Bishkek, I wrote to President Roza Otunbaeva reiterating several issues related to media freedom, including the establishment of a supervisory board of the public service broadcaster, creation of a national platform to ensure respect for media and efforts to co-operate with other international organizations to provide training for journalists. As issues related to the safety of journalists were raised, I also provided the President with a list of cases my Office is aware of regarding violence and intimidation.

On 30 August I commended the appointment of a Supervisory Board for the public service broadcaster and called on the board to provide viewers with fair





and impartial news. I emphasized the importance of a professionally run public service broadcaster in promoting tolerance and understanding in a society, as well as impartial reporting during elections. My Office looks forward to working with the new entity.

On 7 September in a letter to President Otunbaeva I expressed concern over the criminal case filed against Ulugbek Abdusalomov, editor-in-chief of the Uzbek (language) Kyrgyz newspaper *Diydor*. Abdusalomov was arrested in June and charged with abuse of office, incitement to ethnic hatred, organization of and participation in mass unrest and separatism.

I received a response on 11 November from the Office of the Prosecutor General, through the OSCE Centre in Bishkek. I was informed that on 28 September the case against Abdusalomov was dropped due to his illness. On 10 November I issued a public statement calling on the newly elected Parliament to continue media reforms in the country. I expressed hope that, as stipulated in the recently adopted Constitution, Parliament will introduce necessary amendments to the Criminal Code so that defamation is decriminalized and journalists cannot be imprisoned for their work. During the Astana Summit I met with Foreign Affairs Minister Ruslan Kazakvaev and expressed my hope that media legislative reform will continue and Kyrgyzstan will become the first country in Central Asia to decriminalize defamation.

## **Portugal**

On 9 September I wrote to Luís Filipe Marques Amado, Minister of Foreign Affairs, and Alberto Martins, Minister of Justice, to express concern about a decision of a Lisbon court, confirmed by a Court of Appeal on 1 July, to fine the newspaper *Sol* €1.5 million, its editor, José António Saraiva, €110,000 and journalists Felícia Cabrita and Ana Paula Azevedo, €50,000. The court found that the journalists violated the confidentiality of a judicial investigation and did not respect a court injunction because it published transcripts of phone-taps carried out by the police. I believe that the publication of these materials in the context of an alleged corruption affair was a legitimate matter of public interest. I stressed that reasonable limits should be introduced for the size of fines in civil cases in order to prevent the bankruptcy or jeopardizing of the normal operations of media outlets and individual journalists.

On 7 October I received a reply from both ministers pointing out that the matter was in the hand of the courts and outside the purview of the executive branch following the principle of the separation of powers. They assured me that the

court decision was taken without interference by any political or administrative body. I still hope that a higher court will review the sentence against *Soi* and its journalists according to international standards and OSCE media-freedom commitments.

## **Russian Federation**

On 21 September I welcomed the adoption of a resolution by the Supreme Court which recommends that damages awarded by lower courts in civil libel lawsuits should be “reasonable and justified” and “not be conducive to media-freedom violations.” This resolution also says that civil defamation lawsuits should serve only to decide on damages for physical or moral harm and that they should not restrict individuals’ right to express opinions and to receive and impart information without authorities’ interference. By preventing abuses and setting reasonable limits on compensation, this resolution should deter many from suing media outlets for political or economic incentives. It should also lessen the instances of self-censorship and help protect a free and vibrant public debate.

On 8 November in a letter to Foreign Minister Sergei Lavrov and in a press release I condemned the brutal attack on Oleg Kashin, a correspondent for the Moscow-based *Kommersant* daily. I welcomed the swift reaction of President Dmitry Medvedev, who pledged that those responsible for this assault would be brought to justice and instructed law enforcement agencies to thoroughly and rapidly investigate this new case of media-related violence.

Also on 8 November I publicly condemned the assault on yet another journalist, *Zhukovskie vesti*’s correspondent Anatoly Adamchuk. According to reports, police and Adamchuk’s fellow journalists, who conducted their own investigation into this incident, say they suspect the journalist staged the attack for reasons that remain to be clarified. My Office continues to follow this case.

I am encouraged by the announcement made on 28 September by Aleksandr Bastrykin, the head of the Investigative Committee of the Prosecutor-General’s Office, that several cases of murdered journalists will be reopened and further investigated.

I also welcome the fact that the deputy chair of the State Duma’s Information Policy Committee, Boris Reznik, and President Medvedev’s human rights adviser, Mikhail Fedotov, drafted amendments to the Criminal Code with a view to toughening punishment for attacks against journalists.

I urged authorities to turn their declarations into real action and ensure the



safety of journalists, which is one of their most important OSCE media-freedom commitments.

On 24 November I received a detailed response on the Kashin case from the authorities, explaining the specific actions that have been taken in the investigation and assuring me of their determination to find and prosecute the perpetrator of the attack. They also said they support legislative initiatives to increase penalties for those who attack journalists.

I am following closely the case of Mikhail Beketov, the editor of the *Khimkinskaya Pravda* newspaper, who is still recovering from a near-fatal beating in November 2008. I welcome the fact that the probe into this appalling attack was recently reopened and, additionally, that a Russian appeals court has overturned a verdict rendered in November that found Beketov guilty of criminally slandering the mayor of the town of Khimki.

At the Astana Summit I met with Aleksandr Grushko, Deputy Minister of Foreign Affairs, to discuss a host of issues, including violence against journalists and legislative efforts to get tough with those who attack media. Deputy Minister Grushko assured me that the issue of crime against media has the attention of the highest officials in the Government. I offered my Office's support in all efforts to combat violence against journalists.

I hope to visit Russia soon to continue a dialogue with officials on media-freedom issues.

## **Serbia**

On 4 August I noted with satisfaction that in the civil defamation case against journalist Dragana Kocić of *Narodne Novine*, the High Court in Niš ruled in favour of the journalist. Kocić had been fined 1 million Dinars by a lower court for having quoted from an official indictment in a news story about the conduct of a public official and the official's use of public funds. I am pleased that the High Court followed European standards in deciding the appeal. My predecessor had intervened on 28 April 2009 in the case.

On 6 August I welcomed the Government's swift investigation into the attacks against Teofil Pančić, a political columnist for the weekly *Vreme*, and Branka Stanković, a prominent *B92* journalist. On 3 August the First Municipal Court in Belgrade had ordered the arrest of two persons suspected to have brutally beaten Pančić on a Belgrade bus on 24 July.

On 4 August Belgrade's First Basic Court had convicted a football fan for pronouncing death threats against Stanković in December 2009. Stanković had reported about the link between organized crime and football hooligan groups.

I expressed my hope that the Government also will shed light on several unresolved murders and attempted assassinations of Serbian journalists: In 1994, Dada Vujasinović, a journalist of *Duga* magazine, was found dead in her apartment; Slavko Čuruvija of Dnevni *Telegraf* daily was murdered in 1999; Milan Pantić of *Vecernje Novosti* was killed in 2001 and in 2007 two hand grenades were thrown into the house of Dejan Anastasijević, also a journalist at *Vreme*.

## Spain

On 18 October I sent a letter to authorities requesting a copy of the draft law on access to official information which was reported to have been developed by the Government. I offered my Office's assistance in reviewing the draft and encouraged the Government to publish the document so that all stakeholders' opinions are taken into consideration before the law is sent to Parliament for consideration.

On 17 November I received an answer indicating that the issues raised were in a stage of internal discussion and no official text was available for review.

## Tajikistan

On 26 July in a letter to the Foreign Minister Hamrokhon Zarifi, I once again raised the issue of criminal defamation lawsuits against the independent newspapers *Ozodagon*, *Farazh*, *Aziya Plus*, *Paykon* and *Millat*. I offered my Office's assistance in drafting legislation to decriminalize libel.

On 13 October in a letter to Minister Zarifi and in a public statement on 18 October, I publicly expressed my concern about the ongoing deterioration of the media freedom situation in the country. For more than two months, except for a short period in mid-November, access to two Tajik websites, *Avesta.tj* and *Tojnews.tj*, as well as three foreign sites, *Tjknews.com*, *Fergana.ru* and *Centrasia.ru*, has been blocked. Tax inspections also have taken place at the offices of independent newspapers *Farazh*, *Nigoh*, and *Millat* and the print houses Intishor, Mushfiqi and Oila-print, following which the companies refused to print a number of independent newspapers, citing technical reasons.

I once again raised the pending cases against the newspapers and said that the possible closure due to disproportionate damage awards in libel lawsuits brought



by public officials would severely diminish pluralism in print media.

I hope that the authorities will recognize the importance of maintaining media pluralism and thus reverse the ongoing deterioration of the media-freedom situation.

## **Turkey**

On 9 September I wrote to Foreign Minister Ahmet Davutoglu, asking for his co-operation in addressing the continuing pressure that journalists face for their critical writing. I also asked for his assistance to promote much-needed media law reforms.

I noted with concern the high number of lawsuits that threaten journalists with imprisonment. Turkey holds the most journalists in prison in the OSCE region. Currently more than 40 are in prison, either already convicted or awaiting trial. Hundreds more are facing potential imprisonment if found guilty. The charges vary: Some of the journalists face prison sentences for publishing classified documents; some for free speech critical of the authorities and others for reporting on sensitive issues, including terrorism.

In the letter, I spoke out against governmental restrictions on media freedom in order to fight terrorism. The criminalization of speech relating to terrorism should be restricted to instances of intentional incitement to terrorism. Fully acknowledging the threat posed by terrorism to national security and the need to fight it, I also stressed the right of the public to know about issues of public importance.

On 1 November I welcomed the lifting of a ban on the YouTube website. I am pleased that after three years people can once again freely access YouTube. The ban prevented Internet users from being part of the global information society.

I hope that this is not the only ban lifted. I encourage the Government to continue in this direction by reforming its Internet law which has served since 2007 as the basis for blocking thousands of websites.

In recent months, I was encouraged to read statements from high officials on plans to reform media legislation. On 3 September I read with interest the statement of Foreign Minister Ahmet Davutoglu announcing plans to take steps necessary to avoid trials on freedom of expression issues at the European Court of Human Rights. On 21 October Justice Minister Sadullah Ergin spoke about plans to introduce in the Cabinet a bill aimed at easing pressure on journalists

who face trial for their work.

I look forward to receiving details on these legal reforms and I offer my Office's full assistance in this very important endeavour.

## **Ukraine**

On 20 August I wrote to Konstyantyn Gryshchenko, Minister of Foreign Affairs, and expressed concern over the 11 August disappearance of Vasyl Klymentyev, chief editor of the Kharkiv-based newspaper *Novy Stil*.

On 9 September I asked the Foreign Minister to provide my Office with information on the 25 August incident at *Svitlytsya* newspaper when two gun shots were fired at the windows of the editor-in-chief's office and on the 27 August attack on Valery Ivanovsky, editor of newspaper *Silske Zhittya*.

On 9 October I received a response from the authorities. Concerning the case of Klymentyev, I was informed that President Viktor Yanukovich keeps the progress of the investigation under his personal control, that a special inquiry group was set up to intensify the investigation and that several leads are being pursued, including one connected with the journalist's professional activities. In the case of Valery Ivanovsky, two suspects had been detained and their testimonies indicated hooliganism as the motive behind the crime. According to authorities, preliminary results of the investigation in the case of *Svitlytsya* newspaper indicated hooliganism as the motive.

On 11-13 October I visited Ukraine on invitation from President Yanukovich. The purpose of my visit was to meet with representatives of the authorities, civil society and journalists to receive first-hand information on the media-freedom situation.

During my stay in Kyiv I met with Parliament Speaker Volodymyr Lytvyn; Foreign Minister Konstyantyn Gryshchenko; Hanna Herman, Deputy Head of the Presidential Administration; Andriy Shevchenko, Head of the Parliamentary Committee on Freedom of Speech and Information and other top officials.

I was encouraged by the openness of the authorities for dialogue at the highest level, which shows that media remains priority a on Ukraine's political agenda. While I commended the public calls by Government representatives to honour media freedom, I warned the authorities that the lack of results in the disappearance Vasyl Klymentyev and the growing number of physical attacks against journalists have a chilling effect on the media. In this regard, I welcomed



the reopening of the investigation into the death in 2000 of journalist Georgiy Gongadze, and hope that his family, colleagues and friends will achieve their deserved justice.

I discussed with the authorities the need for further steps in the media-law reform and welcomed the adoption of a recent concept for public service broadcasting in Ukraine. I was assured that Ukraine will adopt a comprehensive access to information law during the current session of the Parliament and will establish the legal framework for a public service broadcaster by the end of the year. We agreed that there is a need to adopt laws on the transparency of media ownership; on privatization of state media and that amendments are needed to the law on Television and Radio Broadcasting to ensure the political and financial autonomy of the regulatory body.

I hope that Ukraine will take swift and resolute measures to entrench its exemplary record in media pluralism in the CIS region. I offer my Office's full support in this endeavor.

I was pleased to learn that on 30 November the Verkhovna Rada, in a first reading, voted in favor of a consolidated draft bill on access to information. Representatives of the opposition and the pro-government majority in Parliament last month agreed on the wording of the draft.

## **United States**

On 22 November I wrote to Secretary of State Hillary Clinton and the next day publically condemned the arrest of several journalists, including a television crew from Russia Today, who were covering a demonstration at the Fort Benning military base in Columbus, Georgia, in mid-November.

The arrests, which resulted in convictions for violations of city ordinances only one day later, is a disturbing sign for free media. I indicated that while it is clear that police play a crucial role in maintaining order during public demonstrations, the indiscriminate rounding up of media and bringing charges against them goes well beyond what is necessary to keep the peace.

I asked for a thorough investigation of the incident. I also suggested local police become familiar with methods of crowd control that do not impinge on media coverage of such events.

On 15 December I received an answer from the State Department indicating that the cases brought against the Russia Today journalists on city code violations were resolved by paying a fine. However, I was also informed that criminal

charges under state law brought by the authorities for failure to follow police instructions to remain in a certain area, and judicial proceedings are likely to begin in January.2011.

I find these developments a reason for continued concern and will keep monitoring the case.

## **Uzbekistan**

On 22 September in a letter to Foreign Minister Vladimir Norov and in a press release on 24 September, I expressed concern over unrelenting judicial pressure exerted on independent journalists in Uzbekistan. I raised the cases of two journalists, Abdumalik Boboyev, a freelance reporter for the U.S.-funded broadcaster *Voice of America*, and Vladimir Berezovsky, the chief editor of the Russian-language *Vesti.uz* website and Central Asia correspondent for Russia's *Parlamentskaya gazeta* newspaper, who were both at that time facing charges which included libel and defamation.

I also once again addressed the cases of three journalists who are serving jail sentences of six to 12 and one-half years: Dilmurod Saiid, an independent news writer, Solijon Abdurahmanov, a former reporter for *Radio Free Europe/Radio Liberty* and the *uznews.net* website, and Hairullo Khamidov, the deputy chief editor of *Champion* sports newspaper.

On 20 October in a letter to Minister Norov, I welcomed the encouraging developments in the cases of journalists Vladimir Berezovskiy and Abdumalik Boboyev. Although Berezovskiy was found guilty of libel and insult, on 13 October the Yakka-Saray district court in Tashkent ruled that he should be amnestied. On 15 October the Mirzo-Ulugbek district court in Tashkent sentenced Boboyev to a fine of approximately €5,800. However, one illegal-border crossing charge was dropped and the court refused to accede to the prosecutor's request that Boboyev be denied the right to work as a journalist for three years. I expressed my relief that neither of the journalists was sentenced to jail. My Office will continue to monitor the two cases and I hope that the higher courts will annul their verdicts and the records of both journalists will be cleared.

I also urged Uzbekistan to decriminalize defamation. My Office stands ready to assist with this reform.





## Projects and activities since the last report

### Visits and participation in events

On 29-30 August on invitation from the Slovenian Foreign Minister, I attended and participated in the Bled Strategic Forum in **Slovenia** titled “the global outlook for the next decade” and spoke on the topic of the transformative power of the Internet.

On 13 September, I delivered the keynote speech in **Vienna** at the dinner and award ceremony for 60 World Press Heroes of the International Press Institute World Congress.

See: <http://www.ipiworldcongress.com/home>

On 14-15 September my Office attended the Regional Meeting of Heads of Field Operations in the South Caucasus in **Baku**.

On 16 September a staff member from my Office spoke at an Article 19 sponsored event: “10 Years On – No Justice for Georgiy Gongadze: The Need to Find New Ways to Fight Impunity” in **Kyiv**.

On 7 October I spoke at the media freedom special session of the OSCE Review Conference in **Warsaw**. The session focused on violence, imprisonment and all forms of harassment committed against journalists.

On 6-8 October my Office participated in a European Platform of Regulatory Authorities meeting in **Belgrade**. This Office will become a standing observer of the EPRA in May 2011, joining the Council of Europe and the European Union with that status.

On 12 October my Office took part in a seminar in **Vienna** organized by the Austrian Ministry of Justice which brought together representatives from the legal and media fields to discuss whether there is a need to change Austrian law protecting the confidentiality of newsroom activities.

On 11-13 October I visited **Kyiv** and met with Parliament Speaker Volodymyr Lytvyn; Foreign Minister Konstantyn Gryshchenko; Hanna Herman, Deputy Head of the Presidential Administration; Andriy Shevchenko, Head of the Parliamentary Committee on Freedom of Speech and Information, civil society and journalists.

On 13 October in **Kyiv** I delivered a keynote speech at a conference organized

by the Council of Europe and the European Union on “Safeguards to Media Pluralism in Ukraine”. The participants of the conference discussed European standards regarding media pluralism and practical measures of safeguarding it in Ukraine.

On 15 October I addressed the European Council Working Party on the OSCE and Council of Europe in **Brussels**. I assessed media freedom in the OSCE region and described the priorities of my Office.

On 25-27 October I visited **Minsk** on invitation from the Government of Belarus. I participated in the round-table event on Internet regulation and held meetings with high-ranking officials including Foreign Minister Sergei Martynov, Information Minister Oleg Proleskovsky, Vsevolod Yanchevsky, Aide of the President and Head of the Chief Ideological Department of the Presidential Administration, and Lidiya Yermoshina, Head of the Central Electoral Commission.

On 1 November I gave a lecture on press freedom at Columbia University in **New York** at the event “A Free Press for a Global Society”. See <http://globalfreepress.columbia.edu/>.

On 4-5 November my Office participated in the annual meeting in **Amsterdam** of the Alliance of International Press Councils in Europe. See: <http://www.aipce.net/>.

On 10 November my Office participated in a seminar in **Brussels** organized by the broadcasting regulatory authority CSA-Belgium on the topic of excluding extremist political parties from live broadcast debates.

On 18 November My Office participated in a Council of Europe expert hearing on “Defamation and jurisdiction shopping” in **Strasbourg**.

On 26-28 November I attended the OSCE Review Conference in **Astana** in the run-up to the Summit. I spoke at the Working Session specifically devoted to freedom of expression on the Internet and the digital switchover in broadcasting. I also announced the latest publication of my Office, the Guide to the Digital Switchover, which aims to offer practical help to all stakeholders in the switchover process, and ways to strengthen media freedom in the digital age. It is available in English and Russian on my Office’s website. At the closing session, I set forth principles of my Office for the upcoming years.

See Speeches:

[http://www.osce.org/documents/osce/2010/11/47872\\_en.pdf](http://www.osce.org/documents/osce/2010/11/47872_en.pdf)



[http://www.osce.org/documents/osce/2010/11/47921\\_en.pdf](http://www.osce.org/documents/osce/2010/11/47921_en.pdf)

Guide to the Digital Switchover:

[http://www.osce.org/publications/rfm/2010/11/47821\\_1571\\_en.pdf](http://www.osce.org/publications/rfm/2010/11/47821_1571_en.pdf) (English)

[http://www.osce.org/publications/rfm/2010/11/47821\\_1571\\_ru.pdf](http://www.osce.org/publications/rfm/2010/11/47821_1571_ru.pdf) (Russian)

On 1-2 December I attended the 2010 Summit in **Astana**.

On 2 December my Office participated in the second Working Group (comprised of OSCE, OHR and EU representatives) meeting in **Sarajevo** with the aim of identifying how to advance media-reform measures in Bosnia and Herzegovina.

On 10 December I participated in the Austrian chapter of the Reporters Without Borders awards ceremony in **Vienna**.

On 13 December I participated in a panel discussion on Security and Human Rights at an OSCE Roundtable in **Vienna**.

## LEGAL REVIEWS

### Belarus

At a round table on 25 October Andrei Richter, Professor at Moscow State University and Director of the Media Law and Policy Institute, presented his findings and recommendations on the recently enacted implementing guidelines on Presidential Decree No. 60 on Internet regulation. The recommendations include:

- Take into account the existing international instruments for fighting crime on the Internet.
- Forego mandatory identification of users of subscriber units and users of Internet services.
- Clarify the meaning of and procedure for introducing restrictions and prohibitions on disseminating illegal information, clarify responsibility for unsubstantiated prohibitions.
- Entrust the judicial bodies, instead of the executive power bodies, with determining what information is harmful.
- Envisage the obligation of state bodies to post information on the Internet not only about their own activity, but also share with the public information that has been acquired and created as a result of this activity.
- Envisage the obligation to post documents on the Internet after secret or other information that the law prohibits from being disclosed is removed from

them;

- Envisage the possibility of disclosing information in the event that public interest prevails.

This review was commissioned by my Office. It is available on the website:

[http://www.osce.org/documents/rfm/2010/10/47359\\_en.pdf](http://www.osce.org/documents/rfm/2010/10/47359_en.pdf) (English)

[http://www.osce.org/documents/rfm/2010/10/47359\\_ru.pdf](http://www.osce.org/documents/rfm/2010/10/47359_ru.pdf) (Russian)

## **Hungary**

In September, Dr. Karol Jakubowicz, a renowned international media expert, prepared an analysis of the draft media package of Hungary that was introduced in Parliament in June 2010. The main findings of the analysis are as follows:

- Reconsider and amend the media package, so the legislation can serve its proper function of enhancing Hungarian democracy. The current draft exceeds what is justified and necessary in a democratic society and is cause for serious concern.
- Focus the law primarily on broadcasting and audiovisual media services and retain only general provisions for the print media and for media services on the Internet. The draft extends the traditional regulatory framework to all media (electronic, print and online) and puts public-service media at risk of direct political control.
- Follow internationally accepted standards on new and not fully defined media services and apply their policy and regulatory approach. Reduce the scope of powers given to the Media Authority and the Media Council.
- Ensure that the regulatory regime with regard to the print press and online media relies primarily on the civil and penal code, and additionally on self-regulation and co-regulatory schemes, involving all stakeholders, including trade and professional associations.

The review was commissioned by my Office. It is available in English on the website: [http://www.osce.org/documents/rfm/2010/09/45942\\_en.pdf](http://www.osce.org/documents/rfm/2010/09/45942_en.pdf)

## **Internet-related activities**

On 29-30 August I participated in the Bled Strategic Forum in **Slovenia** where I spoke on the effect of the Internet on society.

On 14-17 September I participated in this year's Internet Governance Forum held in **Vilnius**, where my Office and the Council of Europe for the first time organized a joint open forum on balancing the governance of hate speech with the right to



freedom of expression and the free flow of information on the Internet. The forum assessed the impact of current regulatory initiatives on freedom of expression and free media in the light of OSCE media-freedom commitments and Article 10 of the European Convention on Human Rights.

For more information on the open forum see: [http://www.osce.org/fom/item\\_6\\_45810.html](http://www.osce.org/fom/item_6_45810.html)

In the framework of the IGF I also participated at an event organized by the Ministry of Foreign Affairs of Lithuania on the subject “Internet – an instrument to foster democracy”. I gave a speech on Internet freedom, its limits but also limitations imposed on it.

On 20-22 September I gave a keynote address at the “Internet at Liberty 2010” conference in **Budapest** jointly organized by Central European University and Google. The event titled “Internet at Liberty 2010” focused on the promise and peril of online free expression.

On 23-24 November my Office participated at the ODHR-supported annual conference of the International Network against Cyber Hate held in **Vienna**. The NGO round-table meeting discussed best practices in addressing online hate and racism.

On 26 November at the review conference in **Astana**, I circulated a preliminary report on my Office’s study of legal provisions and practices related to freedom of expression, the free flow of information and media pluralism on the Internet in the OSCE region. The preliminary report represents the first step of a comprehensive assessment of Internet regulation across the OSCE. The final study is expected to be published in early 2011. I would like to use this opportunity to thank those participating States that provided answers to our questionnaire and would like to encourage those who have not yet done so, to submit their input as soon as is possible.

The preliminary report can be viewed at:  
[http://www.osce.org/documents/html/pdftohtml/47857\\_en.pdf.html](http://www.osce.org/documents/html/pdftohtml/47857_en.pdf.html).  
A Russian translation of the executive summary is available at:  
[http://www.osce.org/documents/html/pdftohtml/47857\\_ru.pdf.html](http://www.osce.org/documents/html/pdftohtml/47857_ru.pdf.html).

## **Training activities**

### **Training for Moldovan Journalists on Internet Media**

My Office organized, in co-operation with the OSCE Mission to Moldova, a two-day seminar on Internet media in Chisinau on 20-21 September. Twenty journalists from central and regional newspapers and broadcasters, including those from Gagauzia and Transnistria, discussed the legal context, professional advantages and risks, as well as the sustainability of Internet media. The seminar offered practical solutions to challenges the Internet presents to small markets.

## **Projects**

### **Expert workshop of media legislation drafting in Tajikistan**

On 30 September my Office supported an expert workshop, organized by the OSCE Office in Tajikistan, to facilitate a public debate on draft amendments to the law on press and other mass media. The workshop, which brought together media law experts, parliamentarians, representatives of civil society and academia, prepared specific proposals to improve the existing law and presented them to the Parliament. I commended this public debate and the openness of members of Parliament to listen to arguments of national and international media law experts as an excellent exercise in media lawmaking.

### **Conflict-sensitive election reporting in Kyrgyzstan**

My Office supported a project on conflict-sensitive election reporting conducted by the DW-AKADEMIE (Deutsche Welle) in Kyrgyzstan. The project consisted of two modules that took place in September and November aimed at enhancing print and online journalists' skills in election coverage and adopting a set of guidelines for conflict-sensitive reporting. I hope that the guidelines drawn up by the journalists will serve as the basis of their coverage during elections in the future. I supported this media initiative as a follow-up to my meeting in Bishkek on 19 July with President Roza Otunbaeva during which we discussed practical ways of how my Office could support Kyrgyzstan's efforts to strengthen independent journalism.

### **Joint project with UNESCO to promote self-regulation in South East Europe**

From October to November 2010, my office supported a joint project with UNESCO to promote media self-regulation in South East Europe. This project



was a follow-up of another project implemented in 2009 and already funded by my Office and UNESCO through an EU grant. The synergy of efforts of these international organizations to coordinate and streamline the support to media freedom in South East Europe was very much welcomed during a time of global economic crisis.

Approximately 280 media professionals, experts, publishers and regulators attended the round tables on media self-regulation held in Skopje, Dubrovnik, Istanbul, Sarajevo, Pristina, Novi Sad, Tirana and Podgorica. International experts participated in the events in order to implement recommendations adopted during the first part of the project in 2009 and to build capacities of media professionals wishing to consolidate media self-regulation mechanisms in their countries.

### **South Caucasus Media Conference in Tbilisi**

My Office's 7th South Caucasus Media Conference took place in Tbilisi on 11-12 November. It brought together more than 80 journalists, media experts, government officials, parliamentarians, scholars and civil society representatives from Georgia, Armenia and Azerbaijan. The two-day event offered participants an opportunity to discuss issues related to access to information, the free flow of information on the Internet and regional media developments with international media experts.

Conference participants adopted a declaration on access to information and new technologies in the South Caucasus which is available in English and Russian at:

[http://www.osce.org/documents/rfm/2010/11/47629\\_en.pdf](http://www.osce.org/documents/rfm/2010/11/47629_en.pdf) (English version)

[http://www.osce.org/documents/rfm/2010/11/47629\\_ru.pdf](http://www.osce.org/documents/rfm/2010/11/47629_ru.pdf) (Russian version)

Like all previous conferences, this year's event was financed by extra-budgetary contributions. My thanks go to the delegations of Germany, the Netherlands, Norway, Sweden and the United States. Regional media conferences, which my Office organizes twice a year in the South Caucasus and Central Asia, offer participating States a unique opportunity to engage in a constructive dialogue on media-freedom issues.

### **Publications**

#### **Guide to the Digital Switchover**

My Office has just published "The Guide to the Digital Switchover", in English and Russian. The guide is an update of the guide published in 2009 by my

predecessor, Miklós Haraszti. As the switchover is the challenge of the coming years for many OSCE participating States, this guide aims to offer practical help to all stakeholders for the switchover process and to find ways to strengthen media freedom in the digital age.

The guide explains, in simple terms, a technological process that enables us to gain access to a previously unimaginable amount of information through television and radio. This development also makes it possible to impart information to others more easily than ever before. To what extent such technology is used to benefit people, how it can assist in creating a pluralistic electronic media and to what extent it can break down the information gap that still exists in many areas of the OSCE region very much depends on the media laws and policies governing the switch.

If carried out properly, the digital switchover can safeguard human rights, including freedom of the media and the right of access to information. If all parties involved in the process co-operate, including broadcasters, producers, resellers and consumer associations, the result is a media landscape that protects plurality of opinion and freedom of expression.

But in the digital age, OSCE participating States must deliver on what they have subscribed to in the analogue world: to provide their citizens with pluralistic information, which strengthens democracies. Well-informed people make well-informed decisions, which are the indispensable foundation that democracies can build upon.

The guide is a comprehensive examination of issues to be considered by all stakeholders involved in the switchover process, including the successes and pitfalls encountered. It gives us a list of “Dos and Don’ts” of the switchover, which raises attention to the main difficulties and opportunities of the switch. The guide is available at:

[http://www.osce.org/publications/rfm/2010/11/47821\\_1571\\_en.pdf](http://www.osce.org/publications/rfm/2010/11/47821_1571_en.pdf) (English)

[http://www.osce.org/publications/rfm/2010/11/47821\\_1571\\_ru.pdf](http://www.osce.org/publications/rfm/2010/11/47821_1571_ru.pdf) (Russian)

### **Journalism education**

As a follow up to the 6th South Caucasus Media Conference held in Tbilisi on 19-20 November 2009, my Office produced a publication “Journalism education – improvement of the quality of education and new technologies”. The book compiles papers of international and national experts on the developments in journalism education and challenges that members of the media face in South





Caucasus.

The publication is available in English and Russian at:

[http://www.osce.org/fom/item\\_11\\_47770.html](http://www.osce.org/fom/item_11_47770.html)

## **Planned activities for the next reporting period**

### **First Study on Internet Regulation in the OSCE area**

In early 2011 my Office is planning to release the final report on the findings of a study of legal provisions and practices related to freedom of expression, the free flow of information and media pluralism on the Internet in the OSCE region. This report will represent the first OSCE-wide study on Internet regulation and its impact on free expression and the free flow of information.

### **Media Conferences**

My Office will continue to organize media conferences in the South Caucasus and Central Asia. We will add a third site, the Balkans, for the first time in 2011. We have started consulting with media professionals and OSCE missions to identify the most relevant topic for the conferences.

I would like to thank the Delegations which already have expressed interest in our project activities and indicated their willingness to provide financial support.

## **Legal Reviews**



## **ANALYSIS OF THE CONCEPT PAPER ON MIGRATING TO DIGITAL RADIO AND TV BROADCASTING SYSTEM IN ARMENIA**

*This analysis has been prepared by Dr. Katrin Nyman-Metcalf, Professor and Chair of Law and Technology, Tallinn University of Technology and Andrei Richter, Director of the Media Law and Policy Institute (Moscow), Professor at Moscow State University Department of Journalism), commissioned by the Office of the OSCE Representative on Freedom of the Media*

### **EXECUTIVE SUMMARY**

The analysis examines the Concept Paper on migrating to digital radio and TV broadcasting system (hereinafter – the Concept Paper) approved by the Government of the Republic of Armenia on 12 November 2009. The analysis is made from the viewpoint of international obligations as well as best international and European standards. It also uses earlier reports related to the digital switchover in Armenia and the Guide to Digital Switchover commissioned by the OSCE Representative on Freedom of the Media and published in March 2010. Best European practice is seen in different instruments issued by the Council of Europe and the EU.

From a freedom of the media point of view, digital broadcasting can contribute to more choice for the audience and more opportunities for broadcasters to impart information. Unless certain rules and principles are taken into account by national governments and regulators, there is a risk of negative effects of the digital switchover, including monopolization and less media pluralism. The initial investment costs are high and the return may come later. Digitalisation does not solve other pre-existing problems in the media sector but may even add to them. In the digital era, the importance of public service broadcasting (PSB) increases and the PSB must be able to carry out the tasks entrusted on it. Access to information and reduction of inequalities do not come automatically through a multitude of channels – it is important that there is real diversity.

Technical/Frequency spectrum: Armenia should digitalise by 2015. Analogue broadcasting should not be switched off until almost the entire population (not just territory) can receive digital broadcasting, as is said in the Concept Paper. It is expensive to have parallel analogue and digital broadcasting, so this period should be as short as possible. As for the technology to use, different MPEG standards from MPEG 2 to experimental use of MPEG 12 are discussed but

one should be clearly selected. It is not sensible to use more advanced than the normal standard in the region.

Access to broadcasting: It is important to avoid exclusion in particular from free-to-air services and transnational television. The question of subsidising decoding equipment is important. This is mentioned in the Concept Paper and the realisation in practice must be developed with clear and fair criteria. Industry can and should be encouraged to provide different types of decoding devices, at low cost. At the same time the decoders should be interoperable.

Financing of the digitalisation process is a big challenge for broadcasters and the Government. The Concept Paper fails to include all switchover costs for broadcasters. It is reasonable that private broadcasters carry some of the costs, but more concrete incentives may be needed. The Concept Paper makes a reference to longer duration of licences but is generally not clear on incentives for investment. The need for the public financial support is well-acknowledged in Europe but needs to be in line with state aid rules including not giving undue preference to certain companies. Monopolisation of the market must be avoided, by public or private companies. Privatisation of transmitter network ownership, which can be a means of financing digital switchover should take place.

Infrastructure issues: Broadcasters in the digital system are no longer normally the owners of their infrastructure, but use infrastructure held by someone else. Rules for access to infrastructure and for interconnection are important. The Concept Paper mentions free and equal access to infrastructure. Centralized distribution networks like TRBNA in Armenia may be a way to support broadcasters. Multiple broadcasters use a single multiplex for transmission - the license grants a broadcaster rights to offer a particular programming line-up at a particular channel number, with the frequency license given to the third-party company running the multiplex. There is a need in the Concept Paper for rules on rates and conditions for multiplexes to outlaw cross subsidies as digitalisation should not permit to abuse a dominant position. Transmission ownership should never mean any interference in broadcasting content or in deciding which channels can be broadcast.

Regulatory issues and licensing: Licences will be divided for content provisions and for transmission. The Concept Paper sets out the differences in the licences but the process how this will happen needs clearer rules and some detail, especially as the Concept Paper is built upon a strategy that was first elaborated several years ago. It is reasonable to have a moratorium of analogue licences, which helps to deal with issues of legitimate expectations of the broadcasters, but a moratorium on tenders for broadcasting licenses should not be the first



step in the digitalization process nor be used to limit diversity and must at all times be used without discrimination. In the Concept Paper the independent regulator, the National Commission on Television and Radio (NCTR), is mentioned, but its role remains somewhat unclear.

Programming: Digital broadcasting should not just entail an increase of the number of programmes, but an increase of pluralism. In the Concept Paper's main goals "Promotion of competition and pluralism" is correctly mentioned. At the same time there is concern about a point in "Objectives" which stipulates that programmes ensure protection of spiritual legacy, cultural diversity and pluralism, which is not suitable for all programmes. It is important that the regulator takes steps to increase pluralism of content in addition to preventing concentration. The Concept Paper proposes to introduce one free social package and several paid packages. The Concept Paper fails to explain the method of formation for the social package.

In the switchover period with a wide variety of content, the regulator should be particularly vigilant to ensure respect for broadcasting content standards. There are no such requirements in the Concept Paper.

The role of Public Service Broadcasting: Balanced coexistence of public and private broadcasters is pointed out in the Concept Paper. What is the essence of the "balance" is not clear. In Armenia issues remain on financing of the PSB.

The Concept Paper mentions the need for changes in the laws but is not very clear on the substance of such changes. The kind of legal acts needed or that should be changed depends on the existing structure of the broadcasting legal framework in the country. It is not necessary to have a special digitalisation law but the strategy must be supported by a proper legal framework. Transitional issues need to be dealt with so that changes in existing Statute on Broadcasting (2000) and the Statute on the National Commission on Television and Radio (2001) can be introduced without sacrificing legal certainty. The matters that must be regulated in law are:

- The licensing process and the different parts of the licence
- The status and role (the independence) of the body dealing with licensing
- The criteria for selection of programmes to permit for diversity and plurality
- Infrastructure issues (access, interconnection)
- Special role of undertakings with a significant market power, avoiding abuse of dominant position

## CONCLUSIONS AND RECOMMENDATIONS

- The Concept Paper sets out good aims and objectives that should be promoted but very little on how such promotion shall be made. As the process with drawing up a strategy started already several years ago there should now be more detail.
- The proclaimed aims of the Concept Paper are good as they stress maximum availability as well as free competition. Absence of censorship and editorial freedom are also underlined.
- The Concept Paper recognises the importance of access to networks and similar but provides very little detail on this.
- Balanced coexistence of private and public broadcasters is mentioned and should be achieved through the content of the strategy.
- The digitalisation strategy should not be drafted and adopted as a result of closed-door negotiations between the businesses and the government, but be under constant scrutiny of a wide public discussion to guarantee the pluralism of broadcasting services and public access to an enlarged choice and variety of quality programmes. Consultations with broadcasters, civil society groups and individuals on the digitalisation process should follow internationally accepted guidelines.
- It is preferable that the adopted strategy leads to new legislation introduced to and adopted by the parliament, rather than governmental decisions of presidential decrees.
- The Government should be transparent in the lengthy proceedings of digital dividend that designate specific parts of the airwaves for different types of telecom services. The Concept Paper is weak on convergence and other technologies and on how to benefit from the digital dividend.
- The Concept Paper should clearly select one of the available technological standards, most probably MPEG 4.
- The Concept Paper mentions a regional approach, which is good but this should be elaborated to give it more content and clarity.
- Support for decoding equipment is an important issue as satellite and cable penetration is low and this needs to be paid attention to in practice so that population is not deprived of broadcasting at the analogue switch-off. In cases where viewers face significant financial burden in obtaining digital converter boxes, the Government should consider subsidizing purchase of the boxes. Work with determining who will get assistance with receiving equipment and how this will be handled should be dealt with as a priority. The related research (on what people are willing and able to pay for) must also be carried out as a priority so the related work can proceed.
- It is recommended to deal with digital radio after switchover process in digital television is complete in Armenia.



- The Concept Paper mentions the work of the independent regulator in selecting programmes, etc., which is positive but the regulator in Armenia, the National Commission on Television and Radio, needs to be strengthened. The regulator should be closely involved with or probably even lead the digitalisation process including the planning for it.
- Competition authorities (as well as the telecommunications regulator) should be involved in the process.
- The necessary changes to the licensing regime are recognised but need more detail, in Broadcasting Law and/or by the regulator. Such detail must be transparent and clear as well as objective.
- The Concept Paper contains deadlines (20 July 2010) for legislation – although a bit unclear what exactly in the context of legislation – as well as for standards. The deadlines should be realistic but at the same time it is important to have proper timelines and avoid further delay. There is now some urgency and a strict timeline should be established. Reasons for delays up to now should be analysed so the same kind of reasons can be avoided in the future.
- Licences need to be issued in a transparent, objective and non-discriminatory fashion and for a reasonable length of time. The statements made in the Concept Paper in this regard are good but need to be specified.
- Incentives for the private sector to digitalise and how public sector money shall be used should be elaborated.
- If introduction of licence fee is delayed in the transition period then some other financial incentives should be put into force to ease the switchover process for the Armenian Public Service Broadcaster.
- The Government should proceed on the assumption that all existing analogue broadcasters will be licensed for digital signals. These broadcasters should not have to make the case from scratch for rights to be on the air. While preserving existing licences, the Government should strive to use additional channels to bring new voices to the airwaves.
- The centralized transmission networks for digital TV must have safeguards to assure that all broadcasters have fair and reasonably priced access and that the transmission networks are not misused for political purposes.
- The Government and broadcasters should immediately begin public education and awareness programs to ease disruption to viewers when the transition takes place.

## **A. METHODOLOGY AND INTRODUCTION**

The Concept Paper on migrating to digital radio and TV broadcasting system (hereinafter – the Concept Paper) was approved by Protocol Decree of the Government of the Republic of Armenia No. 47 dated 12 November 2009.

Analyzed was the unofficial English translation of the document provided to the experts by the OSCE office in Yerevan in February 2010.

The Concept Paper was reviewed by them from the point of the international obligations of the Republic of Armenia as a member of the OSCE, international standards and practice of the switchover process. In this regard we took note that in the Introduction to the Concept Paper special reference was made to Recommendation Rec(2003)9 of the Committee of Ministers of the Council of Europe to member states on measures to promote the democratic and social contribution of digital broadcasting.

Also taken into account were earlier analyses of the draft plan of Digital radio and television broadcasting implementation (hereinafter – Implementation Plan) and draft law to amend the Statute on Broadcasting (hereinafter - Broadcasting Law) made in 2006-2009 by the OSCE experts Prof. Katrin Nyman-Metcalf and Prof. Andrei Richter.

The authors also were guided by the report commissioned on them by the OSCE Representative on Freedom of the Media and published in March 2010.<sup>1</sup> From a freedom of the media point of view, the technology of digital TV would allow audiences to seek and receive more information and ideas via the broadcast media. It could also provide more opportunities for broadcasters to impart information to the public. But – as the above-mentioned report states – unless certain rules and principles are taken into account by national governments and regulators, there is a strong risk of negative effects of the digital television switchover, including further monopolization of the media market by the state or other players, less media pluralism, new barriers for cultural and linguistic diversity and for the free international flow of information.

The report underlined that in the digital era, the importance of advertisement-free public-service broadcasting (PSB) only increases. Indeed, digital technologies provide for the possibility of expanding the spectrum of PSB programmes available. Pluralism, and not just a multitude of channels, is of importance here. Access to information and reduction of inequalities do not come automatically through a multitude of channels – it is important that there is real diversity. Therefore, providing PSB, with its mandatory internal pluralism, is recommended as an integral part of the digitalisation reform.

For those countries that only take the first steps in the process, that is adoption

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<sup>1</sup> Guide to the digital switchover by Katrin Nyman-Metcalf and Andrei Richter / OSCE Representative on Freedom of the Media, 2010. See: [http://www.osce.org/documents/rfm/2010/03/42898\\_en.pdf](http://www.osce.org/documents/rfm/2010/03/42898_en.pdf) (pdf) or [http://www.osce.org/documents/html/pdftohtml/42898\\_en.pdf.html](http://www.osce.org/documents/html/pdftohtml/42898_en.pdf.html) (html)





of a digitalisation plan, the guide suggests that prior to its approval, the draft must be open to public, civil and professional scrutiny.

The potential of digital television is to bring the information society into every home. Therefore, it is important to avoid exclusion, and in particular exclusion from free-to-air services and transnational television programmes.

There are a number of key issues linked to introduction of digital broadcasting. These include:

1. Technical/Frequency spectrum that involves international decisions (ITU, EU etc.)
2. Access to broadcasting i.e.: social and economic issues, democratic and social contribution of digital broadcasting.
3. Financing of the digitalisation process: with such issues as financing for the broadcasters, fragmentation of the advertising markets, etc., financing of the Public Service Broadcaster, infrastructure financing, state support
4. Infrastructure issues and how to avoid monopolisation and access to infrastructure.
5. Regulatory issues such as transition for the regulator, licensing (separate licences for the transmission and the programming content), the licensing process (tenders, moratorium, special process initially or not), competition issues.
6. Programming: selection of programmes especially for the free-to-air platform to ensure diversity and plurality; ownership rules, codes of content in a digital environment (protection of minors, protection against incitement, etc).
7. The role of Public Service Broadcasting.
8. Other services and digitalisation (making use of possibilities for convergence).

Special attention is provided for the *process* of the digital switch-over. It includes work on both the *digitalisation plan* and the *legislation*.

This analysis deals with all these key issues, commenting on the Concept Paper from the viewpoint of best European practice, in particular concerning licensing and access of current broadcasters and content producers, how to ensure public access to the new digital channels, regulatory issues including legal provisions, as well as concerning timing and financing for the digitalisation reform.

The authors are not sure in what way the Concept Paper under this review relates to the Implementation Plan that was to be adopted by a Decree of the Government of Armenia. The latter act reviewed by Pof. Katrin Nyman-Metcalf

in October 2006 upon request of the OSCE Representative on Freedom of the Media is not dissimilar to the Concept Paper. Despite many years that took the Implementation Plan to be transformed into the Concept Paper this document keeps most of the weak points and even unnecessary information (like the number of foreign-made TV sets in Armenia) despite criticism of the earlier OSCE-sponsored review and the fact that the text of the document eventually became shorter and less precise. This cannot but disappoint the experts.

## 1. Background

Because radio waves do not respect national borders, consultation over frequency assignments emerged more than a century ago as an early form of global cooperation. Today this activity is overseen by the International Telecommunication Union (ITU), a United Nations agency based in Geneva, Switzerland. In 2006 delegates from 104 countries in Europe, Africa, and the Middle East met there to craft a grand plan for the switchover to digital broadcasting in their parts of the world without creating havoc on the airwaves. Current technical plans as to the introduction of digital terrestrial broadcasting in Armenia are based on international accords and first and foremost the Regional Agreement GE-06 (Geneva 2006)<sup>2</sup> which is a binding international treaty signed by national administrations and registered with the United Nations. This Agreement served as a stimulus for adopting national policies in the switch-over to digital broadcasting in Europe.

The GE-06 Agreement sets 17 June 2015 as the date when all countries in the Europe will no longer need to protect the analogue services of neighbouring states and can freely begin using the frequencies assigned to them for their digital services. This date is not a guarantee that analogue switch-off will then take place throughout a given country. But because analogue services will no longer be possible along its borders, it could serve as an impetus to switching off analogue services completely.

In this respect, Armenia is bound to follow the ITU plans and it aims to fulfil this accord. The allocation to different uses is decided by the ITU, but the assignment to different users is a domestic matter. One important issue mentioned is that attention should be paid to non-broadcasting organisations and the spectrum they use. Another thing not really brought up in the Concept Paper is that convergence of technologies may mean that other new users will be interested

<sup>2</sup> See its text in different languages at the web-site of the International Telecommunications Union: <http://www.itu.int/md/R00-CR-CIR-0262/en> GE-06 takes into account 72,761 country requirements for the transmission of DVB-T and T-DAB services in frequency Band III (174-230 MHz) and DVB-T services in frequency Bands I/IV (470-862 MHz). Generally, countries have been allocated 3 T-DAB and 1 DVB-T "coverage layers" in the Band III and 7-8 DVB-T layers in Bands I/IV. In Europe GE-06 replaces the existing Stockholm 1961 (ST-61) Plan which regulated frequency usage in an analogue broadcast environment.



in the same spectrum as the digital broadcasters. Furthermore, digitalisation may also open possibilities to use other services. Although the Concept Paper mentions this phenomenon it provides little elaboration.

The ITU timetable matches the recommendations made by the European Union. In a communication published in May 2005, the European Commission recommended that its member states phase out analogue terrestrial broadcasting by 2012.

By the beginning of 2010 digital terrestrial television (DTT) services have been entirely implemented in six European countries where switch-off of analogue terrestrial broadcasting is now complete (Germany, Denmark, Finland, Luxembourg, the Netherlands and Sweden). Switch-off has taken place in regions of Austria, Belgium (Flemish Community), the Czech Republic, France, Italy and the UK. Switch-off is due to take place in 2010 in Austria, Malta, Spain and Slovenia.

DTT was launched in 2009 in Latvia, Poland, Portugal and Slovakia and will be launched in Bulgaria, Estonia, Ireland and Romania in 2010. Pay DTT services were launched in 2009 in Germany, Latvia and Spain.

At the end of 2009 the European Audiovisual Observatory (EAO) estimated that out of the total of 7200 European television channels there are more than 730 channels being broadcast over European DTT networks, and of these more than 300 are local and regional channels. This compares with approximately 500 DTT channels in April 2009.<sup>3</sup>

The Concept Paper deals both with digital television and digital radio as a package, given that many issues are similar. Generally the digital television switchover is seen to be of greater impact for society. However, it must be noticed that digital radio has problems that are different from those of television, like that analogue radio receivers are often very cheap, people have many of them, programmes are abundant, and there is very little interest in more expensive digital ones. The freeing of spectrum through digital radio is also less important. For example, in France digital terrestrial radio broadcasting will begin only in 2010 and only in areas with some 30 percent of the population. Here it is considered as an additional digital service. The idea in the Concept Paper to deal with digitalisation of radio after the digitalisation of television has been completed is acceptable and in line with international standards.

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3 See: [http://www.obs.coe.int/about/oea/pr/mavise\\_end2009.html](http://www.obs.coe.int/about/oea/pr/mavise_end2009.html)

## 2. Access to broadcasting

### Receiving equipment

Digitalisation provides many benefits both for the audience and the broadcasters, as it allows more information to be fitted onto the radio frequency spectrum. The benefit for free competition in the communications sector is mentioned in the Concept Paper together with benefits for development of this sector. The Concept Paper underlines that extensive access and availability are aims for digitalisation in Armenia, which is positive. However, there are certain potential obstacles to these positive effects. Such possible obstacles affect both audience and broadcasters. For the audience, the main potential obstacle to enjoyment of the benefits of digitalisation is that special equipment is needed in order to be able to receive broadcasting. For persons that receive broadcasting via cable, satellite or broadband, they will not normally have to change anything themselves, but the changes related to the switch-over will be handled by the service provider. However, for terrestrial television the viewers themselves will have to procure new devices. In Armenia the Concept Paper mentions that the penetration of cable and satellite are low so the question of decoding equipment will be an important one. This was mentioned already in the previous strategy and the importance of this issue was stressed in the comments made to the earlier plan but it is unclear if the matter has been developed in any detail in the intervening time.

The objectives of the Concept Paper include that “Before final termination of analogue broadcasting provide the needy and vulnerable population of Armenia with digital TV and radio broadcasting receiving and decoding equipment”. This is a valuable and important objective (presuming it relates to the special decoding equipment needed) and the work with defining who is covered by this description and how the selection of those to receive assistance will be made (and by whom) should be a priority. This is important also in order to be able to decide the cost of this measure. The Paper mentions research to be made on what the audience is able and willing to pay for and as such research is a prerequisite for other decisions and plans, it must be carried out as a priority. The criteria and system for how to distribute free or subsidised boxes may be complicated and there is likely to be a cost in the administration of this. Regular rules for social security may not be the best or adequate criteria for deciding who gets support. It is essential that people are not cut off from broadcasting when the digital switch-over takes place. The countries that have digitalised early (like Finland and Sweden) did not provide any free set-top boxes. Instead, in line with EU policy the countries promoted that industry made different versions available at different costs (by promoting maximum interoperability etc.). However,



the socio-economic standards of the country must be kept in mind when considering this issue.

### Switch-off of analogue broadcasting

Analogue broadcasting should not be switched off until almost the entire population can receive digital broadcasting. It is important to calculate with population and not territory. This is correctly done in the Concept Paper and the requirement mentioned there is adequate. The Concept Paper mentions coverage for at least one minimum social multiplex in the whole of Armenia before analogue is switched off. This is good, but it needs to be kept in mind that it is expensive to have parallel analogue and digital broadcasting, so the period of this should be as short as possible. Coverage must thus be achieved as quickly as realistically possible. The work with providing or supporting the provision of receiving equipment will go on in parallel with the work by broadcasters to move to digital transmission.

In the analysis of the end of 2006/early 2007, it was pointed out that although a strict timeline is good, what the plan then suggested appeared overly optimistic for Armenia. It appears that this plan was not followed and perhaps the timeline is now more realistic. The reasons for delays with the earlier plan should be analysed so the same obstacles can be avoided. The Concept Paper correctly discusses the realities in Armenia, setting out in some detail the different existing broadcasters and their coverage. This is the correct approach in order to deal with the coverage and possible switch-over in the specific realities of Armenia. Only few programmes have coverage of the whole country and the differences between Yerevan and the country-side is quite marked.

The Armenian Broadcasting Law contains an article on the right to receive television broadcasting. Although this is presumably more of a general principle, it is still important to ensure that technical developments do not make sure receiving of programmes so difficult that in reality this legal right is violated. It may in this context also be relevant to add something about digital broadcasting although the rules for support to receiving equipment fit better in special rules or transitory provisions than in the law as such.

### Technical standards

As for the technology to use, the Concept Paper discusses the different MPEG standards from MPEG 2 to experimental use of MPEG 12. However, in the strategy it is necessary to select which one to use. The countries and regions that digitalized early (like Finland and Sweden) chose the MPEG 2 standard but

as technological developments have been fast, most other European countries have opted immediately for MPEG 4. MPEG 4 allows use of equipment for MPEG 2 but not the reverse. This means that if people already have equipment, it may be difficult to go to the more advanced standard as this would mean additional cost for viewers. If however not many viewers have any form of digital receiving equipment and it is not yet widely distributed in the market, it is sensible to opt for the more advanced standard immediately. It would however not be sensible to go for more advanced than what is the current normal standard in the region, as it is expensive and complicated to be alone with one standard as this reduces the market for the receiving equipment, which in turn may make prices higher and availability more difficult.

### Special needs

People with special needs can in many ways benefit from digitalisation, as not only more broadcasting but also other services will be available and persons with special needs (like impairments of hearing or vision or limited mobility) may be extra much helped by such services. However, this will not be an automatic effect but requires a thought-through policy and should be part of the plan.

### Council of Europe instruments on media

The Council of Europe has issued a number of instruments on media, which either directly mention benefits and changes for media of the process of digitalisation or stress general issues that must be kept in mind in the process of digitalisation. The Committee of Minister's Recommendation (2003)<sup>9</sup> to member states on measures to promote the democratic and social contribution of digital broadcasting provides that member states should "create adequate legal and economic conditions for the development of digital broadcasting". The Recommendation states that there should be well-defined strategies drawn up by Member States to ensure a carefully thought-out transition to digital broadcasting. Such a strategy should promote co-operation between operators, complementarities between platforms, the interoperability of decoders, the availability of a wide variety of content, and generally exploitation of the opportunities offered by digitalisation. Media pluralism is an important goal for digitalisation.

Among general instruments is the "*Declaration on protecting the role of the media in democracy in the context of media concentration and Recommendation on media pluralism and diversity of media content*" (31 January 2007, Committee of Ministers). The Declaration concerns separation of the control of media and the exercise of political authority and highlights the



importance of transparency of media ownership through appropriate regulatory measures. Adequately equipped and financed public service broadcasting can counterbalance the negative consequences of strong media concentration. The Recommendation reaffirms that media are essential for the functioning of a democratic society as they foster public debate, political pluralism and awareness of diverse opinions. This Declaration and Recommendation are relevant in the process of digitalisation as there is a risk, at least initially, that because of the cost involved for broadcasters to digitalise, there may be more concentrations.

Recommendation No. R(99)1 of the Committee of Ministers specifically deals with broadcast concentration, which might endanger media pluralism and suggested measures like creating special media authorities with powers to take action against market concentrations. Recommendation (2003)1 called on Council of Europe states to put in place rules that limit concentration of media ownership. Resolution 1636 (2008) of the Parliamentary Assembly makes transparency of media ownership and economic influence over media one of the indicators for the media in a democratic society.

Specifically for Armenia the Council of Europe Parliamentary Assembly in June 2008 in Resolution 1620 (2008) urged Armenia to ensure “open, fair and transparent licensing procedure”. The reasons for the Parliamentary Assembly to stress this was e.g. a decision of the European Court of Human Rights, upholding an application of an independent TV station critical of the Government, which controversially lost its broadcast license in 2002. In this case, concern for the licensing process in Armenia was raised and these concerns were not effectively dealt with in the years after the decision was passed.

### **3. Financing of the digitalisation process**

The big challenge for broadcasters and the national Government will be financing the switchover, especially today, during the economic recession. Becoming a full-blown digital station able to broadcast on its own can mean acquiring or renting a new transmitter, special cables that carry signals, complex computerized equipment, etc.

Britain's so far uncompleted conversion of more than 1,150 transmitters will cost an estimated 500 million pounds. The U.S. National Association of Broadcasters estimates there was a \$5 billion infrastructure price tag for the United States' roughly 1,750 full-power stations. U.S. commercial stations paid their own way; public ones got grant help from the federally funded Corporation for Public Broadcasting and the governments of the 50 states.

Financial challenges of conversion can be particularly serious for special categories of stations that transmit weak signals. Many of these low-power stations exist to offer original programming just to very small areas of city or countryside. The United States has a particularly large collection of low-power stations, approximately 2,800, and chose to let them continue in analogue to ease their financial strain. From a signal engineering point of view, the decision was correct because their signals do not carry far and definitely do not cross the national borders. U.S. full-power stations, of course, got no such exclusion, but only a handful responded by closing down.<sup>4</sup>

But the impact of switchover in Armenia, where many stations have weak advertising bases and cannot tap government or investors for help with capital costs, might be much stronger. And stations that could shut down may disproportionately be the ones that are small and privately owned, the very stations that tend to bring diversity and local coverage to broadcasting, whether it is in courageous reporting or ethnic music that the large broadcasters do not carry.

The Government can suggest and implement different incentives for the private broadcasters to ease the switchover process for them. The Concept Paper makes a reference in Part VIII that “considering the need of returning financial investments for digital transition it is planned to extend validity of digital broadcasting licenses as compared to the analogue ones.” We understand this provision as a sign that the duration of licences for private broadcasters will be longer than today if they switch to digital broadcasting. In other words, digital licences will be issued for a long enough periods so that the licensees feel secure enough to make the necessary investments. In this regard, a positive example can be brought from France where the licence term for a broadcaster that intends to migrate from analogue to digital television becomes extended from current 15 years up to 30 years (if the station develops coverage of 95 percent and above of the population in the country). In addition every broadcaster migrating to DTT gets permission to a new service (up to 7 such permissions) and a further permission when it switches off analogue broadcasting in accordance with the pre-arranged schedule.<sup>5</sup>

Though the initial investment costs for digitalisation are high, the return may come later in the form of digital dividend. Digital dividend denotes the unprecedented amount of spectrum that will be freed up in the switchover from

4 See: Burgess, John. *Throwing the Switch: Challenges in the Conversion to Digital Broadcasting*. A Report to the Center for International Media Assistance. November 19, 2009. Washington: National Endowment for Democracy, 2009. P. 18.

5 Presentation by Thierry Vachey, Head of Television Department at the Superior Audiovisual Council, in Kiev, 19 February 2010.





analogue to digital terrestrial TV. A fair and well-balanced reallocation of the spectrum between the mobile broadband, broadcasting, and information and communication technologies (ICT) industries will ensure that society reaps the full social and economic benefits of the digital dividend.

The Concept Paper correctly states: “Another important advantage of digital broadcasting systems is release of some part of frequency resource band, which enables to introduce other services such as cellular communication and terrestrial broadcasting” (Part VIII). The way the cleared spectrum will be used in the future should be done rather earlier than later as investments from potential buyers of the spectrum can also be used to finance the switchover process today. It is even more important if, as the Concept Paper states in Part VIII, expected is “a flow of foreign investors to Armenia”.

Speaking of the digital dividend it is necessary to mention the European Commission’s consultation document “Transforming the digital dividend opportunity into social benefits and economic growth in Europe” which was published by the Information Society and Media Directorate-General on July 10, 2009.<sup>6</sup> This paper recommends identifying common bands that can be optimised by enabling “clusters” of services using a similar type of communications network: broadcasting, mobile multimedia and mobile broadband. These bands would be planned and harmonised in some form at EU level.

At the national level, for example, the way the U.K. Government discusses the future use of digital dividend in Great Britain can be monitored through the Digital Dividend Review (DDR), the project releasing the spectrum freed up by digital switchover for new use.<sup>7</sup> A major trend in this regard is involvement – through consultations and seminars – of the public and the businesses in the process of debate and decision-making. Consultation has been an essential element of governmental proposals that generated over 750 responses from a wide variety of stakeholders expressing a wide range of views.<sup>8</sup>

As a result of this process it was decided to auction cleared spectrum in the U.K. This reflects the view that an auction is the fairest and most transparent way to award rights to use spectrum and that market mechanisms are the most effective tool available to encourage efficient use of spectrum and should be used unless there is a compelling case to the contrary. Since the auctions will

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6 See: [http://ec.europa.eu/information\\_society/policy/ecomm/radio\\_spectrum/\\_document\\_storage/consultations/2009\\_digitaldividend/2009\\_0710\\_0904\\_digitaldividendconsultation.pdf](http://ec.europa.eu/information_society/policy/ecomm/radio_spectrum/_document_storage/consultations/2009_digitaldividend/2009_0710_0904_digitaldividendconsultation.pdf)

7 See: <http://www.ofcom.org.uk/radiocomms/ddr/>

8 See: <http://www.ofcom.org.uk/consult/condocs/ddr/statement/>

be held by public (state) bodies the revenues will fill the national budget. This may pay back the state involvement in financing of the digital transfer which is normally needed and is foreseen in the Concept Paper.

The mixture of private and public investment is good in principle but the investment incentives for private companies are not very clear. There must be a careful balance so as not to give undue preference to certain companies. Monopolisation of the market must also be avoided, by public or private companies. Privatisation of transmitter network ownership – another important means of financing digital switchover – should not be delayed because of digitalisation and any holder of the transmission network must observe access rules as well as not influence broadcasting content or which channels are broadcast.

Effective use of the digital dividend in Armenia should be very well foreseen in the Concept Paper with the use of good examples in Europe.

The ratio of the financial contributions expected from private companies and the respective governments for the switch-over period depends on the possibilities of the market and on the wealth of the country. To show two opposite (in this regard) approaches we suggest comparing the following examples from Russia (with mostly public spending) and Ukraine (with high expectations of private investments) (see Table 1).

Table 1. Expenses for the Digital Switch-over in 2009-2015 (planned)<sup>9</sup>

	Public expenses (million EUR)	Private investments (million EUR)	Total (million EUR)
Russia	1 716	1 036	2 752
Ukraine	0.76	364.24	365

The need for the public financial support for the switchover process is well-acknowledged in most parts of Europe. The European Commission recognises that the switchover may be delayed if left entirely to market forces. It also recognises that public intervention can be beneficial through regulation, financial support to consumers, information campaigns or subsidies, in order to overcome a specific market failure or to ensure social or regional cohesion. The onus is on the EU member states to demonstrate that aid is the most appropriate

<sup>9</sup> See Development of Digital Terrestrial Television in Russia and Ukraine by Andrei Richter and Taras Shevchenko. IRIS-Plus, 2010-1. Strasbourg: European Audiovisual Observatory, 2010. P. 10.



instrument, it is limited to the minimum necessary, and it does not unduly distort competition. Acceptable forms of public support for the digital switchover may be:

- funding for the roll-out of a transmission network in areas where there would be insufficient coverage;
- financial compensation to a PSB in order to reach the entire population with its digital signal;
- subsidies to consumers for the purchase of digital decoders (but not digital TV sets!) as long as they are technologically neutral, especially if they encourage the use of open standards for interactivity;
- financial compensation to broadcasters which are required to discontinue analogue transmission before the expiry of their licences, provided this takes account of granted digital transmission capacity.

In a number of cases the EU interfered in the matters that concerned state financing of digital switchover. While it is not completely prohibited, under the EU law policy intervention is possible under certain circumstances so long as it contributes towards general interest goals. However, further clarification of “general interest goals” may be necessary.

Recommendation (2003)9 of the Committee of Ministers of the Council of Europe to member states on measures to promote the democratic and social contribution of digital broadcasting is very specific as to the principles applicable to public service broadcasting in the new environment. One of the principles in it deals with issues of financing public service broadcasting:

“In the new technological context, without a secure and appropriate financing framework, the reach of public service broadcasters and the scale of their contribution to society may diminish. Faced with increases in the cost of acquiring, producing and storing programmes, and sometimes broadcasting costs, member states should give public service broadcasters the possibility of having access to the necessary financial means to fulfil their purpose”.<sup>10</sup>

Industry can and should be encouraged to provide different types of decoding devices, at low cost. At the same time the decoders should be interoperable, so that there will be no exclusion in the reception of competitors’ signal. The Concept Paper sets an ambitious objective to “provide the needy and vulnerable population of Armenia with digital TV and radio broadcasting receiving and

<sup>10</sup> Appendix to Recommendation Rec (2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting. See <https://wcd.coe.int/ViewDoc.jsp?id=38043&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>

decoding equipment” (Part VI). Unless the translation is bad, we would suggest provision of the poor families with decoders only and refrain from supply of digital TV and radio sets.

Around the world, governments have conceded that it is unfair to expect everyone to shoulder expenses on purchase decoders alone. The U.S. government, for example, underwrote a costly coupon program that took \$40 off the retail price of converter boxes.<sup>11</sup>

The Concept Paper fails to include all major costs for broadcasters to make the switch-over. This is reasonable that private broadcasters are expected to carry some of the costs, but it must be recognised that more concrete incentives may be needed in order for them to be willing to make investments. Advertising revenues generally have dropped with the ongoing economic stagnation and when there is low penetration as well as fragmentation of the audience (as happens with the introduction of DTT), the market is rather unattractive, which means that digitalisation may mean less advertising revenue for each participating station. Apart from entailing a limited possibility for private broadcasters to make money from advertising, in order not to create worse conditions for private broadcasters, this may also have consequences for broadcasting legislation on issues such as the ban or restriction of the public service broadcaster’s right to disseminate commercials, so that the market is not even more disturbed.

Although there are various players that stand to gain from the digitalisation, like companies that may get the spectrum cleared, manufacturers and traders of equipment, providers of other services, etc, these are unlikely to be those entities that have to carry the initial costs. Competition issues such as concentration and cooperation issues, if a certain concentration may lead to dominance that is likely to be abused, must take into account the special needs like very heavy infrastructure investment. It may be possible that certain concentrations are the only way to prevent that the process goes bankrupt. Fair access rules are crucial.

Centralized distribution networks like Television and Radio Broadcasting Network of Armenia CJSC, or TRBNA, may be a way to ease broadcasters’ financial pain. In this model, a government-owned corporation or a private company operating on a government license builds and operates a national network of transmitters and rents capacity to broadcasters. Multiple broadcasters use a single multiplex for transmission. The multiplex is essentially an over-the-air version of a cable TV

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<sup>11</sup> See: Burgess, John. *Throwing the Switch: Challenges in the Conversion to Digital Broadcasting. A Report to the Center for International Media Assistance.* November 19, 2009. Washington: National Endowment for Democracy, 2009. P. 23.



system, which carries the content of other parties, whether they are terrestrial stations or companies offering cable-only shows.

Many countries are establishing strict rules on rates and conditions concerning multiplexes to outlaw cross subsidies. In 2006, the Finnish Communications Regulatory Authority issued a detailed set of rules governing pricing and profits for the multiplex company Digita Oy. Pricing must be “cost-oriented and non-discriminatory,” it said. Rules for depreciation were laid out down to the level of how to treat the value of cooling units. Thus providing for competition by licensing more than one multiplex is a safeguard.<sup>12</sup>

#### **4. Infrastructure issues**

##### Access to infrastructure

Digitalisation changes the broadcasting landscape for broadcasters, in that they are no longer normally the owners of their infrastructure as usually is the case in the analogue system, but use infrastructure held by someone else. This means that rules for access to infrastructure and for interconnection are very important, which resembles telecommunications law. The licences will be divided into licences for content provisions and licences for the transmission. Rules and conditions for access need to be developed early in the planning process. These rules and their application must be transparent and objective.

The Concept Paper mentions free and equal access to infrastructure. This is not very clear as it is not evident how and if the access should be free in the sense of not costing anything. It is however a good aim to have equal access and the same possibilities for all to get access on fair terms.

Infrastructure investment for introduction of digital broadcasting will be a major issue and the Concept Paper is a bit unclear and not very convincing about the incentives that the responsible operators will get if they make the necessary investments (Part VIII). What must be recognised when estimating costs and investment readiness of private entities is that the initial costs are high and the increased attractiveness and investment potential of digital broadcasting comes only after a time and at a cost. Advantages (or positive outcomes) will materialise later as is said in the Concept Paper (Part VIII) but the time and scale of such advantages is not known and the issue is too new everywhere to be able to make any exact comparisons.

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<sup>12</sup> See: Burgess, John. *Throwing the Switch: Challenges in the Conversion to Digital Broadcasting*. A Report to the Center for International Media Assistance. November 19, 2009. Washington: National Endowment for Democracy, 2009. P. 19-20.

Concentrations in the area of infrastructure

The infrastructure for digital broadcasting is quite complex and expensive, which means that there is likely to be only few owners of infrastructure. These firms will thus have significant market power and legislation is needed to ensure that such power is not abused. Digitalisation often strengthens the already existing dominance of operators and this effect must be considered by both the plan for digitalisation and the regulator. If a process of structural separation and privatisation is going on, this should proceed and digitalisation not be allowed to delay or stop it. Such a process should be taking place in Armenia. The Concept Paper on the one hand mentions that because of the cost involved in digitalisation, some state resources will be necessary, but on the other hand the same high cost means there is a need for private funds. This is a correct statement but in the Concept Paper incentives for private investment remain unclear as mentioned above.

We understand that in Armenia the dominant network operator is the state-owned or previously state-owned company, Television and Radio Broadcasting Network of Armenia CJSC, or TRBNA, but digitalisation should not be seen as a means to cement the dominance of this body. The involvement of the telecommunications regulatory body is important. Privatisation in the broadcasting network sector should proceed nevertheless and digitalisation not be used as an excuse to maintain a higher state involvement. In Armenia, the broadcasting transmitter network is separate from the broadcasters. Regardless of possible public ownership of the transmission network, access provisions must be strictly applied and transmission ownership should never mean any interference in broadcasting content or in deciding which channels can be broadcast.

In this regard we note that among the countries that completed the switch-off of analogue TV and have only digital broadcasting, the number of multiplex operators today is 3 in Switzerland and in Finland, 2 in Netherlands, in Denmark, Norway, Sweden, and 11 in Germany.<sup>13</sup>

Bad practice of a single national operator should be avoided in Armenia. For example, in Romania, the audiovisual council and broadcasters have been at odds over who should nominate the country's multiplex operator. In Slovenia in 2009, the country's sole multiplex dropped three commercial channels in a pricing dispute. The channels' owner, Central European Media Enterprises Ltd., felt that the prices that the Slovenian multiplex was demanding were too high.

<sup>13</sup> See Development of Digital Terrestrial Television in Russia and Ukraine. IRIS-Plus, 2010-1. Strasbourg: European Audiovisual Observatory, 2010. P. 40-41.



So it is sticking with still legal analogue broadcasting in Slovenia and hoping that by the time those transmissions must be shut off, Slovenia will have a second multiplex that will bring competition and lower prices.

Competition law deals with issues such as these mentioned here, but in almost all countries regular competition law is combined with specific communications law to take into account special issues relevant to a service of general economic interest such as broadcasting. In whichever way the details of this are regulated, legislation as well as a regulatory authority to apply it are needed. Otherwise there is a risk that the positive effects of digitalisation are lost and there is instead abuse of dominance to the detriment of the broadcasters.

The Broadcasting Law contains a general and very brief prohibition on concentration. It should be evaluated if this is clear enough in the digital environment where the role of the broadcaster somewhat changes and where concentration for the content providers and for the owners of transmission facilities are two separate issues that both need to be dealt with by law.

#### The role of the regulator

Even if market principles are the best to create a vibrant market that keeps prices down and quality high, in situations where there are reasons why the market cannot function fully or efficiently, regulators need to step in and make sure competition can work as well as possible without for that reason sacrificing other important goals. One such goal in the area of broadcasting is the universal access to broadcasting, especially public service broadcasting. In the period of digital switch-over it is especially important that authorities keep an eye on the functioning of the market. This shall be done from the viewpoint of the audience (monitoring costs and service provision) but also from the viewpoint of undertakings active in the field (through price controls of infrastructure usage prices).

Those owning and/or operating the technical facilities will have to provide access in a transparent, fair and objective fashion. If content providers cannot get access at reasonable terms to infrastructure, the benefits of plurality that digitalisation can provide will be lost. For practical and environmental reasons as well as costs it makes sense to use existing infrastructure where possible and also to share infrastructure between different users and uses. These matters are best dealt with by the market, but it is very likely that the market will not at all times be able to deal with them in the best manner in which case there is an important role for the regulator. The parties (private undertakings) shall negotiate access conditions and similar and the regulator will only step in if the parties are

not able to agree. This should be the case also for digital broadcasting but it is important that the regulator is up to this.

The large costs for infrastructure, who will invest in this and why remain unclear as has been pointed out earlier. It is reasonable that broadcasters carry some of the cost of digitalisation but they must be realistically able to do this.

The Concept Paper outlines benefits as well as costs (in a broad sense) of the digitalisation process for different concerned parties. This is good as it makes concerned parties aware of these issues in a transparent fashion. At the same time, as mentioned several times, the incentives for private broadcasters to invest are not clear. The benefits are too far in the future as well as too insecure to be clear incentives now. The incentives should be as clear as possible as otherwise too much state intervention will be needed to push the development.

The OSCE Guide sets out in more detail the importance and content of the issue of infrastructure and risk of bottleneck problems.<sup>14</sup>

### EU Directives

The EU Directives, especially the Access Directive 2002/19/EC as amended (Directive 2009/136/EC and 2009/140/EC) and Framework Directive 2002/21/EC provide a basis for the requirements that is of interest also for non-Member states. These Directives show modern communications rules shall be designed and thus provide a model also outside of the EU. In addition, for a country like Armenia with close links with the EU, it is relevant to have compatible rules. The Concept Paper mentions the benefit of a regional approach, which is positive. Among the content of the directives can be mentioned the EU Framework Directive 2002/21/EC, which includes the provision that interoperability of digital interactive television services and enhanced digital television equipment at the level of the consumer should be encouraged in order to ensure the free flow of information, media pluralism and cultural diversity. The Universal Service Directive 2002/22/EC (in an annex) stated that interoperability of digital television equipment for consumers shall be ensured. These provisions are now in an annex to the amending Directive 2009/136. The Directives are based on the idea of technological neutrality – the means of transmission shall not be determining but it is the service as such which matters. Member States shall ensure that services work on different technological platforms.

The Audiovisual Media Services Directive 2007/65/EC which to some extent

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<sup>14</sup> OSCE Guide to the Digital Switchover, especially Chapter 2.





is similar (or an updated version of) to the content of the 1989 Convention on Transfrontier Broadcasting, which has a wider membership, deals mainly with broadcasting content. These instruments do not particularly deal with digitalisation but at the same time the principles for broadcasting content shall apply to the same extent in the digital media landscape. In the OSCE Guide to Digital Switchover<sup>15</sup> it is stated “It is obvious that in the switchover period, which provides access to a wide variety of content, the governments and national regulators should be particularly vigilant to ensure respect for the protection of minors and human dignity and the non-incitement to violence and hatred. The development of new technical means for parental control must not reduce the responsibilities of broadcasters and providers.”

However, EU Directives do not set out details on the digitalisation process - even not for Member States. The aims of the process and general principles are mentioned but Member States must design the exact process as well as the timeline themselves. The Commission can (according to Directive 2009/140/EC) issue some rules for the process, but as can be seen from the different time scale in EU Member States, it remains a matter for each country – whether an EU Member or not – to develop the details within the international framework of which the ITU deadlines form the main basis, as mentioned in the Concept Paper. EU Directives can thus be used for inspiration but do not provide detailed solutions.

## **5. Regulatory issues**

In the comments in 2006/2007, it was stressed that the role of the independent regulator was too weak in Armenia generally and also in the context of the digitalisation plan. In the Concept Paper the independent regulator, the National Commission on Television and Radio (NCTR), is mentioned, which is positive, but its role remains somewhat unclear. From now on the regulator should be closely involved with the digitalisation process. Some amendments on appointment and other matters have been made in legal changes in 2009. In general, the regulator needs to be strong and independent in order to efficiently and objectively carry out its duties in the digitalisation process, including the important selection of which content providers will be placed on platforms, especially the free to air platform. The regulator should be closely involved with or probably even lead the digitalisation process including the planning for it. This way it takes place in France, U.K., Ukraine, etc.

The regulator will streamline the roles between the technical side (close to

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<sup>15</sup> Ibid, at p. 25.

telecommunications regulation) and the content side. In the Concept Paper it appears that not so much attention has been paid to the regulator. In the earlier comments it was pointed out how important it is that the regulator plays an important role in the process of digitalisation. The Concept Paper does mention that an independent regulator will select programmes for the multiplexes, which is good. However, the regulator in Armenia may need general strengthening. Digitalisation does not solve other pre-existing problems but may even add to them, so the regulator needs to be strengthened in order to be able to manage the additional and different tasks that digitalisation entails.

### Licences

As was mentioned above, in some ways the regulator for digital broadcasting resembles more a telecommunications regulator than a classical broadcasting one, in that access to infrastructure is an important issue. Licences will have to change as there will be separate licences for content and for transmission facilities, normally held by different entities.

The Concept Paper is good in setting out the differences in the licences as different issues will be licensed. The process how this will happen needs clearer rules however, as it is a big difference from the current system and thus must be very clear at an early stage in the process. This is the kind of issues on which a Concept Paper such as this one should contain some detail rather than just to make a general mention, especially as this Paper is built upon a strategy that was first elaborated several years ago. As compared with the previous strategy it is now clearer what the licence should look like but there is still no detail. The stressing of the need for a long enough licensing time is also good and follows suggestions made in the comments 2006/2007. What exactly this period should be remains to be stipulated and the view of the regulator should be important in determining this. Longer periods as incentives for investment have been pointed out above.

Open tenders as a basic provision is good, but details including the difference compared with current regulatory practice is not clear. The law will need to be amended in this respect.

### Moratorium

It is reasonable to have a moratorium of analogue licences. However, this should never be used to limit diversity and it must at all times be used without discrimination. In comment made in 2008 to a proposed moratorium it was pointed out that although a moratorium is good as it is one step in the process



of the switch-over and helps to deal with issues of legitimate expectations of the broadcasters, it is essential to not apply a moratorium in a non-objective fashion. As there will be issues of previous licence-holders not having licences extended, which can always have an importance from the viewpoint of legitimate expectations, transparency in the process and careful planning are essential. The process cannot take too long so such transitional issues will arise. In many countries that have digitalised the holders of analogue broadcasting licences have been among those selected for digital broadcasting, which is positive from the viewpoint of legitimate expectations. At the same time, if there are problems of lack of diversity this can cement this situation, so a balance between allowing those broadcasting in the analogue system to carry on and a chance for others to get licences must be considered. Diversity will be dealt with more in detail below, but it may be pointed out here that the role of the regulator is important in dealing with this issue as digitalisation at least in a transitory phase risks to make worse the pre-existing lack of diversity.

A moratorium as such is needed as there is a question of legitimate expectations for broadcasters that have a licence that needs to be terminated. At the same time it is expensive to maintain parallel broadcasting for a long time so there needs to be a clear cut-off date.

On 19 September 2008, the OSCE Representative on Freedom of the Media asked the Government of Armenia to review the adopted amendments to the Broadcasting law that introduced a moratorium on issuing new broadcasting licenses until the planned digital switchover of 20 July 2010. This moratorium makes it impossible for Armenia to comply with the June 2008 decision of the European Court of Human Rights (ECHR), which found that denials of licenses for television station A1+ violated Article 10 of the European Convention on Human Rights, and urged the country to allow the station to apply for a new license. The moratorium effectively contravenes the decision of the ECHR. While the digital broadcasting switchover is cited by the Armenian authorities as the reason for the amendment, a moratorium on tenders for broadcasting licenses should not be the first step in the digitalization process.

## **6. Programming**

The essence of digital broadcasting is not just an increase of the number of programmes, as the Concept Paper states in its Introduction, but an increase of pluralism of the programmes. Therefore we would like to underline the importance of goal 6 of the “Main goals of the strategy” as it is stipulated in Part II of the Concept Paper: “Promotion of competition and pluralism”.

At the same time there is concern about point 4 of Part IV “Objectives” of the Concept Paper which states: “In the digital broadcasting process of TV and radio programmes ensures protection of spiritual legacy, cultural diversity and pluralism.” Should each of the programmes ensure “spiritual legacy, cultural diversity and pluralism” or should all of them represent such heritage and pluralism? While such a demand may be appropriate if addressed to the PSB, it is hardly a democratic principle if introduced towards every private channel. While the licensing body, the National Commission on Television and Radio, should strive to establish such broadcasting landscape in Armenia that will “ensure protection of spiritual legacy, cultural diversity and pluralism” it is unlikely that each of these principles should apply to each broadcasting programme.

It is appropriate to remember here that OSCE participating States have pledged to “take every opportunity offered by modern means of communication... to increase the freer and wider dissemination of information of all kinds”.<sup>16</sup>

Thus, in the switchover process it is important that the NCTR as the national regulator takes steps to increase pluralism of content in addition to preventing of concentration of property in broadcasting. In particular, measures are to be introduced to influence or limit the freedom of the network operator to compose the multiplex. The “Guide to the digital switchover” published by the OSCE Representative on Freedom of the Media in March 2010<sup>17</sup> and other sources provide the following examples from the current practice in Europe:

1. Must-carry rules for PSBs and other terrestrial channels are imposed in the Netherlands and Austria, whereas such measures are not necessary in the UK, Spain or Italy or whenever terrestrial broadcasters are allocated their share of the digital capacity. Of particular interest is an example of Ukraine where the Statute “On Television and Radio Broadcasting” (as amended in 2006) foresees that any terrestrial broadcaster has the right to have its licence reissued for digital broadcasting without a new competition, though for a special fee (Art. 31 para. 4).<sup>18</sup>
2. In Norway the multiplex operator reserves some capacity for the so-called “open channels” and should local channels require access to the platform, the network operator is forced to find an adequate solution.
3. In Italy specific measures are adopted to guarantee access to the platform for “independent channels”, i.e. channels not owned by the broadcasters,

<sup>16</sup> Para (35) of the Concluding Document “Cooperation in Humanitarian and Other Fields” of the OSCE Vienna Follow-Up Meeting in 1986 / Freedom of Expression, Free Flow of Information, Freedom of Media: OSCE/OSCE Main Provisions 1975-2007. Published at: [http://www.osce.org/fom/item\\_11\\_30426.html](http://www.osce.org/fom/item_11_30426.html)

<sup>17</sup> See [http://www.osce.org/documents/rfm/2010/03/42898\\_en.pdf](http://www.osce.org/documents/rfm/2010/03/42898_en.pdf) P. 22

<sup>18</sup> See Development of Digital Terrestrial Television in Russia and Ukraine by Andrei Richter and Taras Shevchenko. IRIS-Plus, 2010-1. Strasbourg: European Audiovisual Observatory, 2010. P. 15.

which will operate through DTT capacity.

These measures are relevant as the capacity has not been allocated through a regular procedure, but has been more or less “purchased” by broadcasters willing to operate on the DTT network. Such measures are aimed at avoiding bottlenecks created by the vertical integration of the DTT network operators that have their own channels.<sup>19</sup>

The situation with the structure of analogue television in Italy may be close to that in the post-Soviet countries like Armenia. Therefore, it is of interest to look into the efforts to provide plurality of content in the switchover process in Italy.

Good practice in relation to this issue seems to be the decision of the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - AGCOM) of 6 July 2005. The decision itself followed relevant provisions of the Broadcasting Act of 2004. AGCOM set the terms for the independent content providers to be carried on a reserved quota of 40 per cent of the capacity DTT multiplexes of the two major players in broadcasting, RAI and R.T.I. S.p.A. (part of Mediaset Group), until the complete implementation of the national digital frequency plan takes place. The content providers must:

- Respect the principles of pluralism and objectivity and offer programming with a wide coverage of various genres, so as to satisfy the tastes of different categories of viewers, especially during prime time;
- Respect fundamental human rights and refrain from transmitting violent or pornographic programmes;
- Offer attractive programming both in order to increase the audience share and the advertising revenues on DTT frequencies and comply with at least two of the following:
  1. Entertainment programming, such as talk-shows, games, programmes dealing with particular events (sports, social issues, culture, music);
  2. Programmes of general interest that deepen awareness of scientific, cultural, historical or musical issues;
  3. Fiction, TV-films, shows, sit-coms and cinematographic works, in addition to the existing obligations regarding European works;
  4. Programmes devoted to children and young people.

Should the available capacity prove to be insufficient to satisfy all applications, priority has to be given to those who provide most of the above-mentioned genres. Capacity has to be assigned on fair, transparent and non-discriminatory

<sup>19</sup> Working Group on Digital Terrestrial Television in EPRA Countries. Final Report. 2 June 2004. See at the official site of EPRA, the European Platform of Regulatory Authorities, at: [http://www.epra.org/content/english/press/papers/DTTWG\\_finalreport.doc](http://www.epra.org/content/english/press/papers/DTTWG_finalreport.doc)

conditions in order to ensure pluralistic programming. For this reason, RAI and R.T.I. must inform the public at least 60 days in advance on their websites about their intention to assign DTT capacity, specifying the technical and economic conditions they intend to apply. All agreements between RAI/R.T.I. and the interested content providers must be submitted to AGCOM in advance, in order to verify their compliance with the above-mentioned obligations. AGCOM is also competent to deal with any dispute resolution that may arise during the validity of these agreements.<sup>20</sup>

Other regulatory measures adopted to guarantee access are enumerated in a report by the European Platform of Regulatory Authorities. For example, network providers may be required by regulation to offer fair, transparent and non-discriminatory conditions. Network providers, as well as platform operators, may be required to publish a price list for the technical services offered to the content providers. When the network/platform operator is also a broadcaster, it could be required to keep separate accounting for its different activities.<sup>21</sup>

The Recommendation on media pluralism of the Committee of Ministers of the Council of Europe further suggests that member states evaluate, at a national level and on a regular basis, the effectiveness of existing measures to promote media pluralism and content diversity, examining the possible need to revise them in light of economic, technological and social developments.

At the conference devoted to the future of public-service broadcasting and the digital switchover held under the auspices of the OSCE Representative on Freedom of the Media in Tbilisi (5th South Caucasus Media Conference, 13-14 November 2008), participants expressed concern that small local provincial private broadcasters that operate over-the-air would not be able to afford entry into market without outside help (e.g. stations like GALA-TV in Gyumri, Armenia). Such broadcasters are popular among the local audiences, they are important for informational and political pluralism of the media, but the government leaves them alone in the face of the mounting costs of switchover. Concern was raised that governments seemed to be satisfied with the inability of small private broadcasters to reach their audience.

The Council of Europe recommends that while encouraging a rapid changeover, governments should ensure that the interests of the public, as well as that of broadcasters, particularly non-commercial, regional and local broadcasters,

20 *Cappello M. Italy: 40% of DTT Capacity on the Multiplexes of RAI and RTI for Independent Content Providers // IRIS 2005-9:15/26. See: <http://merlin.obs.coe.int/iris/2005/9/article26.en.html>*

21 See Table 5.4 in: Working Group on Digital Terrestrial Television in EPRA Countries. Final Report. 2 June 2004. See at the official site of EPRA, the European Platform of Regulatory Authorities, at: [http://www.epra.org/content/english/press/papers/DTTWG\\_finalreport.doc](http://www.epra.org/content/english/press/papers/DTTWG_finalreport.doc)



are taken into account. In this respect, an appropriate legal framework and favourable economic and technical conditions must be provided.<sup>22</sup>

It is worthwhile mentioning in this context that in the number of just local digital terrestrial channels available to viewers today is, for example, 196 in Denmark, 25 in Norway, and 16 in Austria.<sup>23</sup>

The Concept Paper mentions a social multiplex (or social package of programmes) (see Part IX). The idea of the social package is that it will ensure that broadcasting of a public service nature is available to all people. The task of the public service broadcaster to provide such broadcasting remains with digital switchover. More channels and numerically more choice does not necessarily mean more plurality so the task of the public service broadcaster to cater for other needs than what private broadcasters do is still there. In most countries, at least one new programme like 24h news will be added to existing public broadcasting programmes at the time of digitalisation. The social package should also include some free commercial channels that complement the public broadcasting ones. The Concept Paper fails to explain the method of formation for the social package.

The Concept Paper suggests that “among conceptual issues in the digitalisation process is selection between paid or free delivery of TV and radio services”, that is establishment of either free-to-air (FTA) or pay TV digital channels in Armenia (Part IV). This is not in line with the current state of affairs in Europe where the business models are either a combination of FTA and PayTV, or just a FTA DTT. Fortunately the Concept Paper proposes to introduce in Armenia “one free social package (5 to 6 channels) and several paid packages” (Part VI).

The Convention on Transfrontier Television<sup>24</sup> of the Council of Europe (not signed by Armenia) and Audiovisual Media Services Directive<sup>25</sup>, its parallel instrument in the European Union, enumerate certain important general interest objectives related to audio-visual content. These include obligations for member states to take measures to ensure that:

- Audio-visual services do not contain any incitement to hatred based on race,

<sup>22</sup> See: Appendix to Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting.

<sup>23</sup> See Development of Digital Terrestrial Television in Russia and Ukraine. IRIS-Plus, 2010-1. Strasbourg: European Audiovisual Observatory, 2010. P. 40-43.

<sup>24</sup> Adopted 5 May 1989. Text was amended according to the provisions of the Protocol (ETS No. 171), which entered into force on 1 March 2002. Now under new revision.

<sup>25</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0065:en:NOT>

sex, religion or nationality;<sup>26</sup>

- The availability of on-demand audio-visual media services which might seriously impair the physical, mental or moral development of minors is appropriately restricted;<sup>27</sup>
- For the purpose of short news reports, any broadcaster established in the community has access on a fair, reasonable and non-discriminatory basis to events of interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.<sup>28</sup>

It is obvious that in the switchover period, which provides access to a wide variety of content, the governments and national regulators should be particularly vigilant to ensure respect for the protection of minors and human dignity and the non-incitement to violence and hatred. The development of new technical means for parental control must not reduce the responsibilities of broadcasters and providers.

Unfortunately there are no such content requirements in the Concept Paper. At the same time, just as for any broadcast regulation, content regulation can never mean prior censorship or undue restrictions on freedom of speech. For the guidance on what is legitimate broadcast regulation, existing law and principles as shown not least in the case law from the European Court on Human Rights concerning Article 10 of the European Convention on Human Rights remains relevant.

## **7. The role of Public Service Broadcasting**

The Concept Paper in Part II “Main goals of the strategy” points that balanced coexistence of public and private broadcasters” is one of the 7 principles of regulating relations in the area of broadcasting. What is the essence of the “balance” is not clear from the document. Meanwhile the Council of Europe has stated that public service broadcasting is a vital element of democracy. Whether run by public organisations or privately owned companies, public service broadcasting differs from broadcasting for purely commercial or political reasons because of its specific purpose: to operate independently of those holding economic and political power. It provides society with information, culture, education and entertainment; it enhances social, political and cultural citizenship and promotes social cohesion. To that end, it is typically universal in terms of content and access; it guarantees editorial independence and impartiality; it

<sup>26</sup> Article 3b. Item 9 of Recommendation (2003) 9 also addresses the issue of non-incitement to hatred and violence of racial and religious origin in digital broadcasting.

<sup>27</sup> Article 3i. Again, Item 9 of Recommendation (2003)9 also addresses this issue.

<sup>28</sup> Article 3k.





provides a benchmark of quality; it offers a variety of programmes and caters to the needs of all groups in society; furthermore, it is publicly accountable.<sup>29</sup>

These principles apply and should be taken into account in whatever changes may have to be introduced in Armenia to meet the requirements of the digital television and radio. Organized by the Office of the OSCE Representative on Freedom of the Media in 2008, the 10th Central Asia Media Conference declared that public service broadcasting is one of the basic tools of democracies – indispensable in ensuring the freedom and transparency of elections, in fighting against hate speech, and in protecting the minority cultures of a country by offering objective news reporting and by broadcasting high quality programs.

The OSCE further stresses that in the digital era, the importance of advertisement-free public service broadcasting with high-quality and objective programming only increases.<sup>30</sup> This viewpoint is in line with the position of the Council of Europe stating that “the specific role of public service broadcasting as a uniting factor, capable of offering a wide choice of programmes and services to all sections of the population, should be maintained in the new digital environment”.<sup>31</sup>

Recommendation Rec (2007)3 of the Committee of Ministers of the Council of Europe to member states on the purpose of public service media in the information society of 31 January 2007 provides a focus on the implications of the new digital environment and the specific role of public service broadcasting in the information society. It states that public service purpose is all the more relevant in the digital era and can be offered via diverse platforms resulting in the emergence of public service media.

The Recommendation suggests that member states guarantee the fundamental role of the public service media in the new digital environment; include provisions in their legislation/regulations specific to the purpose of public service media, covering in particular the new communication services; guarantee public service media the financial and organizational conditions required to carry out the function entrusted to them in the new digital environment, in a transparent and accountable manner; enable public service media to respond fully and effectively to the challenges of the information society, respecting the dual structure of the European electronic media landscape of public and private broadcasters and

29 Recommendation 1641 (2004) Public Service Broadcasting of the Parliamentary Assembly of the Council of Europe at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta04/erec1641.htm>

30 10th Central Asia Media Conference “The future of public-service broadcasting and the digital switchover in Central Asia”. Almaty, 16-17 October 2008. See: [http://www.osce.org/documents/html/pdf/html/34491\\_en.pdf](http://www.osce.org/documents/html/pdf/html/34491_en.pdf)

31 Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting.

paying attention to market and competition questions; and ensure that universal access to public service media is offered to all individuals and social groups.<sup>32</sup>

Recommendation (2003)9 of the Committee of Ministers of the Council of Europe to member states on measures to promote the democratic and social contribution of digital broadcasting is very specific as to the principles that the member states should apply to public service broadcasting in the new environment.

“Member states should create the financial, technical and other conditions required to enable public service broadcasters to fulfil this purpose in the best manner while adapting to the new digital environment. In this respect, the means to fulfil the public service purpose may include the provision of new specialised channels, for example in the field of information, education and culture, and of new interactive services, for example EPGs<sup>33</sup> and programme-related on-line services. Public service broadcasters should play a central role in the transition process to digital terrestrial broadcasting”.

The act deals with the issue of **universal access** to public service broadcasting:

“Universality is fundamental for the development of public service broadcasting in the digital era. Member states should therefore make sure that the legal, economic and technical conditions are created to enable public service broadcasters to be present on the different digital platforms (cable, satellite, terrestrial) with diverse quality programmes and services that are capable of uniting society, particularly given the risk of fragmentation of the audience as a result of the diversification and specialisation of the programmes on offer. In this connection, given the diversification of digital platforms, the must-carry rule should be applied for the benefit of public service broadcasters as far as reasonably possible in order to guarantee the accessibility of their services and programmes via these platforms”.<sup>34</sup>

In terms of the role played by the PSB, in most cases under the study by the European Platform of Regulatory Authorities (EPRA), the public broadcasters have been allocated one or more multiplexes, rather than the capacity to

<sup>32</sup> Recommendation Rec (2007)3 of the Committee of Ministers of the Council of Europe to member states on the purpose of public service media in the information society (Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies). See: <https://wcd.coe.int/ViewDoc.jsp?id=1089759>

<sup>33</sup> EPG is an Electronic Programme Guide.

<sup>34</sup> Appendix to Recommendation Rec (2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting.



simulcast only existing terrestrial channels. In most cases, PSBs have been free to decide how to compose the multiplex.<sup>35</sup>

Indeed, digital technologies provide for the possibility of expanding the spectrum of public service broadcasting programmes. This will serve the governments' general goals of promoting both digital and public broadcasting. At the same time, such a possibility typically supported by the license fee or public funds should not represent unfair competition to private broadcasters and prevent the development of an independent television sector. Such expansion should be considered to be distinctive and to have a clear public service value. Therefore it should be approved subject to conditions.

The Concept Paper does mention the special role of public service broadcasting but does not contain much specifically about how this role will be fulfilled.

Last but not the least is the issue of practical steps to ensure financial independence of the public broadcaster in the digital era (see also above). Like all other post-Soviet countries with public broadcasting Armenia has not yet introduced licence fee to provide for the financial independence of the PSB. At the same time objective 5 of the Concept Paper states to "Ensure regulation of fees for public services for digital broadcasting and propagation of TV and radio programs". While we do not propose immediate introduction of the licence fee, more clear objectives in this regard must be part of the Concept Paper.

We believe that the norm introduced in 2009 to the Statute "On Television and Radio Broadcasting" (Art. 35) which says that "every year in the expenditure part of the state budget of in the Republic of Armenia, in case of growth of budget revenue part as compared with the previous year, for the Public TV-radio Company the State shall envisage allocations not less than approved by the state budget of the previous year" is not sufficient to facilitate transition of the PSB to digital. Earlier in the analysis of the changes in the Statute one of the authors stated: "No mention is given in the bill as to whether or when the allocations will decrease and under what circumstances. There is no guarantee, especially today, that there will be a tendency of an increase of the revenue side of the state budget over the previous year. If the case is the opposite will the public broadcaster and NTRC suffer? If yes, why? Why funding of the public broadcasting and independent regulatory body be dependent on the revenues of the state and to what degree? It is clear that the proposed scheme provides for the majority in the parliament to sanction or support them at ease, thus making dependent on such majority. In this way instead of following public duty

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<sup>35</sup> Working Group on Digital Terrestrial Television in EPRA Countries. Final Report. 2 June 2004. See at the official site of EPRA, the European Platform of Regulatory Authorities, at: [http://www.epra.org/content/english/press/papers/DTTWG\\_finalreport.doc](http://www.epra.org/content/english/press/papers/DTTWG_finalreport.doc)

“independent public broadcaster” and “independent regulator” will exercise self-censorship.”<sup>36</sup> Thus mechanisms ensuring financial independence of the PSB should be conceptualized in the Concept Paper.

At the same time neighbouring countries strive to implement other types of guarantees for the stable financial state of the PSB. In Georgia, the Parliament has just amended the Law on Broadcasting, which now stipulates that annual funding of the Georgian Public Broadcaster should be equal or superior to 0.12 per cent of the country's gross domestic product. Georgia had a similar system until 2008, with 0.15 per cent of GDP guaranteed as the broadcaster's revenue. Prime-time advertisements are banned on Georgian public television, except during sport events.<sup>37</sup> In Azerbaijan there is a legal provision to introduce a licence fee from 2014 (although original deadline was in 2010). Study of good and bad examples with financing PBS abroad could help find the best option for Armenia.

If introduction of licence fee is delayed in the transition period then some other financial incentives should be put into force to ease the switchover process for the Armenian PSB. One option could be that the first multiplex is operated by the Public Television and Radio Company. In this regard we underline the importance of the provision of the Concept Paper (Part VII) that “corresponding legislative modifications need to be made, which will allow the provision of the public television and radio broadcasting company with a license preserving public broadcasting in the digital environment and the formation of operators unifying companies dominant (conglomerate) in the digital broadcasting environment – digital multiplexes, TV stations, TV programme producers and software vendors.”

## **8. Other services and digitalisation**

In a digital environment gains can be made by having other services than broadcasting on the airwaves. This is one aspect of the digital dividend, which is discussed above in relation to financing of digitalisation. In the earlier comments it was pointed out that not much attention appeared to have been given to this issue in the Armenian plan and the same opinion remains.

In the beginning of the Concept Paper the benefit of interactivity is mentioned as one of the potential benefits of digitalisation. The Concept Paper however does not mention other technologies and possible benefits of convergence. Such

<sup>36</sup> See [http://www.osce.org/documents/rfm/2009/04/37230\\_en.pdf](http://www.osce.org/documents/rfm/2009/04/37230_en.pdf)

<sup>37</sup> This step was welcomed by the OSCE Representative for Freedom of the Media on 19 January 2010, see: [http://www.osce.org/fom/item\\_1\\_42400.html](http://www.osce.org/fom/item_1_42400.html)



additional benefits of digitalisation should be examined more in the process. This should not be left too late in the process as other services and their use of spectrum should be part of the planning for digital switch-over. There may be income from such other services that can support the process, as elaborated above.

As pointed out in the OSCE Guide<sup>38</sup> an additional benefit of digital broadcasting – additional to the possibility for a multitude of channels – is the possibility of delivery of other information services to people through the convergence of technologies as various kinds of services can be distributed through the same transmission means. Such services can be collectively delivered or at least use (some of) the same infrastructure and terminal equipment. If handled well, digitalisation can help eliminate inequalities of availability of such services and increase access to information. To know how this can apply in Armenia, an analysis would be needed of the status of different information society services in the country. This is treated only summarily in the Concept Paper and should be an issue for research at an early stage. Only if the need for services is known can it be determined how best to make use of possibilities for convergence. The availability and use of high-speed internet is one factor that should be known as this both may influence how people received broadcasting and what other services they may be looking for.

## **B. THE PROCESS**

### **1. The digitalisation plan**

The authors are not sure in what way the Concept Paper under this review relates to the Implementation Plan that was to be adopted by a Decree of the Government of Armenia. We appreciate that according to the protocol of the meeting of the Government of Armenia of 12 November 2009 there should be public discussion of the Concept Paper. We hope this analysis contributes to such a discussion.

The digitalisation strategy should not be drafted and adopted as a result of closed-door negotiations between the businesses and the government, but be under constant scrutiny of a wide public discussion to guarantee the pluralism of broadcasting services and public access to an enlarged choice and variety of quality programmes. It is preferable that the adopted strategy leads to new legislation introduced to and adopted by the parliament, rather than governmental decisions of presidential decrees. This will also help manage the

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38 At page 35.

transition without compromising legal certainty.

The legislation process of Hungary can serve as an example. Digital terrestrial television broadcasts have taken place since 2004. A first draft of the strategy was published in early October 2006. This was followed by two months of public consultation. The Prime Minister's Office finalised the strategy in line with the outcome of the consultation, which was transposed into an official policy document. On 7 March 2007 the Government adopted the National Strategy for Digital Switchover and decided to take the regulatory measures necessary for its implementation. Later, in June 2007, the Parliament of Hungary adopted a statute on rules of broadcast transmission and digital switchover (Digital Switchover Act) (see below).

Recommendation of the Committee of Ministers of the Council of Europe (2003)<sup>9</sup> on measures to promote the democratic and social contribution of digital broadcasting provides that a digitalisation strategy should definitely foresee the following elements:

- co-operation between operators,
- complementarity between platforms,
- the interoperability of decoders,
- the availability of a wide variety of content, including free-to-air radio and television services,
- widest exploitation of the unique opportunities which digital technology can offer following the necessary reallocation of frequencies,
- interests of the public as well as the interests and constraints of all categories of broadcasters, particularly non-commercial and regional/local broadcasters.<sup>39</sup>

An Implementation Plan or Digitalisation Concept Paper can have other important components. For example, in Serbia the Strategy and Action Plan for the Transfer from Analogue to Digital Broadcasting adopted in 2009 includes the following items: a place within the multiplexes shall be guaranteed only to broadcasters having valid licenses at the time of the analogue switch-off; the application of equal, non-discriminatory conditions relating to quality, availability and fees for all broadcasters shall be guaranteed by the future network operator, whereas the fee amount shall be based upon the cost-covering principle; a special simulcast fee shall not be introduced by the operators; the maintaining of the same service zones as provided by the existing broadcasting licenses is

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<sup>39</sup> See Appendix to Recommendation Rec (2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting.



guaranteed.<sup>40</sup>

In Ukraine, the key document that provides an outlook on the switch-over process is the *State Programme of Introduction of Digital Television and Radio Broadcasting* approved by the Resolution No. 1085 of the Cabinet of Ministers on 26 November 2008. As part of this programme the government also plans to facilitate the production of digital TV sets and signal adaptors for analogue TV sets, and other elements and parts of hardware for digital broadcasting. This plan includes the provision of financial and technical assistance to research institutions in order to lay the “scientific and technological grounds for Ukraine’s participation in international activities aimed at introducing digital terrestrial broadcasting.” Conceptual guidelines for the transition to digital broadcasting were also provided by the National Council of Ukraine on TV and Radio Broadcasting. The National Council is a special supervising and licensing body with the mandate to implement legislative provisions on television and radio broadcasting and to monitor compliance of both state and private broadcasters with such rules. These guidelines took the form of a “Plan for the Development of the National Television and Radio Sphere of Ukraine”. This Development Plan set a number of basic rules according to which the National Council promised to act during the digital switch-over process. It undertook, among others, “to guarantee that the licence-holders, who at this time provide analogue terrestrial broadcasting, will keep their right to broadcast with the switch-over to digital standards without any loss of their audience.”<sup>41</sup>

## 2. Legislation

The Concept Paper mentions the need for changes in the laws but is not very clear on the substance of such changes. There is a deadline of 20 July 2010 for development of the legal framework. It is not clear if this refers to the framework being ready and in force then or if the proposal will be presented then. If it means the former, the timeframe may well be unrealistic unless the proposal is ready now or very soon, at least if there will be changes to or introduction of new laws (as opposed to other forms or regulatory instruments), as legislative procedure normally takes time. The national standards should be adopted until this same deadline. Presuming these do not need to be as laws but can be in some other form of act, this timeline should be realistic if the standards are already developed and in any case, there is now a need to generally speed up the process a bit.

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40 See Development of Digital Terrestrial Television in Russia and Ukraine. IRIS-Plus, 2010-1. Strasbourg: European Audiovisual Observatory, 2010. P. 33.

41 See Development of Digital Terrestrial Television in Russia and Ukraine by Andrei Richter and Taras Shevchenko. IRIS-Plus, 2010-1. Strasbourg: European Audiovisual Observatory, 2010. P. 9.

It is important to remember in relation to legislative work what has been pointed out also in a different context, that digitalisation does not solve other problems that may exist in the broadcasting sector such as government interference, monopolies, structural problems or problems with a weak regulator or public service broadcaster. Such problems must be solved before digitalisation and/or parallel with the digitalisation process. For the legislative work this means that laws may need to be amended to cope with such general issues (like the increased risk of concentration) rather than with digitalisation as such, for which other instruments than laws may be sufficient.

What kind of legal acts that are needed or that should be changed depends on the structure of the broadcasting legal framework in the country. It is not necessary to have a special digitalisation law and only few countries have this. As mentioned above, such a law or a special law to implement a digitalisation strategy may be a good idea as it should provide for a transparent process, but it is equally possible to deal with digitalisation through amendments to existing laws. The strategy for digitalisation should however be supported by a proper legal framework and for reasons of democratic accountability, transparency and access to information as well as legal certainty it is better to have legislation adopted by the normal legislative procedure (by the parliament), rather than governmental decisions or presidential decrees. Digitalisation should be permitted and preferably also promoted by the legal framework. What is needed is a proper legal basis for the process and for the different components of it (like for the new licensing regime, for access to infrastructure, for how to give support to receiving equipment, etc.). It is generally better not to have too many special laws but instead to make sure relevant legislation is brought up to the current situation and that every issue is properly founded on law. As for what laws can promote may be mentioned co-operation between operators and complementarity of platforms as well as interoperability of decoders. Through the licensing system the regulator can promote availability of a wide variety of content, including both free-to-air and paid broadcasting services. If the public service broadcaster is given a special role for the digitalisation process, the law must support this and the broadcaster be given the adequate resources.

Many transitional issues need to be dealt with so that changes can be introduced without sacrificing legal certainty. Such issues may be in special transitory parts of the law or in some cases in other forms of regulatory instruments.

The matters that are likely to be regulated in law are:

- The licensing process and the different parts of the licence for DTT;
- The status and role (the independence) of the body dealing with digital



licensing;

- The criteria for selection of programmes to permit for diversity and plurality;
- Infrastructure issues (access, interconnection);
- Special role of undertakings with a significant market power, avoiding abuse of dominant position.

A key consideration in legislation is that attention should be given to how to ensure and support diversity and plurality through law. This will be relevant in relation to criteria for selecting programming but also in the licensing process. The Armenian legislation and especially the regulator needs to have more emphasis on plurality and diversity, as set out further below.

Transparency of media ownership is recognized in Resolution 1636 (2008) of the Parliamentary Assembly of the Council of Europe to be one of the indicators for the media in a democratic society. Its text notes that *“legislation must be enforced against media monopolies and dominant market positions among the media. In addition, concrete positive action should be taken to promote media pluralism”*.

Issues of undertakings with significant market power and access issues may be found also in competition law and/or (tele)communications law. Such legislation in Armenia will need review so that all legal issues are covered and that there is no negative duplication that could lead to confusion.

For example, as was mentioned above, the Parliament of Hungary adopted in June 2007 Digital Switchover Act, or a statute on rules of broadcast transmission and digital switchover. This law introduces a clear separation of content regulation and regulation of broadcast transmission. It contains a set of provisions aimed at promoting the diversity of the media. In this respect the act introduces several obligations for cable operators and similar service providers for preserving and promoting the national culture, cultural diversity and pluralism of opinion. This includes the re-definition of “must-carry” rules.

The most important feature of the Digital Switchover Act is the defining of the legal framework necessary for the introduction of digital terrestrial television services. This includes the introduction of interpretative provisions such as the notions of “multiplex”, “application programme interface”, “electronic programme guide”, or “interactive digital television service”. The Act also provides a clear framework for the utilisation of frequencies for broadcasting purposes and a series of rules promoting competition as well as specifies the tendering procedure for operators of terrestrial digital broadcast transmission services. Implementing the Digital Switchover Act is the task of the regulatory authority

and a special parliamentary committee to elaborate and publish the call for tender for multiplex operators.<sup>42</sup>

In another example the Spanish Parliament adopted on 14 June 2005 an Act on the promotion of digital terrestrial TV. Here it basically amended some previous Acts related to the media and telecommunications. In particular the new Act reserved local governments up to two digital terrestrial TV programme services in a local multiplex. The duration of the local terrestrial TV concessions (licenses) was extended from 5 to 10 years. No legal or natural person may own more than one concession in a certain area. The new Act included provisions related to the access to digital terrestrial TV by disabled people and to the promotion of the use of regional languages by the digital terrestrial public broadcasters. It was then agreed that it was necessary to draft a new general bill on radio and TV, which should unify the existing regulation of the audiovisual sector; set up the basic principles concerning licensing, public broadcasting and safeguarding of pluralism. Drafting of the bill took more than 4 years and such a bill was submitted to the Parliament only in late 2009.<sup>43</sup>

The Armenian Broadcasting Law of 2000 (and a number of related laws) was amended in 2009, but digitalisation is not mentioned in these amendments. In this regard we would like to refer to the earlier recommendations stated in the comments on the draft broadcasting law of the Republic of Armenia released by the Office of the Representative on Freedom of the Media of the OSCE that were adopted by the National Assembly in 2009.<sup>44</sup>

For example, according to the amendments, candidates to the Council could not ensure ideological and political pluralism that is the essence of any public broadcasting. By definition they do not represent political and ideological minorities, although are supposed to ensure pluralism (according to their oath). They do not represent pluralistic views by the method of appointment (by the President).

The selection process of the candidates to the NTRC has a basic flaw in that none of the tests taken by candidates and requirements subscribed to them demand their integrity, their high moral standing, or the understanding of their mission.

42 *Lengyel M.* Hungary: Act on Digital Switchover and Amendment of the Broadcasting Act // IRIS 2007-8:14/23 See: <http://merlin.obs.coe.int/iris/2007/8/article23.en.html>

43 Alberto Pérez Gómez. Spain: New Act on the Promotion of Digital Terrestrial Television // IRIS 2005-7:11/18 See: <http://merlin.obs.coe.int/iris/2005/7/article18.en.html> and Laura Marcos and Enric Enrich. Spain: Audiovisual Draft Law// IRIS 2010-1:1/19 See: <http://merlin.obs.coe.int/iris/2010/1/article19.en.html>

44 See [http://www.osce.org/documents/rfm/2009/04/37230\\_en.pdf](http://www.osce.org/documents/rfm/2009/04/37230_en.pdf)



The scheme of financing public broadcasting and regulatory bodies in the sector provides for the majority in the parliament to sanction or support them at ease, thus rendering them dependent on such majority. In this way, instead of following public duty, the “independent public broadcaster” and “independent regulator” exercise self-censorship.

The amendments in a number of articles put public broadcasting under control of the National Commission on Television and Radio. It makes the broadcaster dependent on two overseeing bodies – the Council and the Commission, appointed (elected) differently and as a result possibly issuing different or even conflicting orders. There is not enough clear division of their competence in regards to public broadcasting thus leading to further conflicts over boundaries of such a division.

Given the importance of public service broadcasting in the digital environment, the law needs to clearly set out the tasks and responsibilities as well as guarantee the broadcaster independence and sufficient resources for these tasks.

The amendments also ignore an acute problem of the moratorium introduced in 2008 by amendments to the law on broadcasting already adopted by the National Assembly.





## **COMMENTARY ON THE DECREE OF THE PRESIDENT OF THE REPUBLIC OF BELARUS**

### **On Measures to Improve the Use of the National Segment of the Internet**

*This commentary has been prepared by Andrei Richter, Director of the Media Law and Policy Institute (Moscow), Doctor of Philology (Moscow State University Department of Journalism), commissioned by the Office of the OSCE Representative on Freedom of the Media*

Having analyzed the Decree of the President of the Republic of Belarus No. 60 “On Measures to Improve the Use of the National Segment of the Internet” of 1 February 2010 in the context of the Constitution and current legislation of the Republic of Belarus, as well as of international regulations on freedom of information and the Internet, the expert commissioned by the Office of the OSCE Representative on Freedom of the Media has come to the following conclusions.

### **BRIEF SUMMARY OF THE COMMENTARY AND RECOMMENDATIONS**

The Decree of the President of the Republic of Belarus No. 60 “On Measures to Improve the Use of the National Segment of the Internet” is aimed at protecting the interests of citizens, society, and the state in the information sphere and ensuring further development of the national segment of the Internet. It contains 16 paragraphs and was signed by President Alexander Lukashenko on 1 February 2010. The Decree will come into force on 1 July 2010.

The Decree contains several requirements that call for making information about state bodies and other government organizations more accessible on the Internet. The Decree contains several provisions aimed at protecting authorship rights on the Internet. It envisages state licensing of information networks and resources of the national segment of the Internet on the territory of Belarus which providers of Internet services must undergo by applying to the Ministry of Communications and Informatization of the Republic of Belarus or its authorized organization.

Providers of Internet services shall identify the subscriber units of Internet service users, as well as keep an account of and save information on such units and the Internet services rendered. They shall also submit this information to law enforcement agencies.

The Decree regulates the mechanism for restricting access to information at

the request of an Internet service user regarding information that is aimed at spreading pornography, promulgating violence and brutality, or any other acts prohibited by the law.

The Decree addresses issues that relate to obtaining and disseminating information on the Internet, which cannot help but have an effect on the activity of journalists in Belarus and on the freedom of the media.

The Decree of the President of the Republic of Belarus contains several provisions aimed at enhancing freedom of information on the Internet. In particular, it envisages again (following the Law of the Republic of Belarus On Information, Informatization and Protection of Information, 2008) the obligation of state bodies and government organization to post information about their activities on Internet sites. The providers of Internet services are not held responsible for the contents of the information placed on the Internet.

**However the merits of the Decree are ambiguous and are outweighed by shortcomings that restrict freedom of expression and freedom of the media on the Internet.**

The following provisions of the Decree “On Measures to Improve the Use of the National Segment of the Internet” arouse particular concern:

- The demand for mandatory identification of users of subscriber units and users of Internet services.
- The vaguely defined restrictions and prohibitions on spreading illegal information and the procedure for implementing them.
- The unclear responsibility of the provider of information on the Internet in the event the instructions of a corresponding body to remove identified violations or its demands to halt Internet services are not carried out.
- The absence of any obligation on the part of state bodies to place not only information about their own activities on the Internet, but also share information that has been acquired or created as a result of such activities.
- The obligation that information reports and/or media articles disseminated via the Internet must include hyperlinks to the original source of the information or to the media agency that previously placed it.

## **INTRODUCTION**

At the request of the OSCE Office of the Representative on Freedom of the Media, this commentary was prepared by Andrei Richter, Doctor of Philology. Dr. Richter is the director of the Media Law and Policy Institute and the head



of the Department of History and Legal Regulation of Domestic Media at the Department of Journalism of Lomonosov Moscow State University. He is a member of the International Commission of Jurists (ICJ, Geneva) and of the International Council of the International Association of Mass Communication Researchers (IAMCR).

This commentary contains an analysis of the Decree of the President of the Republic of Belarus No. 60 “On Measures to Improve the Use of the National Segment of the Internet” of 1 February, 2010 in the context of its correspondence to international standards relating to the right to freedom of expression and to freedom of the mass media.

Section 1 of this commentary examines the international obligations of the Republic of Belarus with respect to human rights and sets forth the international standards relating to the right to freedom of expression, including on the Internet. These standards are envisaged in international law, e.g., in the International Covenant on Civil and Political Rights and in various OSCE commitments, to which the Republic of Belarus is a party; in the decisions of international courts and tribunals on human rights; in declarations by representatives of international agencies, e.g., the UN Special Rapporteur on Freedom of Opinion and Expression and the OSCE Representative on Freedom of the Media; and are also commensurable with constitutional law on issues of freedom of expression.

Section 2 contains an analysis of the Decree of the President of the Republic of Belarus “On Measures to Improve the Use of the National Segment of the Internet”, with due account of the abovementioned standards.

This commentary is also based on the instructions of the OSCE Parliamentary Assembly set forth in 2009 in the Resolution on Freedom of Expression on the Internet. In Paragraph 12, the Parliamentary Assembly:

*“Requests that the OSCE Representative on Freedom of the Media monitor the policies and practices of participating States regarding the free flow of information and ideas relating to political, religious or ideological opinion or belief on the Internet, including Internet censorship, blocking and surveillance”.*<sup>1</sup>

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<sup>1</sup> Resolution of the Eighteenth Annual Session. Vilnius, 29 June-3 July 2009. See the full English text at [http://www.eerstekamer.nl/id/vibsmzqhdnh/document\\_extern/090629\\_vilnius\\_declaration/f=/vibsmzqpmwnr.pdf](http://www.eerstekamer.nl/id/vibsmzqhdnh/document_extern/090629_vilnius_declaration/f=/vibsmzqpmwnr.pdf).

## **INTERNATIONAL STANDARDS RELATING TO FREEDOM OF EXPRESSION, INCLUDING ON THE INTERNET**

### **1.1. Recognition of the Importance of Freedom of Expression**

Freedom of expression has long been recognized as a fundamental human right. It is of paramount importance to the functioning of democracy, is a necessary condition for the exercise of other rights, and is in and of itself an indispensable component of human dignity.

The Republic of Belarus is a full-fledged member of the international community and a participant in the United Nations and the Organization for Security and Co-operation in Europe (OSCE). It has therefore assumed the same obligations as all the other participating States.

The Universal Declaration of Human Rights (UDHR), the basic instrument on human rights adopted by the General Assembly of the United Nations in 1948, protects the right to the free expression of one's convictions in the following wording of Article 19:

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.<sup>2</sup>*

The International Covenant on Civil and Political Rights (ICCPR),<sup>3</sup> a UN treaty of binding judicial force and ratified by the Republic of Belarus, also guarantees the right to freedom of expression, as can be seen from the text of its Article 19:

*1. Everyone shall have the right to hold opinions without interference.*

*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

With respect to documents adopted by the United Nations, mention should be made of Resolution 59 (I), adopted by the UN General Assembly at its very first session in 1946. In reference to the freedom of information in the broadest sense

<sup>2</sup> Resolution 217A(III) of the General Assembly of the United Nations, adopted 10 December 1948. A/64, pp. 39-42. See the full English text at <http://www.un.org/en/documents/udhr/>.

<sup>3</sup> International Covenant on Civil and Political Rights. Adopted by Resolution 2200 A (XXI) of the General Assembly 16 December 1966. Entered into force 23 March 1976. See the full official English text on the UN website at <http://www2.ohchr.org/english/law/ccpr.htm>.





of the concept, the resolution states:

*Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.*<sup>4</sup>

Freedom of expression is of fundamental importance in and of itself, and as the foundation for exercising all other human rights. Full-fledged democracy is only possible in societies that permit and guarantee the free flow of information and ideas. Freedom of expression is also of paramount importance in identifying and exposing violations of this and other human rights and in dealing with such violations.

The European Court of Human Rights created to monitor the Convention for the Protection of Human Rights and Fundamental Freedoms has consistently emphasized the “pre-eminent role of the press in a State governed by the rule of law”.<sup>5</sup> It has noted in particular that

*Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.*<sup>6</sup>

In turn, the Inter-American Court of Human Rights believes: “It is the media that make the exercise of freedom of expression a reality”.<sup>7</sup>

In the same context, Part 1, Article 8 of the Constitution of the Republic of Belarus reads:

*The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles.*

4 United Nations 65th Plenary Session, 14 December 1946. The official English text can be found at the UN website: [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59\(II\)&Lang=R&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59(II)&Lang=R&Area=RESOLUTION).

5 *Thorgerison v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63. See the official text of this judgement at the ECHR website: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Thorgerison%20%7C%20v.%20%7C%20Iceland&sessionId=47499501&skin=hudoc-en>.

6 *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43. See the official text of this judgement at the ECHR website: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Castells%20%7C%20v.%20%7C%20Spain%2C&sessionId=47499840&skin=hudoc-en>.

7 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

In turn, Part 3, Article 21 of the Constitution envisages that:

*The State shall guarantee the rights and liberties of the citizens of Belarus that are enshrined in the Constitution and the laws, and specified in the state's international obligations.*

*Finally, Articles 33 and 34 of the Constitution of the Republic of Belarus protect the right to freedom of expression and information as follows:*

*Article 33. Everyone shall be guaranteed freedom of thoughts and beliefs and their free expression.*

*No one shall be forced to express their beliefs or to deny them.*

*No monopolization of the mass media by the State, public associations or individual citizens and no censorship shall be permitted.*

*Article 34. Citizens of the Republic of Belarus shall be guaranteed the right to receive, store and disseminate complete, reliable and timely information of the activities of state bodies and public associations, on political, economic, cultural and international affairs, and on the state of the environment.*

*State bodies, public associations and officials shall afford citizens of the Republic of Belarus an opportunity to familiarize themselves with material that affects their rights and legitimate interests.*

*The use of information may be restricted by legislation with the purpose to safeguard the honour, dignity, personal and family life of the citizens and the full implementation of their rights.<sup>8</sup>*

## **1.2. Obligations of the OSCE Participating States with Respect to Freedom of the Media and the Internet**

The right to freely express one's opinions is inseparably bound to the right of freedom of the media. Freedom of the media is guaranteed by various documents of the Organization for Security and Co-operation in Europe (OSCE), to which the Republic of Belarus has given its assent.

The Organization for Security and Co-operation in Europe is the world's largest

<sup>8</sup> Constitution of the Republic of Belarus of 1994. See full English text at <http://law.by/work/EnglPortal.nsf/FINDPage/D93BC51590CF7F49C2256DC0004601DB?OpenDocument>.



regional security organization and comprises 56 nations of Europe, Asia, and North America. Founded on the basis of the Final Act of the Conference on Security and Co-operation in Europe (1975), the Organization has assumed the tasks of identifying the potential for the outbreak of conflicts, and of preventing, settling, and dealing with the aftermaths of conflicts. The protection of human rights, the development of democratic institutions, and the monitoring of elections are among the Organization's main methods for guaranteeing security and performing its basic tasks.

The Final Act of the Conference on Security and Co-operation in Europe (CSCE) in Helsinki<sup>9</sup> states “[T]he participating States will act in conformity with the purposes and principles of the... Universal Declaration of Human Rights.” The provisions coordinated by the participating States in the Helsinki Final Act of 1975 recognize “the importance of the dissemination of information from the other participating States” and “make it their aim to facilitate the freer and wider dissemination of information of all kinds” and “encourage co-operation in the field of information and the exchange of information with other countries.”

The Final Act of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE states that the OSCE participating States will respect human rights and fundamental freedoms, including freedom of thought, conscience and religion for all and will not discriminate solely on the grounds of race, colour, sex, language and religion. They will encourage and promote civil, political, economic, social, cultural and other rights and freedoms, recognizing them to be of paramount importance for human dignity and for the free and full development of every individual.

In Paragraph 9.1 of the same document, the OSCE participating States reaffirm that:

*“everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards”.*<sup>10</sup>

9 Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1 August 1975. See the complete official text at [http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf) and in extracts concerning freedom of expression at [http://www.medialaw.ru/laws/other\\_laws/european/zakl\\_akt.htm](http://www.medialaw.ru/laws/other_laws/european/zakl_akt.htm).

10 Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990. See in particular Paragraph 9.1 and 10.1 at [http://www.osce.org/publications/rfm/2008/03/30426\\_1084\\_en.pdf](http://www.osce.org/publications/rfm/2008/03/30426_1084_en.pdf). The full official text is available at [http://www.osce.org/documents/odhr/2006/06/19392\\_en.pdf](http://www.osce.org/documents/odhr/2006/06/19392_en.pdf).

The OSCE Charter for European Security states:

*“We reaffirm the importance of independent media and the free flow of information as well as the public’s access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society”.*<sup>11</sup>

Finally, at the Moscow Meeting of the Conference on the Human Dimension of the CSCE held in October 1991, the participating States unanimously agreed that they:

*“... reaffirm the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. They further recognize that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms”.*

The document of the Moscow Meeting also states that the CSCE participating States

*“... consider that the print and broadcast media in their territory should enjoy unrestricted access to foreign news and information services. The public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards”.*<sup>12</sup>

For the purposes of regulating the Decree of the President of the Republic of Belarus, it is important to be particularly mindful of the fact that in Paragraph 35 of the Concluding Document on Co-operation in Humanitarian and Other Fields of the Vienna Meeting 1986 of the CSCE, the participating States will also

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<sup>11</sup> See Paragraph 26 of the Charter for European Security, adopted at the OSCE Istanbul Summit, November 1999. The full official text is available at [http://www.osce.org/documents/mcs/1999/11/4050\\_en.pdf](http://www.osce.org/documents/mcs/1999/11/4050_en.pdf).

<sup>12</sup> Paragraphs 26 and 26.1, Final Document of the Moscow Meeting of the Conference on the Human dimension of the CSCE. See the official text at the OSCE website: [http://www.osce.org/fom/item\\_11\\_30426.html](http://www.osce.org/fom/item_11_30426.html). The obligation to impose restrictions on the freedom of mass communications within the law and in accordance with international standards was also reaffirmed by all the OSCE participating states in Paragraph 6.1 of the Final Document of the Symposium on the Cultural Legacy of CSCE Participating States (July 1991). See *ibid.*



*“take every opportunity offered by modern means of communication, including cable and satellites, to increase the freer and wider dissemination of information of all kinds”.*<sup>13</sup>

Decision No. 633 of the OSCE Permanent Council on Promoting Tolerance and Media Freedom on the Internet approved by the Ministerial Council of the OSCE participating States at the meeting in Sofia (2004) is also important in this respect, in which the Permanent Council

*Reaffirming the importance of fully respecting the right to the freedoms of opinion and expression, which include the freedom to seek, receive and impart information, which are vital to democracy and in fact are strengthened by the Internet,*

*Decides that:*

*1. Participating States should take action to ensure that the Internet remains an open and public forum for freedom of opinion and expression, as enshrined in the Universal Declaration of Human Rights;*<sup>14</sup>

The OSCE has been concerned for several years now about the situation regarding freedom of information and ideas on the Internet in some of its participating states. In Paragraph 11 of its Resolution on Freedom of Expression on the Internet, the OSCE Parliamentary Assembly

*Calls on participating States to communicate to repressive States, including participating States, their concerns about government actions aimed at censoring, blocking or surveilling the free flow of information and ideas relating to political, religious or ideological opinion or belief on the Internet.*<sup>15</sup>

### **1.3. Permissible Restrictions on Freedom of Expression**

The right to freedom of expression, including on the Internet, is inarguably not absolute: in a few specific instances, it may be subject to restrictions. Due to the fundamental nature of this right, however, any restrictions must be precise and clearly defined according to the principles of a state governed by rule of law. In addition, restrictions must serve legitimate purposes and be necessary for the

<sup>13</sup> See full English text at <http://www.fas.org/nuke/control/osce/text/VIENN89E.htm>.

<sup>14</sup> Appendix to Decision No. 12/04. See full English text on the OSCE website at [http://www.osce.org/documents/mcs/2004/12/3915\\_en.pdf](http://www.osce.org/documents/mcs/2004/12/3915_en.pdf).

<sup>15</sup> Resolution of the Eighteenth Annual Session. Vilnius, 29 June-3 July 2009. See the full English text at [http://www.eerstekamer.nl/id/vibsmzqhdnh/document\\_extern/090629\\_vilnius\\_declaration/f=/vibsmzqpmwnr.pdf](http://www.eerstekamer.nl/id/vibsmzqhdnh/document_extern/090629_vilnius_declaration/f=/vibsmzqpmwnr.pdf).

well-being of a democratic society.<sup>16</sup>

The limits to which legal restrictions on freedom of expression are permissible are set forth in Paragraph 3 of Article 19 of the ICCPR cited above:

*The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

- a. *For respect of the rights or reputations of others;*
- b. *For the protection of national security or of public order (ordre public), or of public health or morals.*

It is worth noting that the matter does not concern the need or duty of states to establish appropriate restrictions on this freedom but only of the admissibility or possibility of doing so while continuing to observe certain conditions. This regulation is interpreted as establishing a threefold criterion demanding that any restrictions (1) be prescribed by law, (2) serve a legitimate purpose, and (3) are necessary for the well-being of a democratic society.<sup>17</sup> This international standard also implies that vague and unclearly formulated restrictions, or restrictions that may be interpreted as enabling the state to exercise sweeping powers, are incompatible with the right to freedom of expression.

If the state interferes with the right to freedom of the media, such interference must serve one of the purposes enumerated in Article 19 (Paragraph 3). The list is succinct, and interference not associated with one or another of the specified aims is consequently a violation of the covenant's Article 19. In addition, the interference must be "necessary" to achieve one of the aims. The word "necessary" has special meaning in this context. It signifies that there must be a "pressing social need" for such interference;<sup>18</sup> that the reasons for it adduced by the state must be "relevant and sufficient", and that the state must show that the interference was proportionate to the aims pursued. As the UN Committee on Human Rights has declared, "the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to

<sup>16</sup> See Section II.26 of the Report from the Seminar of Experts on Democratic Institutions to the CSCE Council (Oslo, November 1991). The official text can be found at <http://www2.ohchr.org/english/law/ccpr.htm>.

<sup>17</sup> See, e.g., Paragraph 6.8 of the UN Committee on Human Rights judgment in the case *Rafael Marques de Morais v. Angola*, No. 1128/2002, 18 April 2005: <http://humanrights.law.monash.edu.au/undocs/1128-2002.html>.

<sup>18</sup> See, e.g., *Hrico v. Slovakia*, 27 July 2004, Application No. 41498/99, para. 40 at the ECHR website: <http://www.echr.coe.int/eng/Press/2004/July/ChamberJudgmentHricoV Slovakia200704.htm>.



protect”.<sup>19</sup> The European Court of Human Rights also makes similar demands of the concept “necessary”.

With respect to the Internet, the European Convention on Cybercrime adopted in Budapest on 23 November 2001 emphasizes the need to be

*Mindful of the need to ensure a proper balance between the interests of law enforcement and respect for fundamental human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties, which reaffirm the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, and the rights concerning the respect for privacy.*<sup>20</sup>

In this respect, it is worth noting that Part 1 of Article 23 of the Constitution of the Republic of Belarus reads:

*Restriction of personal rights and liberties shall be permitted only in the instances specified in law, in the interest of national security, public order, the protection of the morals and health of the population as well as rights and liberties of other persons.*

The Republic of Belarus Constitution, in the same way as international acts, points to the admissibility and possibility of restricting personal rights and freedoms in certain conditions. This regulation essentially demands that any restrictions are: 1) prescribed by the law, and 2) pursue legal aims set forth in the Republic of Belarus Constitution.

#### **1.4. Regulating Media and Internet Operations**

To protect their constitutional rights to freedom of expression, it is vital that the media have the opportunity to carry out their operations independently of government control. This ensures their functioning as a public watchdog and the people’s access to a broad range of opinions, especially on issues of public interest. The primary aim of regulating media operations in a democratic society ought therefore to be the facilitation of the development of independent and

<sup>19</sup> See the Judgment in the case *Rafael Marques de Morais v. Angola*, note 31, para. 6.8.

<sup>20</sup> Participating States of the Council of Europe as well as the U.S., Japan, RSA, and Canada participated in drawing up the Convention. The Convention came into force on 1 July 2004, as of today it has been signed by 46 states and ratified by 26 of them (Belarus is not one of them). See full English text at <http://conventions.coe.int/Treaty/EN/Treaties/html/185.htm>.

pluralistic media, thus guaranteeing the public's right to receive information from a wide variety of sources.

Article 2 of the ICCPR assigns participating States the duty of adopting "such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." This means that participating States are required not only to refrain from violating these rights but also to take positive measures to guarantee that such rights are respected, including the right to freedom of expression. The states are de facto obliged to create conditions in which a variety of media can develop, thus ensuring the public's right to information.

Thus it is generally accepted today that any state authorities which exercise formal regulatory powers in the field of the media or telecommunications (including the Internet) should be fully independent of the government and protected from interference by political and business circles. Otherwise regulation of the media could easily become a target of abuse for political or commercial purposes. The Joint Declaration presented in December 2003 by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression notes:

*All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.*<sup>21</sup>

The licensing requirement for media was especially condemned in a resolution on Persecution of the Press in the Republic of Belarus, adopted by the Parliamentary Assembly of the Council of Europe (PACE) in 2004. Moreover, this was the first mention in such a high-ranking document of the fact that Article 10 of the European Convention on Human Rights *in principle* does not permit such licensing of media. The Council of Europe saw this as a violation of "the fundamental principle of the separation of powers between the executive and the judiciary and ... contrary to Article 10 of the European Convention on Human Rights", and called for the corresponding articles of the Law on the Media to be revised.<sup>22</sup>

<sup>21</sup> See: <http://www.unhchr.ch/huricane/hurricane.nsf/0/93442AABD81C5C84C1256E000056B89C?opendocument>.

<sup>22</sup> See: Parliamentary Assembly of the Council of Europe, Resolution 1372 (2004), Persecution of the press in the Republic of Belarus. Full English text available on the official Council of Europe website at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/ERES1372.htm>.





The Parliamentary Assembly recognizes the need for a number of principles relating to freedom of the media to be observed in every democratic society. A list of these principles can be found in PACE Resolution No. 1636 (2008), “Indicators for Media in a Democracy”.<sup>23</sup> This list helps to objectively analyze the state of the environment for the media in a particular country with respect to the observation of media freedom, and to identify problem issues and potential weaknesses. This allows the authorities to discuss matters at the European level with respect to possible actions for resolving such issues. The Parliamentary Assembly proposed in its resolution that national parliaments regularly conduct objective and comparative analyses in order to reveal shortcomings in legislation and media policy, and to take the measures needed to correct them. In the context of the amendments being analyzed, the following principle from this list is worth noting:

*8.17. the state must not restrict access to foreign print media or electronic media including the Internet...*

Based on the above provisions, commentary and recommendations on the key provisions of the Decree of the President of the Republic of Belarus “On Measures to Improve the Use of the National Segment of the Internet” will follow.

## **II. ANALYSIS OF THE DECREE OF THE PRESIDENT OF THE REPUBLIC OF BELARUS “ON MEASURES TO IMPROVE THE USE OF THE NATIONAL SEGMENT OF THE INTERNET”**

### **2.1. Basic Concepts and Area Covered by the Decree**

The President shall issue decrees and orders on the basis of and in accordance with the Constitution which are mandatory on the territory of the Republic of Belarus (Art. 85). The government is responsible for their implementation (Art. 107). Whereby Article 137 envisages: “The Constitution shall have the supreme legal force. Laws, decrees, edicts and other instruments of state bodies shall be promulgated on the basis of, and in accordance with the Constitution of the Republic of Belarus. Where there is a discrepancy between a law, decree or edict and the Constitution, the Constitution shall apply”.

The Decree of the President of the Republic of Belarus “On Measures to Improve the Use of the National Segment of the Internet” is aimed at protecting the interests of citizens, society, and the state in the information sphere, raising the quality and reducing the cost of Internet services, and ensuring further

<sup>23</sup> The full English text of the Resolution is available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1636.htm>.

development of the national segment of the Internet.

The Decree contains 16 paragraphs and was signed by President of the Republic of Belarus Alexander Lukashenko on 1 February 2010.

The legislative act contains several demands that call on state bodies and other government organizations to provide more information about themselves. For this purpose, the Decree makes it incumbent upon state bodies and other government organizations, as well as the business entities that have a prevalent share in their authorized funds, to place information about their activities on the official sites of these bodies and organizations and ensure their efficient functioning and systematic updating.

The Decree contains several provisions aimed at protecting copyright from piracy on the Internet. For example, literary, scientific, music, photographic, audiovisual works, works of art, and other subject matters of copyright and associated rights that enjoy legal protection on the territory of the Republic of Belarus should only be placed on the Internet providing the requirements of the legislation on copyright and associated rights, including with the consent of the copyright holders, are observed. Information reports and/or other media materials disseminated via the Internet should include a hyperlink to the original source of the information or to the media organization that previously placed such information reports and/or materials.

The Decree envisages that Internet service providers undergo state licensing of information networks, systems, and resources of the national segment of the Internet located on the territory of the Republic of Belarus by applying to the Ministry of Communications and Informatization of the Republic of Belarus or its authorized organization. The Government of the Republic of Belarus shall determine the state licensing procedure, as well as the list and types of documents to be submitted, by 1 May 2010.

“In order to ensure the security of citizens and the state”, after 1 July 2010 Internet service providers must identify the subscriber units of Internet service users, keep an account of, and store information on such units and the Internet services rendered.

The Decree introduces regulation of the mechanism for limiting access to information at the request of the Internet service user. For example, at the request of an Internet service user, the provider is obligated to limit access of the subscriber unit belonging to this user to information aimed at disseminating pornography and/or at promulgating violence, brutality, or other acts prohibited



by law.

The Decree comes into force six months after its adoption – on 1 July 2010.

As can be seen, the Decree applies to questions relating to the procurement and dissemination of information on the Internet, which will inevitably have an impact on the activity of journalists in Belarus and on freedom of the media.

## **2.2. Questions Arousing Concern**

### **2.2.1. Licensing of Internet Resources**

The Decree (paragraph 14.1) entrusts the Council of Ministers of the Republic of Belarus with determining before 1 May 2010, in coordination with the Operative-Analytical Centre under the President of the Republic of Belarus, the state licensing procedure for information networks, systems, and resources of the national segment of the Internet located on the territory of the Republic of Belarus.

It is assumed that resources physically located on the territory of the Republic of Belarus or in the national domain of the Republic of Belarus belong to the national segment of the Internet. So it is obvious that the phrase in the text of Decree No.60 “located on the territory of the Republic of Belarus” refers not only to the domain name in the .by zone, but also to the hosting on the server that is physically located on the territory of the Republic of Belarus. This provision could create problems for those who use the services of the hosting on servers located outside the Republic of Belarus.

Resources evidently also imply Internet media. The danger arises that this Decree will awaken the regulation of Article 11 of the Republic of Belarus Law “On the Media”, which has been “dormant” since February 2009, in compliance with which all Internet media must undergo mandatory licensing, while “the state licensing procedure for media disseminated via the global Internet shall be determined by the Council of Ministers of the Republic of Belarus”. This regulation has already been criticized in a memorandum issued by the Office of the OSCE Representative on Freedom of the Media in 2008.<sup>24</sup>

However, it should be presumed that this refers to a different type of licensing – not to licensing of an Internet resource as a form of media (according to the regulations of the Law “On the Media”), but rather to licensing as an information

<sup>24</sup> See full English text of the Comments on the Draft Law of the Republic of Belarus “On the Mass Media” on the website of the OSCE Representative on Freedom of the Media at [http://www.osce.org/documents/rfm/2008/06/31899\\_en.pdf](http://www.osce.org/documents/rfm/2008/06/31899_en.pdf).

resource (according to the regulations of Article 24 of the Law of the Republic of Belarus of 10 November 2008 “On Information, Informatization and the Protection of Information”).

### **2.2.2. Identification of Internet Users**

The Decree obligates the owners and administrators of Internet clubs and Internet cafes to identify their users, as well as keep an account of and store the personal data of such Internet service users. The same identification regulation also applies to the technical units of an Internet service user required for connecting to the telecommunication line in order to access the Internet (paragraph 6).

Whereas at present, a distance or public contract on rendering hosting services or access to the Internet can be entered, when the law comes into force, the client will have to come to the provider’s office in person in order to enter a contract and “go through the identification procedure”. This may be easy to do in Minsk or in other large regional centres, but it will be much more difficult in a small village. The Decree essentially prohibits access to the Internet without a password, use of prepaid cards, and acquiring a hosting through the Internet.

It is worth noting that even today when using Internet services at an Internet cafe or club, a client must give his/her name and address, although showing one’s passport is not yet required.<sup>25</sup>

It is very likely that the Council of Ministers, which is to determine the new procedure, will introduce tough requirements regarding “identification”. Moreover, according to the Decree, this information must be stored for a year and presented at the request of investigation agencies, public prosecutor and preliminary inquiry bodies, State Regulation Committee structures, tax agencies, and courts as set forth by the law.

These regulations are based in particular on the provisions of Article 20 of the Law of the Republic of Belarus “On Information, Informatization and Protection of Information” with respect to the fact that the information disseminated should contain reliable facts about its owner, as well as about the person disseminating the information, in a form and amount sufficient for identifying such persons. The Comments on the draft of this law issued in 2008 by the Office of the OSCE Representative on Freedom of the Media already mentioned that such a

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<sup>25</sup> See: M. Zolotova, The President’s Decree Will Improve Binet? Report of the TUT.BY portal of 15 December 2009, available at <http://news.tut.by/155251.html> (in Russian).



condition makes anonymous dissemination of information illegal.<sup>26</sup>

Hence, the regulations introduced concerning mandatory identification of subscriber units and Internet service users will lead to unjustified restrictions on the rights of citizens to obtain and spread information guaranteed by the Constitution of the Republic of Belarus and international agreements.

***Recommendation:***

- Mandatory identification of the users of subscriber units and the users of Internet services should be abandoned.

**2.2.3. Restrictions on Disseminating Harmful Information**

Paragraph 8 of the Decree sets forth a regulation in compliance with which Internet service providers, at the request of Internet service users, shall restrict access of these users to information aimed at:

- carrying out extremist activity;
- illicit circulation of weapons, ammunition, detonators, explosives, radioactive, contaminating, aggressive, poisonous, and toxic substances, drugs, psychotropic substances, and their precursors;
- assisting illegal migration and human trafficking;
- spreading pornography;
- promulgating violence, brutality, and other acts prohibited by law.

Accordingly, at the request of individual Internet users, providers must close access to such resources for such users (and not for all other Internet users). The Decree also envisages that access shall be automatically closed to illegal information from government authorities and organizations (for example, universities and schools). However, it is not clear who will evaluate the nature of the information with respect to which a “request to restrict access” has arrived and in what way. Internet providers themselves do not have the necessary qualifications or opportunities for this.

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<sup>26</sup> See English text of the Comments on the website of the Office of the OSCE Representative on Freedom of the Media at [http://www.osce.org/documents/rfm/2007/06/25078\\_en.pdf](http://www.osce.org/documents/rfm/2007/06/25078_en.pdf).

Another problem with this regulation is that the definitions of types of harmful and illegal information set forth in the Belarus legislation are very ambiguous. They are not formulated with sufficient precision and do not permit a citizen to regulate his/her behaviour and to foresee the possible consequences of a particular situation. For example, there is a restriction on “promulgating [any] acts prohibited by the law”. Such definitions give the authorities extremely broad powers to act at their own discretion. In this respect, the Belarusian authorities are recommended to turn their attention to the European Convention on Cybercrime and the Supplementary Protocol to the Convention on Cybercrime with respect to criminalization of racist and xenophobic acts committed via computer systems, as well as to important international instruments to combat crimes on the Internet.<sup>27</sup>

***Recommendation:***

- The meaning and procedure for introducing restrictions and prohibitions on the spread of illegal information should be clarified.

**2.2.4. Responsibility**

Paragraph 12 of the Decree removes responsibility for the content of information placed on the Internet from providers (shifting it to those persons who place this information). This makes it impossible to accuse the administration of a site that runs forums, blogs, chat rooms, and so on of spreading illegal information, which is definitely a positive step. But if the instructions of a corresponding body to rectify identified violations or its demands to halt Internet services are not carried out, responsibility for the content (!) of the information is shifted to the Internet service providers and the owners and administrators of Internet clubs and cafes.

***Recommendation:***

- The nature of the responsibility of the provider of information on the Internet in the event the instructions of a corresponding body to rectify identified violations or its demands to halt Internet services are not carried out should be clarified.

**2.2.5. Disclosure of Information**

Following the regulations of Article 22 of the Law of the Republic of Belarus “On Information, Informatization and Protection of Information”, the Decree (paragraph 1) contains several demands that republican state regulation bodies,

<sup>27</sup> See texts of these acts at [http://media1aw.ru/laws/other\\_laws/european/index.htm](http://media1aw.ru/laws/other_laws/european/index.htm).



local executive and regulation bodies, and other government organizations, as well as business entities in the authorized funds of which the Republic of Belarus or an administrative-territorial entity owns shares and to the decisions of which is therefore a party, shall provide information about themselves on the Internet, thus making it more accessible to citizens (including journalists). The Decree makes it incumbent upon such organizations to place information about their activities on the official sites of such bodies and organizations and to ensure their efficient functioning and regular updating.

Following the regulations of the same Article of the Law “On Information, Informatization and Protection of Information”, access to information is free of charge. Admittedly, the matter here (paragraph 1.6) only concerns access to certain home pages (?) of Internet sites, from which it follows that access to other pages might require payment.

The list of information on state sites on the Internet coincides with the list presented in Article 22 of the Law “On Information, Informatization and Protection of Information”, additional information to it on the sites shall be determined either by the President of the Republic of Belarus, or by the Council of Ministers of the Republic of Belarus, or by a decision of the head of the state body or organization.

With respect to the latter regulation, it is worth remembering that the Constitution of the Republic of Belarus (Article 34) guarantees citizens of the Republic of Belarus not only the “right to receive, store and disseminate complete, reliable and timely information of the activities of state bodies and public associations”, but also “on political, economic, cultural and international life, and on the state of the environment”. The decrees of the President, as follows from Article 137 of the Constitution, are issued not only in accordance with, but also on the basis of the Constitution of the Republic of Belarus. Consequently, the Decree should envisage that state bodies are obligated not only to provide information about their own activities, but also to share information that has been obtained or created as a result of such activities.

***Recommendation:***

- The responsibility of state bodies to provide information on the Internet not only about their own activities, but also to share information that has been acquired or created as a result of such activities should be envisaged.

### 2.2.6. Obligatory Hyperlinks

The Decree prescribes that information reports and/or other media matter disseminated via the Internet must include a hyperlink to the original source of information or to the media organization that previously placed such information reports and/or matter. This additional demand on editorial boards does not apply in those cases when the original source is not an Internet source. It develops the regulation of Paragraph 1.2 of Article 52 of the Law “On the Media”. This paragraph of the said Law says that a journalist, founder (founders) of a medium, editor-in-chief (editor), editorial board, disseminator of media products, an information agency, or a correspondent bureau shall not be responsible for disseminating unreliable information, if this information was obtained from information agencies, providing there are references to such information agencies. That is, now the demand for a *reference* to an agency is supplemented by the demand for a *hyperlink* to the information. This means that stricter state control is being established over whether particular information was indeed initially disseminated by an information agency. The need for this regulation does not seem justified from the viewpoint of guaranteeing freedom of information as a citizen and human right.

#### ***Recommendation:***

- The obligation that information reports and/or media matter disseminated via the Internet must have a hyperlink to the original source of information or to the media organization that previously placed them should be eliminated.









## **ANALYSIS OF THE DRAFT LAWS AMENDING THE DEFAMATION LEGISLATION IN THE REPUBLIC OF ARMENIA**

*This analysis has been commissioned by the Office of the OSCE Representative on Freedom of the Media and prepared by Boyko Boev, Legal Officer, ARTICLE 19, London*

### **KEY RECOMMENDATIONS**

#### **Definitions**

- The term “statement” should be replaced by term “public expression” in item 2 of proposed Article 1087.1 para 2 of the Civil Code to avoid the impression that not all forms of expression relating to public interests are protected by the law.
- Proposed Article 1087.1 para 3 of the Civil Code should be revised to eliminate the redundant words.
- The Draft Amendment should include a definition of public interest specifying that it includes matters relating to all branches of government, politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic interests, the exercise of power, art and culture.

#### **Insult**

- The definition of insult should be harmonised with the standards of the European Court of Human Rights concerning value judgments; or, at best, liability for insult should be completely eliminated.

#### **System of Legal Defences**

- The protection to statements afforded by proposed Article 1087.1 para 5 a) of the Civil Code should be extended.
- The requirement for presentation of the statements in a balanced manner should be removed from the Draft Amendment.
- The Draft Amendment should explicitly recognise the defence of truth, the defence of opinion and the defence of reporting words of others.

#### **Regime of Remedies**

- The purpose of remedies should be explicitly set out in the Draft Amendment,

stating that it is limited to redressing the immediate harm done to the reputation of the individual who has been defamed.

- The Draft Amendment should explicitly require that all remedies for damages meet the necessity-prong of the three-part test set out by Article 10 of the European Convention.
- The Draft Amendment should adopt the following rule in order to strengthen the regime of remedies and provide safeguards for the right to freedom of expression:
  - Courts should be obliged to take into account whether non-judicial remedies - including voluntary or self-regulatory mechanisms – have been requested and used to limit the harm caused to plaintiff’s honour or reputation.
  - Courts should prioritise the use of available non-pecuniary remedies to redress any harm to reputation caused by defamatory statements.
  - When ordering pecuniary remedies courts should have due regard to the potential chilling effect of the award on freedom of expression.
- Courts should be obliged to propose to the parties to reach a settlement and assist them in this regards. Offers for settlements should be regarded as mitigating factors with respect to damages.
- The ceiling of pecuniary remedies should be significantly lowered.
- The Draft Amendment should specify that defendant’s limited means should be a factor in determining the proportionality of a damage award.
- The Draft Amendment should contain an explicit provision that pecuniary awards should be proportionate to the harm done and that the maximum level of compensation should be applied only in the most serious cases.
- One ceiling for remedies should apply to all defamatory statements. The involvement of the media should not be regarded per se as a ground for higher liability.

### **Procedural Safeguards**

- Proposed wording of Article 1087.1 para 4 should be revised stating that the plaintiff bears the burden of proving the falsity of any statement of fact alleged to be defamatory if the latter relates to matters of public concern.
- The Draft Amendment should include a provision setting out that the

interpretation of the provisions concerning protection of honour, dignity and public reputation should be carried out in accordance with the guarantees of the European Convention on Human Rights as elaborated in the case-law of the European Court of Human Rights.

- The Draft Amendment should specify that the time limit for initiating of defamation cases starts from the first date the statement in question was published at that location and in that form.
- The Draft Amendment should exclude from the scope of liability for defamation people who are not authors, editors or publishers of statements who did not know and could not know that they were contributing to the dissemination of defamatory statements.
- Courts should be able to strike out unsubstantiated claims at an early stage of the proceedings in order to prevent malicious plaintiffs from suppressing media criticism by initiation of defamation cases with no prospect of success.

## I. INTRODUCTION

This Memorandum contains ARTICLE 19's analysis of three draft laws of Armenia aiming to reform the legal framework on defamation. These include the Amendment to the Civil Code of the Republic of Armenia, the Amendment to the Criminal Code of the Republic of Armenia, and the Amendment to the Criminal Procedural Code of the Republic of Armenia ("Draft Amendments").<sup>1</sup> The Armenian Parliament adopted the Draft Amendments in the first reading in March 2010.

ARTICLE 19 is an international, non-governmental human rights organisation which works with partner organisations around the world to protect and promote the right to freedom of expression. We have previously provided legal analyses in the area of media law to government and civil society organisations in over 30 countries.<sup>2</sup> Regarding Armenia, we have analysed a number of the freedom of expression and freedom of information laws and draft laws, including the 2000 version of the Television and Radio Broadcasting Law, the 2002 Draft Law on Access to Information, the Law on Mass Media (in 2003), 2005 proposal for the amendment of the Law on Mass Communication and others.

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<sup>1</sup> The Republic of Armenia Law on Making Amendments to the Republic of Armenia Civil Code - the proposed new part of the Civil Code is entitled *§2.1 The Order and Terms of Compensation for Harm Caused to the Honour, Dignity and Business Reputation*; The Republic of Armenia Law on Making Amendments to the Republic of Armenia Criminal Code; and The Republic of Armenia Law on Making Amendments to the Republic of Armenia Criminal Procedural Code. Copy of an unofficial translation of the Draft Amendments is attached in Annex 1 to this Memorandum. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

<sup>2</sup> These analyses can be found on the ARTICLE 19 website, at <http://www.article19.org/publications/law/legal-analyses.html>.

ARTICLE 19 broadly welcomes the proposed Draft Amendments, in particular the decision to decriminalise defamation by the Amendment to the Criminal Code. By decriminalising defamation, Armenia will join the group of progressive states where fair balance between the right to freedom of expression and the right to reputation is sought without recourse to criminal sanctions.<sup>3</sup> Further, the proposed Draft Amendment to the Civil Code includes progressive provisions, such as the introduction of several defences against claims for defamation, the limiting persons who can sue for insult and defamation, the fixed maximum levels of pecuniary awards, the establishment of a short time limit for legal actions; and the provision of non-pecuniary awards such as public apology, refutation and publication of the court decision.

At the same time, ARTICLE 19 has serious concerns with regard to the high pecuniary awards for damages, the lack of adequate and effective safeguards against disproportionate awards, the regulation of liability for insult and the failure to recognise a comprehensive system of defences that can be invoked against defamation claims. Further, the Draft Amendments fail to provide sufficient procedural safeguards for the right to freedom of expression and as a result can act as serious deterrent to free speech in the country.

The detail of our analysis is contained in Section III of this Memorandum. Section II summarises the body of international law on freedom of expression and defamation that the analysis draws on, focusing on the jurisprudence of the United Nations Human Rights Committee and the European Court of Human Rights. The analysis additionally draws on a set of standards on freedom of expression and defamation articulated in the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* (“Defining Defamation”).<sup>4</sup> These principles, which draw on comparative constitutional law as well as European and UN human rights jurisprudence, have attained significant international endorsement, including that of the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.<sup>5</sup>

3 Other countries in Europe which have decriminalised defamation include Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Ireland, Moldova, Ukraine and the UK.

4 London: ARTICLE 19, 2000.

5 See their Joint Declaration of 30 November 2000. Available at: <http://www.unhchr.ch/huricane/huricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument>



## II. INTERNATIONAL STANDARDS

### II.1. The Guarantee of Freedom of Expression

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. Article 19 of the *Universal Declaration on Human Rights* (“UDHR”),<sup>6</sup> a United Nations General Assembly resolution, guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The *International Covenant on Civil and Political Rights* (“ICCPR”),<sup>7</sup> ratified by the Republic of Armenia in 1993, elaborates on many of the rights set out in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found in Article 19 of the UDHR. Freedom of expression is also protected in the three regional human rights systems, Article 10 of the *European Convention on Human Rights* (European Convention),<sup>8</sup> which was ratified by the Republic of Armenia in 2002, Article 13 of the *American Convention on Human Rights*<sup>9</sup> and Article 9 of the *African Charter on Human and Peoples’ Rights*.<sup>10</sup>

Article 10(1) of the European Convention states, in part:

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.

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. The European Court of Human Rights (“the European Court”) has repeatedly stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.<sup>11</sup>

6 UN General Assembly Resolution 217A(III), adopted 10 December 1948.

7 UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

8 Adopted 4 November 1950, in force 3 September 1953.

9 Adopted 22 November 1969, in force 18 July 1978.

10 Adopted 26 June 1981, in force 21 October 1986.

11 *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

The European Court has also made it clear that the right to freedom of expression protects offensive speech. It has become a fundamental tenet of its jurisprudence that the right to freedom of expression “is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”<sup>12</sup>

It has similarly emphasised that “[j]ournalistic freedom ... covers possible recourse to a degree of exaggeration, or even provocation.”<sup>13</sup> This means, for example, that the media are free to use hyperbole, satire or colourful imagery to convey a particular message.<sup>14</sup> The choice as to the form of expression is up to the media. For example, the European Court has protected newspapers choosing to voice their criticism in the form of a satirical cartoon.<sup>15</sup> The context within which statements are made is relevant as well. For example, in the second *Oberschlick* case, the European Court considered that calling a politician an idiot was a legitimate response to earlier, provocative statements by that same politician while in the *Lingens* case, the European Court stressed that the circumstances in which the impugned statements had been made “must not be overlooked.”<sup>16</sup>

The European Court attaches particular value to political debate and debate on other matters of public importance. Any statements made in the conduct of such debate can be restricted only when this is absolutely necessary: “There is little scope ... for restrictions on political speech or debates on questions of public interest.”<sup>17</sup> The European Court has rejected any distinction between political debate and other matters of public interest, stating that there is “no warrant” for such distinction.<sup>18</sup> The European Court has also clarified that this enhanced protection applies even where the person who is attacked is not a ‘public figure’; it is sufficient if the statement is made on a matter of public interest.<sup>19</sup> The flow of information on such matters is so important that, in a case involving newspaper articles making allegations against seal hunters, a matter of intense public debate at the time, the journalists’ behaviour was deemed reasonable, and

<sup>12</sup> *Ibid.* Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

<sup>13</sup> *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.

<sup>14</sup> See *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras 50-54.

<sup>15</sup> See, for example, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 63 and *Bergens Tidende and Others v. Norway*, 2 May 2000, Application No. 26131/95, para. 57.

<sup>16</sup> *Oberschlick v. Austria* (No. 2), 1 July 1997, Application No. 20834/92, para. 34 and *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 43.

<sup>17</sup> See, for example, *Dichand and others v. Austria*, note 13, para. 38.

<sup>18</sup> *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 64.

<sup>19</sup> See, for example, *Bladet Tromsø and Stensaas v. Norway*, note 15.





hence protected against liability, even though they did not seek the comments of the seal hunters to the allegations.<sup>20</sup>

The guarantee of freedom of expression applies with particular force to the media. The European Court has consistently emphasised the “pre-eminent role of the press in a State governed by the rule of law”<sup>21</sup> and has stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.<sup>22</sup>

In nearly every case before it concerning the media, the European Court has stressed the “essential role [of the press] in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”<sup>23</sup> In the context of defamation cases, the European Court has emphasised that the duty of the press goes beyond mere reporting of facts; its duty is to interpret facts and events in order to inform the public and contribute to the discussion of matters of public importance.<sup>24</sup>

## II.2. Restrictions on the Right to Freedom of Expression

International law permits limited restrictions on the right to freedom of expression in order to protect various interests, including reputation. The parameters of such restrictions are provided for in Article 10(2) of the European Convention, which states:

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

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20 *Ibid.*

21 *Thorgeirson v. Iceland*, note 18, para. 63

22 *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

23 See, for example, *Dichand and others v. Austria*, note 13, para. 40.

24 *The Sunday Times v. The United Kingdom*, 26 April 1979, Application No. 6538/74, para. 65.

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.

Any restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by both the Human Rights Committee<sup>25</sup> and the European Court,<sup>26</sup> requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest (including, as noted, protecting the reputations of others, relevant to the comments contained herein), and (3) necessary to secure this interest. In particular, in order for a restriction to be deemed necessary, it must restrict freedom of expression as little as possible, it must be carefully designed to achieve the objective in question and it should not be arbitrary, unfair or based on irrational considerations.<sup>27</sup> Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

The European Court has held that this represents a high standard which any interference must overcome:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.<sup>28</sup>

### **III. ANALYSIS OF THE DRAFT AMENDMENTS/DRAFT AMENDMENT TO THE CIVIL CODE**

This section analyses in detail the Draft Amendments against international legal standards on freedom of expression. The Draft Amendment of the Criminal Code consists of provisions abolishing criminal defamation, we focus on the analysis of the Amendment of the Civil Code. We support the decision to decriminalize defamation and recommend the Armenian Parliament to adopt the Amendment to the Criminal Code.

As stated in the introduction, the Draft Amendment to the Civil Code includes some progressive provisions and should be adopted by the Armenian Parliament. It introduces defences that can be invoked against claims for

25 For example, in *Laptevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

26 For example, in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.

27 See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

28 See, for example, *Thorgeirson v. Iceland*, note 18, para. 63 (European Court of Human Rights).



defamation; limits the scope of persons who can sue for insult and defamation; introduces the ceiling on pecuniary compensations; establishes a time limit for legal actions; provides for non-pecuniary awards such as a public apology, refutation and publication of the court decision; eliminates possibilities for relatives of deceased persons to sue for defamation and insult of the latter; and eliminating the possibility of public entities (such as government bodies, local self-government bodies and judicial bodies legal persons) to bring action for defamation or insult. At the same time, a number of provisions may unnecessarily restrict of the right to freedom of expression.

We elaborate on these general recommendations in the following paragraphs.

### **III.1. Definitions**

#### Overview

The new wording of Article 1087.1 of the Civil Code defines insult and defamation. According to Article 1087.1 para 2, insult is “a *public expression* [emphasis added] by means of speech, picture, voice, sign or by any other form of publicity with the intention of causing harm to honour, dignity and business reputation (opinion or value judgement).” According to Article 1087.1 para 3, defamation is “a public expression of false facts in regard to a person, which infringe his/her honor, dignity or business reputation and do not correspond to the reality.”

Article 1087.1 para 2 further elaborates that the *statement* can not be deemed to have been made with the purpose of discrediting a person if that statement in the given situation and content is made due to an overweighing public interest. Also, proposed Article 1087.1 para 5b, states that statement of facts shall not be considered as defamation “if stating it, in the given situation and content, contributes to an overweighing public interest and if its author proves that he/she has made reasonable efforts to find out the truthfulness and substantiality of the statements and has presented them in a balanced manner and in good faith”.

#### Analysis

The use of the term “statement” in Article 1087.1 in addition to “public expression” creates an impression that the Draft Amendment does not protect all forms of public expression relating to overweighing public interests. In order to avoid this confusion, we recommend to use instead the term “public expression” when defining expression that cannot constitute insult and defamation. This wording would be in line with international law which protects all expression concerning public interests.

In respect to definition of defamation as “a public expression of *false facts.... that do not correspond to the reality*” [emphasis added], we note that the last part of the definition seems to be redundant because it is obvious that false facts do not correspond to the reality.

We also note that the Draft Amendment contains no definition of “public interest”. This is a significant shortfall. For the purpose of clarity, we recommend that the Draft Amendment includes a provision defining public interests. The definition should state that of public interest are matters relating to all branches of government, politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic interests, the exercise of power, art and culture.

### **Recommendations:**

- The term “statement” should be replaced by term “public expression” in item 2 of proposed Article 1087.1 para 2 of the Civil Code to avoid the impression that not all forms of expression relating to public interests are protected by the law.
- Proposed Article 1087.1 para 3 of the Civil Code should be revised to eliminate the redundant words.
- The Draft Amendment should include a definition of public interest specifying that it includes matters relating to all branches of government, politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic interests, the exercise of power, art and culture.

### **III.2. Protection against insult**

#### Overview

As noted in the previous section, Article 1087.1 para 2 of the Draft Amendment of the Civil Code differentiates between insult and defamation. Insult is defined “a public expression by means of speech, picture, voice, sign or by any other form of publicity with the intention of causing harm to honour, dignity and business reputation (opinion or value judgement).” The provisions also provide for exculpation in cases of “an overwhelming public interest.”



## Analysis

ARTICLE 19 is concerned about the protection against insult afforded by the Draft Amendment. *First*, the definition of insult implies that expression of every negative opinion or value judgment with intention to harm an individual's honour is prohibited by the law. The wording of the part of Article 1087.1 para 2 suggests that there is always presumption of intention to harm. The presumption can be refuted by proving that the expression of opinion was made due to overwhelming public interests.

This regulation of opinion or value judgment runs against the position of the European Court that affords protection of expression of negative opinions as long as they are based on established or admitted facts and made in good faith.<sup>29</sup> Moreover, while the definition of insult implies that at least the rebuttal of the presumption of intention to harm is susceptible of proof, the European Court emphasised that no proofs were required for expression of value judgments.<sup>30</sup>

In view of the foregoing, it is recommended to harmonise the definition of insult with the European Court standards concerning value judgment.

At the same time, mindful of the reluctance of the European Court to allow restrictions of value judgments and opinions, ARTILCE 19 believes it is reasonable and practical to decide against providing for legal liability for insult. The European Court has repeatedly held that tolerance and broadmindedness are at the heart of democracy, and that the right to freedom of expression protects not just those forms of speech that are broadly considered acceptable, but exactly those statements that others may find shocking, offensive or disturbing.<sup>31</sup> Moreover, there are disturbing examples from around the world about the use of insult laws to punish truth or unfavourable opinions.

## **Recommendations:**

- Harmonise the definition of insult with the standards of the European Court concerning value judgments; or, at best, eliminate completely the opportunity to seek legal responsibility for insult.

29 *Lingens v Austria*, Judgment of 8 July 1986, Application No. 9815/82, para. 46, and *De Haes & Gijssels v Belgium*, Judgment of 24 February 1997, Application No. 7/1996/626/809 at para. 47

30 *Ibid.* *Lingens v Austria*, at para. 46.

31 E.g. *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world. Another example is the case of *Oberschlick v Austria* (no.2), in which the applicant had been convicted by domestic courts for referring to a politician as an 'idiot'; the ECtHR held that this conviction violated his right to freedom of expression because he was expressing an opinion.

### III.3. Weak System of Legal Defences

#### Overview

The Draft Amendment recognises explicitly two legal defences which can be invoked against defamation claims. According to the proposed Article 1087.1 para 5 a) of the Civil Code, a statement of facts shall not be considered as defamation if it was made in court proceedings on the circumstances of the case under hearing. Article 1087.1 para 5 b) provides that there is no defamation if the statement of facts in the given situation and content, contributes to an overwhelming public interest and if its author proves that he/she has made reasonable efforts to find out the truthfulness and substantiality of the statements and has presented them in a balanced manner and in good faith.

#### Analysis

The system of legal defences against defamation claims in the Draft Amendment is weak.

First, Article 1087.1 para 5 a) provides a very limited scope of the absolute privilege to speak out freely and without fear of legal action. These should include, at minimum, for example statements made in the course of proceedings at legislative bodies, any statements made in the course of proceedings at local authorities, by members of those authorities; any statements made in the course of any stage of judicial proceedings (including interlocutory and pre-trial processes) by anyone directly involved in that proceeding (including judges, parties, witnesses, counsel and members of the jury) as long as the statement is in some way connected to that proceeding; any statement made before a body with a formal mandate to investigate or inquire into human rights abuses; any document ordered to be published by a legislative body; a fair and accurate report of the material related to the above mentioned proceedings; described in points (i) – (v) above; and a fair and accurate report of material where the official status of that material justifies the dissemination of that report, such as official documentation issued by a public inquiry, a foreign court or legislature or an international organisation.<sup>32</sup> Moreover, certain types of statements should be exempt from liability unless they can be shown to have been made with malice, in the sense of ill-will or spite. These should include statements made in the performance of a legal, moral or social duty or interest.<sup>33</sup>

Hence, ARTICLE 19 recommends expanding exemptions from liability to cover these instances.

<sup>32</sup> Principle 11, *Defining Defamation*. See also, for example, *A v. the United Kingdom*, Judgment of 19 December 2002, Application no. 35373/97.

<sup>33</sup> Principle 11, *Defining Defamation*.



*Second*, even though the recognition of the defence of reasonable publication proposed in Article 1087.1 para 5 b) is commendable, the proposed provision is problematic for two reasons. The Draft Amendment requires that the statements are presented in “a balanced manner.” This requirement amounts to an interference with the right to free expression that is not necessary in a democratic society. If people are obliged to present their statements in a balanced way, they are by definition impeded to express their own opinion.

Presumably, the requirement for presentation of the statements in a balanced manner was intended to ensure responsible journalism. However, the regulation is still too restrictive. The standards of the European Court require only that journalists act in good faith and provide reliable and precise information.<sup>34</sup>

Therefore, ARTICLE 19 recommends to remove the requirement for presentation of the statements in a balanced manner from the Draft Amendment.

*Third*, in addition to the two recognised defences of absolute privilege (as set out in Article 1087.1 para 5 a)) and reasonable publication (Article 1087.1 para 5 b)), international and comparative jurisprudences also recognise other defences. These are defence of truth, defence of opinion and defence of reporting words of others.

While the *defences of truth and opinion* can be drawn from the definition of defamation set out in the proposed Article 1087.1 para 3 of the Civil Code, it is recommended to explicitly specify these defences in the Draft Amendment because a true statement of fact and an opinion (value judgment) are not considered as defamation under international law.

However, the *defence of reporting words of others* cannot be drawn from the definition of defamation. We note that the European Court previously recognised this defence in order to protect journalists against legal actions for publishing or broadcasting defamatory allegations of others. In *Jersild v. Denmark*, the European Court found that interviews “whether edited or not, constitute one of the most important means whereby the press is able to play its vital role of ‘public watchdog’.”<sup>35</sup> Therefore, the European Court held that journalists should be protected against punishment for dissemination of matters of public interest.

ARTICLE 19, therefore, recommends that the Draft Amendment includes a provision recognising the defence of reporting words of others.

<sup>34</sup> See *Pedersen and Baadsgaard v Denmark*, Judgment of 17 December 2004, Application No. 49017/99.

<sup>35</sup> See *Jersild v. Denmark*, Judgment of 23 September 1994, Application No. 15890/89, para. 35.

**Recommendations:**

- The protection to statements afforded by proposed Article 1087.1 para 5 a) of the Civil Code should be extended.
- The requirement for presentation of the statements in a balanced manner should be removed from the Draft Amendment.
- The Draft Amendment should explicitly recognise the defence of truth, the defence of opinion and the defence of reporting words of others.

**III.4. Problematic Regime of Remedies**Purpose of remedies

Article 1087.1 para 6 – 8, deal with remedies for insult and defamation. The Draft Amendment, however, does not explicitly define the purpose of remedies. As a result, there is a risk of using the remedies to the detriment of the right to freedom of expression.

We note that the European Court has established that the purpose of a remedy for defamatory statement should be limited to redressing the immediate harm done to the reputation of the individual who has been defamed.<sup>36</sup> Using remedies to serve any other goal would exert an unacceptable chilling effect on freedom of expression which could not be justified as necessary in a democratic society.

To safeguard freedom of expression and ensure that remedies are awarded in compliance with the aforementioned principle, ARTICLE 19 recommends that the purpose of remedies be explicitly set out in the Draft Amendment.

Necessity of remedies

ARTICLE 19 is very concerned about the regime of remedies set out by the Draft Amendment. In particular, Article 1087.1 para 6 – 8 of the Draft Amendment grants a wide discretion to judges without providing them with sufficient guidance in this regard.

*First*, the Draft Amendment fails to incorporate the principle of the European Court of Human Rights that “any order to pay damages, regardless of their type and amount, constitute ‘interference’ with the speaker’s Article 10 rights so that the imposition of liability must be justified in accordance with the principle of

<sup>36</sup> *Tolstoy Miloslavsky v. United Kingdom*, Judgment of 13 July 1995, para. 51





Article 10 (2).<sup>37</sup> *Second*, the rules on provision of remedies are not sufficient and there is a danger that orders to pay damages may violate the right to freedom of expression. *Third*, the lack of precise rules will very likely make it difficult to ensure consistence application of the law in the country and equal treatment of all defendants. *Fourth*, there is a danger that maximum levels of compensations might be abusively and discriminately used to punish journalists and media.

We point out that the European Court has previously established that defamation laws should provide for adequate and effective safeguards against awards that are disproportionately large in relation to the actual damage sustained.<sup>38</sup> Further, *Defining Defamation* in Principles 14 and 15, include extensive guidance on rules for remedies. They recommend that courts should prioritise the use of available non-pecuniary remedies to redress any harm to reputation caused by defamatory statements.<sup>39</sup> Pecuniary damages should be awarded only where non-pecuniary remedies are insufficient to redress the harm caused by defamatory statements.<sup>40</sup> Moreover, the following rules should be considered when awarding pecuniary damages:

(b) In assessing the quantum of pecuniary awards, the potential chilling effect of the award on freedom of expression should, among other things, be taken into account. Pecuniary awards should never be disproportionate to the harm done, and should take into account any non-pecuniary remedies and the level of compensation awarded for other civil wrongs.

(c) Compensation for actual financial loss, or material harm, caused by defamatory statements should be awarded only where that loss is specifically established.

(d) The level of compensation which may be awarded for non-material harm to reputation – that is, harm which cannot be quantified in monetary terms – should be subject to a fixed ceiling. This maximum should be applied only in the most serious cases.

(e) Pecuniary awards which go beyond compensating for harm to reputation should be highly exceptional measures, to be applied only where the plaintiff has proven that the defendant acted with knowledge of the falsity of the statement and with the specific intention of causing harm to the plaintiff.<sup>41</sup>

<sup>37</sup> *Bladet Tromsø and Stensaas v. Norway*, Judgment of 20 May 1999, Application no. 21980/93.

<sup>38</sup> *Tolstoy Miloslavsky v. United Kingdom*, Judgment of 13 July 1995, para. 51.

<sup>39</sup> Principle 14, *Defining Defamation*.

<sup>40</sup> Principle 15 para 1, *Defining Defamation*.

<sup>41</sup> Principle 15, *Defining Defamation*.

ARTICLE 19 recommends that these standards are reflected in the Draft Amendment and a detailed guidance on the use of damage awards is introduced. Such guidance will ensure consistent application of the law and serve as a safeguard for freedom of expression.

In addition to these rules, it is recommended to consider that the European Court has indicated that defendant's limited means could be a factor in determining the proportionality of a damage award. In *Steel and Morris v United Kingdom*, the European Court of Human Rights held that awards of thirty-six and forty thousands pounds against the defendants were considered excessive "when compared to [their] modest incomes and resources."<sup>42</sup>

#### Pecuniary remedies

Although the Draft Amendment can be commended for subjecting the level of compensation to fix ceilings, the lump sums suggested in Article 1087.1 para 7 c) for different types of insults and defamations are very high. In the most extreme cases, the award for moral damages can be up to 2000 times the minimum salary.<sup>43</sup>

ARTICLE 19 believes that the proposed high ceilings of pecuniary remedies will inevitably exert a chilling effect on freedom of expression even if they remain only on the books. In addition, if awarded the compensations of such considerable amounts are very likely to be excessive when compared with the significantly lower incomes in the country.

ARTICLE 19, therefore, recommends that the ceiling of pecuniary remedies be significantly decreased.

#### Dissemination of insult and defamation by media

The proposed Article 1087.1. para 6 d) and Article 1087.1. para 7 c) (respectively) provide for higher pecuniary awards if insult and defamation were "disseminated through mass media" or were made/published through a mass medium.

By allowing a higher liability for insult and defamation disseminated by media or made through mass media, the Draft Amendment suggests that the involvement of the media increases the damage to one's honour, dignity and reputation. Although it may seem correct at a first sight, this perception is in fact inaccurate.

<sup>42</sup> *Steel and Morris. v United Kingdom* , Judgment of 15 February 2005, Application no. 68416/01.

<sup>43</sup> Minimum salaries are regulated by RA law "On minimum monthly salary", which sets out the amount of this salary and safeguards, that it can be altered by law.



For example, a defamatory statement can cause a smaller harm if published in a newspaper with a small circulation rather than in an election flier with a large circulation, which is obviously not media.

Moreover, the regulation affects journalists because due to the nature of their profession their views are disseminated by the media. Higher sanctions against journalists are discriminatory and will have a chilling effect on them and the media. In addition, the regulation runs against the position of the European Court that journalists should be protected from legal actions for disseminating statements of public interest.<sup>44</sup>

Therefore, ARTICLE 19 recommends not to formally differentiate between statements on the basis of whether they were disseminated or not by media. Even if the media may facilitate wide dissemination of a defamatory statement awards should always depend on the circumstance of an individual case and should not be higher than the actual harm.

### **Recommendations:**

- The purpose of remedies should be explicitly set out in the Draft Amendment, stating that it is limited to redressing the immediate harm done to the reputation of the individual who has been defamed.
- The Draft Amendment should explicitly require that all remedies for damages meet the necessity-prong of the three-part test set out by Article 10 of the European Convention.
- The Draft Amendment should adopt the following rule in order to strengthen the regime of remedies and provide safeguards for the right to freedom of expression:
  - Courts should be obliged to take into account whether non-judicial remedies - including voluntary or self-regulatory mechanisms – have been requested and used to limit the harm caused to plaintiff's honour or reputation.
  - Courts should prioritise the use of available non-pecuniary remedies to redress any harm to reputation caused by defamatory statements.
  - When ordering pecuniary remedies courts should have due regard to the potential chilling effect of the award on freedom of expression.
- Courts should be obliged to propose to the parties to reach a settlement and assist them in this regards. Offers for settlements should be regarded as

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<sup>44</sup> *Jersild v. Denmark*, Judgment of 23 September 1994, Application No. 15890/89, para. 35.

mitigation factors with respect to damages.

- The ceiling of pecuniary remedies should be significantly lowered.
- The Draft Amendment should specify that defendant's limited means should be a factor in determining the proportionality of a damage award.
- The Draft Amendment should contain an explicit provision that pecuniary awards should be proportionate to the harm done and that the maximum level of compensation should be applied only in the most serious cases.
- One ceiling for remedies should apply to all defamatory statements. The involvement of the media should not be regarded per se as a ground for higher liability.

### **III.5. Weak Procedural Safeguards**

With the exception of the short time limit for initiating defamation and insult cases in proposed Article 1087.1 para 9, the Draft Amendment is short of procedural safeguards for freedom of expression.<sup>45</sup> Hence, the Draft Amendment makes it easy to sue for defamation and insult. Below, we analyse some procedural rules and make recommendations for adoption of additional ones in view of the need to strengthen the protection the right to freedom of expression.

#### Burden of Proof

According to proposed Article 1087.1 para 4, the burden to prove that the facts are true lies with the defendant. It shifts upon the plaintiff if "it would require unreasonable efforts on the part of the defendant to prove the truth, while the plaintiff possesses necessary proofs."

This provision is problematic for two reasons. *First* it opens the floor for new arguments between the parties as a result of which the proceedings can be protracted. Due to their conflicting interests, defendants and plaintiffs would fight on the issue of burden of proof. While the defendant would wish to shift the burden of proof, the plaintiff would fight that it remains with the defendant. The arguments would complicate the proceedings which may result in protraction. The proceedings might be further prolonged if the decision of the court on the issue of burden of proof is appealed before the appellate court.

*Second*, the proposed provision is not consistent with international standards.

<sup>45</sup> A good rule of protection of sources is formulated in Article 5 of the Law of Mass Media



In particular, *Defining Defamation Principles* recommend that in cases involving statements on matters of public concern, the plaintiff should bear the onus of proving the falsity of any statements or imputations of fact alleged to be defamatory.<sup>46</sup>

This re-states the general principle developed by constitutional courts that placing the burden of proof on the defendant will have a significant chilling effect on the right to freedom of expression. For example, in the case of *New York Times v Sullivan*, the US Supreme Court held

Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defence as an adequate safeguard have recognised the difficulties of adducing legal proof that the alleged libel was true in all its factual particulars. ... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'.<sup>47</sup>

ARTICLE 19 recommends revising the proposed Article 1087.1 para 4 in accordance with the above principles.

#### Time Limit for Suing for Defamation and Insult

Proposed Article 1087.1 para 9 of the Draft Amendment sets out the time limit for lodging a claim for compensation for defamation and insult. The time limit is one month from the moment the person becomes aware of the dissemination of the insult or defamation but not later than 6 months after publication.

Even though the Draft Amendment can be commended for the short time limit for initiating of court proceedings for insult and defamation, the regulation is incomplete inasmuch as it does not take into account that statements are often published on continuous basis, such as websites on the internet.

ARTICLE 19 recommends that the Draft Amendment specifies that the date of publication shall be the first date when the statement in question was published at that location and in that form.

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<sup>46</sup> Principle 7, *Defining Defamation*

<sup>47</sup> *New York Times Co. v. Sullivan*, 376 US 254 (1964), p. 279.

### Interpretation

The Draft Amendment does not contain a specific provision ensuring that the interpretation of its provisions is made in accordance with the European Convention on Human Rights.

The case-law of the European Court establishes principles and standards which should guide national judges in the examination of defamation cases. The incompliance of domestic case law with the European Convention leads to applications to the European Court decisions against the government responsible for violations of human rights.

Bearing in mind that compensations to victims of violations increase the financial burden of the government, it is recommended that an explicit provision of the Civil Code ensures that the interpretation of the provisions concerning protection of honour, dignity and public reputation be carried out in accordance with the guarantees of the European Convention as elaborated in the case-law of the European Court.

### Limits of Liability for Defamation

The Draft Amendment does not impose any limit of the liability for defamation.

The failure of the Draft Amendment to impose limits of the liability for defamation is worrisome because a large number of people risk being sued for defamation due to their “innocent dissemination” of defamatory statements. For example, internet service providers may be held responsible for dissemination of defamatory statements even though they lack any direct link to them. In this respect, it is worth pointing as an example to Article 16 of the Law of Georgia on the Freedom of Speech and Expression which states that “[a] person shall not be imposed a liability if he did not and could not know that he disseminated defamation.”

ARTICLE 19 recommends that the Draft Amendment exclude from the scope of liability for defamation people who are not authors, editors or publishers of statements who did not know and could not know that they were contributing to the dissemination of defamatory statements.

### Summary dismissal of unfounded claims

The Draft Amendment does not provide effective remedies against abuse of the judicial process by plaintiffs who bring unsubstantiated defamation cases with a view to stifling criticism rather than vindicating their reputation.

Defendants should have legal means against plaintiffs who bring clearly



unsubstantiated defamation cases, without prospect of success, to try to prevent media criticism of their actions. Like any other court action, unsubstantiated defamation cases have a chilling effect on freedom of expression. The latter is actually sought by plaintiffs.

ARTICLE 19 recommends that a procedural mechanism is set up to strike out claims early on in the proceedings unless the plaintiff can show some probability of success.

### **Recommendations:**

- Proposed wording of Article 1087.1 para 4 should be revised stating that the plaintiff bears the burden of proving the falsity of any statement of fact alleged to be defamatory if the latter relates to matters of public concern.
- The Draft Amendment should include a provision setting out that the interpretation of the provisions concerning the protection of honour, dignity and public reputation should be carried out in accordance with the guarantees of the European Convention as elaborated in the case-law of the European Court.
- The Draft Amendment should specify that the time limit for initiating defamation cases starts from the first date the statement in question was published at that location and in that form.
- The Draft Amendment should exclude from the scope of liability for defamation people who are not authors, editors or publishers of statements who did not know and could not know that they were contributing to the dissemination of defamatory statements.
- Courts should be able to strike out unsubstantiated claims early on in the proceedings in order to prevent malicious plaintiffs from suppressing media criticism by initiation of defamation cases with no prospect of success.

## ANNEX 1: DRAFT AMENDMENTS

*First Reading*  
-774-23.11.2009,15.03.2010- -010/1

### REPUBLIC OF ARMENIA LAW On making amendments and supplements to the RoA Civil Code

#### **Article 1.**

Rephrase Article 19 of the Civil Code of the Republic of Armenia (as of May 5, 1998) in the following wording:

“Article 19. Protection of Honor, Dignity and Business Reputation

The honor, dignity and business reputation of a person is subject to protection from insult and defamation manifested by another person in the cases and order set forth under this code and other laws.

**Article 2.** Supplement Chapter 60 with a new 2.1 paragraph containing the following:

“2.1 The Order and Terms of Compensation for Harm Caused to the Honor, Dignity and Business Reputation

Article 1087.1. The Order and Terms of Compensation for Harm Caused to the Honor, Dignity and Business Reputation

1. A citizen, whose honor, dignity or business reputation has been infringed by way of insult or defamation, can file a lawsuit against the person having insulted or defamed.
2. In the context of this code, insult is deemed to be a public expression by means of speech, picture, voice, sign or by any other form of publicity with the intention of causing harm to honour, dignity and business reputation (opinion or value judgement).

Within the context of this article a statement can not be deemed to have been made with the purpose of discrediting a person if that statement in the given situation and content is made due to an overwhelming public interest.

3. In the sense of this code defamation is deemed to be the public expression



of false facts in regard to a person, which infringe his/her honor, dignity or business reputation and do not correspond to the reality.

4. The burden of proof that the facts are true lies with the defendant. It will devolve upon the plaintiff if it would require unreasonable efforts on the part of the defendant to prove the truth, while the plaintiff possesses necessary proofs.
5. The statement of facts within the meaning of part 3 of this Article shall not be considered as defamation if:
  - a. it was made by a participant in a court proceeding on the circumstances of the case under hearing;
  - b. if stating it, in the given situation and content, contributes to an overwhelming public interest and if its author proves that he/she has made reasonable efforts to find out the truthfulness and substantiality of the statements and has presented them in a balanced manner and in good faith.
6. In the case of insult as a moral compensation the aggrieved party has the right to demand in court from the person having insulted him/her one or several of the measures listed below:
  - a. Public apology. The manner of apologising shall be determined by court.
  - b. Refutation, if this is possible, taking into account the nature of insulting statements.

The manner of refutation shall be determined by court.

- c. Publication of the court decision by the media having published the insult. The manner and volume of such publication shall be determined by court.
- d. a lump sum payment of compensation
  - in the amount of up to 250 times the minimum monthly salary.
  - In the amount of upto 500 times of minimum salary if the insult has been disseminated by mass media due to gross negligence and intention of a person.
  - In the amount of 1000 times of the minimum salary from the mass medium if the insult is made through mass medium. The amount shall be determined by court taking into account the peculiarities of a given

case.

7. In the case of defamation, as a moral compensation the aggrieved party has the right to demand in court from the person having defamed him/her one or several of the measures listed below:
  - a. A public refutation of defamatory facts. The manner refutations shall be determined by court as per the law on Mass Media.
  - b. Publication of the court decision by media having published the defamation. Manner and volume of publication shall be determined by court.
  - c. A lump-sum payment of compensation:
    - in the amount of up to 500 times the minimum monthly salary.
    - In the amount of upto 1000 times of minimum salary if the defamation has been disseminated by mass media due to a person's gross negligence and intention;
    - In the amount of 2000 times of the minimum salary from the mass medium if the defamation is published through mass medium. The amount shall be determined by court taking into account the peculiarities of a given case.
8. Along with receiving moral compensation defined in close 6-7 of this article, a person has the right to demand in court from the person having insulted or defamed him/her material damages, including reasonable court expenses and reasonable expenses made by him/her for restoring his/her violated rights.
9. A claim under the present article shall be submitted to the court within one month from the moment the person becomes aware of the dissemination of the insult or defamation but no later than within 6 months after publication.

Article 3: Replace the words "Article 19" of Article 22 of the Code with the words "1087.1<sup>st</sup> Article".

Article 4: Concluding provisions: This law shall enter into force on the 10th day following its publication.



*First Reading*

-7742-23.11.2009,15.03.2010- -010/1

**REPUBLIC OF ARMENIA LAW**  
**On making amendments to the RoA Criminal Code**

Article 1: To consider invalid articles 135 and 136 of the Criminal Code of the Republic of Armenia (April 18, 2003).

Article 2: This law shall enter into force on the 10<sup>th</sup> day following its official publication.

**REPUBLIC OF ARMENIA LAW**  
**On making amendments to the RoA Criminal Procedural Code**

Article 1: To remove the words “paragraphs 1 and 2 of Article 135, paragraphs 1 and 2 of Article 136” from paragraph 1 of Article 183 of the RoA Criminal Procedural Code (01 July 1998).

Article 2: This law shall enter into force on the 10th day following its official publication.





## **ANALYSIS OF THE DRAFT LAW ON FREEDOM OF EXPRESSION OF MOLDOVA**

*This analysis has been commissioned by the Office of the OSCE Representative on Freedom of the Media and prepared by Boyko Boev, Legal Officer, ARTICLE 19, London*

### **KEY RECOMMENDATIONS**

#### **Purpose of the Draft Law**

The wording of Article 1 of the Draft Law should be revised, stating that the law aims to elaborate on the content of the right to freedom of expression as guaranteed by the Constitution of Moldova and incorporate international principles of freedom of expression.

#### **Definitions**

- The list of terms in Article 2 of the Draft Law should be shortened to include only terms with specific legal meaning.
- The definition of public interest in Article 2 of the Draft Law should state that it includes matters relating to all branches of government, and, in particular, matters related to public figures and public officials - politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic interests, the exercise of power, art and culture. However, the definition should exclude purely private matters in which the interest of members of the public, if any, is merely sensational.
- The definition of speech that incites to hatred (hate speech) in Article 2 of the Draft Law should be revised in accordance with Article 20 of the ICCPR and Principle 12 of ARTICLE 19's Camden Principles on Freedom of Expression and Equality. It should state that hate speech is "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

#### **General characteristics of freedom of expression**

- Article 3 para 1 of the Draft Law should specify that the right to freedom of expression includes that "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

- The Draft Law should require that any restriction on the right to freedom of expression must meet a strict three-part test; that is any restriction (1) must be provided by law, (2) must pursue a legitimate aim, and (3) must be necessary to secure this aim.
- Article 3 of the Draft Law should require that state bodies always use the least restrictive means of action when their bodies interfere with the exercise of the right to freedom of expression.
- Paragraph 5 of Article 3 of the Draft Law should be revised to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. It should also specifically require, (1) an intention to promote hatred towards a target group as a necessary requisite for hate speech; and (2) that the activity concerned creates an imminent risk of discrimination, hostility or violence against persons belonging to that group.

### **Freedom of expression in the mass media**

- All restrictions on freedom of expression, specified in Articles 4 and 5, should always meet the three-part test for lawfulness.
- Article 6, paragraph 3 should permit the confiscation of the circulation or liquidation of media outlets only as a measure of last resort in response to extremely serious violations of the law, for example, in the case of serious and repeated advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

### **Defamation**

- The definition of defamation in Article 2 should be revised to state that defamation is the dissemination of a substantially false statement that lowers the esteem in which a natural or legal person is held in the community.
- The qualifying statement in Article 7 para 8, requiring that humorous and satirical expression does not mislead the public as to the material facts, should be removed.
- The qualifying statement in Article 9 para 4, limiting acceptable criticism of public officials to what is necessary to ensure transparency and responsible discharge of their public functioning, should be removed.

### **Insult**

- The Draft Law should not make special distinction between value judgments

with or without sufficient factual basis. Instead it should explicitly recognise a defence of opinion stating that expression of an opinion (value judgment) is protected as long as it is made in good faith and there is some established or admitted factual basis for it.

- The definition of insult in Article 2 should be refined to ensure that nobody is liable for offensive speech based on true facts; or, at best, no legal responsibility for insult should be possible.

### **Presumption of innocence**

- Article 12 should restrict only statements of public officials on guiltiness of persons accused of crimes.
- Article 12 para 3 of the Draft Law should be removed insofar as no distinction between public officials should be made for the purposes of presumption of innocence.
- Article 12 para 4 of the Draft Law should be removed so that ordinary citizens can freely voice opinion on the guiltiness of persons accused of crimes.

### **Protection of confidential information and sources**

- Article 13 should not give powers of law enforcement bodies to oblige a person to disclose information sources.
- Article 13 should set out that the interest in disclosure is always balanced with the harm to freedom of expression.
- The circumstances which justify the disclosure in Article 13 should be harmonised with Council of Europe Recommendation R (2000) 7.
- Article 13 should set out that the information sources can be disclosed only at the request of an individual or body with a direct, legitimate interest.
- Article 13 should limit the access to disclosed information sources as far as possible, by ensuring that the disclosed information is provided only to those who requested the disclosure.

### **Miscellaneous: substantive shortfalls**

- The Draft Law should afford protection to whistleblowers.
- The Draft Law should grant a special degree of protection to information collected or created for journalistic purposes against search and seizure by

the authorities.

- The Draft Law should include a provision stating that the interpretation of the provisions concerning the protection of honour, dignity and public reputation should be carried out in accordance with the European Convention on Human Rights and case-law of the European Court of Human Rights.

### **Procedural Safeguards for the Right to Freedom of Expression**

- Article 20 para 1 letter b) of the Draft Law, enabling interested parties to sue for defamation of deceased, should be removed.
- The percentage of state fees in Article 19 should be increased to further limit the possibilities for claiming excessive pecuniary compensations for moral damages.
- The measures in Article 22 of the Draft Law should be amended to satisfy the three-part test for assessment of the legality of restrictions on the right to freedom of expression.
- The Draft Law should reserve the use of the measures in Article 22 for highly exceptional cases.
- The exemptions from liability in Article 28 should be extended to cover statements made in the course of proceedings at legislative bodies and at local authorities.
- Article 24 of the Draft Law, setting out the burden of proof, should be amended to make it clear that once the defendant establishes that a publication concerned a matter of public interest, the plaintiff must prove malice for the claim to succeed.
- Article 29 of the Draft Law, allowing for corporations to sue for moral damages, should be removed.
- The Draft Law should establish an absolute ceiling for compensation awards for moral damages.
- The Draft Law should explicitly provide that sanctions for expression should be strictly proportionate to the damage.
- The Draft Law should provide for protection against statements in requests, letters or complaints to public authorities made in bad faith.





- The Draft Law should introduce special provision that recognise the defence of ‘reasonable dissemination,’ enabling not only the media but every person to invoke it.
- The Draft Law should exclude from the scope of liability for defamation persons who are not authors or editors, as well as publishers of statements who did not know and could not know that they were contributing to the dissemination of defamatory statements.
- The Draft Law should give powers to courts to strike out unsubstantiated claims early on in the proceedings in order to prevent malicious plaintiffs from suppressing media criticism by initiating defamation cases with no prospect of success.

## I. Introduction

This Memorandum contains ARTICLE 19’s analysis of the Draft Law on Freedom of Expression of Republic of Moldova (“Draft Law”);<sup>1</sup> that was submitted by the Moldovan Government to the Parliament in 2009. At the time of the release of this Memorandum, the Draft Law awaits a second reading by the Moldovan Parliament.

This Memorandum analyses the Draft Law from the viewpoint of its compatibility with relevant international human rights standards. The Memorandum also examines the Draft Law in the light of international best practices in regard to freedom of expression laws. The Constitution of Moldova recognises the binding character of international human rights law and proclaims its supremacy over domestic law in Article 4. Therefore the Moldovan authorities are obliged to comply with the provisions of the *International Covenant on Civil and Political Rights*<sup>2</sup> (“ICCPR”) and the *European Convention on Human Rights*<sup>3</sup> (“European Convention”), against which the Draft Law is analysed.

ARTICLE 19 is an international, non-governmental human rights organisation which works with partner organisations around the world to protect and promote the right to freedom of expression. It has previously provided legal analyses in the area of media law to government and civil society organisations in over

1 ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

2 Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A, (XXI), 16 December 1966, entered into force 3 January 1976. Moldova ratified the Covenant in 1993.

3 Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953. Moldova ratified the ECHR in 1997.

30 countries.<sup>4</sup> Regarding Moldova, ARTICLE 19 has analysed a number of the freedom of expression and freedom of information-related laws and Draft Laws, including the 1999 and 2000 versions of the Draft Law on freedom of information, the 2003 version of Draft Law on freedom of press, the 2006 version of the Draft Law to promote participation and transparency in the decision making of public authorities, the audiovisual code, the 2008 version of draft state secrets law. ARTICLE 19 has also analysed the defamation provisions in the legislation of Moldova in its 2006 Memorandum concerning the amendments to decriminalise defamation and the 2008 Comment on the Moldovan President's proposal on moral damages for defamation.<sup>5</sup>

The proposed Draft Law is praised for aiming at elaboration of the content of the right to freedom of expression as guaranteed by the Constitution and incorporation in national legislation of general international principles of freedom of expression. Although Moldova abolished criminal defamation in 2004, the domestic law and practice in the area of freedom of expression remain problematic.<sup>6</sup> The introduction of the present Draft Law would therefore represent a significant step forward in the realisation of the right to freedom of expression in Moldova.

At the same time, ARTICLE 19 has serious concerns about the vagueness of some provisions of the Draft Law as international freedom of expression standards are not always correctly reflected in the legal principles of the Draft Law. In particular, the Draft Law fails to ensure that all restrictions on the right to freedom of expression fulfil the necessity requirement of the three-part test and that confiscation of the circulation or liquidation of media outlets are allowed only as a last resort in response to extremely serious violations of the law. The regulation of protection of confidential sources is not in full compliance with Council of Europe Recommendation R (2000)7. The defence of 'reasonable publication' cannot be invoked by all citizens. The regime of measures for ensuring legal action is confusing, and the proposed measures can be widely used. Finally, it allows interested persons to sue for defamation of deceased persons.

Section II of the Memorandum summarises the general international principles

4 These analyses can be found on the ARTICLE 19 website, at <http://www.article19.org/publications/law/legal-analyses.html>.

5 The analyses of Moldovan media legislation are posted on the ARTICLE 19 website, at <http://www.article19.org/publications/law/legal-analyses.html>.

6 The Association of Independent Press in Moldova has estimated that of the 165 European Court of Human Rights judgments against Moldova as of 1 October 2009 nearly 10% relate to violations of the right to freedom of expression. Cases against Moldova for violations of the right to freedom of expression include: e.g. *Amihalachioaie v. Moldova*, 20 July 2004, Application No. 60115/00; *Busuioac v. Moldova*, 21 March 2005, Application No. 61513/00; *Christian Democratic People's Party v. Moldova*, 14 May 2006, Application no. 28793/02; *Kommersant Moldova v. Moldova*, 7 January 2007, Application No. 41827/02; *Manole and Others v. Moldova*, 17 September 2009, Application no. 13936/02.



on freedom of expression and defamation that the analysis draws on, focusing on the jurisprudence of the European Court of Human Rights. The analysis additionally refers to several documents developed by ARTICLE 19 and endorsed by international bodies and other stakeholders. In particular, we refer to *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* (“Defining Defamation”)<sup>7</sup> as an authoritative standard-setting document, drawing on comparative constitutional and international law jurisprudence. It contains principles which have attained significant international endorsement, including that of the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.<sup>8</sup> In addition, ARTICLE 19 also relies on *The Camden Principles on Freedom of Expression and Equality* (the “Camden Principles”), a progressive interpretation of international law and standards concerning the balance between the rights to freedom of expression and equality prepared by ARTICLE 19 in consultation with high-level inter-governmental officials, civil society representatives and academic experts.<sup>9</sup>

Section III of this Memorandum contains a detailed analysis of the provisions of the Draft Law.

## II. International Standards

### II.1. Guarantees for freedom of expression

The right to freedom of expression enjoys very strong protection under international law. Article 19 of the *Universal Declaration on Human Rights* (“UDHR”), the flagship human rights document drawn up under the auspices of the United Nations and adopted in 1948, guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.<sup>10</sup>

This provision has now passed into what is known as customary international

<sup>7</sup> London: ARTICLE 19, 2000.

<sup>8</sup> See their Joint Declaration of 30 November 2000. Available at: <http://www.unhchr.ch/huricane/hurricane.nsf/view01/EF58839B169CC09C12569AB002D02C0?opendocument>

<sup>9</sup> ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality* (April, 2009). Available at: <http://www.article19.org/advocacy/campaigns/camden-principles/index.html>.

<sup>10</sup> UN General Assembly Resolution 217A(III), adopted 10 December 1948.

law, the body of law that is considered binding on all States as a matter of international custom.<sup>11</sup> The International Covenant on Civil and Political Rights ("ICCPR"),<sup>12</sup> elaborates on many of the rights set out in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found in Article 19 of the UDHR. Freedom of expression is also protected in the three regional human rights systems, Article 10 of the *European Convention on Human Rights* (European Convention),<sup>13</sup> Article 13 of the *American Convention on Human Rights*<sup>14</sup> and Article 9 of the *African Charter on Human and Peoples' Rights*.<sup>15</sup>

Article 10 (1) of the European Convention, to which the Republic of Moldova is a State party, sets out:

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.

The right to freedom of expression is generally considered to be an extremely important right. Not only is it crucial to individual self-fulfilment and thus of key importance as a right in itself; it is also fundamental to the proper functioning of democracy and to the enforcement of other human rights. Without free expression, democracy cannot function. This has been recognised by international courts and bodies worldwide. It is worth recalling that at its very first session, in 1946, the UN General Assembly adopted Resolution 59(II) which states: "Freedom of information is a fundamental human right and ... the touch-stone of all the freedoms to which the United Nations is consecrated."<sup>16</sup>

This has been echoed by other courts and bodies. For example, the UN Human Rights Committee has said:

The right to freedom of expression is of paramount importance in any democratic society.<sup>17</sup>

<sup>11</sup> For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27.

<sup>12</sup> UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

<sup>13</sup> Adopted 4 November 1950, in force 3 September 1953.

<sup>14</sup> Adopted 22 November 1969, in force 18 July 1978.

<sup>15</sup> Adopted 26 June 1981, in force 21 October 1986.

<sup>16</sup> 14 December 1946. "Freedom of information" is referred to in the broad sense of the free circulation of information and ideas.

<sup>17</sup> *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.



The European Court of Human Rights (“European Court”) has also elaborated on the importance of freedom of expression:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.<sup>18</sup>

The guarantee of freedom of expression applies with particular force to the media. The European Court has consistently emphasised the “pre-eminent role of the press in a State governed by the rule of law.”<sup>19</sup> It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.<sup>20</sup>

The European Court has also stated that it is incumbent on the media to impart information and ideas in all areas of public interest:

Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.<sup>21</sup>

## II.2. Restrictions on the right to freedom of expression

International law permits limited restrictions on the right to freedom of expression

<sup>18</sup> *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

<sup>19</sup> *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

<sup>20</sup> *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

<sup>21</sup> See *Castells v. Spain*, note 20, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, para. 65.

in order to protect various interests, including reputation. The parameters of such restrictions are provided for in Article 10(2) of the European Convention, which states:

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.

Any restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by both the Human Rights Committee<sup>22</sup> and the European Court,<sup>23</sup> requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest (including, as noted, protecting the reputations of others, relevant to the comments contained herein), and (3) necessary to secure this interest. In particular, in order for a restriction to be deemed necessary, it must restrict freedom of expression as little as possible, it must be carefully designed to achieve the objective in question and it should not be arbitrary, unfair or based on irrational considerations.<sup>24</sup> Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

### III. Analysis of the Draft Law

The Draft Law has two aims. According to Article 1, it seeks to guarantee the exercise of the right to freedom of expression and establish a balance between: 1) the right to freedom of expression and the protection of honour, dignity, and professional reputation, and 2) the right to freedom of expression and the right to respect for private and family life of a person. To this end, the Draft Law elaborates on the content and limitations of the right to freedom of expression and sets out procedural regimes for examination of defamation cases and violations of the right to respect for private and family life.

The Draft Law contains very detailed substantive and procedural norms grouped in two chapters and thirty-four articles. The first chapter includes mainly

<sup>22</sup> For example, in *Laptevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

<sup>23</sup> For example, in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.

<sup>24</sup> See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).



substantive provisions relating to the various aspects of the right to freedom of expression, the right to honour, dignity and professional reputation, and the right to respect for private and family life. It also sets out the scope of the law, lists definitions of the terms used, and establishes the principle of prohibition of censorship and the right to protection of confidential sources of information. The second chapter consists of procedural norms concerning defamation and privacy-related cases. The norms set out the procedures for examination of complaints both in and out of court, including time limits for legal actions, elements of complaints, court fees, personal competence to sue for defamation and violation of privacy rights, courts' jurisdiction to examine such complaints, measures to ensure legal actions, exemptions of liability, presumptions in favour of free expression in defamation cases, and reparation and compensation awards. All articles in the Draft Law consist of numerous paragraphs.

## **IV. Overview of Substantive Regulation**

### **IV.1 Positive features**

ARTICLE 19 commends the Draft Law for a number of positive features. The most important of these is a clear respect for international human rights standards and efforts to incorporate these standards into domestic law. Other positive features include the elaboration on the content of the right to freedom of expression, and of rights and privileges implicit to the right to freedom of expression, such as protection of confidential information and sources.

The Draft Law introduces progressive safeguards for freedom of expression. For example, it establishes the principle that public officials must tolerate more criticism than ordinary citizens. Further, requirements are set out to determine the legality of all restrictions on the right to freedom of expression. Censorship in mass media is prohibited. In addition the Draft Law contains safeguards for the right to private and family life, introducing strong protection for publications on matters in the public interest.

At the same time, a number of provisions unnecessarily restrict the right to freedom of expression. The following paragraphs will elaborate upon these general recommendations.

## **IV.2 Problematic areas**

### **IV.3**

#### **IV.3.1 Purpose of the law**

##### Overview

According to Article 1, the Draft Law aims to promote and safeguard the exercise of the right to freedom of expression and to establish a balance between the right to freedom of expression, the right to protection of honour, dignity, and professional reputation, and the right to respect for private and family life.

There are two provisions which directly relate to the balance between the right to freedom of expression, the right to protection of honour, dignity, and professional reputation, and the right to respect for private and family life.

According to paragraph 2 of Article 7 a person may have his/her rights restored if the information disseminated about him/her is false and defamatory. According to paragraph 4 of Article 10, read in conjunction with paragraph 3 of the same Article, the balance between the right to freedom of expression and the right to respect for privacy depends on the balance between the interest of the public in knowing certain private information and the interest of a citizen to keep that information away from the public.

##### Analysis

The wording of Article 1 of the Draft Law is problematic. It is not correct to say that the Draft Law attempts to guarantee rights. International treaties and national Constitutions guarantee rights including the right to freedom of expression. By contrast, the purpose of laws – such as the Draft Law – should be to elaborate on the provisions found in the constitutions and international treaties.

Further, the judiciary, rather than the legislature, has the power to determine the balance between rights because that balance should be weighed in the context of the particular circumstances in which an impugned statement was made. Establishing that balance in a law is impossible because the legislators cannot foresee all of the possible circumstances involving conflicts of these rights and, thus, cannot offer appropriate regulation thereof.

Taking into account that only two out of thirty-four provisions in the Draft Law directly relate to the balance between the right to freedom of expression, the right to protection of honour, dignity, and professional reputation, and the right to respect for private and family life, it would be an exaggeration to claim that the Draft Law seeks to establish the balance between these rights. Therefore,





it is more accurate to say that the Draft Law seeks to incorporate the general international principles of freedom of expression.

Finally, mindful of Article 12, which sets out the right to the presumption of innocence for criminal or administrative offence, it is incorrect to maintain that the Draft Law relates only to the balance between the three rights specified in Article 1. The existence of Article 12 means that the Draft Law regulates also the balance between the right to freedom of expression and the right to fair trial.

The wording of Article 1 should be revised to state that the law aims to elaborate on the content of the right to freedom of expression as guaranteed by the Constitution, while also incorporating international principles of freedom of expression.

### **Recommendations:**

- The wording of Article 1 should be revised to state that the law seeks to elaborate on the content of the right to freedom of expression as guaranteed by the Constitution of Moldova, while also incorporating international principles of freedom of expression.

### **IV.3.2 Definitions**

#### Overview

Article 2 of the Draft Law lists twenty-three definitions of key terms. These include defamation, dissemination, information, fact, value judgment, value judgment without sufficient factual basis, insult, censorship, data on the private and family life, public interest, public authority, public official, public figure, public authority document, public authority's communiqué, mass media, journalist investigation, impugned statement, retraction, reply, excuse, a speech which incite to hatred, and conventional unit.

In this section, we provide comments on two definitions – definition of public interest (in Article 2 letter j) and definition of hate speech in Article 2 letter v). Public interest' is defined as "society's interest (and not the individuals' sheer curiosity) either in the events related to the exercise of public power in a democratic state, or in problems that would normally raise the interest of the society or of a part of it." Speech which incites to hatred ("hate speech) is defined as "any form of expression which provokes, spreads, promotes or justifies the racial hatred, xenophobia, anti-Semitism or any other forms of hate based on intolerance."

### Analysis

Many terms included in the list in Article 2 are self-explanatory and do not need legal definitions. These include ‘fact’, ‘journalistic investigation’, ‘reply’, ‘excuse’, ‘public authority document’, ‘impugned statement’. The provision of legal definitions of these ordinary terms makes the text of the law more complicated. Therefore it is advisable that only terms that have specific legal meaning be included in Article 2.

### *Public interest*

It is commendable that the Draft Law includes a definition of ‘public interest’. At the same time, the definition is confusing and tautological, defining the public interest as “the social interest ... in the problems which normally raise the interest of the society or a part of it”.

Further, even though the definition commendably covers a broad area of interests - which is in line with the best practices for the protection of freedom of expression<sup>25</sup> - it remains unclear whether interests in public officials’ lives fall within the scope of the term. The US Supreme Court has indicated that the public interest extends to virtually all activities of these individuals, including those that fall in the private sphere:

[A]nything which might touch on an official’s fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these [401 U.S. 265, 274] characteristics may also affect the official’s private character.<sup>26</sup>

This position is followed by the European Court which has ruled that the ‘public interest’ extends to all matters of public concern and, in particular, that “there is no warrant ... for distinguishing ... between political discussion and discussion of other matters of public concern.”<sup>27</sup> For the purpose of clarity and to avoid undue restriction of this concept, we recommend that the Draft Law revise the definition of public interest to include matters relating to all branches of government – and, in particular, matters relating to public figures and public officials, such as politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic interests, the exercise of power, and art and culture. However, it does not include purely private matters in which the interest of members of the public, if any, is merely sensational.

<sup>25</sup> Courts have stressed that the concept is to be given a very wide reading and that where there is doubt, decisions should come down on the side of freedom of expression. See, for example, *A v. B* (a company) and *C*, [2002] EWCA Civ 337, 11 March 2002, Court of Appeal (United Kingdom).

<sup>26</sup> *Garrison v. Louisiana*, 401 U.S. 265, pp. 273-4.

<sup>27</sup> *Thorgeir Thorgeirson v. Iceland*, note 19, para. 64.



### *Hate speech*

In our opinion the definition of “hate speech” should be “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” to properly reflect Article 20 para 2 of the ICCPR. We also believe that the definition of hate speech in Article 2 of the Draft Law can be further improved by elaborating upon key concepts within that definition of hate speech in the *Camden Principles*, in particular Principle 12 which states:

- i. The terms “hatred” and “hostility” refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group
- ii. The term “advocacy” is to be understood as requiring an intention to promote hatred publicly towards the target group.
- iii. The term “incitement” refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.
- iv. The promotion, by different communities, of a positive sense of group identity does not constitute hate speech.

### **Recommendations:**

- The list of terms in Article 2 should be shortened to include only terms with specific legal meaning.
- The definition of public interest should be revised to include matters relating to all branches of government – and in particular matters relating to public figures and public officials – politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic interests, the exercise of power, art and culture. However, the definition should exclude purely private matters in which the interest of members of the public, if any, is merely sensational.
- The definition of speech that incites to hatred (hate speech) should be revised in accordance with Article 20 of the ICCPR and Principle 12 of the Camden Principles. It should state that hate speech is “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

### **IV.3.3 General characteristics of freedom of expression**

#### Overview

The content and meaning of the right to freedom of expression is elaborated in

## Chapter 1 of the Draft Law.

Article 3 paras 1 and 2 states that “free expression ... includes the freedom to seek, receive and communicate facts and ideas [and] protects both the content and the form of expressed information, including information which offends, shocks or disturbs.” Article 3 paras 3 and 4 permits restrictions on freedom of expression only when “necessary in a democratic society to protect the national security, territorial integrity or public safety, to defend public order and prevent crimes, to protect health and morals, the reputation or rights of others, to prevent disclosure of confidential information and to maintain the authority and impartiality of the judiciary” and only if they are “proportional with the situation which determined them, by observing the requirement of a fair balance between the protected interest and the freedom of expression.” Article 3 para 5 states that the guarantee of freedom of expression does not extend to cover speech that constitutes incitement to hatred and violence.

Analysis

First, Article 3 para 1 defines freedom of expression as including the freedom to “seek, receive and communicate facts and ideas”. However, consideration must be given to the wording of Article 19 of the ICCPR, which states that the right to freedom of expression includes “freedom to seek, receive and impart information and ideas *of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*” (italics added). The additional phrases stipulating that ideas of all kinds are protected would make it clear that freedom of expression extends to the expression of any idea or fact. At the same time, the stipulation that freedom of expression includes a choice as to the media used would complement the existing statement in paragraph 2 that freedom of expression protects the form in which the information or idea is expressed. Finally, the phrase “regardless of frontiers” makes it clear that the State may not ban or control international forms of communication, such as the internet or satellite-based communications.

Second, while we welcome Article 3 paras 3 and 4 regarding restrictions, we note that the provisions do not require that all restrictions be based on the law, as required by the three-part test in Article 19 of the ICCPR and Article 10 of the European Convention. Consequently, it is recommended that the Draft Law requires that any restriction be provided by law. The first condition is a safeguard against arbitrary decisions and means that restrictions must be provided through democratically adopted rules and regulations. Further, a requirement should be added that regulations limiting speech must be clearly and narrowly drafted



laws as set out in the Law of Georgia on Freedom of Speech and Expression.<sup>28</sup> Finally, Article 3 of the Draft Law should also require that state bodies always use the least restrictive means of action when their bodies interfere with the exercise of the right to freedom of expression. The latter is not the same as requiring that states use “proportional” measures. This would reflect a more sophisticated understanding of the term “necessary”. An alternative way of achieving this would be to define “proportional” as “representing the most effective and least limiting measure.”<sup>29</sup>

Third, it is problematic that Article 3 para 5 places all speech that incites to hatred and violence outside the scope of legal protection.<sup>30</sup> As mentioned above, the right to freedom of expression applies to information and ideas *of any kind* (emphasis added).<sup>31</sup> The UN Human Rights Committee has interpreted Article 19, paragraph 2 as encompassing “every form of subjective ideas and opinions capable of transmission to others, which are compatible with Article 20 of the ICCPR...”<sup>32</sup> Article 20 paragraph 2 of the ICCPR<sup>33</sup> does not require from States to prohibit all negative statements towards national groups, races or religions. It only obliges them to ban such statements as soon as they “constitute incitement to discrimination, hostility or violence”. Allowing a broader restriction of speech the Draft Law is therefore in conflict with the ICCPR. Further, in contrast to Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*,<sup>34</sup> which bans racially discriminatory speech, the restriction on speech that constitutes incitement to hatred is broader inasmuch as it covers different kinds of hate speech.

Mindful that offensive speech is often interpreted by some people as inciting to hatred or violence, the restriction in question poses concerns that it is open to abuse. For this reason it is recommended that Article 3 para 5 of the Draft Law is revised to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As we noted above in the comment to Article 2 letter j), the Draft Law would benefit from elaborating on the definitions based on Principle 12 of the *Camden Principles*.

Furthermore, the Draft Law should stipulate that intention to promote hatred

<sup>28</sup> *Ibid*, articles 1(o) and 8(1) of the Georgian Law on Freedom of Speech and Expression.

<sup>29</sup> See Article 8, paragraph 1 of the Georgian Law on Freedom of Speech and Expression. [http://www.liberty.ge/eng/page.php?genre\\_id=79&section\\_id=2&news\\_id=1&from=categories](http://www.liberty.ge/eng/page.php?genre_id=79&section_id=2&news_id=1&from=categories).

<sup>30</sup> Article 2 (v) defines ‘speech that incites to hatred’ as any form of expression which provokes, spread, promotes or justifies the racial hatred, xenophobia, anti-Semitism or any other form of hate based on intolerance.

<sup>31</sup> Article 19, paragraph 2 of the ICCPR

<sup>32</sup> *Ballantyne and Davidson v. Canada*, Communication No.359/1989, and *McIntyre v. Canada*, Communication No. 385/1989, UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev. 1 5 May 1993, Annex, para. 11.3.

<sup>33</sup> Article 20 (2) of the ICCPR states: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

<sup>34</sup> Ratified by Moldova in 1993.

publicly should be a requirement for an offence of hate speech and that the absence of intention should be a sufficient defence to a charge of hate speech in itself. In hate speech cases, therefore, it should be for the prosecution to prove such an intention, rather than for the defence to prove the absence of such an intention. The Draft Law makes no reference to such a requirement. In this respect, the drafters may also consult the example of the Law of Georgia on Freedom of Speech and Expression setting out that “an incitement shall cause liability envisaged by law only when a person commits an intentional action that creates direct and substantial danger of an illegal consequence.”<sup>35</sup>

### **Recommendations:**

- Paragraph 1 of Article 3 should specify that the right to freedom of expression includes the “freedom to seek, receive and impart information and ideas *of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*”.
- The Draft Law should set out that any restriction on the right to freedom of expression must meet a strict three-part test: (1) be provided by law, (2) pursue a legitimate aim, and (3) be necessary to secure this aim.
- Article 3 should require that state bodies always use the least restrictive means of action when their bodies interfere with the exercise of the right to freedom of expression.
- Paragraph 5 of Article 3 of the Draft Law should be revised to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. It should also specifically require, (1) an intention to promote hatred towards a target group as a necessary requisite for hate speech; and (2) that the activity concerned creates an imminent risk of discrimination, hostility or violence against persons belonging to that group.

### **IV.3.4 Freedom of expression in the mass media**

#### Overview

Article 4 of the Draft Law guarantees freedom of expression for the media and makes it clear that “freedom of expression of the mass media also includes a certain degree of exaggeration, or even provocation, providing that it does not misinterpret the essence of the facts.” Paragraph 1 of Article 4 specifies that “[n]obody can prohibit or prevent the mass media from disseminating information on

<sup>35</sup> Article 4 para 2 of the Law of Georgia on Freedom of Speech and Expression.



issues of public interest, unless it is in compliance with the law.”

Article 5 of the Draft Law guarantees editorial independence of mass media and prohibits all forms of censorship. Any interference in the editorial activity of mass media is prohibited except when provided by law. Public authorities, tasked with the preliminary control of the information which is to be disseminated by mass media, shall not be created. The obligation imposed by the law court, through a final decision, to disseminate or not to disseminate the information, as well as the obligation imposed by law to disseminate a certain piece of information, shall not constitute censorship.

Article 6 of the Draft Law protects the public’s right to receive information, and states that “[t]he seizure of the print run or liquidation of a mass media outlet can take place only if this is necessary in a democratic society for the protection of national security, territorial integrity or public security, or in order to prevent the disclosure of secret information through an irrevocable final court decision.”

### Analysis

These provisions are problematic for several reasons.

*First*, in contradiction with international law, Article 4 para 1 permits restrictions on dissemination of information in the public interest provided that they are set out by law. Both Article 19 of the ICCPR and Article 10 of the European Convention state that restrictions on freedom of expression are not only set out in law but also pursue legitimate interests and are necessary to achieve these interests. While a strong legal argument can be made that this should be read together with paragraphs 3 and 4 of Article 3, and thus import the conditions on restrictions stated in those paragraphs into Article 4, this should be stated explicitly. As currently formulated, a public authority might interpret paragraph 1 of Article 4 as authorising restrictions on the dissemination of information, as long as this is done within the framework of a law. It is recommended that the provision refer back to Article 3 paras 3 and 4, which pose these requirements.

*Second*, in contradiction with international standards, the journalistic freedom as set out in Article 4 is conditioned upon “the correct interpretation of facts.” No such conditions are envisaged by the ICCPR or the European Convention. Similarly, the European Court emphasised that “[j]ournalistic freedom ... covers possible recourse to a degree of exaggeration, or even provocation” without placing any restriction in connection with the interpretation of the facts.<sup>36</sup> It is therefore recommended that the qualifying statement concerning journalistic

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<sup>36</sup> See *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.

freedom be removed.

*Third*, in contradiction with international law, Article 5 para 2 allows interference in the editorial activity of mass media provided that they are set out by law. Interference in editorial activity should meet the three-part test set out by Article 10 para 2 of the European Convention. This means that it should be not only provided by law but also necessary to achieve a legitimate interest.

*Fourth*, in contradiction with international law, Article 5 para 4 permits obligations to disseminate or not to disseminate information as long as they are imposed by a court or by law. Obligations to disseminate or not information constitute interference with the right to freedom of expression. Therefore, to be lawful under international law such obligations should also be necessary in a democratic society to achieve a legitimate interest.

*Finally*, the confiscation of the circulation or liquidation of a mass media outlet, as set out by paragraph 3 of Article 6, is an extremely severe measure. The Draft Law should limit the closure of a media outlet only to extreme cases such as serious and repeated advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence. Violations of public order law should not lead to confiscation of circulation and liquidation of a media outlet. It is also worrisome that an outlet may be closed to “prevent the disclosure of information which represents a state secret.” This would cover a broad range of situations and is open to abuse. Similarly, the term “public security” covers a range of situations and is open to abuse. It is recommended that both be removed or redrafted in narrower terms.

### **Recommendations:**

- The Draft Law should consistently require that restrictions on freedom of expression, regardless of their type, always meet the three-part test for lawfulness. This requires that they are not only set out by law but are proportionate and a measure of last resort.
- The confiscation of the circulation or liquidation of media outlets should be allowed only as a measure of last resort in response to extremely serious violations of the law, for example in case of serious and repeated advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.



### IV.3.5 Defamation

#### Overview

Article 2 defines ‘defamation’ as dissemination of false and harmful information about another person. The term ‘information’ used in this definition refers to “any factual report, opinion or idea presented as a text, sound and/or image”.

Article 7 of the Draft Law states that every person is entitled to the protection of their honour, dignity and professional reputation. Article 7 para 8 states that the use of humorous and satirical expression will not render a person liable “unless its usage mislead the public as to material facts”.

Article 9 recognises a right to criticise the State, public authorities and public officials. Article 9 para 4 sets out that public officials shall be subject to criticism, and their actions shall be subject to verification by mass media, concerning the way they have fulfilled and are fulfilling their duties, to the extent that this is necessary to ensure transparency and the fulfilment of their duties in a responsible way.

#### Analysis

The defamation provisions of the Draft Law introduce a number of international standards into Moldovan law. The proposed strong protection for criticism of public institutions and officials is very welcomed. This regulation is in line with the position of the European Court that public officials are required to tolerate more, not less, criticism, in part because of the public interest in open debate about public officials and institutions.<sup>37</sup> The European Court has affirmed this principle in several cases.<sup>38</sup>

However, we do believe that there are a number of areas in which the Draft Law should enhance the protection for the right to freedom of expression. The most pertinent of these are discussed in the following paragraphs.

The definition of defamation provided in Article 2 is unclear and incorrect. *First*, it includes the word ‘information’ which is ambiguous. Moreover, in contradiction to the European Court’s position that defamation is committed through statements of facts, the definition of defamation in the Draft Law refers to dissemination of ‘information’ which includes statements of facts, opinions

<sup>37</sup> In its very first defamation case (*Lingens v Austria*), the European Court emphasised:

The limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.

<sup>38</sup> See, for example, *Lopes Gomez da Silva v Portugal*, 28 September 2000, Application No. 37698/97, para. 30; *Wabl v Austria*, 21 March 2000, Application No. 24773/94, para. 42; and *Oberschlick v Austria*, 23 May 1991, Application No. 11662/85, para. 59.

and ideas. *Second*, according to the definition, any harmful information about a person could amount to defamation. Under this definition it is possible to regard as defamation incorrect information about a medicine which can be harmful for one's health. By contrast, according to its commonly recognised definition, defamation is harmful to one's reputation, which is the esteem in which a person is held in the community. *Third*, the definition allows for liability to be sought even for minor mistakes of facts which is a harsh and unnecessary restriction on freedom of expression. There is no pressing social need and consequently it is not necessary in a democratic society to hold a person – and especially journalists and the media - responsible for minor mistakes. Cognisant of this principle the Law of Georgia on Freedom of Speech and Expression<sup>39</sup> contains a definition of defamatory statement which is exemplary in this regard. It states that the latter is “a statement containing substantially false fact causing damage to a person or his reputation.”<sup>40</sup> It is recommended that the definition of defamation be revised to state that defamation is a dissemination of a substantially false statement that lowers the esteem in which a natural or legal person is held in the community.

Further, the qualifying statement in Article 7 para 8, requiring that humorous and satirical expression do not mislead the public as to material facts is unclear. Humorous and satirical expression cannot be treated like news reporting. While the latter requires correct reporting of facts, the purpose of the first is not to inform the public but rather to hold up to ridicule public figures and their actions. The qualifying statement unnecessarily restricts humorous and satirical expression and runs counter to democracy for which broadmindedness and tolerance are key norms. Therefore, the qualifying statement in Article 7, paragraph 8 should be removed.

Additionally, the protection granted by Article 9 to criticism of public authorities is weak. It is problematic that heightened protection for criticism is available only for statements that are “necessary to ensure the transparency and responsible discharge of their functions.” The European Court has made it clear that politicians and public figures of a similar status must tolerate greater criticism than ordinary individuals with regard to many of their activities. For example, in *Dichand and Others v. Austria*, the Court held that a politician's business affairs fell within the realm of activities that should be open to public scrutiny.<sup>41</sup> In politics, it can be difficult to distinguish between purely private activities and activities of a public character. It is recommended, therefore, that the qualifying

39 Law of Georgia on Freedom of Speech and Expression, adopted on June 24, 2004. The text of the Law may be found on the Internet at: [http://www.liberty.ge/eng/page.php?genre\\_id=79&section\\_id=2&news\\_id=1&from=cat\\_news](http://www.liberty.ge/eng/page.php?genre_id=79&section_id=2&news_id=1&from=cat_news)

40 See *ibid.* Article 1, letter e).

41 26 February 2002, Application No. 29271/95.



statement be removed.

### **Recommendations:**

- The definition of defamation should be revised to state that defamation is a dissemination of any substantially false statement that lowers the esteem in which a natural or legal person is held in the community.
- The qualifying statement in Article 7, paragraph 8, requiring that humorous and satirical expression do not mislead the public as to the material facts, should be removed.
- The qualifying statement in Article 9 paragraph 4, limiting acceptable criticism of public officials to what is necessary to ensure transparency and responsible discharge of their public functioning, should be removed.

### **IV.3.6 Insult**

The Draft Law provides protection to persons whose right to honour, dignity and professional reputations was infringed by dissemination of value judgments without sufficient factual basis. Article 2 defines value judgment as an opinion and commentary, whose truthfulness cannot be proved. According to Article 7, paragraph 5 persons whose right to honour, dignity and professional reputations were infringed by dissemination of value judgments without sufficient factual basis can request the denial or rectification of the information, or the publication of a reply and the reparation of the moral and material damage caused.

In addition, the Draft Law provides protection to persons whose rights to honour, dignity and professional reputations were infringed by insult. Article 2 defines insult as verbal or non-verbal expression, which deliberately offends the person and which runs counter to the moral norms generally accepted in a democratic society. Insulted persons can request excuses and reparation of the caused moral and material damage.

#### Analysis

There are several problems in regard to the protection against insult and value judgments with and without sufficient factual basis. *First*, the simultaneous use of defamatory value judgments without sufficient factual basis and insult is confusing inasmuch as these terms are synonymous. *Second*, the definitions of 'insult' and 'value judgement without sufficient factual basis' are vague. This vagueness makes it possible for the Draft Law to be abused to stifle free and open discussion. *Third*, the definition of 'value judgement without sufficient

factual basis' is overbroad and makes it possible to restrict opinion based on established facts if the facts were reported in a distorted manner. The Draft Law should not use value judgments with and without sufficient basis. Instead, it should recognise a defence of opinion, stating that expression of an opinion (value judgment) made in good faith is protected as long as there is some established or admitted factual basis for it.

At the same time, mindful of the reluctance of the European Court to allow restrictions of value judgments and opinions, ARTICLE 19 believes that it is reasonable and practical to decide against providing for legal liability for insult. The European Court has repeatedly held that tolerance and broadmindedness are at the heart of democracy, and that the right to freedom of expression protects not just those forms of speech that are broadly considered acceptable, but exactly those statements that others may find shocking, offensive or disturbing.<sup>42</sup> Moreover, there are disturbing examples from around the world about the use of insult laws to punish true or unfavourable opinions.

### **Recommendations:**

- The Draft Law should not make a special distinction between value judgments with or without sufficient factual basis. Instead it should explicitly recognise a defence of opinion stating that expression of an opinion (value judgment) is protected as long as it is made in good faith and there is some established or admitted factual basis for it.
- The definition of insult should be refined to ensure that nobody is liable for offensive speech based on true facts; or, at best, no legal responsibility for insult should be possible.

### **IV.3.7 Presumption of innocence**

#### Overview

Article 12 of the Draft Law, setting out the principle of presumption of innocence for criminal or administrative offences, aims at preventing the undermining of fair trial by prejudicial statements about the guiltiness of a charged person. The provision sets out different limits on statements by public and ordinary persons in this regard. Public authorities and their representatives are obliged to observe the presumption of innocence and to refrain from any comment which would

<sup>42</sup> E.g. *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world. Another example is the case of *Oberschlick v Austria (no.2)*, in which the applicant had been convicted by domestic courts for referring to a politician as an 'idiot'; the ECtHR held that this conviction violated his right to freedom of expression because he was expressing an opinion.



suggest that the person is guilty of committing a felony or an administrative offence.<sup>43</sup> Law enforcement bodies are allowed to make public statements on the guiltiness of the accused only when supporting the accusation in court.<sup>44</sup>

By contrast, all other persons, including mass media, have the right to voice their opinion on the person's guiltiness provided that: their expression includes a message that, at the time, the person has not yet been convicted; the expression clearly indicates that these are opinions and not confirmed facts; the facts on which the comments on the guiltiness of a person and his/her role in the judicial proceedings are based are clearly exposed.<sup>45</sup>

### Analysis

The inclusion of a provision in the Draft Law laying down the principles concerning statements on the guiltiness of a charged person is to be welcomed even though the purpose of this regulation – preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings – falls outside the goals of the Draft Law set out in Article 1.

Noting that, in practice, public officers are tempted to make and often make statements undermining the right to fair trial, it is appropriate to set out the limits of such expression. In line with the European Convention, the Draft Law correctly differentiates between expressions by public officers and by ordinary persons regarding the guiltiness of accused persons. At the same time, Article 12 suffers from several shortfalls.

*First*, the above provision sets out narrower limits on expression of opinion than international law. While Article 6 para 2 of the European Convention, establishing the presumption of innocence, relates to statements on one's guiltiness in pending criminal trials, the restrictions in Draft Law also cover comments which would suggest that a person is guilty of committing a felony or an administrative offence. This limitation is too broad because in reality it will restrict even information that a person is arrested in connection with a crime as this information contains a suggestion - no matter how big it is - that the person is implicated in the crime. Mindful that often those arrested are released without criminal charges there is no danger that such information should violate their right to fair trial. In this respect it should be noted that the European Court stresses that Article 6 para 2 of the European Convention cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary

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43 Article 12, para. 2 of the Draft Law.

44 Article 12, para. 3 of the Draft Law.

45 Article 12, para. 4 of the Draft Law.

if the presumption of innocence is to be respected.<sup>46</sup> Therefore the restrictions on public officials' comments that would suggest one's guiltiness are broadly defined and would allow expression to be restricted in cases when this is not necessary in a democratic society.

Further, there is no need to differentiate between public authorities, their representatives and law enforcement bodies. The European Court takes heed of statements made by *public officials* (italics added) setting out and applying the same rule for public authorities and law enforcement bodies.<sup>47</sup> Consequently, paragraph 3 of the Draft Law should be removed.

In contrast to the European Convention, which guarantees the presumption of innocence by restricting only judicial decisions and statements by public officials,<sup>48</sup> the Draft Law extends this safeguard by placing requirements on ordinary persons who are voicing their own opinions on the guiltiness of persons accused of crimes. This regulation is not necessary in a democratic society because ordinary persons are not likely to influence judicial proceedings with their opinions.

Article 12 para 4 of the Draft Law should be distinguished from journalistic codes of ethics which require journalists to refrain from referring to suspects as though their guilt is certain.<sup>49</sup> While journalists and media outlets are free to adopt and voluntarily follow professional standards, any attempt of the state authorities to set out such standards and ensure their implementation would amount to interference with freedom of expression which is unnecessary in a democratic society. Consequently, Article 12 para 4 should be removed.

### Recommendations:

- Article 12 should restrict only statements of public officials on guiltiness of persons accused of crimes.
- Paragraph 3 of Article 12 of the Draft Law should be removed insofar as no distinction between public officials should be made for the purposes of presumption of innocence.

<sup>46</sup> See for example *Alletet de Ribemont v France* Judgment of 7 August 1996, Application No. 15175/89 § 38

<sup>47</sup> See for example, *Fatullayev v Azerbaijan*, Judgment of 22 April 2010, Application No. 40984/07.

<sup>48</sup> See the judgment in the case of *Fatullayev v Azerbaijan*, *ibid*, where the ECtHR reiterated its consistent approach the presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law.

<sup>49</sup> For example, the Principle 16 of *Honour Codex of Croatian Journalists* states: The assumption of innocence, integrity, dignity and the sensibilities of all parties in a trial must be respected. Similarly the *Ethical Code of the Bulgarian Media* states that the representatives of Bulgarian media respect the 'assumption of innocence' and not describe someone as a criminal prior to their conviction. If they identify a person as being charged with a crime, they also have an obligation to make known the outcome of the trial. These and other ethical codes of journalists can be found on the Internet at: <http://ethicnet.uta.fi/>



- Paragraph 4 of Article 12 of the Draft Law should be removed so that ordinary citizens' can freely voice their own opinions on the guiltiness of persons accused of crimes.

### **IV.3.8 Protection of confidential information and sources**

#### Overview

Article 13 of the Draft Law guarantees the right to protection of information sources. This right belongs to mass media and any person who carries out a journalistic activity or who collaborates with mass media. Nobody shall be bound to disclose the identity of the source of information in civil and administrative proceedings. Article 13 para 4 sets out that within the criminal proceedings, the law enforcement body or the court has the right to oblige the person to disclose the source of information, if the following conditions are met: 1) the criminal case refers to very serious or exceptionally serious crimes; 2) the disclosure is absolutely necessary for criminal proceedings; and 3) all other possibilities to disclose the source of information have been exhausted.

#### Analysis

While the legal recognition of the right to protection of information sources is commendable, the standard set out in Article 13 runs counter to international standards and, in particular, the Council of Europe Recommendation No. R(2000)7.<sup>50</sup> First, in contrast to this Recommendation, which sets out that the power to order disclosure of a source's identity should be exerted exclusively by courts, the Draft Law makes it possible for law enforcement bodies to also order the disclosure of information. Second, Recommendation No. R(2000)7 and the Draft Law adopt different tests for legality of orders of disclosure. While the first requires that the interest in disclosure be always balanced against the harm to freedom of expression and provides for a list of vital interests which would justify disclosure, the Draft Law does not include the requirement to balance the interest with the harm. Third, the 1st condition for disclosure under the Draft Law – that the criminal case refers to very serious or exceptionally serious crimes – is unclear. Presumably this provision lists circumstances of which justify forcing somebody to disclose their information sources. By contrast, Council of Europe Recommendation R (2000) 7 sets out that these circumstance are the protection of human life, prevention of major crime or defence of a person accused of having committed a major crime. Moreover, the distinction between very serious or exceptionally serious crimes is not explained in the law. Third, the Draft Law does not specify who can request the order to disclose information. By contrast,

<sup>50</sup> The full title of the document is Council of Europe Recommendation No. R (2000) 7 of the Committee of Ministers of Member States on the right to journalists not to disclose their sources of information, adopted 8 March 2008.

the Recommendation No. R(2000)7 states that disclosure should only be ordered at the request of an individual or body with a direct, legitimate interest. Finally, in order for the extent of a disclosure to be limited as far as possible, the disclosed information should be provided only to the requesters of the order to disclosure.

### **Recommendations:**

- Law enforcement bodies should not have powers to oblige a person to disclose information sources.
- The Draft Law should require that the balance of the interest in disclosure and the harm to freedom of expression be always carried out.
- The circumstances which justify the disclosure in Article 13 should be harmonised with Council of Europe Recommendation R (2000) 7.
- Article 13 should set out that the disclosure of information sources can be ordered only at the request of an individual or body with a direct, legitimate interest.
- Article 13 should limit the access to disclosed information sources as far as possible, by ensuring that the disclosed information is provided only to those who requested the disclosure.

### **IV.3.9 Miscellaneous: substantive shortfalls**

The Draft Law can enhance the protection of the right to freedom if it includes provisions requiring that the interpretation protection of its provisions be made in accordance with international standards, and affording protection to whistleblowers and to information against search and seizure of the authorities.

The protection of individuals who release information on wrongdoings – whistleblowers -provides an important information safety valve, ensuring that key information does indeed reach the public. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement. In some countries, this protection is set out in a separate law rather than being included in the freedom of information law. In the case of *Guja v Moldova*,<sup>51</sup> finding that the applicant's right to freedom of expression was violated as a result of his dismissal for informing the press of attempts of high-

<sup>51</sup> *Guja v Moldova*, Judgment of 12 February 2008, Application no. 14277/04





ranking public officials to put pressure on the prosecutor's office, the European Court observed that Moldovan law did not contain any provision for employees to report irregularities. Accordingly, the suggested provision is appropriate and proposed on time. The drafters may wish to use paragraphs 1 and 2 of Article 12 of the Law of Georgia on Freedom of Speech and Expression as a source of inspiration. It states:

Article 12: Liability for disclosure of a secret

1. A person shall be liable only for the disclosure of secrets to which they are bound by contract or pursuant to his or her official position the disclosure of which creates a direct and substantial danger to values protected by law.

2. No person shall be liable for the disclosure of a secret if that disclosure aimed to protect a lawful societal interest and the public interest in disclosure outweighs the damage done by the disclosure.

Further international law recognises that information collected and created for journalistic purposes enjoys a special degree of protection from search and seizure by the authorities. This is necessary to safeguard the information sources and prevent chilling effect exerted on journalists and media outlets by such operations. Concerns like these have led several countries to specify a separate procedure in law for the search and seizure of journalistic premises and materials. For example, the French Criminal Procedure Code provides:

Searches of the premises of a press or broadcasting company may be conducted only by a judge or a State prosecutor, who must ensure that the investigations do not endanger the free exercise of the profession of journalism and do not obstruct or cause an unjustified delay to the distribution of information.<sup>52</sup>

A special provision should be included in the Draft Law granting a special degree of protection from official search and seizure to information collected or created for journalistic purposes.

Finally, the Draft Law has no provision ensuring that the interpretation of its legal provisions is made in accordance with the European Convention and the case law of the European Court.

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52 Article 56-2, Criminal Procedure Code.

The case-law of the European Court establishes principles and standards which should guide national judges in the examination of defamation cases. The deviation of domestic case law from the European Convention leads to applications to the European Court and judgments against the government responsible for violations of human rights. Bearing in mind that compensations to victims of violations increase the financial burden of the government, it is recommended that an explicit provision in the Draft Law ensures that the interpretation of the provisions concerning protection of honour, dignity and public reputation and the right to private and family life be carried out in accordance with the guarantees of the European Convention on Human Rights as elaborated in the case-law of the European Court.

### **Recommendations:**

- The Draft Law should afford protection to whistleblowers.
- The Draft Law should grant a special degree of protection to information collected or created for journalistic purposes against search and seizure by the authorities.
- The Draft Law should include a provision setting out that the interpretation of the provisions concerning the protection of honour, dignity and public reputation should be carried out in accordance with the European Convention and case-law of the European Court.

## **V. Overview of Procedural Regime**

This section analyses in detail the procedural norms in the Draft Law. These norms set out the procedures for examination of defamation cases and for cases on protection of private and family life. It is possible to examine both procedures simultaneously as they are strikingly similar.

### **V.1 Positive features**

As stated in the introduction, the Draft Law includes some progressive procedural provisions, such as:

- The prohibition on the State and its bodies from suing for defamation;<sup>53</sup>
- The introduction of a procedure for voluntary rectification and compensation

<sup>53</sup> Article 9, para. 2 of the Draft Law.



for defamation and cases on protection of private and family life;<sup>54</sup>

- The short limitation period for submitting a request for voluntary rectification and compensation (one year) and for filing a defamation suit (30 days from the day of receiving an answer to the request for voluntary rectification or from the day the answer was due).<sup>55</sup>
- The linkage of the state fees for claims for moral and material damages to the value of the action at law;<sup>56</sup>
- The placement of the burden of proof on the plaintiff with respect to the defamatory statements of fact;<sup>57</sup>
- The introduction of a list of presumptions in favour of freedom of expression.<sup>58</sup>
- The introduction of a regime of exemptions from liability for defamation for statements made by the president, the members of parliament, to statements made during judicial proceedings or statements made in the requests, letters or complaints to public authorities<sup>59</sup> and for defamation for reporting of words of others;<sup>60</sup>
- The limitation of compensation for moral damages caused to a public person only in the cases when the latter has become a victim of bad faith defamation.<sup>61</sup>

At the same time, a number of procedural provisions are problematic from the viewpoint of freedom of expression. We elaborate on the procedural shortfall in the following paragraphs.

## **V.2 Problematic areas**

### **V.2.1 Parties**

#### Overview

Article 9 para 2 of the Draft Law states that the State bodies, including all executive, legislative and judicial bodies, cannot take legal action for defamation. Paragraph 3 of the same article states that these bodies should not enjoy protection against defamation through administrative or criminal law.

According to Article 20, a plaintiff in defamation proceedings may be an individual whose honour, dignity or professional reputation has been violated, any interested person on behalf of a deceased person (if prior to his/her death the

54 Articles 15 and 16 of the Draft Law.

55 Article 15, para. 3 and Article 17 of the Draft Law.

56 Article 19 of the Draft Law read together with Article 3, paragraph 1, letter (a) of the Law on State Fee.

57 Article 24, paragraph 1 of the Draft Law.

58 Article 25 of the Draft Law.

59 Article 8 of the Draft Law.

60 Article 28 of the Draft Law.

61 Article 29, para. 2 of the Draft Law.

respective person did not initiate a defamation case), and any legal entity whose professional reputation has been violated.

### Analysis

While the restriction of the ability of the state and its bodies to sue for defamation is one of the positive features of the Draft Law, the same cannot be said for the provision enabling individuals to sue on behalf of persons who are deceased. The harm from an unwarranted attack on someone's reputation is direct and personal in nature. Unlike property, it is not an interest that can be inherited; any interest surviving relatives may have in the reputation of a deceased person is fundamentally different from that of a living person in their own reputation. Furthermore, a right to sue for defamation for the reputation of deceased persons could easily be abused and might prevent free and open debate about historical persons and events. Consequently, the Draft Law should not enable individuals to sue for defamation on behalf of deceased persons.

### **Recommendations:**

- Article 20, paragraph 1, letter b), enabling interested parties to sue for defamation of deceased, should be removed.

## **V.2.2 State fees**

### Overview

According to Article 19, plaintiffs should pay two types of state fees to have their claims under the Draft Law examined. The first is fixed in the amount of 5 conventional units (1 unit is equal to 20 Moldovan lei) and applies to legal actions seeking denial, bringing excuses, or granting the right to reply. The second one applies to claims related to the reparation of material and moral damage caused as a result of defamation and amounts to 3% of the value of the action at law.<sup>62</sup>

### Analysis

Making the state fees for claims for moral and material damages dependent on the value of the action at law would deter many plaintiffs from requesting excessive amounts of compensations. This will have a positive effect on freedom of expression in view of the chilling effect that excessive claims for compensation awards have on plaintiffs. At the same time, it is recommended that the percentage of state fees be increased to further limit the possibilities for claiming excessive pecuniary compensations for moral damages.

<sup>62</sup> Article 3, paragraph 1, letter (a) of the Law of Moldova on State Fee.



## Recommendations:

- The percentage of state fees should be increased to further limit the possibilities for claiming excessive pecuniary compensations for moral damages.

### **V.2.3 Measures for ensuring legal actions**

#### Overview

Article 22 of the Draft Law sets out measures for ensuring legal action. They can be requested from courts simultaneously with the submission of the request for voluntary rectification or compensation for defamation and for violation of the right to private and family life. Upon the claimant's request, the court can apply the following measures to ensure the action:

- a. interdiction to disseminate the appealed information;
- b. levying a distraint upon the circulation which contains appealed information;
- c. interdiction to destroy audio and TV records.

#### Analysis

There are several problems concerning the measures set out in Article 22.

*First*, in comparison with other measures for ensuring legal actions such as attachment on the property, the nature of the measures implies that their purpose is not to ensure that the plaintiff will be able to obtain the requested compensation from the defendant at the end of the court proceedings, but rather to restrict the freedom to disseminate the impugned expression. As such, the three measures set out in Article 22 should be regarded as interim injunctions. Second, failing to regard the measures as restrictions on the right to freedom of expression, the Draft Law does not require that they meet the three-part test for assessment of the legality of freedom of expression restrictions. Finally, it is problematic that the Draft Law makes it easy to apply these measures. Noting the need of safeguards against abusive use of the measures in Article 22, it is recommended that the Draft Law include the following safeguards established by Principle 16 of ARTICLE 19's *Defining Defamation* concerning interim measures:

- b. Interim injunctions, prior to a full hearing of the matter on the merits, should not be applied to prohibit further publication except by court order and in highly exceptional cases where all of the following conditions are met:
  - i. the plaintiff can show that he or she would suffer irreparable damage – which could not be compensated by subsequent remedies – should further publication take place;

- ii. the plaintiff can demonstrate a virtual certainty of success, including proof:
  - that the statement was unarguably defamatory; and
  - that any potential defences are manifestly unfounded.<sup>63</sup>

### **Recommendations:**

- The measures in Article 22 should satisfy the three-part test for assessment of the legality of restrictions on the right to freedom of expression.
- The Draft Law should reserve the use of these measures in Article 22 for highly exceptional cases

## **V.2.4 Defences**

### Overview

Article 8 of the Draft Law establishes a regime for exemptions from liability for defamation for statements made by the president, the members of parliament, to statements made in the course of judicial proceedings or for statements made in the requests, letters or complaints to public authorities.

The final paragraph of Article 29 establishes a defence against a defamation charge as such for a mass media outlet, stating that a mass media outlet can be held liable only when it acted in bad faith or in disregard of its professional obligations.

### Analysis

While the provision should be welcomed, it is recommended that the exemption is extended to cover statements in the course of proceedings at legislative bodies and at local authorities. It is widely recognised that it is in the public interest that not only elected public officials but everybody is able to speak freely without fear in the course of the proceedings in such bodies.

Further, the exemption from liability for statements made in requests, letters or complaints to public authorities is positive. Nevertheless the Draft Law should provide protection against statements of this type made in bad faith.

Finally, the Draft Law does not contain a fully developed defence of ‘reasonable dissemination’: that persons are not liable for the dissemination of wrong

<sup>63</sup> *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations*, see *ibid.* note 7.



and defamatory facts when they acted in good faith and in accordance with professional ethics and when the dissemination concerned a matter of public interest. While such a defence is explicitly recognised in the privacy provisions of the Draft Law,<sup>64</sup> the defence is not fully recognised with respect to defamation. The provision in Article 29 does not afford this defence to everybody but to mass media only. It is recommended that a special provision recognises the reasonable publication defence for defamation that will apply to everybody. Together with this, we recommend that Article 24 – on the burden of proof – is amended to make it clear that once the defendant establishes that a publication concerned a matter of public interest, the plaintiff should prove malice for the claim to succeed.

### **Recommendations:**

- The exemptions from liability should be extended to cover statements made in the course of proceedings at legislative bodies and at local authorities.
- The Draft Law should provide for protection against statements in requests, letters or complaints to public authorities made in bad faith.
- A special provision should recognise the defence of ‘reasonable dissemination,’ enabling not only the media but every person to invoke it.
- Article 24, setting out the burden of proof, should be amended to make it clear that once the defendant establishes that a publication concerned a matter of public interest, the plaintiff should prove malice for the claim to succeed.

## **V.2.5 Remedies/Sanctions**

### Overview

The remedies for defamation are set out in Articles 26, 27 and 29 of the Draft Law. They include: rectification, publication of reply, compensation for actual and moral damages. If the person obliged to make the rectification refuses the publication of correction it should pay the plaintiff a compensation amounting from 50 to 5000 convention units (1 unit = 50 Moldovan lei).

Article 29 sets out criteria for determining the quantum of the awards for moral damages. Public persons can be granted compensations for moral damages only if they have been victims of bad faith defamation. The moral damage is

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<sup>64</sup> See Article 10, paragraph 3 of the Draft Law.

granted to legal entities only if the dissemination of information has endangered its management.

Article 29 deals with the difficult issue of “moral damages”. Paragraph 1 sets out a non-exhaustive list of factors that a court must take into account when determining the quantum of moral damages, including:

- the nature and severity of physical and psychological suffering caused to the claimant;
- the nature of the information disseminated;
- the scope of the information’s dissemination;
- the personality of the plaintiff;
- the reputation of the defendant;
- the defendant’s degree of guilt;
- the consequences brought about by the dissemination of the defamatory information;
- the material status of both defendant and claimant;
- whether a correction has been published;
- whether the right to reply was granted or a retraction was published before the law suit was filed; and
- any other relevant circumstances.

Article 29 further limits the award of moral damages in a number of circumstances:

- moral damages may be awarded to a public figure only when the defamation was committed in bad faith;
- moral damages may be awarded to a corporation only when the defamation disrupted its management; and
- no moral damages may be awarded to a legal entity that has been liquidated.

The final paragraph of Article 29 establishes a defence against a defamation charge as such for a mass media outlet, stating that a mass media outlet can be held liable only when it acted in bad faith or in disregard of its professional obligations.

### Analysis

The set of guidelines for determination of the amount of moral damages is to be welcomed. However, there is no overall limit on moral damages. Article 29 should be further strengthened by imposing an absolute ceiling for compensation awards.

In addition, the regime of sanctions in the Draft Law does not refer to the principle of proportionality, according to which sanctions for expression should





be strictly proportionate to the damage. In *Tolstoy Miloslavsky v. United Kingdom*<sup>65</sup> the European Court held that the imposition of a £1,500,000 damage award could not be justified as ‘necessary in a democratic society’ and therefore constituted a violation of Article 10 of the European Convention. The Court noted:

Under the Convention, an award of damages for defamation must bear a *reasonable relationship of proportionality* to the injury to reputation suffered [italics added].<sup>66</sup>

In accordance with the foregoing, it is recommended that the Draft Law require that sanctions for expression be strictly proportionate to the damage.

Finally, the provision in Article 29 that moral damages may be awarded to a corporation only when the defamation disrupted its management, is vague because it is impossible to foresee how speech can disrupt management of a corporation. The Draft Law is also silent in this respect. This provision should be removed in order to make it impossible for corporations to sue for moral damages. Corporations should be able to take legal action only in relation to defamatory statements made in regards to the quality of a business' product(s) or services.

### **Recommendations:**

- An absolute ceiling for compensation awards for moral damages should be established.
- The Draft Law should explicitly provide that sanctions for expression should be strictly proportionate to the damage.
- Article 29, allowing for corporations to sue for moral damages, should be removed.

### **V.2.6 Miscellaneous: procedural shortfalls**

The Draft Law does not impose any limit on the liability for defamation and does not provide effective remedies against abuse of the judicial process by plaintiffs who bring unsubstantiated defamation cases with a view to stifling criticism rather than vindicating their reputation.

<sup>65</sup> 13 July 1995, Application No. 18139/91.

<sup>66</sup> *Ibid.*, para. 49.

The failure of the Draft Law to impose limits on the liability for defamation is worrisome because a large number of people risk being sued for defamation due to their “innocent dissemination” of defamatory statements. For example, internet service providers may be held responsible for dissemination of defamatory statements even though they lack any direct link to them.

It is recommended that the Draft Law exclude from the scope of liability for defamation people who are not authors or editors, as well as publishers of statements who did not know and could not know that they were contributing to the dissemination of defamatory statements. Article 16 of the Law of Georgia on the Freedom of Speech and Expression gives a good example in this respect, stating that “[a] person shall not be imposed a liability if he did not and could not know that he disseminated defamation.”

Further, defendants should have legal means against plaintiffs who bring clearly unsubstantiated defamation cases, without prospect of success, to try to prevent media criticism of their actions. Like any other court action, unsubstantiated defamation cases have a chilling effect on freedom of expression which is deliberately sought by plaintiffs.

A procedural mechanism should be set up to strike out claims early on in the proceedings unless the plaintiff can show some probability of success.

### **Recommendations:**

- The Draft Law should exclude from the scope of liability for defamation people who are not authors or editors, as well as publishers of statements who did not know and could not know that they were contributing to the dissemination of defamatory statements.
- Courts should be able to strike out unsubstantiated claims early on in the proceedings in order to prevent malicious plaintiffs from suppressing media criticism by initiation of defamation cases with no prospect of success.







## **COMMENTARY ON THE DECREE OF THE PROVISIONAL GOVERNMENT OF THE KYRGYZ REPUBLIC**

### **“On Establishment of the Public Television and Radio Broadcasting in Kyrgyz Republic”**

and

### **THE KYRGYZ REPUBLIC STATUTE**

### **“On the Public Broadcasting Corporation of the Kyrgyz Republic” approved by the Decree**

*This commentary has been prepared by Andrei Richter, Director of the Media Law and Policy Institute (Moscow), Doctor of Philology (Moscow State University Department of Journalism), and commissioned by the Office of the OSCE Representative on Freedom of the Media*

Having analyzed the Decree of the Provisional Government of the Kyrgyz Republic “On Establishment of the Public Television and Radio Broadcasting in Kyrgyz Republic” (hereinafter referred to as “the Decree”) and the Kyrgyz Republic Statute “On the Public Broadcasting Corporation of the Kyrgyz Republic” approved by the Decree (hereinafter referred to as “the Statute”) in the context of the Constitution (and the draft new Constitution) and current legislation of the Kyrgyz Republic as well as international regulations on freedom of information and the standards of public broadcasting, the expert commissioned by the Office of the OSCE Representative on Freedom of the Media has come to the following conclusions.

## **BRIEF SUMMARY OF THE COMMENTARY AND RECOMMENDATIONS**

The right to freedom of expression and the right to freedom of the media are guaranteed by instruments of the United Nations and the Organization for Security and Cooperation in Europe, with which the Kyrgyz Republic has expressed its agreement.

The International Covenant on Civil and Political Rights imposes on UN member states the duty of “adopting such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” This means that they should not only refrain from violating these rights but also take positive steps to ensure they are respected. This includes the right to freedom of

expression. Government bodies are in fact required to create conditions in which diverse, independent media can develop, thereby guaranteeing the public's right to information. These conditions include creating a public broadcasting service as well.

The 30 April 2010 Decree of the Provisional Government of the Kyrgyz Republic "On Creating a Public Broadcasting Service in the Kyrgyz Republic" assigns public broadcaster status to the existing National Television and Radio Broadcasting Corporation (NTRBC), renaming it the Public Broadcasting Corporation of the Kyrgyz Republic (hereinafter referred to as the PBC). The Decree approves the Kyrgyz Republic Statute "On the Public Broadcasting Corporation of the Kyrgyz Republic," which is essentially the law on the public broadcasting organization.

In its wording, however, this new act coincides almost completely with the old Kyrgyz Republic Law "On the National Broadcasting Corporation" of 2007, which ceased to be valid in 2008. With the abolition of this law, a procedure was introduced for the appointment of the NTRBC general director and deputy directors by the president of the Kyrgyz Republic and for electing members to the Supervisory Board of the National Television and Radio Broadcasting Corporation of the Kyrgyz Republic according to the recommendations of the president only. This was condemned at the time by the OSCE Representative on Freedom of the Media.

The return to the earlier (2007–2008) system of management and supervision of the operations of the former National Television and Radio Broadcasting Corporation was indisputably a positive legal development.

Given the inconsistencies between the Decree and the Statute with regard to the initial appointments and elections to the governing bodies, it is important to be guided by such norms of the Statute as the qualifications required of candidates for membership in the Supervisory Board, and that elections of the PBC general director be held on an alternative, competitive basis.

The powers defined in the Statute in re the Public Broadcasting Corporation's governing bodies are sufficient for it to be efficiently managed and to perform its mandated functions as the Kyrgyz Republic's national public broadcasting service. The legal framework regulating the operations of a public broadcasting organization clearly and unambiguously defines the sphere of competence of its supervisory bodies. The Supervisory Board does not have the right to exercise any preemptive censorship of programmes.



The norms of the Statute that contain requirements for the Public Broadcasting Corporation's programme content are scattered among several different articles; if they do not contradict one another, they clearly do not coincide. This could lead to different interpretations of the PBC's mandate and to problems in the broadcaster's efficient operation. At the same time, the overall desire to fix the Public Broadcasting Corporation's duty to present detailed, objective, and balanced news reports and current events programmes is to be welcomed.

The Statute contains a number of important norms for a public broadcasting service to perform its functions. These concern quotas for the productions of other television and radio organizations independent of the Public Broadcasting Corporation.

The Statute does not guarantee the observance of any minimum standards whatsoever for the financing of a public broadcasting service, something that is vital to the broadcaster's economic independence. The Statute stipulates only that the relevant item of the state budget is protected from being cut. This issue requires further consideration in light of the recommendations presented in this commentary.

The Statute's duplication of the norms in the Kyrgyz Republic Law "On Advertising" introduces unwarranted confusion, as a number of the Statute's novel norms could also be applied to the programming of private broadcasting. On the whole, the norms on advertising and sponsorship in the Kyrgyz Republic's public broadcasting service correspond to the standards of the European Convention on Transfrontier Television, and are in certain cases even stricter than the provisions of the Convention.

Presented below is a brief summary of the main recommendations with regard to the acts under review:

- For the second and subsequent elections to the Public Broadcasting Corporation's Supervisory Board, it would be preferable to establish a system of representation that would prevent state agencies from gaining a preponderance of power within it.
- In making appointments to the first and subsequent Supervisory Boards, the qualification requirements for candidates should be taken into consideration.
- The elections of the first and subsequent general directors should be held on an alternative, competitive basis.
- The incongruities between the provisions of the Statute articles in regard to the requirements for the Public Broadcasting Corporation's programming content should be eliminated on the basis of public broadcasting's

international standards of objectivity.

- The contradictions and inconsistencies in regard to the size of quotas for broadcasters independent of the PBC should be eliminated.
- The norm on the financing of the Public Broadcasting Corporation should be refined or reexamined in light of international experience.
- The unwarranted duplication in the Statute and the Kyrgyz Republic Law “On Advertising” with respect to the regulation of advertising and sponsorship should be eliminated by amending the Law “On Advertising.”

The main aspects of the Decree and Statute that are cause for expert approval or concern are discussed in greater detail below, after a brief review of the Kyrgyz Republic’s international and constitutional obligations in regard to freedom of expression.

## INTRODUCTION

At the request of the OSCE Office of the Representative on Freedom of the Media, this commentary was prepared by Andrei Richter, Doctor of Philology. Dr. Richter is the director of the Media Law and Policy Institute and the head of the Department of History and Legal Regulation of Domestic Media at the Department of Journalism of Lomonosov Moscow State University. He is a member of the International Commission of Jurists (ICJ, Geneva) and of the International Council of the International Association of Mass Communication Researchers (IAMCR).

This commentary contains an analysis of the Decree of the Provisional Government of the Kyrgyz Republic “On Creating a Public Broadcasting Service in the Kyrgyz Republic” and the Kyrgyz Republic Statute “On the Public Broadcasting Corporation of the Kyrgyz Republic” approved by the Decree in the context of its correspondence to international standards relating to the right to freedom of expression and to freedom of the media. The texts of the acts under review were provided by the OSCE Representative on Freedom of the Media.

The Decree was adopted at an extended session of the Provisional Government of the Kyrgyz Republic on 30 April 2010.<sup>1</sup> The body adopting the Decree – the Provisional Government of the Kyrgyz Republic – “in order to create an effective system of state governance in the name of the people of Kyrgyzstan” assumed the authority and functions specified in the KR Constitution for the president, parliament, and government of the Kyrgyz Republic.<sup>2</sup> In terms of its legal status,

1 See the Provisional Government’s official website: [http://www.kyrgyz-el.kg/index.php?option=com\\_content&task=view&id=114&Itemid=36](http://www.kyrgyz-el.kg/index.php?option=com_content&task=view&id=114&Itemid=36)

2 See Decree No. 1 of the Provisional Government of Kyrgyzstan, 7 April 2010, at the Provisional Government’s official website: <http://>





the KR Provisional Government's decree thereby became a valid law of the Kyrgyz Republic.

Section 1 of this commentary examines the international obligations of the Kyrgyz Republic with respect to the right to freedom of expression and freedom of the media, and sets forth the international standards relating to public broadcasting. These obligations and standards are defined and established in international law, e.g., in the International Covenant on Civil and Political Rights, and in other instruments of the United Nations and the international organizations associated with it. They are also found in various OSCE commitments to which the Kyrgyz Republic is a party; in the decisions of international courts and tribunals on human rights; in intergovernmental declarations and in statements by the OSCE Representative on Freedom of the Media. They are also commensurable with the constitutional law of the Kyrgyz Republic on issues of human rights and freedoms.

Section 2 contains an analysis of the Decree of the Provisional Government of the Kyrgyz Republic “On Creating a Public Broadcasting Service in the Kyrgyz Republic” and the Kyrgyz Republic Statute “On the Public Broadcasting Corporation of the Kyrgyz Republic” approved by the Decree.

## **I. INTERNATIONAL AND CONSTITUTIONAL STANDARDS RELATING TO FREEDOM OF EXPRESSION**

### **1.1. Recognition of the Importance of Media Freedom of Expression**

Freedom of expression has long been recognized as one of the fundamental human rights. It is of paramount importance to the functioning of democracy, and is a necessary condition for the exercise of other rights, and is in and of itself an indispensable component of human dignity.

The Kyrgyz Republic is a full-fledged member of the international community and a participant in the United Nations and the Organization for Security and Cooperation in Europe (OSCE). It has therefore assumed the same obligations as all the other participating states.

The Universal Declaration of Human Rights (UDHR), the basic instrument on human rights adopted by the General Assembly of the United Nations in 1948, protects the right to the free expression of one's opinions in the following wording of Article 19:

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.<sup>3</sup>*

The Kyrgyz Republic ratified the International Covenant on Civil and Political Rights (ICCPR),<sup>4</sup> a UN treaty of binding legal force. It is worth noting that the ICCPR also contains guarantees as to the right to freedom of expression, as can be seen from the text of its Article 19:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

In this context, it should also be recalled that Section 3 of Article 12 of the Constitution of the Kyrgyz Republic states:

*International treaties and agreements to which the Kyrgyz Republic is a party that have entered into force under the established legal procedure and also the universally recognized principles and norms of international law shall be a constituent part of the legal system of the Kyrgyz Republic.*

This wording is repeated verbatim in the draft new Constitution of the Kyrgyz Republic (dated 3 May 2010) in Section 3 of Article 12.<sup>5</sup>

The UN Human Rights Committee, meeting alternately in New York and Geneva, is responsible for monitoring compliance with the International Covenant on Civil and Political Rights. The committee's experts are entitled to review petitions from private individuals claiming to have been victims of violations of the rights enunciated in the Covenant, including the rights specified in Article 19. The UN Human Rights Committee has established:

*The right to freedom of expression is of paramount importance in any*

<sup>3</sup> Resolution 217A(III) of the General Assembly of the United Nations, adopted 10 December 1948. A/64, pp. 39–42. See the full English text at <http://www.un.org/en/documents/udhr/>.

<sup>4</sup> International Covenant on Civil and Political Rights. Adopted by Resolution 2200 A (XXI) of the General Assembly 16 December 1966. Entered into force 23 March 1976. See the full official English text at the UN website <http://www.ohchr.org/english/law/ccpr.htm>.

<sup>5</sup> The text of the draft new Constitution of the Kyrgyz Republic can be found at the Provisional Government's website: [http://www.kyrgyz-el.kg/index.php?option=com\\_content&task=view&id=120&Itemid=41](http://www.kyrgyz-el.kg/index.php?option=com_content&task=view&id=120&Itemid=41)

*democratic society.*<sup>6</sup>

Free media, as the UN Human Rights Committee has stressed, play a vital role in the political process:

*[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.*<sup>7</sup>

Statements of this sort also abound in the decisions of human rights courts everywhere in the world and serve as precedents for understanding the generally recognized principles and norms of international law mentioned in Section 3 of Article 12 of the Constitution of the Kyrgyz Republic. The European Court of Human Rights stated, for instance:

*Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.*<sup>8</sup>

As was noted in the cited judgement, freedom of expression is of fundamental importance both in and of itself and as the foundation for exercising all other human rights. Full-fledged democracy is only possible in societies where the free flow of information and ideas is allowed and guaranteed. Freedom of expression is also of paramount importance in identifying and exposing violations of this and other human rights, and in combating such violations.

The European Court of Human Rights, created to monitor compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms, has consistently emphasized the “pre-eminent role of the press in a State governed by the rule of law.”<sup>9</sup> It has noted in particular:

*Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables*

6 *Tae-Hoon Park v. Republic of Korea*, 20 October 1998. Case No. 628/1995, pt. 10.3. See the official text at <http://www.ohchr.org/Documents/Publications/SDecisionsVol6en.pdf>.

7 General Comment No. 25 of the Human Rights Committee (para 25), 12 July 1996. See the official text at: <http://www.unhcr.org/tbs/doc.nsf/%28Symbol%29/d0b71023e8d6d9898025651e004bc0eb?Opendocument>.

8 *Handyside v. the United Kingdom*, 7 December 1976. Application No. 5493/72, para. 49. See the official text of this judgement at the ECHR website: <http://www.medialaw.ru/article10/6/2/52.htm>.

9 *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63. See the official text of this judgement at the ECHR website: <http://www.medialaw.ru/article10/6/2/25.htm>.

*everyone to participate in the free political debate which is at the very core of the concept of a democratic society.*<sup>10</sup>

For its part, the overseas analogue of the ECHR, the Inter-American Court of Human Rights, believes “It is the mass media that make the exercise of freedom of expression a reality.”<sup>11</sup> The European Court of Human Rights has also stated that the media bear a responsibility to disseminate information and ideas concerning all areas of public interest:

*Although [the press] must not overstep various bounds set, inter alia, for [protecting the interests enumerated in Article 10 (2)]<sup>12</sup> of the European Convention on Human Rights], it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog."<sup>13</sup>*

## **1.2. Obligations of the OSCE Participating States with respect to freedom of the media**

The right to freely express one’s opinions is inseparably bound to the right of freedom of the media. Freedom of the media is guaranteed by various documents of the Organization for Security and Cooperation in Europe (OSCE) which the Kyrgyz Republic signed when joining the OSCE.

The Organization for Security and Cooperation in Europe is the world’s largest regional security organization and comprises 56 nations of Europe, Asia, and North America. Founded on the basis of the Final Act of the Conference on Security and Cooperation in Europe (1975), the Organization has assumed the tasks of identifying the potential for the outbreak of conflicts, and of preventing, settling, and dealing with the aftermaths of conflicts. The protection of human rights, the development of democratic institutions, and the monitoring of elections are among the Organization’s main methods for guaranteeing security

10 See *Castells v. Spain*, note 25, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, para. 59; and *The Sunday Times v. UK* (II), 26 November 1991, Application No. 13166/87, para. 65). The official texts of these judgements can be found at the ECHR website: <http://www.medialaw.ru/article10/6/index.htm#2>.

11 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

12 Article 10 (2) says: “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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

13 See *Castells v. Spain*, note 25, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, para. 59; and *The Sunday Times v. UK* (II), 26 November 1991, Application No. 13166/87, para. 65). The official texts of these judgements can be found at the ECHR website: <http://www.medialaw.ru/article10/6/index.htm#2>.



and performing its basic tasks.

The Final Act of the Conference on Security and Cooperation in Europe (CSCE) in Helsinki<sup>14</sup> states: “[T]he participating States will act in conformity with the purposes and principles of the ... Universal Declaration of Human Rights.”<sup>15</sup>

The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE<sup>16</sup> also proclaims:

*The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion. They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.*

Para 9.1 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE also says that the OSCE participating states reaffirm that

*... everyone will have the right to freedom of expression.... This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.*<sup>17</sup>

The OSCE Charter for European Security (1999) states:

*We reaffirm the importance of independent media and the free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.*<sup>18</sup>

14 Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1 August 1975. See the complete official text at <http://www.osce.org/item/4046.html?lc=ru> and in extracts concerning freedom of expression at [http://www.medialaw.ru/laws/other\\_laws/european/zakl\\_akt.htm](http://www.medialaw.ru/laws/other_laws/european/zakl_akt.htm).

15 Section VII of the 1975 Helsinki Final Act.

16 Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990. See in particular Paras. 9.1 and 10.1. The full official text is available at [http://www.osce.org/fom/item\\_11\\_30426.html](http://www.osce.org/fom/item_11_30426.html).

17 Ibid.

18 See Para 26 of the Charter for European Security, adopted at the OSCE Istanbul Summit, November 1999. The full official text is available at <http://www.osce.org/item/4051.html?>.

Finally, at the Moscow Meeting of the Conference on the Human Dimension of the CSCE (October 1991), the participating states unanimously agreed that they

*... reaffirm the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. They further recognize that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms.*

Given the obligation of the Kyrgyz Republic, stemming from the foresaid, as to “[a]ny restriction in the exercise of this right will be prescribed by law and in accordance with international standards” and the constitutional norm stating that “the universally recognized principles and norms of international law shall be a constituent part of the legal system of the Kyrgyz Republic,” it is worth recalling these generally recognized norms, standards, and principles of international law.

### **1.3. Permissible Restrictions on Freedom of Expression**

The right to freedom of expression is inarguably not absolute: in a few specific instances, it may be subject to restrictions. Due to the fundamental nature of this right, however, any restrictions must be precise and clearly defined according to the principles of a state governed by the rule of law. In addition, restrictions must serve legitimate purposes and be necessary to the well-being of a democratic society.<sup>19</sup>

The right cannot be restricted simply because a particular statement or expression is considered offensive, or because it casts doubt on accepted dogmas. The European Court of Human Rights has therefore stressed that such statements are worthy of protection:

*Freedom of expression ... is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society.”*<sup>20</sup>

<sup>19</sup> See Section II.26 of the Report from the Seminar of Experts on Democratic Institutions to the CSCE Council (Oslo, November 1991). The official text can be found at the OSCE website: [http://www.osce.org/om/Item\\_11\\_30426.html](http://www.osce.org/om/Item_11_30426.html).

<sup>20</sup> *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49. See the official text of this judgement at



The limits to which legal restrictions on freedom of expression are permissible are established in Paragraph 3 of the above Article 19 of the ICCPR:

*The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

- a. For respect of the rights or reputations of others;*
- b. For the protection of national security or of public order (order public), or of public health or morals.*

It is worth noting that the matter does not concern the need or duty of states to establish appropriate restrictions on this freedom but only the admissibility or possibility of doing so while continuing to observe certain conditions. This regulation is interpreted as establishing a threefold criterion demanding that any restrictions (1) be prescribed by law, (2) serve a legitimate purpose, and (3) are necessary for the well-being of a democratic society.<sup>21</sup> This international standard also implies that vague and imprecisely formulated restrictions, or restrictions that may be interpreted as enabling the state to exercise sweeping powers, are incompatible with the right to freedom of expression.

If the state interferes with the right to freedom of the media, such interference must serve one of the purposes enumerated in Article 19 (Para 3). The list is succinct, and interference not associated with one or another of the specified aims is consequently a violation of the Covenant's Article 19. In addition, the interference must be "necessary" to achieve one of the aims. The word "necessary" has special meaning in this context. It signifies that there must be a "pressing social need" for such interference;<sup>22</sup> that the reasons for it adduced by the state must be "relevant and sufficient," and that the state must show that the interference was proportionate to the aims pursued. As the UN Committee on Human Rights has declared, "the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect."<sup>23</sup> Restrictions imposed with observation of the above conditions must

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the ECHR website: <http://www.medialaw.ru/article10/6/2/52.htm>.

21 See, e.g., Paragraph 6.8 of the UN Committee on Human Rights judgment in the case *Rafael Marques de Morais v. Angola*, No. 1128/2002, 18 April 2005: <http://humanrights.law.monash.edu.au/undocs/1128-2002.html>.

22 See, e.g., *Hrico v. Slovakia*, 27 July 2004, Application No. 41498/99, para. 40 at the ECHR website: <http://www.echr.coe.int/eng/Press/2004/July/ChamberJudgmentHricovSlovakia200704.htm>.

23 See the Judgment in the case *Rafael Marques de Morais v. Angola*, note 31, para. 6.8.

be proportional to the legitimate aim pursued.

In this respect, it is worth noting that Article 18 of the Kyrgyz Republic Constitution (duplicated in Article 36 of the draft new Constitution) states:

*1. In the Kyrgyz Republic, no laws abolishing human rights and freedom shall be issued.*

*2. Restrictions on human rights and freedoms shall be permitted under the Constitution and laws solely for the purposes of protecting the rights and freedoms of others, public security and order, territorial integrity, and defence of the constitutional order. Where such measures are taken, constitutional rights and freedoms shall not be affected in their essence.*

In regard to freedom of the media, Section 6 of Article 65 of the Constitution of the Kyrgyz Republic (also duplicated in the draft new Constitution) states:

*No laws restricting freedom of speech and freedom of the press may be adopted.*

Article 14 (Section 6) of the Constitution of the Kyrgyz Republic (and the corresponding Article 28 in the draft new Constitution) in turn define the right to freedom of expression and freedom of the media in the following way:

*Everyone shall have the right to freedom of thought, speech, and the press, and to freely express these thoughts and convictions. No one shall be compelled to express his thoughts and convictions.*

At the same time, it cannot be ignored that the provision banning censorship was for no apparent reason removed from the text of the current version of the KR Constitution adopted in 2007. The draft new Constitution does not, unfortunately, correct the situation. Thus, the Kyrgyz Republic is, along with Turkmenistan and Armenia, an exception among the post-Soviet states: everywhere in the remainder, there are constitutional bans on censorship.

#### **1.4. Regulating Media Operations**

To protect the constitutional right to freedom of expression, it is vital that the media have the opportunity to carry out their activities independently of government control. This ensures their functioning as a public watchdog and the people's access to a broad range of opinions, especially on issues of public interest. The primary aim of regulating media operations in a democratic society





ought therefore to be promoting independent and pluralistic media, guaranteeing thereby the exercise of the public's right to receive information from a wide variety of sources.

Article 2 of the ICCPR assigns participating states the duty of adopting "such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." This means that participating states are required not only to refrain from violating these rights but also to take positive measures to guarantee that such rights are respected, including the right to freedom of expression. The states are *de facto* obliged to create conditions in which a variety of media can develop, thus ensuring the public's right to information. These conditions apply to creating a public service broadcasting as well.

An important aspect of the states' positive obligations to help bring about freedom of expression and freedom of the media is the need to develop pluralism within the media themselves and to guarantee equal access to the media for each and every person. The European Court of Human Rights has noted:

*The imparting] of information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism....*<sup>24</sup>

The Inter-American Court of Human Rights states that freedom of expression demands "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."<sup>25</sup>

In this respect, it is worth noting that this is universally recognized today: any public agency empowered with the authority to regulate media operations ought to be fully independent of the government and protected against interference by political and business circles. Otherwise, any system of media regulation can easily become an object of abuse for political or commercial purposes. With respect to this, three special representatives stated:

*All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political*

<sup>24</sup> *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application No. 13914/88 and 15041/89, para. 38). The text of this Judgement can be found at <http://www.medialaw.ru/article10/6/2/14.htm>.

<sup>25</sup> Recommendation on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Note 27, Para. 34). See also the Decree on International Mechanisms for Promoting Freedom of Expression: [http://www.osce.org/documents/html/pdftohtml/27439\\_en.pdf.html](http://www.osce.org/documents/html/pdftohtml/27439_en.pdf.html)

*or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.*<sup>26</sup>

### **1.5. Principles Regulating the Operations of Public Broadcasting.**

The idea of public broadcasting has received powerful support in a whole series of intergovernmental declarations adopted in recent years. As early as 1992, the Almaty Declaration on Promoting Independent and Pluralistic Media in Asia,<sup>27</sup> which called on the governments in the region to help promote nongovernmental and educational broadcasting services in their countries, was adopted with the support of UNESCO.

The vital function of public service broadcasting, accessible to all at the national and regional levels through the creation of a basic universal broadcasting service comprising information, education, culture, and entertainment, is emphasized as an essential factor of pluralism in communications in Recommendation No. R (96) 10 on guarantees of public broadcasting's independence, adopted under the aegis of the Council of Europe.<sup>28</sup>

The need for all broadcasters in general, and those belonging to a public broadcasting service in particular, to enjoy a high degree of independence (especially from interference by government agencies) that would allow them to effectively fulfil their responsibilities to the public has been stressed repeatedly in documents of international law. The Resolution "On the Future of Public Service Broadcasting" adopted at the 4th European Ministerial Conference on Media Policy emphasizes that the participating states undertake to ensure the independence of public service broadcasters against "political and economic interference."

UNESCO in particular has publicly stressed the need for such independence many times. In the 1991 Declaration of Windhoek, UNESCO confirmed its criteria for this, stating that "All funding should aim to encourage pluralism as well as independence" (para 11).<sup>29</sup> In another document, the 1997 Declaration of Sofia, UNESCO stated (para 7):

*State-owned broadcasting and news agencies should be, as a matter*

<sup>26</sup> See [http://www.osce.org/documents/html/pdf/html/27439\\_en.pdf.html](http://www.osce.org/documents/html/pdf/html/27439_en.pdf.html)

<sup>27</sup> The text (in Russian) can be found at <http://www.bestpravo.ru/fed1992/data01/tex11569.htm>

<sup>28</sup> The full English text of the recommendation can be found at the official Council of Europe website: [http://www.ebu.ch/CMSImages/er/leg\\_ref\\_coe\\_r96\\_10\\_psb\\_110996\\_tcm6-4322.pdf](http://www.ebu.ch/CMSImages/er/leg_ref_coe_r96_10_psb_110996_tcm6-4322.pdf)

<sup>29</sup> The English text of the declaration can be found at the official UN website: [http://www.unesco.org/webworld/fed/temp/communication\\_democracy/windhoek.htm](http://www.unesco.org/webworld/fed/temp/communication_democracy/windhoek.htm)

*of priority, reformed and granted statutes of journalistic and editorial independence as open public service institutions. If supervisory regulatory broadcasting authorities are established, they must be fully independent of government.*<sup>30</sup>

In the opinion of the heads of this international organization, “UNESCO is committed to promote Public Service Broadcasting and empower citizens with knowledge to participate actively in the decision making process.”<sup>31</sup> Though UNESCO declarations “are not binding documents, the fact that they have been endorsed by UNESCO’s General Conference reflects the will of the international community.”<sup>32</sup>

The 1st Conference of Ministers on Information and Broadcasting in the Asia–Pacific Region, organized by the Asia–Pacific Institute for Broadcasting Development with the assistance of the United Nations, UNESCO, the International Telecommunication Union, and other organizations, was held in Bangkok, Thailand, 27–28 May 2003. It was conducted in a format of topic discussion and regional preparatory meeting prior to the World Summit on the Information Society, held in Geneva, Switzerland, 2003. A statement containing a number of important recommendations on various aspects of public broadcasting (including regulation), stressed the important role of public service broadcasting in the region.

The Bangkok Declaration adopted at the conference states in particular:

### **Recommendation 3: Public Service Broadcasting**

#### **3.1 Public Service Broadcasters are encouraged to:**

1. *Promote and develop education, including community education, spread of information, empowerment and people’s participation in society and development addressing all groups of society;*
2. *Create programs which carry credibility with pluralistic groups and which promote cultural diversity and bring positive effects of globalization to all communities;*
3. *Create rich and quality content for all, and in particular by and for women,*

<sup>30</sup> The Declaration of Sofia, approved by the European Seminar on Promoting Independent and Pluralistic Media (with special focus on Central and Eastern Europe) held in Sofia, Bulgaria, from 10 to 13 September 1997. The English text can be found at the official UN website: [http://portal.unesco.org/ci/en/ev.php-RL\\_ID=5352&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-RL_ID=5352&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>31</sup> Public Service Broadcasting: A Best Practices Sourcebook. Indrajit Banerjee and Kalinga Seneviratne, eds. UNESCO, 2005. P. 5. The English text can be found at the official UNESCO website: <http://unesdoc.unesco.org/images/0014/001415/141584e.pdf>

<sup>32</sup> *Ibid.* P. 80.

*youth and children that counters the influence of violence, communal hatred and carry such content on prime time;*

- 4. Initiate public debate and common ground talks between policy-makers, academics and media professionals to counter negative effects of violence in media. Broadcasters can promote the culture of dialogue among civilizations with the view to promote understanding and peace;*
- 5. Exploit new technologies to expand coverage and accessibility to information and healthy entertainment;*
- 6. Promote protection of copyrights of content by coming out strongly against piracy and unauthorized use of content.*

**3.2** *Authorities are encouraged to:*

- 1. Allow autonomy in content creation, management, finance and administration of public service broadcasters;*
- 2. Study and consider the following funding mechanisms for public service broadcasting:*
  - a. One-time fee while buying a radio/television/electronic appliances/mobile phones*
  - b. Introduction of a license fee either as a stand-alone or as an addition to the electricity bill*
  - c. Government grants for infrastructure*
  - d. Advertising/commercial revenue, but it should not undermine the mandate of public service broadcasting*
  - e. Sponsorship*
  - f. Contribute to production of programs for clearly defined developmental needs;*
- 3. Regularly review the mandate of public service broadcasting in view of national, regional and global events in order to foster mutual understanding, tolerance and trust;*
- 4. Allocate preferential frequencies to public service broadcasters;*

5. *Create legal structures to allow independence of decision making to public broadcasters;*
6. *Ensure allocation of adequate time by private networks for public service programs and for pluralistic content for all groups of society;*
7. *Ensure complete editorial independence.*<sup>33</sup>

The Parliamentary Assembly of the Council of Europe (PACE) defined the following basic principles of public broadcasting in its Recommendation No.1641 (2004), “Public Service Broadcasting”:

*2. Public service broadcasting, whether run by public organisations or privately-owned companies, differs from broadcasting for purely commercial or political reasons because of its specific remit, which is essentially to operate independently of those holding economic and political power. It provides the whole of society with information, culture, education and entertainment; it enhances social, political and cultural citizenship and promotes social cohesion. To that end, it is typically universal in terms of content and access; it guarantees editorial independence and impartiality; it provides a benchmark of quality; it offers a variety of programmes and services catering for the needs of all groups in society and it is publicly accountable. These principles apply, whatever changes may have to be introduced to meet the requirements of the twenty-first century.*<sup>34</sup>

The Parliamentary Assembly also considers it necessary for a number of principles concerning media freedom to be respected. A list of such principles can be found in PACE Resolution No. 1636 (2008), “Indicators for Media in a Democracy.”<sup>35</sup> A list of such principles would facilitate analyses of national media environments in respect of media freedom, which could identify problematic issues and potential shortcomings. This will enable member states to discuss, at European level, possible actions to address those problems. In its resolution, the Parliamentary Assembly invites national parliaments to analyse their own media situation regularly in an objective and comparable manner in order to be able to identify shortcomings in their national media legislation and practice and take appropriate measures to remedy them. Such analyses should be based on the

<sup>33</sup> The full English text can be found at [http://www.aibd.org.my/the\\_institute/profile/bangkok\\_declaration.html](http://www.aibd.org.my/the_institute/profile/bangkok_declaration.html)

<sup>34</sup> The full English text can be found at the official PACE website: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta04/erec1641.htm>

<sup>35</sup> The full English text of the resolution can be found at the official PACE website: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta08/eres1636.htm>

following list of basic principles:

*8.20. public service broadcasters must be protected against political interference in their daily management and their editorial work. Senior management positions should be refused to people with clear party political affiliations;*

*8.21. public service broadcasters should establish in-house codes of conduct for journalistic work and editorial independence from political sides;*

Recommendation No. R (96) 10 of the Council of Europe's Committee of Ministers on the guarantee of the independence of public service broadcasting recommends the governments of the member states to include in their domestic law or in instruments governing public service broadcasting organizations provisions guaranteeing their independence in accordance with the guidelines set out in the appendix to this recommendation.<sup>36</sup> We relied on the recommendation's data in performing our own analysis.

Finally, the Tenth Central Asia Media Conference, organized by the Office of the OSCE Representative on Freedom of the Media in 2008, stated in its Declaration "The Future of Public-Service Broadcasting and the Digital Switchover in Central Asia" that "public-service broadcasting is one of the basic tools of democracies":

*They are indispensable in ensuring the freedom and transparency of elections, in fighting against hate speech, and in protecting the minority cultures of a country by offering objective news reporting and by broadcasting high quality programs.*

*When establishing public-service broadcasters, Central Asian countries should make sure that they create a legally protected broadcasting infrastructure, with guaranteed editorial autonomy, and with a financing system that allows the public-service broadcasters to be independent from both political and commercial interests.<sup>37</sup>*

The participants urge the Kyrgyz government to abide by international standards of independence of public service broadcasting from government, and provide a positive example for the region.

<sup>36</sup> The full English text of the recommendation can be found at the official Council of Europe website: [http://www.ebu.ch/CMSimages/en/leg\\_ref\\_coe\\_r96\\_10\\_psb\\_110996\\_tcm6-4322.pdf](http://www.ebu.ch/CMSimages/en/leg_ref_coe_r96_10_psb_110996_tcm6-4322.pdf)

<sup>37</sup> The full English text of the declaration can be found at the official OSCE website: [http://www.osce.org/documents/rfm/2007/10/34491\\_en.pdf](http://www.osce.org/documents/rfm/2007/10/34491_en.pdf)



## **II. ANALYSIS OF THE DECREE OF THE PROVISIONAL GOVERNMENT OF THE KYRGYZ REPUBLIC “ON ESTABLISHMENT OF THE PUBLIC TELEVISION AND RADIO BROADCASTING IN THE KYRGYZ REPUBLIC” AND THE KYRGYZ REPUBLIC STATUTE “ON THE PUBLIC BROADCASTING CORPORATION OF THE KYRGYZ REPUBLIC” APPROVED BY THE DECREE**

The Decree under analysis, “On Establishment of the Public Television and Radio Broadcasting in Kyrgyz Republic,” was adopted at an extended session of the Provisional Government of the Kyrgyz Republic on 30 April 2010. The Decree approved the Kyrgyz Republic Statute “On the Public Broadcasting Corporation of the Republic of Kyrgyzstan.”

The body adopting the Decree – the Provisional Government of the Kyrgyz Republic – “in order to create an efficient system of state administration on behalf of the people of Kyrgyzstan” –assumed the authority and functions specified in the KR Constitution for president, parliament, and the government of the Kyrgyz Republic.<sup>38</sup> In terms of its legal status, the KR Provisional Government’s Decree thereby became a valid law of the Kyrgyz Republic.

The initial memorandum on the drafting of the Decree, signed by the deputy chairman of the Provisional Government of the Kyrgyz Republic, indicates that the operations of the Public Broadcasting Corporation will be built upon two principles:

- state financing;
- public control over broadcasting operations and content.

Below is a commentary with corresponding recommendations to bring the national legislation closer to the Kyrgyz Republic’s international obligations and the generally recognised standards of international law on freedom of expression and public service broadcasting. Before reading the commentary, note the earlier remarks by the Office of the OSCE Representative on Freedom of the Media regarding other proposed changes to the Kyrgyz Republic’s laws on the media.<sup>39</sup>

<sup>38</sup> See Decree No. 1 of the Provisional Government of Kyrgyzstan (in Russian), dated 7 April 2010, at the Kyrgyzstan Provisional Government’s website: [http://www.kyrgyz-el.kg/index.php?option=com\\_content&task=view&id=68&Itemid=36](http://www.kyrgyz-el.kg/index.php?option=com_content&task=view&id=68&Itemid=36)

<sup>39</sup> See, e.g., Commentary on the Draft Law of the Kyrgyz Republic “On Amendments and Addenda to the Kyrgyz Republic ‘Law on the Mass Media’” (2009) at the official OSCE website: [http://www.osce.org/documents/rfm/2009/11/41315\\_en.pdf](http://www.osce.org/documents/rfm/2009/11/41315_en.pdf)

## **2.1. Scope of Application of the Decree and the Management System for the Public Broadcasting Corporation**

The KR Provisional Government's Decree on creating a public broadcasting service in the Kyrgyz Republic gives public broadcaster status to the National Broadcasting Corporation, renamed the Kyrgyz Republic Public Broadcasting Corporation (para 1).

The Decree approves the KR Statute "On the Public Broadcasting Corporation of the Kyrgyz Republic," which is essentially the law on public broadcasting organizations (para 2).

The Decree stipulates that the first members of the KR Public Broadcasting Corporation's Supervisory Board shall be appointed for three years (and not five, as stated in the Statute) by the Provisional Government (and not parliament). The members of the Supervisory Board shall be appointed exclusively from candidates proposed by non-profit organizations (and not the president, parliament, or the public at large, as in the Statute) (para 3).

In the event of a clash of norms between the Statute and the Decree (they are all listed above), those of the Decree take precedence, while in the event of a clash between the norms of the Decree and current legislation or other legal norms of the Kyrgyz Republic, those of the Decree and the Statute approved by it prevail (para 4). The Decree entered into force from the moment it was signed.

Note that the text of the KR Statute "On the Public Broadcasting Corporation of the Kyrgyz Republic" largely coincides with KR Law No. 41 of 2 April 2007, "On the National Public Broadcasting Corporation," which was adopted by the parliament of the Kyrgyz Republic on 8 June 2006 but was superseded by KR Law No. 106 of 2 June 2008. The Statute and the indicated Law differ only in that the former has no chapter titled "Final Provisions," while the National Broadcasting Corporation (or in some articles, the State Broadcasting Corporation) is referred to as "The Public Broadcasting Corporation" (but not everywhere).

The 2008 repeal of the KR Law "On the National Public Broadcasting Corporation" at that time evoked concern from the OSCE Representative on Freedom of the Media. In a public statement, he pointed out the incompatibility between the OSCE states' accepted principles of democratic public service broadcasting and the procedures introduced by KR Law No. 106 of 2 June 2008, "On Television and Radio Broadcasting," for the president of the Kyrgyz Republic to appoint a chief executive and his deputy, and to select members of





the KR National Broadcasting Corporation's Supervisory Board according to the recommendations of the president.<sup>40</sup>

The return to the earlier system of management and supervision for the operations of the former National Broadcasting Corporation is undoubtedly a positive legal development.

Nevertheless, should the new convocation of parliament examine the KR Law "On the National Public Broadcasting Corporation" on the basis of the adopted Decree and Statute, it would be preferable to create a correlation of forces in the Public Broadcasting Corporation's Supervisory Board (representatives of the president, parliament, and the public at large) that would provide a counterweight to the representatives of government agencies. This could be done, e.g., by stipulating quotas for representatives of the parliamentary opposition within the Supervisory Board.

In making appointments to the Supervisory Board, the qualification requirements for candidate members must be considered (Article 3 of the Statute) since they remain in force, despite the special procedure for appointing the initial members of the board. The election of the general director must be held on an alternative, competitive basis, as the Statute (Article 19) does not contradict the Decree in this matter.

The powers defined in the Statute for the Public Broadcasting Corporation's managing bodies (Chapter III) are sufficient for its effective management and for it to perform the functions of the KR National Public Broadcasting Service. The legal framework regulating the operations of the public service broadcaster carefully and clearly defines the areas of responsibility for their supervisory bodies. The Supervisory Board does not have the right to assume any advance control over programming.

Members of the Supervisory Board cannot be dismissed, temporarily suspended, or replaced during their tenure by any official or body other than the agency that appointed them, except in cases where they are either incapable of executing their duties or do not have the opportunity to do so, or if they have committed a crime (Article 12).

In order to avoid the likelihood of a conflict of interest with the functions they perform in the Supervisory Board, members do not have the right, either directly or indirectly, to perform functions, accept payments, or have a financial

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40 See the press release (in English) at the official OSCE website: [http://www.osce.org/fom/item\\_1\\_31063.html](http://www.osce.org/fom/item_1_31063.html)

interest in businesses or other broadcasting media organizations, or in the telecommunications sector associated with broadcasting.

Along with creating the KR Public Broadcasting Corporation on the base of the National Broadcasting Corporation, it is necessary to define the legal status of the Public Television Broadcasting Company (PTBC), created on the base of the Osh-3000 State Television and Radio Broadcasting Company on 10 December 2005 by a KR presidential edict. It does not contradict the Decree for it to function with this status, but it loses its sense in the context of adopting this act.

### **Recommendations:**

- For the second and subsequent elections to the Public Broadcasting Supervisory Board, it would be preferable to establish a system of representation that would prevent state agencies from gaining a preponderance of power within it. This could be done, e.g., by setting a quota for representatives of the parliamentary opposition among the Supervisory Board's members.
- In making appointments to the first and subsequent Supervisory Boards, the qualification requirements for candidates must be considered.
- The elections of the first and subsequent general directors should be held on an alternative, competitive basis.
- Along with creating the KR Public Broadcasting Corporation on the base of the National Broadcasting Corporation, it is necessary to define the legal status of the Public Television Broadcasting Company (PTBC), created on the base of the Osh-3000 State Television and Radio Broadcasting Company on 10 December 2005 by a KR presidential edict.

## **2.2. Regulating Public Broadcasting's Programming Content**

The formalisation in the Statute of the prohibition on censorship and creating organizational structures whose duties include censorship functions (Article 5) is to be welcomed. Considering the absence of a prohibition on censorship in the Constitution of the Kyrgyz Republic (see the above), this norm is destined to play an important role in strengthening the editorial independence of the Public Broadcasting Corporation (referred to below as the PBC).

Norms concerning requirements for PBC programming content are set in several articles; even if they do not contradict one another, they clearly do not



coincide. This is especially true of Article 6, Section 2 (“Goal and Objectives of the Corporation”); Article 7, Section 1 (“Rights and Duties of the Corporation”); Article 21 (“Corporation Programming Policy”); and Article 23 (“Corporation Information Broadcasting”).

Article 6, in particular, requires that the Public Broadcasting Corporation implement an information policy that allows it to maintain the information security of the state; that it follow an active marketing, information, and advertising policy aimed at shaping and supporting a positive image of Kyrgyzstan as a democratic state; and that it be able to provide consumers with timely coverage of the operations of government agencies.

In turn, the norms of Article 7 require it to “perform the dissemination of reliable, objective information.” Article 21 mentions the broadcasting of exclusively “comprehensive, objective, and balanced news reports and current events programmes.” Article 22 requires PBC journalists to be guided by the ethical standards of presenting information: precision, reliability, balance, depth, and comprehensibility. Article 23 prescribes that the PBC “is to provide complete and up-to-date information on all events of significance to the public that take place in the Kyrgyz Republic and around the world. The news should be unbiased, balanced, and independent. Commentary must be clearly separated from fact.” In the same article, the Statute requires that air time be provided free of charge to the heads of the public authorities for extraordinary announcements.

There is major inconsistency between the norms of Article 6 and those of other articles. This must be corrected on the basis of the international standards of objectivity for public service broadcasting.

For example, Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting, adopted under the aegis of the Council of Europe, states the following:

*The legal framework governing public service broadcasting organizations should clearly stipulate that they shall ensure that news programmes fairly present facts and events and encourage the free formation of opinions.*

*The cases in which public service broadcasting organizations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations.*

*Any official announcements should be clearly described as such and should be broadcast under the sole responsibility of the commissioning authority.<sup>41</sup>*

The Statute contains a number of important norms required for the Public Service Broadcaster to perform its functions. These concern quotas for the productions of other broadcasting companies independent of the Public Broadcasting Corporation. Article 7 (Section 3) states that the PBC “has the right to tender 30% of its airtime annually for productions (non-commercial cultural or educational programmes) of outside television and/or radio broadcasting companies.” Article 25, however, establishes this quota as a duty of the PBC, and states “no less than 20% and no more than 30% of the Corporation’s airtime shall be devoted to the broadcasting of outside programming annually.” It is recommended that the above contradictions and inconsistencies be eliminated in future legislative efforts.

### **Recommendations:**

- The inconsistencies between the norms of Article 6 and those of other articles of the Statute in regard to the requirements for the Public Broadcasting Corporation’s programming content should be eliminated on the basis of international standards of objectivity for public service broadcasting.
- Any official announcements in PBC programming should be clearly described as such and should be broadcast under the sole responsibility of the commissioning authority.
- The contradictions and inconsistencies in regard to the size of quotas for broadcasters independent of the PBC should be eliminated.

### **2.3. Financing the Public Broadcasting Corporation: Advertising and Sponsorship**

Article 20 (“Property and Financing of the Corporation’s Operations”) of the Statute states the following:

1. The Corporation shall be financed from a protected provision of the state budget of the Kyrgyz Republic.

<sup>41</sup> The full English text of the recommendation can be found at the official COE website: [http://www.ebu.ch/CMSImages/en/leg\\_ref\\_coe\\_r96\\_10\\_psb\\_110996\\_tcm6-4322.pdf](http://www.ebu.ch/CMSImages/en/leg_ref_coe_r96_10_psb_110996_tcm6-4322.pdf)

## 2. The Corporation may also be financed by

- advertising, grants, and funds provided by sponsors;
- its own funds, obtained through the sale of products, labour, services, and other types of economic activity;
- income associated with copyright use;
- other income not prohibited under the laws of the Kyrgyz Republic.

The mention of the protected budget provision means that funds cannot be sequestered while they are being used. This is an important guarantee of the PBC operation, especially in difficult economic times. Nevertheless, the Statute does not guarantee that any sort of minimum standards of financing will be observed for public service broadcasting, as is vital to ensuring its economic independence. It is recommended that this norm be reviewed in light of the recommendations of the Bangkok Declaration (see Part I). It is also possible that the experience of public service broadcasting in Georgia, where as of 2010 the volume of financing from the state budget cannot be less than 0.12% of the gross domestic product, should be taken into account.

The COE Ministerial Committee's Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting states the need to adopt rules governing the funding of public service broadcasting organizations based on the principle that the state undertakes to maintain and, where necessary, establish an appropriate, secure and transparent funding framework which guarantees public service broadcasting organizations the means necessary to accomplish their missions.<sup>42</sup>

In cases where (as in the Kyrgyz Republic) the financing of public service broadcasting organizations is based on funds from the state budget, it is recommended that the following principles be observed:

- *the decision-making power of authorities external to the public service broadcasting organization in question regarding its funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the organisation;*
- *the level of the contribution or license fee should be fixed after consultation*

<sup>42</sup> The full English text of the recommendation can be found at the official COE website: [http://www.ebu.ch/CMSImages/en/leg\\_ref\\_coe\\_r96\\_10\\_psb\\_110996\\_tcm6-4322.pdf](http://www.ebu.ch/CMSImages/en/leg_ref_coe_r96_10_psb_110996_tcm6-4322.pdf)

*with the public service broadcasting organization concerned, taking account of trends in the costs of its activities, and in a way which allows the organization to carry out fully its various missions;*

- *payment of the contribution or license fee should be made in a way which guarantees the continuity of the activities of the public service broadcasting organization and which allows it to engage in long-term planning;*
- *the use of the contribution or license fee by the public service broadcasting organization should respect the principle of independence and autonomy mentioned in guideline No. 1;*
- *where the contribution or license fee revenue has to be shared among several public service broadcasting organizations, this should be done in a way which satisfies in an equitable manner the needs of each organization.<sup>43</sup>*

The Statute deals in detail with the question of advertising in the Public Broadcasting Corporation's programming as one source of financing for PBC operations. This takes place despite the existence of KR Law No. 155, "On Advertising" (24 December 1998), a revised version of laws No. 134 (30 November 1999), No. 130 (25 July 2002), No. 17 (27 January 2006), and No. 35 (6 February 2006), specially designed for just such matters. It contains a multitude of norms for regulating questions of sponsorship and airing advertisements in radio and television broadcasts. Many of the norms in the Law "On Advertising" are needlessly duplicated in the Statute. Other norms (e.g., with regard to the length of advertisements) apply only to the Public Broadcasting Corporation. Some of the Statute's norms on advertising and sponsorship could apply to all media or to all television and radio programmes. Among these are important provisions borrowed from the European Convention on Transfrontier Television. This introduces unneeded chaos into the legislation. It is recommended that the necessary amendments and additions be made to the KR Law "On Advertising" as a result of the adoption of the Decree and the Statute, eliminating from the latter all norms regarding questions of advertising and sponsorship.

Similar remarks may be made in regard to the need to unify, in all media legislation, the norms on the right of rebuttal (or refutation) (Article 26) and on protecting journalists' confidential sources of information (Article 24). The Statute could serve here as a model for other KR media laws.

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<sup>43</sup> Ibid.



On the whole, the norms on advertising and sponsorship meet the standards of the European Convention on Transfrontier Television, and in some aspects are even stricter than those of the Convention.

**Recommendations:**

- The norm on financing should be specified or revised in light of international experience.
- 
- The unwarranted duplication in the Statute and the KR Law “On Advertising” should be eliminated with respect to the regulation of advertising and sponsorship, and the Law “On Advertising” should be amended.







## **ADDENDUM TO THE COMMENTS ON THE AMENDMENTS TO THE LAW OF THE REPUBLIC OF ARMENIA ON BROADCASTING**

**and**

### **TO THE REVIEW ON THE CONCEPT PAPER ON MIGRATING TO DIGITAL RADIO AND TV BROADCASTING SYSTEM MADE EARLIER (IN MAY AND MARCH 2010) BY THE OSCE FOM EXPERTS**

*The review has been prepared by Dr. Andrei Richter, Director of the Media Law & Policy Centre at the Faculty of Journalism of the Lomonosov Moscow State University, professor and head of the media law department there, member of the International Commission of Jurists (ICJ), and the co-chair of the Law Section of the International Association for Media and Communication Research (IAMCR).*

The broadcasting law under this analysis is titled “Law of the Republic of Armenia “On making amendments and supplements to the Law of the Republic of Armenia “On television and radio”” (hereinafter – the Law) adopted by the National Assembly of the Republic of Armenia in second reading on 10 June 2010.

#### ***Main changes after the 1st reading:***

i.

1. Article 22 (“Impermissibility of Abuse of Television-Radio Programmes”) of the Law provides a long list of programmes and their elements that if broadcast lead to a termination of the term of the license. Now it takes place not by outright discretionary powers of the NTRC but in a court procedure based on the application from NCTR after a single violation of Art. 22 (as stipulated in Art. 61). We believe that this change is not sufficient as this provision anyway leads to self-censorship of journalists and limitations of freedom of the media. The court should follow what the law says and the law in this regard is far below the OSCE standards of democracy.

2. While it is a positive step that Article 22 of the Law has been shortened

and now excludes “publicizing a state or other secret protected by law... and broadcasting programmes containing worship of violence and cruelty, degrading human dignity, disparaging the family, contributing to violations of law”, at the same time the provisions of the article still include, for example, “defaming or violating the rights of others and the presumption of innocence”. We know of no country in the modern democratic world where such offence as defamation leads to a forced closure of a broadcaster on the initiative of an administrative body.

3. The same is true for violating of such “rights of others” as intrusion into private life, copyright violations: these are weak grounds for such a measure as withdrawal of the licence to broadcast.

4. A provision that punishes in the same manner for “spreading calls for criminally punishable acts or acts prohibited by legislation” is extremely wide making calls for any offence (like illegal parking) basically a capital crime for broadcasters.

5. Similar punishment for “disseminating pornography” raises even more questions. According to para 1 of Article 263 of the Criminal Code of Armenia only “illegal manufacture, sale as well as, dissemination of pornographic materials or items, as well as, printed publications, films and videos, images or other pornographic objects, and advertising”<sup>1</sup> is a crime in the country. Thus the wording of the Code presumes there is also “legal pornography” alongside “illegal pornography”. Unless there is a clear definition in the current legislation of Armenia of what is “illegal pornography” (like in narrow cases of para 2 of the same Art 263) all other pornography is legal. That makes such an outright ban as in the Law legally dubious.

6. The ban of “broadcasting programmes containing or propagating worship of violence and cruelty” is too broad for practical use in the courtroom and again makes room for arbitrary decisions.

7. The same is true of violation of presumption of innocence. A constitutional dispute is not a subject of this review, but in our strong view Article 21 of the Constitution of the Republic of Armenia which stipulates (in part 1) that “Everyone charged with a criminal offence shall be presumed innocent until proved guilty by the court judgment lawfully entered into force as prescribed by law” cannot relate to the mass media sphere whatsoever.<sup>2</sup>

1 See <http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng>

2 See e.g. (in English) Recommendation by the Judicial Chamber for Information Disputes under the President of the Russian Federation No. 3 (10), dated 24 December 1997 “On the Application of the Principle of Presumption of Innocence in Journalists’

This constitutional definition of presumption of innocence contained here does not include journalists or the media as they cannot “charge” anyone in a legal sense of this word (and there is no doubt that the Constitution is a legal document). In any case the provision of Art. 22 of the Law opens door to arbitrary application of the notion of presumption of innocence with grave effects for the media.

***Recommendation:***

Our recommendation stands as before:

- Eliminate possibility of arbitrary abolishment of the freedom of expression and freedom of the mass media in case of violations by broadcasters of Article 22.
  - That should involve elimination of a possibility of self-censorship of the journalists in view of drastic purges of the broadcasters at large for violations of Art. 22 such as defaming or violating the rights of others, etc.
- II. We welcome the instalment of the provision that the National Commission “once a year publishes the full list of air frequencies having as a basis the compiled and provided on regular basis by an authorized by the Republic of Armenia Government body frequency list for broadcasting TV/Radio programmes in the territory of the Republic of Armenia” (Art. 36 para 6). In this way our recommendation to keep the current obligations of the National Commission to make public the frequency plan has been fulfilled.
- III. We welcome that Article 49 of the Law now includes the responsibility of the National Council to take into account in the licensing process the ability of an applicant to promote pluralism. At the same time our recommendation to “reinstall responsibility on the NCTR to promote diversity of opinion on the airwaves” instead had to do with another part of the Law – Article 36 (“Functions of the National Commission”).
- IV. In our original recommendation it was said: Reinstall provision that the National Commission is obliged to properly explain its decision to reject an application for a broadcast license. After debate the following wording of the Law was adopted: “The decision of the National Commission shall be properly justified and reasoned. The National Commission shall ensure the publicity of its decision”. We believe that this means that the National Commission shall properly justify and provide reasons for its decisions on both selecting a licensee, and refusing a license. If so, this is a welcome change and will conform to the position of the European Court of Human

Rights in a licensing-related case against Armenia:

*“The Court considers that a licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression.”*<sup>3</sup>

- V. Article 8 provides now that the “broadcast of domestically produced programmes by television-radio companies on one television (radio) channel may not be less than 55 per cent of the overall monthly airtime”. Earlier it read: “may not be less than 65 per cent”. This reduction from 65 to 55 per cent would ease an economic strain on broadcasters to produce (order production) of domestic programmes and is welcome, but the measure is still extreme. Even the West European countries, where economy (including economy of broadcasting) is stronger than that in Armenia, the law does not demand more than 50 per cent of domestic (or rather, European-produced) programmes, and even that aim is so far unattainable in countries like Greece and Spain. No wonder the European Convention on Transfrontier Television (para 1 of Article 10: Cultural objectives) says in this regard:

*“Each transmitting Party shall ensure, where practicable (sic!) and by appropriate means, that a broadcaster within its jurisdiction reserves for European works a majority proportion of its transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and tele-shopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.”*

**Recommendation:**

- Consider abolishment of the quota of domestically produced programmes for private broadcasters.
- VI. A positive step was reformulating para 1 of Article 14 of the Law so that the notion of “sponsorship” is now defined exactly as in the European Convention on Transfrontier Television (para h of Article 2). In general this article of the Law follows the Convention. At the same time some important provisions of the Convention are not included: for example the Law does not provide that sponsored programmes shall not encourage the sale,

<sup>3</sup> See point 68 of the Judgment on the case of *Meltex Ltd and Mesrop Movsesyan v. Armenia* (Application no. 32283/04) on 17 June 2008 at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&Action=html&highlight=ARMENIA%20%2010&sessionId=67430&skin=hudoc-en>

purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services in such programmes (as in the Convention, para 3 of Art. 17).

**Recommendation:**

- Implement sponsorship and advertising rules common for the European countries and specified in the Convention on Transfrontier Television.
- Consider signing and ratifying the European Convention on Transfrontier Television.<sup>4</sup>

**Main points that were not dealt with:**

Some earlier recommendations were totally ignored and/or related to “future law” or “future amendments”. These include recommendations to:

- *Provide clear distinctions of regulating satellite, mobile, Internet-provided broadcasting and non-linear audiovisual media services.*
- *Lay legal grounds for the establishment of non-state operators of digital broadcasting.*
- *Be specific in relation to the number or thematic direction of radio programmes on national and capital multiplexes.*
- *Change the system of financing Public Television and Radio and that of the National Commission on Television and Radio for an automatic guarantee of their financial independence from the state.*
- *Reform the system of selecting and appointing members of the Council for Public Television and Radio to provide for a possibility of a pluralistic public broadcasting.*

For example, para 13 of Article 62 of the Law now provides that “in order to create a private network of digital broadcasting by legal persons starting from 1 January 2015, the procedure and terms for multiplexer licensing will be established by law”. When these important terms will be established by law or why their adoption was delayed is not specified in the draft or in the Substantiating Memo.

While it is understood that legal reform cannot be made in several days and the Government is in a hurry to have the draft law adopted before expiration of the moratorium, we would like to point out that earlier recommendations were not compiled in a chaotic but rather in a complex way and put to the single aim of

<sup>4</sup> See: <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=132&CM=1&DF=&CL=ENG> It should be noted in this regard that while several West European countries have not signed the Convention they joined its parallel instrument in the European Union, currently - the Audiovisual Media Services Directive.

harmonisation of the draft law with the OSCE standards. Thus singling out some recommendations makes no sense.

For example, there is no point in putting the public broadcaster under the sole authority of the Council (as was done according to our previous recommendation) unless the Council itself is reformed in a democratic way. Therefore we urge the authorities to deal with all these issues together and if delay in reforming the Law is unavoidable adopt a policy paper that will envision such changes in concrete and near future.

Ignored were also almost all recommendations put forward in the review on the Concept Paper on migrating to digital radio and TV broadcasting system made by Dr. Katrin Nyman-Metcalf and Dr. Andrei Richter in March 2010.<sup>5</sup> At the same time it is the Concept Paper that was supposed to lay basic grounds for the Law.

**Recommendation:**

- *Adopt a policy paper that will envision a timetable for other changes in the broadcasting law in concrete and near future.*
- *Allow a working group that would include representatives of journalistic non-governmental organizations, parliamentarians and other stakeholders to work on a fundamental revision of the Law, fully taking into account the remarks and suggestions of the working group members, as well as the recommendations of international organizations and their experts made in relation to both the current Law and the Concept Paper on migrating to digital radio and TV broadcasting system.*

**Conclusion**

The Office of the OSCE Representative on Freedom of the Media has consistently supported the preparation of a liberal law on broadcasting in Armenia, which would envisage participation by non-governmental and international organizations in its drafting and would facilitate promotion of freedom of expression and freedom of the media in Armenia.

The proposed version of the Law, however, raises doubts that the appeals of the OSCE Representative on Freedom of the Media concerning broadcasting legislation, have been adequately reflected in its draft.

The Office of the OSCE Representative on Freedom of the Media urges the National Assembly to allow a working group that includes representatives of

<sup>5</sup> See [http://www.osce.org/documents/html/pdftohtml/43565\\_en.pdf.html](http://www.osce.org/documents/html/pdftohtml/43565_en.pdf.html)



journalistic non-governmental organizations, opposition parliamentarians and other stakeholders to work on a fundamental revision of the Law, fully taking into account the remarks and suggestions of the working group members, as well as the recommendations of international organizations and their experts. The Law should serve not the technical conditions of digitalization, nor the business or political interests, but should provide for a freedom of expression and freedom of the media in the interests of the population of Armenia.







## **COMMENTARY ON RECENT DOCUMENTS OF THE REPUBLIC OF BELARUS REGARDING USE OF THE NATIONAL SEGMENT OF THE INTERNET**

*This commentary has been prepared by Andrei Richter, Director of the Media Law and Policy Institute (Moscow), Doctor of Philology (Moscow State University Department of Journalism), commissioned by the Office of the OSCE Representative on Freedom of the Media*

Having analyzed the documents of the executive power bodies adopted in execution of Decree of the President of the Republic of Belarus No. 60 "On Measures to Improve the Use of the National Segment of the Internet" of 1 February 2010: Decree of the President of the Republic of Belarus No. 129 "On Approval of the Provisions on the Procedure for Interaction between Telecommunications Operators and Criminal Investigation Agencies" in the context of the Constitution and current legislation of the Republic of Belarus, as well as of international regulations on freedom of information and the Internet, the Office of the OSCE Representative on Freedom of the Media has come to the following conclusion.

### **BRIEF SUMMARY OF THE COMMENTARY AND RECOMMENDATIONS**

This commentary analyzes several documents adopted in the wake of Decree of the President of the Republic of Belarus No. 60 of 1 February 2010 and designed to improve use of the national segment of the Internet.

State licensing of information networks and resources of the national segment of the Internet is envisaged. In accordance with Decree No. 60 and subsequent resolutions of the Council of Ministers of the Republic of Belarus, providers of Internet services shall identify the subscriber units of Internet service users, keep an account of and store information on such units and the Internet services rendered, and submit this information to law enforcement and other government agencies.

In particular, the Council of Ministers has required that users of Internet services in cafes and clubs identify themselves by presenting an ID or any other document allowing unequivocal confirmation of the user's identity. These establishments must keep an account of and store personal data of all visitors; keep a record of the time when Internet services began and ended; and keep an

electronic log of all the domain names or IP addresses of the Internet resources the user contacted.

It is also envisaged that Internet providers keep a record of data on the users of telecommunications services and the telecommunications services they were provided, and submit this data to the criminal investigation agencies.

The adoption of the abovementioned documents makes anonymous receipt and dissemination of information illegal and impossible. The adoption of these documents has closed the last loopholes for this. It appears that this restriction prevents compliance with the provisions of the law "On the Media" regarding the confidentiality of information sources in that it makes information on a journalist's Internet correspondents and Internet sources available without the consent of the journalist and the source of confidential information. The regulations introduced on mandatory identification of subscriber units and users of Internet services lead to unsubstantiated restrictions of a citizen's right to receive and disseminate information.

Making it incumbent on the providers of services to keep such logs at their own expense, register domains in the .by zone, and provide remote access services within the framework of investigative activities cannot but reduce the potential of the Internet for the economic and technological development of Belarus and have a negative effect on the country's image.

Decree No. 60 elaborated, and the resolutions of the Council of Ministers of the Republic of Belarus regulate, the mechanism for restricting access to information at the request of an Internet service user regarding information that is aimed at spreading pornography, promulgating violence and brutality, or any other acts prohibited by law. It is envisaged that access to illegal information from government bodies and cultural and educational organizations shall automatically be closed.

This process is being carried out on the basis of decisions of the heads of the Committee of State Control, the Prosecutor General's Office, the Operations and Analysis Centre of the President of the Republic of Belarus (OAC), and all national-level bodies of state administration. The problem with this regulation is also that types of harmful and illegal information are defined very ambiguously in the Belarus legislation. They are not formulated with sufficient precision and do not allow citizens to regulate their behaviour and foresee the possible consequences of a particular situation. There is clearly insufficient opportunity to appeal any illegal decisions by "authorized" agencies.



It is also necessary to recall the need for supervision by judicial or other independent bodies of the procedure for applying prohibitions, as well as restrictions on the scope and time such prohibitions, authorities, or procedures are in effect.

The documents under review contain several provisions aimed at enhancing freedom of information on the Internet and making information on state bodies and other government organizations more accessible on the Internet.

In particular, state bodies and government organizations must post information about their activity on Internet websites, which will make it more available to citizens (including journalists). Access to it is unrestricted and free of charge, and textual information should be posted on the website in a format that makes it possible to search for and copy fragments of text.

There is doubt about the legitimacy of complete prohibition on posting information on the websites of state bodies and other government organizations containing facts that constitute state secrets or other information and/or correspondingly restricted data protected in accordance with national legislation. It is presumed that information contained in a particular document on the activity of a state body to which access is restricted by law does not mean complete prohibition of its dissemination. Such documents should be furnished provided that the part constituting a secret is removed.

It would also be expedient to envisage that state bodies must inform not only about their own activity, but also share with the public information that has been acquired or created as a result of this activity.

So the merits of Decree No. 60 and the documents adopted after it are ambiguous and outweighed by shortcomings that restrict freedom of expression and freedom of the media on the Internet.

***Recommendations:***

- *Take into account the existing international instruments for fighting crime on the Internet.*
- *Forego mandatory identification of users of subscriber units and users of Internet services.*
- *Clarify the meaning of and procedure for introducing restrictions and prohibitions on disseminating illegal information, clarify responsibility for*

*unsubstantiated prohibitions.*

- *Entrust the judicial bodies, instead of the executive power bodies, with determining what information is harmful.*
- *Envisage the obligation of state bodies to post information on the Internet not only about their own activity, but also share with the public information that has been acquired and created as a result of this activity.*
- *Envisage the obligation to post documents on the Internet after secret or other information that the law prohibits from being disclosed is removed from them.*
- *Envisage the possibility of disclosing information in the event that public interest prevails.*

## **INTRODUCTION**

At the request of the OSCE Office of the Representative on Freedom of the Media, this commentary was prepared by Andrei Richter, Doctor of Philology. Dr. Richter is the director of the Media Law and Policy Institute (Moscow) and the head of the Chair of History and Legal Regulation of Domestic Media at the Department of Journalism of Lomonosov Moscow State University. He is a member of the International Commission of Jurists (ICJ) and of the International Council of the International Association for Media and Communication Research (IAMCR).

This commentary contains an analysis of the following documents adopted in execution of Decree of the President of the Republic of Belarus No. 60 "On Measures to Improve the Use of the National Segment of the Internet" of 1 February 2010 (hereinafter referred to as Decree No. 60):

1. Resolution of the Council of Ministers of the Republic of Belarus No. 644 of 29 April 2010 "On Certain Matters of Improving the Use of the National Segment of the World Wide Web" (hereinafter referred to as Resolution No. 644).
2. Resolution of the Council of Ministers of the Republic of Belarus No. 645 of 29 April 2010 "On Certain Matters Concerning the Internet Sites of State Bodies and Government Organizations and Deeming Resolution of the Council of Ministers of the Republic of Belarus No. 192 of 11 February 2006 Invalid" (hereinafter referred to as Resolution No. 645).



3. Resolution of the Council of Ministers of the Republic of Belarus No. 646 of 29 April 2010 "On Making Amendments and Addenda to the Regulations for Providing Telecommunications Services" (hereinafter referred to as Resolution No. 646).
4. Resolution of the Council of Ministers of the Republic of Belarus No. 647 of 29 April 2010 "On Making Amendments and Addenda to Resolution of the Council of Ministers of the Republic of Belarus No. 175 of 10 February 2007" (hereinafter referred to as Resolution No. 647).
5. Resolution of the Council of Ministers of the Republic of Belarus No. 649 of 29 April 2010 "On Registration of the Internet Stores in the Trade Register of the Republic of Belarus, Monitoring Their Operation, and Making Amendments and Addenda to Certain Resolutions of the Council of Ministers of the Republic of Belarus" (hereinafter referred to as Resolution No. 649).
6. Resolution of the Operations and Analysis Centre of the President of the Republic of Belarus and the Ministry of Communications and Informatization of the Republic of Belarus No. 4/11 of 29 June 2010 "On Approving the Provisions on the Procedure for Restricting Access of the Users of Internet Services to Information Prohibited from Dissemination by the Law" (hereinafter referred to as Resolution No. 4/11).

This commentary also contains an analysis of the provisions of Decree of the President of the Republic of Belarus No. 129 of 3 March 2010 "On Approval of the Provisions on the Procedure for Interaction between the Telecommunications Operators and Criminal Investigation Agencies " (and, correspondingly, the provisions themselves) (hereinafter referred to as Decree No. 129).

An analysis was also carried out of the regulations of Resolution of the Council of Ministers of the Republic of Belarus No. 1001 of 2 July 2010 "On Approval of the List of Administrative Procedures Performed by the Ministry of Communications and Informatization and Its Subordinate Government Organizations with respect to Legal Entities and Private Businessmen, Making Amendments and Addenda to Certain Resolutions of the Council of Ministers of the Republic of Belarus and Deeming Several Resolutions and Certain Provisions of Resolutions of the Government of the Republic of Belarus Invalid" (hereinafter referred to as Resolution No. 1001).

This commentary aims at ensuring compliance of the aforesaid documents with international standards relating to the right to freedom of expression and freedom

of the media.

Section I of this commentary takes a look at the international obligations of the Republic of Belarus with respect to human rights and sets forth the international standards relating to the right to freedom of expression and of information, including on the Internet. These standards are envisaged in international law, e.g., in the International Covenant on Civil and Political Rights and in various OSCE agreements, to which the Republic of Belarus is a party; and are also commensurable with constitutional law on issues of freedom of expression and of information.

Section 2 contains an analysis of the aforesaid documents regarding use of the national segment of the Internet, with due account of the abovementioned standards.

This commentary is also based on the instructions of the OSCE Parliamentary Assembly set forth in 2009 in the Resolution on Freedom of Expression on the Internet. In Paragraph 12, the Parliamentary Assembly:

"Requests that the OSCE Representative on Freedom of the Media monitor the policies and practices of participating States regarding the free flow of information and ideas relating to political, religious or ideological opinion or belief on the Internet, including Internet censorship, blocking and surveillance."<sup>1</sup>

## **I. INTERNATIONAL STANDARDS RELATING TO FREEDOM OF EXPRESSION, INCLUDING ON THE INTERNET**

### **1.1. Recognition of the Importance of Freedom of Expression and of Information**

Freedom of expression has long been recognized as one of the fundamental human rights. It is of paramount importance to the functioning of democracy, is a necessary condition for the exercise of other rights, and is in and of itself an indispensable component of human dignity.

The Republic of Belarus is a full-fledged member of the international community and a participant in the United Nations and the Organization for Security and Co-operation in Europe (OSCE). It has therefore assumed the same obligations as all the other participating States.

<sup>1</sup> Resolution of the Eighteenth Annual Session, Vilnius, 29 June-3 July 2009. See the full English text at [http://www.eerstekamer.nl/id/vibsmzqghdnh/document\\_extern/090629\\_vilnius\\_declaration/f=/vibsmzqpmwnr.pdf](http://www.eerstekamer.nl/id/vibsmzqghdnh/document_extern/090629_vilnius_declaration/f=/vibsmzqpmwnr.pdf).



The Universal Declaration of Human Rights (UDHR), the basic instrument on human rights adopted by the General Assembly of the United Nations in 1948, protects the right to the free expression of one's convictions in the following wording of Article 19:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."<sup>2</sup>

The International Covenant on Civil and Political Rights (ICCPR),<sup>3</sup> a UN treaty of binding judicial force and ratified by the Republic of Belarus, also guarantees the right to freedom of expression, as can be seen from the text of its Article 19:

"1. Everyone shall have the right to hold opinions without interference.  
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

With respect to documents adopted by the United Nations, mention should be made of Resolution 59 (I), adopted by the UN General Assembly at its very first session in 1946. In reference to freedom of information in the broadest sense of the concept, the resolution states:

"Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated."<sup>4</sup>

Freedom of expression is of fundamental importance in and of itself, and as the foundation for exercising all other human rights. Full-fledged democracy is only possible in societies that permit and guarantee the free flow of information and ideas. Freedom of expression is also of paramount importance in identifying and exposing violations of this and other human rights and in dealing with such violations.

Freedom of information, which is inseparably linked to freedom of expression,

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<sup>2</sup> Resolution 217A(III) of the General Assembly of the United Nations, adopted 10 December 1948. A/64, pp. 39-42. See the full English text at <http://www.un.org/en/documents/udhr/>.

<sup>3</sup> International Covenant on Civil and Political Rights. Adopted by Resolution 2200 A (XXI) of the General Assembly 16 December 1966. Entered into force 23 March 1976. See the full official English text on the UN website at: <http://www2.ohchr.org/english/law/ccpr.htm>.

<sup>4</sup> United Nations 65th Plenary Session. 14 December 1946. The official English text can be found on the UN website at: [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59\(I\)&Lang=R&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59(I)&Lang=R&Area=RESOLUTION).

is a universal human right. Along with the abovementioned standards, this issue is also addressed by the UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998); Articles 6, 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Convention of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (ETS No.108). Attention should also be paid to the following indirect-action documents: the Declaration on the Freedom of Expression and Information adopted on 29 April 1982; as well as the recommendations of the Council of Europe Committee of Ministers to the participating states: No. R (81) 19 on the Access to Information Held by Public Authorities, No. R (91) 10 on the Communication to Third Parties of Personal Data Held by Public Bodies, No. R (97) 18 concerning the Protection of Personal Data Collected and Processed for Statistical Purposes, No. R (2000) 13 on a European Policy on Access to Archives, and No. Rec (2002) 2 concerning Access to Official Documents.

A unique international agreement, the Council of Europe Convention on Access to Official Documents,<sup>5</sup> has recently assumed a special place in this matter. It states that exercise of the right to access to official documents:

- i. provides a source of information for the public;
- ii. helps the public to form an opinion on the state of society and on public authorities;
- iii. fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy.

The Convention considers that "all official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests." In turn, "official documents" means "all information recorded in any form, drawn up or received and held by public authorities."

The European Court of Human Rights created to monitor the Convention for the Protection of Human Rights and Fundamental Freedoms has consistently emphasized the "pre-eminent role of the press in a State governed by the rule of law."<sup>6</sup> It has noted in particular that

"Freedom of the press affords the public one of the best means of discovering

5 Adopted by the Committee of Ministers on 27 November 2008 at the 1042bis meeting of the Ministers' Deputies. See full text of the Convention at: <https://wcd.coe.int/ViewDoc.jsp?id=1377737&Site=CM>.

6 *Thorgeirson v. Iceland*, 25 June 1992, Application No.13778/88, para. 63. See the official text of this judgement at the ECHR website: <http://cmiskp.echr.coe.int/lkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Thorgeirson%20%7C%20v.%20%7C%20Iceland&sessionId=47499501&skin=hudoc-en>



and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society."<sup>7</sup>

In turn, the ECHR transoceanic analogue, the Inter-American Court of Human Rights believes: "It is the media that make the exercise of freedom of expression a reality."<sup>8</sup>

In the same context, it is worth noting that Part 1, Article 8 of the Constitution of the Republic of Belarus reads:

"The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles."

In turn, Part 3, Article 21 of the RB Constitution envisages that:

"The State shall guarantee the rights and liberties of the citizens of Belarus that are enshrined in the Constitution and the laws, and specified in the state's international obligations."

Finally, Articles 33 and 34 of the Constitution of the Republic of Belarus protect the right to freedom of expression and information as follows:

"Article 33. Everyone shall be guaranteed freedom of thoughts and beliefs and their free expression.

"No one shall be forced to express their beliefs or to deny them.

"No monopolization of the mass media by the State, public associations or individual citizens and no censorship shall be permitted.

"Article 34. Citizens of the Republic of Belarus shall be guaranteed the right to receive, store and disseminate complete, reliable and timely information of the activities of state bodies and public associations, on political, economic, cultural and international affairs, and on the state of the

7 *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43. See the official text of this judgement at the ECHR website: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Castells%20%7C%20v.%20%7C%20Spain%2C&sessionId=47499840&skin=hudoc-en>.

8 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

environment.

"State bodies, public associations and officials shall afford citizens of the Republic of Belarus an opportunity to familiarize themselves with material that affects their rights and legitimate interests.

"The use of information may be restricted by legislation with the purpose to safeguard the honour, dignity, personal and family life of the citizens and the full implementation of their rights."

## **1.2. Obligations of the OSCE Participating States with Respect to Freedom of the Media and the Internet**

The right to freely express one's opinions is inseparably bound to the right of freedom of the media. Freedom of the media is guaranteed by various documents of the Organization for Security and Co-operation in Europe (OSCE), to which the Republic of Belarus has given its assent.

The Organization for Security and Co-operation in Europe is the world's largest regional security organization and comprises 56 states of Europe, Asia, and North America. Founded on the basis of the Final Act of the Conference on Security and Co-operation in Europe (1975), the Organization has assumed the tasks of identifying the potential for the outbreak of conflicts, and of their preventing, settling, and dealing with their aftermaths. The protection of human rights, the development of democratic institutions, and the monitoring of elections are among the Organization's main means for guaranteeing security and performing its basic tasks.

The Final Act of the Conference on Security and Co-operation in Europe (CSCE) in Helsinki<sup>9</sup> states: "[T]he participating States will act in conformity with the purposes and principles of the... Universal Declaration of Human Rights." The provisions agreed by the participating States in the Helsinki Final Act of 1975 recognize "the importance of the dissemination of information from the other participating States" and "make it their aim to facilitate the freer and wider dissemination of information of all kinds" and "encourage co-operation in the field of information and the exchange of information with other countries."

The Final Act of the Copenhagen Meeting of the Conference on the Human

<sup>9</sup> Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1 August 1975. See the full official text at [http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf) and in extracts concerning freedom of expression at [http://www.medialaw.ru/laws/other\\_laws/european/zakl\\_akt.htm](http://www.medialaw.ru/laws/other_laws/european/zakl_akt.htm).



Dimension of the CSCE<sup>10</sup> states that:

"the participating States will respect human rights and fundamental freedoms, including freedom of thought, conscience and religion for all and will not discriminate solely on the grounds of race, colour, sex, language and religion. They will encourage and promote civil, political, economic, social, cultural and other rights and freedoms, recognizing them to be of paramount importance for human dignity and for the free and full development of every individual."

In Paragraph 9.1 of the same document, the OSCE participating States reaffirm that:

"everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards."<sup>11</sup>

The OSCE Charter for European Security (1999) states:

"We reaffirm the importance of independent media and the free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society."<sup>12</sup>

Finally, at the Moscow Meeting of the Conference on the Human Dimension of the CSCE held in October 1991, the participating States unanimously agreed that they:

"... reaffirm the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international

<sup>10</sup> Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990. See in particular Paragraph 9.1 and 10.1 at [http://www.osce.org/publications/rfm/2008/03/30426\\_1084\\_en.pdf](http://www.osce.org/publications/rfm/2008/03/30426_1084_en.pdf). The full official text is available at [http://www.osce.org/documents/odhr/2006/06/19392\\_en.pdf](http://www.osce.org/documents/odhr/2006/06/19392_en.pdf).

<sup>11</sup> See the official text at [http://www.osce.org/from/item\\_11\\_30426.html](http://www.osce.org/from/item_11_30426.html).

<sup>12</sup> See Paragraph 26 of the Charter for European Security, adopted at the OSCE Istanbul Summit, November 1999. The full official text is available at [http://www.osce.org/documents/mcs/1999/11/4050\\_en.pdf](http://www.osce.org/documents/mcs/1999/11/4050_en.pdf).

standards. They further recognize that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms."

The document of the Moscow Meeting also states that the CSCE participating States

"... consider that the print and broadcast media in their territory should enjoy unrestricted access to foreign news and information services. The public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards."<sup>13</sup>

For the purposes of regulating the documents of the Republic of Belarus in this commentary, it is important to be particularly mindful of the fact that in Paragraph 35 of the Concluding Document on Co-operation in Humanitarian and Other Fields of the Vienna Meeting 1986 of the CSCE, the participating States will also

"take every opportunity offered by modern means of communication, including cable and satellites, to increase the freer and wider dissemination of information of all kinds."<sup>14</sup>

Also important in this respect is Decision No. 633 of the OSCE Permanent Council on Promoting Tolerance and Media Freedom on the Internet approved by the Ministerial Council of the OSCE participating States at the meeting in Sofia (2004), in which the Permanent Council

"Reaffirming the importance of fully respecting the right to the freedoms of opinion and expression, which include the freedom to seek, receive and impart information, which are vital to democracy and in fact are strengthened by the Internet,

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<sup>13</sup> Paragraphs 26 and 26.1, Final Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE. See the official text at the OSCE website: [http://www.osce.org/fom/item\\_11\\_30426.html](http://www.osce.org/fom/item_11_30426.html). The obligation to impose restrictions on the freedom of mass communications within the law and in accordance with international standards was also reaffirmed by all the OSCE participating states in Paragraph 6.1 of the Final Document of the Symposium on the Cultural Legacy of CSCE Participating States (July 1991). See *ibid*.

<sup>14</sup> See the full English text at: <http://www.fas.org/nuke/control/osce/text/VIENN89E.htm>.

Decides that:

1. Participating States should take action to ensure that the Internet remains an open and public forum for freedom of opinion and expression, as enshrined in the Universal Declaration of Human Rights."<sup>15</sup>

The OSCE has been concerned for several years now about the situation regarding freedom of information and ideas on the Internet in some of its participating States. In Paragraph 11 of its Resolution on Freedom of Expression on the Internet, the OSCE Parliamentary Assembly

"Calls on participating States to communicate to repressive States, including participating States, their concerns about government actions aimed at censoring, blocking or surveilling the free flow of information and ideas relating to political, religious or ideological opinion or belief on the Internet."<sup>16</sup>

### **1.3. Permissible Restrictions on Freedom of Expression, including on the Internet**

The right to freedom of expression, including on the Internet, is inarguably not absolute: in a few specific instances, it may be subject to restrictions. Due to the fundamental nature of this right, however, any restrictions must be precise and clearly defined according to the principles of a state governed by rule of law. In addition, restrictions must serve legitimate purposes and be necessary to the well-being of a democratic society.<sup>17</sup>

The limits to which legal restrictions on freedom of expression are permissible are set forth in Paragraph 3 of Article 19 of the ICCPR cited above:

"The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

<sup>15</sup> Appendix to Decision No. 12/04. See the full English text on the OSCE website at [http://www.osce.org/documents/mcs/2004/12/3915\\_en.pdf](http://www.osce.org/documents/mcs/2004/12/3915_en.pdf).

<sup>16</sup> Resolution of the Eighteenth Annual Session, Vilnius, 29 June-3 July 2009. See the full English text at [http://www.eerstekamer.nl/id/vibsmzeghdnh/document\\_extern/090629\\_vilnius\\_declaration/f=/vibsmzpmwnr.pdf](http://www.eerstekamer.nl/id/vibsmzeghdnh/document_extern/090629_vilnius_declaration/f=/vibsmzpmwnr.pdf).

<sup>17</sup> See Section II.26 of the Report from the Seminar of Experts on Democratic Institutions to the CSCE Council (Oslo, November 1991). The official text can be found at <http://www2.ohchr.org/english/law/ccpr.htm>.

(b) For the protection of national security or of public order (order public), or of public health or morals."

It is worth noting that the matter does not concern the need or duty of states to establish appropriate restrictions on this freedom but only of the *admissibility* or *possibility* of doing so while continuing to observe certain conditions. This regulation is interpreted as establishing a threefold criterion demanding that any restrictions (1) be prescribed by law, (2) serve a legitimate purpose, and (3) are necessary for the well-being of a democratic society.<sup>18</sup> This international standard also implies that vague and unclearly formulated restrictions, or restrictions that may be interpreted as enabling the state to exercise sweeping powers, are incompatible with the right to freedom of expression.

If the state interferes with the right to freedom of the media, such interference must serve one of the purposes enumerated in Article 19 (Paragraph 3). The list is succinct, and interference not associated with one or another of the specified aims is consequently a violation of the covenant's Article 19. In addition, the interference must be "necessary" to achieve one of the aims. The word "necessary" has a special meaning in this context. It signifies that there must be a "pressing social need" for such interference<sup>19</sup>; that the reasons for it adduced by the state must be "relevant and sufficient," and that the state must show that the interference was proportionate to the aims pursued. As the UN Committee on Human Rights has declared, "the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect."<sup>20</sup> The European Court of Human Rights also makes similar demands of the concept "necessary".

With respect to the Internet, the European Convention on Cybercrime adopted in Budapest on 23 November 2001 emphasizes the need to be

"Mindful of the need to ensure a proper balance between the interests of law enforcement and respect for fundamental human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties, which reaffirm the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including

18 See, e.g., Paragraph 6.8 of the UN Committee on Human Rights judgment in the case *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, 18 April 2005: <http://humanrights.law.monash.edu.au/undocs/1128-2002.html>.

19 See, e.g., *Hrico v. Slovakia*, 27 July 2004, Application No. 41498/99, para. 40 at the ECHR website: <http://www.echr.coe.int/eng/Press/2004/July/ChamberJudgmentHricovSlovakia200704.htm>.

20 See the Judgment in the case *Rafael Marques de Morais v. Angola*, note 31, para. 6.8.

the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, and the rights concerning the respect for privacy."<sup>21</sup>

In this respect, it is worth noting that Part 1 of Article 23 of the Constitution of the Republic of Belarus reads:

"Restriction of personal rights and liberties shall be permitted only in the instances specified in law, in the interest of national security, public order, the protection of the morals and health of the population as well as rights and liberties of other persons."

The Republic of Belarus Constitution, in the same way as international acts, points to the admissibility and possibility of restricting personal rights and freedoms in certain conditions. This regulation essentially demands that any restrictions are: 1) prescribed by law, and 2) pursue legal aims set forth in the Republic of Belarus Constitution.

#### **1.4. Regulating the Work of Media and the Internet**

To protect their constitutional rights to freedom of expression, it is vital that the media have the opportunity to carry out their work independently of government control. This ensures their functioning as a public watchdog and the people's access to a broad range of opinions, especially on issues of public interest. The primary aim of regulating the work of media in a democratic society ought therefore to be facilitation of the development of independent and pluralistic media, thus guaranteeing the public's right to receive information from a wide variety of sources.

Article 2 of the ICCPR assigns participating States the duty of adopting "such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant". This means that participating States are required not only to refrain from violating these rights but also to take positive measures to guarantee that such rights are respected, including the right to freedom of expression. The states are *de facto* obliged to create conditions in which a variety of media can develop, thus ensuring the public's right to information.

Thus it is generally accepted today that any state authorities which exercise formal regulatory powers in the field of the media or telecommunications

<sup>21</sup> Participating states of the Council of Europe as well as the U.S., Japan, RSA, and Canada participated in drawing up the Convention. The Convention came into force on 1 July 2004, as of today it has been signed by 46 states and ratified by 26 of them (Belarus is not one of them). See the full English text at <http://conventions.coe.int/Treaty/FN/Treaties/html/185.htm>.

(including the Internet) should be fully independent of the government and protected from interference by political and business circles. Otherwise regulation of the media could easily become a target of abuse for political or commercial purposes. The Joint Declaration presented in December 2003 by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression notes:

"All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party."<sup>22</sup>

The licensing requirement for media was especially condemned in a resolution on the "Persecution of the Press in the Republic of Belarus," adopted by the Parliamentary Assembly of the Council of Europe (PACE) in 2004. Moreover, this was the first mention in such a high-ranking document of the fact that Article 10 of the European Convention on Human Rights *in principle* does not permit such licensing of media. The Council of Europe saw this as a violation of "the fundamental principle of the separation of powers between the executive and the judiciary and ... contrary to Article 10 of the European Convention on Human Rights," and called for the corresponding articles of the Law on the Media to be revised.<sup>23</sup>

The Parliamentary Assembly of the Council of Europe recognizes the need for a number of principles relating to freedom of the media to be observed in every democratic society. A list of these principles can be found in PACE Resolution No. 1636 (2008), "Indicators for Media in a Democracy."<sup>24</sup> This list helps in objectively analyzing the state of the environment for the media in a particular country with respect to the observation of media freedom, and in identifying problem issues and potential weaknesses. This allows the states to discuss matters at the European level with respect to possible actions for resolving such issues. The Parliamentary Assembly proposed in its resolution that national parliaments regularly conduct objective and comparative analyses in order to reveal shortcomings in legislation and media policy, and to take the measures needed to correct them. In the context of the amendments being analysed, the

22 See: [http://www.osce.org/documents/html/pdf/tohtml/27439\\_en.pdf.html](http://www.osce.org/documents/html/pdf/tohtml/27439_en.pdf.html).

23 See: Parliamentary Assembly of the Council of Europe. Resolution 1372 (2004). Persecution of the press in the Republic of Belarus. The full English text is available on the official Council of Europe website at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/ERES1372.htm>.

24 The full English text of the Resolution is available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1636.htm>.





following principle from this list is worth noting:

"8.17. the state must not restrict access to foreign print media or electronic media including the Internet..."

Based on the above provisions, commentary and recommendations on the key provisions of the documents adopted in the Republic of Belarus with respect to the use of the national segment of the Internet will follow.

## **II. ANALYSIS OF DOCUMENTS ON THE USE OF THE NATIONAL SEGMENT OF THE INTERNET**

### **2.1. Scope and Basic Provisions of Decree No. 60**

The President of the Republic of Belarus shall issue decrees and orders on the basis of and in accordance with the Constitution which are mandatory in the territory of the Republic of Belarus (Art. 85). The government is responsible for their implementation (Art. 107). Whereby Article 137 envisages: "The Constitution shall have the supreme legal force. Laws, decrees, edicts and other instruments of state bodies shall be promulgated on the basis of, and in accordance with the Constitution of the Republic of Belarus. Where there is a discrepancy between a law, decree or edict and the Constitution, the Constitution shall apply."

Decree No. 60 of the President of the Republic of Belarus "On Measures to Improve the Use of the National Segment of the Internet" is aimed at protecting the interests of citizens, society, and the state in the information sphere, raising the quality and reducing the cost of Internet services, and ensuring further development of the national segment of the Internet. The Decree contains 16 paragraphs and was signed by President of the Republic of Belarus Alexander Lukashenko on 1 February 2010. The Decree came into effect on 1 July 2010. Its detailed legal analysis was presented by the Office of the OSCE Representative on Freedom of the Media in February 2010.

This analysis by the Office of the OSCE Representative on Freedom of the Media states that Decree No. 60 contains several demands that call for information about state bodies and other government organizations to be made more available. For this purpose, it was made incumbent upon state bodies and other government organizations, as well as business associations in which the state has a prevalent share in the authorized funds thereof, to place information about their activity on the official websites of said bodies and organizations and ensure the efficient functioning and systematic updating of the said websites.

The Decree envisages that Internet service providers shall carry out state licensing of information networks, systems, and resources of the national segment of the Internet located in the territory of the Republic of Belarus by applying to the Ministry of Communications and Informatization of the Republic of Belarus or its authorized organization.

"In order to ensure the security of citizens and the state," after 1 July 2010 Internet service providers must identify the subscriber units of Internet service users, keep an account of, and store information on such units and the Internet services rendered.

The Decree is the first to regulate the mechanism for limiting access to information at the request of the Internet service user. For example, at the request of an Internet service user, the provider is obligated to limit access of the subscriber unit belonging to this user to information aimed at disseminating pornography and/or at promulgating violence, brutality, or any other acts prohibited by law.

As can be seen, Decree No. 60 applies to matters relating to the procurement and dissemination of information on the Internet, which will inevitably have an impact on the activity of journalists in Belarus and on freedom of the media.

## **2.2. Development of the Provisions of Decree No. 60 in Subsequent Documents**

The Decree of the President of the Republic of Belarus "On Measures to Improve the Use of the National Segment of the Internet" is aimed, as it stipulates, at protecting the interests of citizens, society, and the state in the information sphere, and ensuring further development of the national segment of the Internet.

This document contains several requirements that call for making information about state bodies and other government organizations more available on the Internet. Decree No. 60 contains several provisions aimed at protecting author's rights on the Internet. It envisages state licensing of the information networks and resources of the national segment of the Internet on the territory of Belarus for which providers of Internet services must apply. It should be noted as a positive aspect of Resolution No. 644 adopted in execution of Decree No.60 that Internet sites are licensed free of charge for an unlimited period and in a relatively short time – 15 days.

It was feared that Resolution No. 644 would call for mandatory state licensing of



all email boxes in the .by domain. However, since Resolution No. 1001, adopted later, does not envisage any such administrative procedures, it can be presumed that the government decided to forgo introduction of this practice.

It was also feared that Decree No. 60 would awaken the regulation of Article 11 of the Republic of Belarus Law "On the Media", which has been "dormant" since February 2009, in compliance with which all Internet media must undergo mandatory licensing, while "the state licensing procedure for media disseminated via the global Internet shall be determined by the Council of Ministers of the Republic of Belarus." This regulation has already been criticized in a memorandum issued by the Office of the OSCE Representative on Freedom of the Media in 2008.<sup>25</sup> However, the subsequent documents give reason to believe that Decree No. 60 and the documents of the Council of Ministers of the Republic of Belarus adopted in accordance with it refer to other licensing, not to licensing of an Internet resource as a form of media (in compliance with the regulations of the law "On the Media"), but rather to licensing as an information resource (in compliance with the regulations of Article 24 of the Law of the Republic of Belarus of 10 November 2008 "On Information, Informatization and the Protection of Information").

According to Decree No. 60 and the subsequent resolutions of the Council of Ministers of the Republic of Belarus, the providers of Internet services must identify the subscriber units of Internet service users, keep an account of and store data on such units and the Internet services rendered, and make these data available to the law-enforcement agencies and other government bodies upon request.

Decree No. 60 has elaborated, and the resolutions of the Council of Ministers of the Republic of Belarus regulate, the mechanism for limiting access to information at the request of the Internet service user that is aimed at disseminating pornography and/or promulgating violence, brutality, or any other acts prohibited by law.

Decree No. 60 and Resolution No. 645 envisage several provisions that enhance the freedom of information on the Internet. In particular, once again (after adoption of the Law of the Republic of Belarus "On Information, Informatization and the Protection of Information") state bodies and other government organizations are required to post information about their activity on Internet websites. The providers of Internet services may not be held responsible for the contents of information posted on the Internet.

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<sup>25</sup> See full English text of the Comments on the Draft Law of the Republic of Belarus "On the Mass Media" on the website of the OSCE Representative on Freedom of the Media at [http://www.osce.org/documents/rfm/2008/06/31899\\_en.pdf](http://www.osce.org/documents/rfm/2008/06/31899_en.pdf).

However, the merits of Decree No. 60 and the documents subsequently adopted are ambiguous and are outweighed by shortcomings that restrict freedom of expression and freedom of the media on the Internet.

The following provisions of Decree No. 60 have aroused and continue to arouse particular concern:

- The demand for mandatory identification of the users of subscriber units and the users of Internet services.
- The inexplicitly defined restrictions and prohibitions on disseminating illegal information and the procedure for implementing them.
- The unclear responsibility of the provider of information on the Internet in the event the instructions of a relevant authority to eliminate detected violations or its demands to suspend Internet service provision are not fulfilled.
- The absence of any obligation on the part of state authorities to place on the Internet not only information about their own activity, but also to share information that has been acquired or created as a result of this activity.
- The obligation that information reports and/or media articles disseminated via the Internet must have hyperlinks to the original source of the information or to the media agency that previously placed it.

### **2.3. Analysis of Questions Arousing Concern in the Documents Adopted After Decree No. 60.**

#### ***2.3.1. Identification of Internet Users***

Decree No. 60 obligates the owners and administrators of Internet clubs and Internet cafes to identify their users, as well as keep an account of and store the personal data of such Internet service users. The same identification regulation also applies to the technical units of an Internet service user required for hooking up to the telecommunication line in order to access the Internet (paragraph 6).

Whereas at present, a distance or public contract on rendering hosting services or access to the Internet can be entered, when the law comes into force, the client will have to come to the provider's office in person in order to enter a contract and "go through the identification procedure." This may be easy to do in Minsk or in other large regional centres, but it will be much more difficult in a



small village. The Decree essentially prohibits access to the Internet without a password, issue and use of prepaid cards, and acquiring a hosting through the Internet.

Resolution No. 647 of the Council of Ministers of the Republic of Belarus requires identification of the users of Internet services in cafes and clubs, which must now be carried out by showing some form of ID or using other means that allow unequivocal confirmation of the user's identity. In particular, foreigners will have to show their so-called "guest card," issued during registration at their place of temporary residence upon arrival in the Republic of Belarus. The above-mentioned establishments are required to keep an account of and store the personal data of all visitors; keep a record of the time Internet services began and ended; and keep an electronic log of all the domain names or IP addresses of the Internet resources the user contacted.

According to Decree No. 60 and Resolution No. 647, these data must be stored for one year and made available to investigation agencies, public prosecution and preliminary inquiry agencies, State Regulation Committee bodies, tax agencies, and courts as set forth by the law upon request.

Decree No. 129 and Resolution No. 646 also envisage keeping an account of and furnishing the investigation agencies with information on the users of telecommunication services and on telecommunication services rendered (although, admittedly, this refers to "general information" on telecommunication services).

The adoption of the abovementioned documents makes anonymous receipt and dissemination of information illegal and impossible. Adoption of these documents has closed the last loopholes for this.

It appears that this limitation makes it impossible for media journalists to perform the obligations imposed on them by Law of the Republic of Belarus "On the Media" of 17 July 2008 No. 427-Z. This law refers to obligations to keep information and its sources confidential, apart from cases envisaged by Para. 2 of Article 39 of the said law (Para. 4.5 of Art. 34). In turn, Para. 2 of Article 39 says that the source of information and data on the physical or legal entity providing the information shall only be disclosed at the request of a criminal prosecution agency or court and only with respect to preliminary investigation or legal proceedings. Journalists can no longer guarantee the confidentiality of their sources if the latter contact them via the Internet – now these sources can be traced by the State Regulation Committee bodies and tax agencies, for example, during an audit.

So it can be seen that Decree No. 60 and Resolutions No. 647 and No. 646 prevent execution of the regulations of the law "On the Confidentiality of Information Sources" by making information on a journalist's Internet correspondents and Internet sources available without the consent of either the journalist or the source of the confidential information.

Meanwhile, privacy of the information source is one of the fundamental principles of journalism and consists of the following. An asset of public freedom is the fact that citizens may freely inform journalists about socially significant problems and events, as well as discuss, including anonymously, such events in the media, even if the information furnished contains facts about improper acts and behaviour of the informers themselves. In this way, public debate in the media has greater social value than directly exposing and convicting tax evaders or squanderers of state property. The existence of this regulation in the law "On the Media" protects the citizen who, while disclosing information, does not fear for his personal safety and wellbeing. Its repeal will lead to a decline in investigative journalism in Belarus and, consequently, to violation of the information rights and freedoms of all citizens.

So the regulations introduced with respect to mandatory identification of subscriber units and the users of Internet services are leading to unsubstantiated limitation of a citizen's right, which is guaranteed by the Constitution of the Republic of Belarus and international agreements, to receive and impart information.

Moreover, it appears that making it incumbent on the providers of services to keep detailed visitors' logs at their own expense, register domains in the .by zone, and provide remote access services within the System for Operative Investigative Activities (SORM) envisaged by Decree No. 129 and Resolution No. 647 will:

- make Internet services more expensive for the population;
- lead to the closure of several Internet resources, the owners of which cannot or do not wish to undergo state licensing;
- limit use of the most promising vector of technological development in this sphere today – broadband, including free Internet, particularly in public places;
- become another way of intimidating users.



All of this cannot fail to reduce the potential of the Internet for the economic and technological development of Belarus and have a negative effect on the country's image.

***Recommendation:***

- Mandatory identification of the users of subscriber units and the users of Internet services should be foregone.

***2.3.2. Restrictions on the Dissemination of Harmful Information***

Paragraph 8 of Decree No. 60 sets forth a regulation in compliance with which Internet service providers, at the request of Internet service users, shall restrict access of these users to information aimed at:

- carrying out extremist activity;
- illicit circulation of weapons, ammunition, detonators, explosives, radioactive, contaminating, aggressive, poisonous, and toxic substances, drugs, psychotropic substances, and their precursors;
- assisting illegal migration and human trafficking;
- spreading pornography;
- promulgating violence, brutality, and any other acts prohibited by law.

Accordingly, at the request of individual Internet users, providers must close access to such resources for such users (but not for all other Internet users). The Decree also envisages that access shall be automatically closed to illegal information from government authorities and cultural and educational organizations (for example, universities, schools and clubs).

Resolution No. 4/11 regulates the procedure for restricting access. It stipulates that Internet service providers shall limit access on the basis of a limited access list duly compiled by the Republic of Belarus State Telecommunications Inspectorate of the Ministry of Communications and Informatisation. This process is carried out on the basis of decisions of the heads of the State Regulation Committee, the Prosecutor General's Office, the Operating and Analytical Centre under the President of the Republic of Belarus (OAC), and all republic-level state administration bodies. The decisions are adopted by the heads of these bodies within the limits of their competence.

Moreover, Para. 4 of the Provision approved by Resolution No. 4/11 mentions a certain limited access list compiled by the Internet service provider independently. The procedure for compiling such a list is not specified. It is doubtful that the Internet providers themselves are sufficiently qualified or able to do this.

The problem with this regulation is that the definitions of harmful and illegal information set forth in the Belarus legislation are very ambiguous. They are not formulated with sufficient precision and do not permit a citizen to regulate his/her behaviour and to foresee the possible consequences of a particular situation. For example, there is a restriction in Decree No. 60 and Resolution No. 4/11 on "promulgating [any] other acts prohibited by the law." Such definitions give the authorities extremely broad powers to act at their own discretion. It would be expedient to shift the responsibility for making decisions on what information is considered harmful for users from the state authorities, institutions, and cultural and educational organizations to the judicial bodies. There is clearly insufficient opportunity to appeal illegal decisions by "authorised" bodies.

In any case, the need to observe human rights must also be remembered here, the conditions and guarantees of which should include, among other things, supervision by judicial and other independent agencies; substantiation of prohibitions; and limitations on the scope and time-limits of such prohibitions, authorizations or procedures. The "reference" to the regulation of the legal act for substantiating the prohibition envisaged in Resolution No. 4/11 is clearly insufficient.

Nor is it clear precisely what the same Resolution envisages when it states that the authorized state agency shall be responsible for the lawfulness and substantiation of the decision it makes to include Internet resources on the limited access list. As far as it is known, in accordance with Para. 14 of Decree No. 60, a law of the Republic of Belarus aimed at enhancing responsibility for violating the law in the sphere of Internet use should be drawn up by the end of 2010. It is expected that this law will be aimed not only at dealing with violations of limiting dissemination of information on the Internet, but also at dealing with unsubstantiated and illegal limitations on the freedom of information on the Internet.

In this respect, it is recommended that attention be paid to the provisions of the European Convention on Cybercrime and the Supplementary Protocol to the Convention on Cybercrime with respect to criminalization of racist and xenophobic acts committed via computer systems, as well as to important





international instruments to combat crimes on the Internet.<sup>26</sup>

**Recommendations:**

- Clarify the meaning and procedure for introducing limitations and prohibitions on the dissemination of illegal information, specify responsibility for unjustified prohibitions.
- Entrust the judicial bodies, rather than the executive power bodies, with determining what information shall be considered harmful.
- Take into account the existing international instruments to combat crime on the Internet.

**2.3.3. Regulations for Posting Information**

In keeping with the regulations of Article 22 of the Law of the Republic of Belarus "On Information, Informatization and the Protection of Information", Decree No. 60 (Para. 1) and Resolution No. 645 contain several provisions which require that republic-level state administration bodies, local executive and regulatory authorities, other state bodies and government organizations, as well as business associations, with respect to which the Republic of Belarus or an administrative-territorial unit holding shares (stakes) in their authorized funds may determine the decisions made by these business associations, post information on the Internet, which will make it more available to the public (including journalists). The above-mentioned documents make it incumbent on these organizations to post information about their activity on the official websites of the said bodies and organizations and ensure the efficient operation and systematic updating of the said websites.

In keeping with the regulations of the same article of the law "On Information, Informatization and the Protection of Information" and Decree No. 60, access to information on the Internet websites of state bodies and government organizations shall be unrestricted and free of charge (Para. 3 of Resolution No. 645). This is certainly a positive aspect that promotes greater access to the above-mentioned information. Another positive aspect is that textual information should be posted on websites in a format that makes it possible to search for and copy fragments of text.

Paragraph 4 of the Provision approved by Resolution No. 645 prohibits

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<sup>26</sup> See texts of these acts at [http://mediajlaw.ru/laws/other\\_laws/european/index.htm](http://mediajlaw.ru/laws/other_laws/european/index.htm).

information from being posted on the websites of state bodies and other government organizations containing facts that constitute state secrets or other information and/or correspondingly restricted data protected in accordance with national legislation. It is presumed that the legislation of the Republic of Belarus is referring to the fact that information contained in a particular document on the activity of a state body to which access is restricted by law (see, for example, Article 37 of the Republic of Belarus Law "On the Media") does not mean complete prohibition of its dissemination (see, for example, Article 38 of the Republic of Belarus Law "On the Media"). Such documents should be made available provided that the part constituting a secret is removed.

It would also be expedient to envisage an exception from this limitation in accordance with other considerations indicated in the Council of Europe Convention on Access to Official Documents (Article 3):

"Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure."<sup>27</sup>

The minimum list of information to be posted on the websites of state bodies and government organizations coincides in Decree No. 60 and Resolution No. 645, any additional information shall be determined either by the President of the Republic of Belarus, or by the Council of Ministers of the Republic of Belarus, or by a decision of the head of a state body or government organization. The matter essentially concerns furnishing information that applies only to the activity of these state bodies.

It is worth recalling in this respect that the Constitution of the Republic of Belarus (Article 34) not only guarantees the citizens of the Republic of Belarus "the right to receive, store and disseminate complete, reliable and timely information on the activities of state bodies and public associations," but also "on political, economic, cultural and international life, and on the state of the environment."

Presidential decrees, as follows from Article 137 of the Constitution of the Republic of Belarus, shall be promulgated not only on the basis of, but also in accordance with the Constitution of the Republic of Belarus. Consequently, it would be expedient for Decree No. 60 and the resolutions of the Council of Ministers of the Republic of Belarus adopted on its basis to envisage that state bodies be required to provide information not only about their own activity, but

<sup>27</sup> See full text of the Convention at: <https://wcd.coe.int/ViewDoc.jsp?id=1377737&Site=CM>



also share information that has been acquired or created as a result of this activity with the public.

***Recommendations:***

- Require state bodies to provide information on the Internet not only about their own activity, but also share information that has been acquired or created as a result of this activity with the public.
- Envisage the obligation of posting documents after secret or other information prohibited from disclosure by law has been removed from them.
- Envisage the possibility of disclosing information in the event of an overriding public interest.





# **ANALYSIS AND ASSESSMENT OF A PACKAGE OF HUNGARIAN LEGISLATION AND DRAFT LEGISLATION ON MEDIA AND TELECOMMUNICATIONS**

*Prepared by Dr Karol Jakubowicz,  
Commissioned by the Office of the OSCE Representative on Freedom of the Media*

## **Introduction**

The present analysis was commissioned by the OSCE Representative on Freedom of the Media with a view to assessing the package of legislation (encompassing T/359 on amendment of the Constitution; T/360 on amendment of the Act on Electronic Telecommunication, the Act on Radio and Television, the Act on Digital Transition, and the Act on National News Agency; and Bill T/363 – a new Law on Press Freedom and Basic Rules of Media Content). The objective is to evaluate its contribution to protecting freedom of expression and of the media in Hungary, serving the democratic development of the Hungarian media system, and promoting the observance of European standards in the media field in the country.

The sole frame of reference that is applied in conducting this analysis and assessment – based exclusively on a close reading of the legislation, draft legislation and amendments available at the time of writing (in English translation arranged for by the Office of the OSCE Representative on Freedom of the Media) – is provided by OSCE principles and commitments in the field of freedom of expression, free flow of information and freedom of the media; by Council of Europe standards emanating from Article 10 of the European Convention on Human Rights; and by European Union policies and legislation. Reference will also be made to documents issued by other international organizations.

For reasons of space, given the very extensive body of detailed legislation covered in this analysis, it will not be possible at this stage to conduct an article-by-article examination of the provisions of each law or draft law separately. Rather, a cross-cutting approach will be adopted, identifying selected main sets of problematic issues of a systemic nature and discussing them on the basis of all the pieces of legislation. Such an analysis must unavoidably seek to establish whether sufficient care has been taken in drafting legal provisions to guard against their (mis)implementation in a way that would run counter to well-established free speech or democratic principles in the media field.

I have also been asked to formulate recommendations, where needed, on possible changes in the package. Some legislation covered by the present analysis has already been adopted and has entered into force. Some part of it is yet to be debated in Parliament. Therefore, recommendations relating to adopted legislation should be treated as advice on implementation and regulatory practice, with a view to amending the laws in the spirit of these recommendations in the near future. Recommendations related to Bill T/363 are intended to assist in its improvement. All should help to bring the package into line with internationally accepted standards in the field and with the requirements of the democratic development of the Hungarian media system and media policy and regulation.

The author wishes to acknowledge the work of many excellent experts in Central and Eastern Europe in the field of media policy and regulation, which provided a general inspiration for the present analysis. He also wishes to express his gratitude for the technical assistance received from the Office of the OSCE Representative on Freedom of the Media. Of course, he alone is responsible for the contents, and any possible shortcomings, of this analysis and assessment.

## **GENERAL ASSESSMENT**

The package represents an attempt to modernize Hungarian media law by responding to the challenges posed by technological change leading to the emergence of new communication services. This, however, is done mainly by extending the traditional regulatory framework to the new media, an approach widely recognized as inappropriate.

At the same time, the package represents an equally far-reaching effort to put into place a new axiological, legal and institutional framework for media regulation and supervision.

**The results can be assessed as (i) on the one hand instituting a system for media content regulation (including Internet- and ICT-delivered media content) going in its sweep and reach beyond almost anything attempted in democratic countries and beyond the limits of what is accepted in the international debate as an appropriate and justified approach to regulating new communication services, and (ii) on the other, as introducing – often in disregard or violation of the needs of a democratic system of social communication and of the letter and spirit of international standards - stricter regulation, more pervasive controls and limitations on freedom of expression.**



Few of the new measures and changes of the existing framework can be described without reservation as serving the cause freedom of expression and media freedom. They will introduce **a highly centralized governance and regulatory system, with many new and unnecessary bodies of oversight and supervision and with many decision-making processes involving a succession of inputs by disparate bodies – probably breeding conflicts and inefficiencies, but also multiplying opportunities for political control. The whole system may have a serious chilling effect on media freedom and independence ((by encouraging self-censorship) and on the exercise of freedom of expression.**

Traps are created that content providers cannot avoid falling into, giving the authorities an opportunity to penalize them for it. Some provisions are transferred from the Civil Code to media legislation, presumably to make it easier to apply them in an administrative procedure, rather than a judicial one.

**The new institutional framework may, if deliberately (mis)used for this purpose, create conditions for the realization of the “winner-takes-most” or indeed “winner-takes-all” scenario in the current term of Parliament, in defiance of the principle of the division of powers and of the checks and balances typical of liberal democracy.** As such, the design of this framework runs directly counter to democratic standards in the field of media system organization and governance.

**Accordingly, this package, which exceeds what is justified and necessary in a democratic society, is cause for very serious concern. It needs urgently to be reconsidered and amended, so the legislation can serve its proper function of enhancing Hungarian democracy. Parliament might serve this cause by initiating a revision of the adopted parts of the package and not considering Bill T/363 until it has been comprehensively rethought and re-written.**

## **OVERVIEW OF RECOMMENDATIONS**

### **I. SCOPE OF REGULATION**

#### **I.1. Material Scope**

#### CONCLUSION

Bill T/363 creates a seamless content regulation regime for traditional and

new Internet media content, administered by one body and applying the same criteria to all these cases. It does so in a way that while ostensibly covering only media services, the provisions of the law could in fact be applied practically to all Internet content. It defines the material scope of regulation in an imprecise, open-ended way, giving the National Media and Telecommunications Authority and the Media Council discretionary power to apply the regulatory regime to any future services it sees fit.

The printed press and the Internet have so far been virtually free from content regulation. This Bill, if adopted in the present form, will significantly change their situation, subjecting them to a content regulation regime almost without precedent in democratic countries. This constitutes unwarranted and unjustified interference with freedom of expression and of the media, and may create conditions for suppression of this freedom.

## RECOMMENDATION

The draft law requires urgent revision:

1. The serious flaws in the definition of its scope should be removed, so that it relates (in a way that provides legal certainty) primarily to broadcasting and audiovisual media services (in line with AVMSD) and retains only general provisions for the print media and for media services on the Internet.
2. The concept of “media content” should be replaced with the term “media services”, meeting the criteria listed above (whether or not provided by professional communicators), to avoid “mission creep”, in that regulators could successively extend their scope of activity. A graduated regulatory system (taking as an example the AVMSD system of introducing a clear difference between levels of regulation for linear and non-linear services) should be introduced, adjusting the degree and methods of regulation to the particularities of each type of media service.
3. Any regulatory regime with regard to the printed press and Internet-delivered media services (unless they are covered by the AVMSD) should rely primarily the civil and penal code and additionally primarily on self-regulation and co-regulatory schemes (with regulatory intervention reserved only for cases when they cannot be fully effective) , involving the Media Council in multi-stakeholder cooperation with trade and professional associations as co-regulators, administering codes of conduct and enforcing jointly developed standards and rules.





4. It is not possible to develop “future-proof regulation” in this field. Any such attempt is bound to be ineffective and unworkable. The AVMSD is expected to have a life of 10 years, at best, with further changes needed after that. This is why internationally accepted standards and the state of international debate on new and not fully defined media services and the policy and regulatory approach to them should be closely followed and applied. Otherwise, the law, though seeking to cover everything, will leave many new media and services undefined and unregulated, ceding excessive powers to the Authority and Media Council to fill the gaps at their own discretion, and leaving their policies and regulatory practice open to legal challenge, as they will find no clear basis in Bill T/363 and other legislation.

## **I.2. Territorial Scope**

### CONCLUSION

In a very unusual approach, Bill T/363 would establish world-wide territorial scope for itself, at least as far as Internet content “aimed at” Hungary, and originating technically from Hungary, is concerned. In both cases, the objective appears to be to gain the ability to take action against providers of vaguely defined unwanted content. In the first case, this could involve seeking to prosecute them abroad and blocking access to such content coming in from abroad. In the second case, the intention seems to be to produce a chilling effect on users seeking to disseminate content worldwide that might turn out to be unwanted by the authorities. Under this law, Hungary would give itself powers which it cannot effectively apply, but which would require instituting a system of surveillance, supervision and possible repression that are unacceptable in a democratic society.

This proposed system represents a serious challenge to freedom of expression on the Internet and would, if adopted, be in obvious violation of international law.

This does not apply to audiovisual media services, as defined in the AVMSD, as its provisions are observed.

### RECOMMENDATION

Provisions on territorial scope, especially with regard to the Internet, should be thoroughly revised in line with international law. Article 3 (5) and (6) should be deleted, as is already proposed with reference to para. (6) in Amendment 17.

## **II. FREEDOM OF EXPRESSION AND CONTENT REGULATION**

### **II.1. Freedom of (transfrontier) broadcasting**

#### CONCLUSION

In addition potentially to reducing the range of Hungarian content providers able to launch their activities (see below), Bill T/363 could serve the purpose of depriving Hungarian audiences of access to information available via the Internet media (see above) and from broadcast media, especially transfrontier broadcasting, though Hungary could hardly do so under the international commitments that the country has undertaken.

#### RECOMMENDATION

In order to remove any doubt as to the legislator's intentions and to prevent the appearance of contradiction and conflict between different parts of the legal framework in force in Hungary, Article 25 of Bill T/363 should not annul Article 3 (1) of RTBA.

### **II.2. Registration**

#### CONCLUSION

The registration system would create a legal, administrative and potentially also a political barrier to the entry of new content providers into the media landscape, or to the extension of activities by existing providers. It could also be used to silence existing media outlets. While licensing of terrestrial broadcasters must still be maintained, the introduction of the system of registration and its extension to Internet communicators is unacceptable and would place Hungary alongside authoritarian countries seeking to control all forms of social communication.

#### RECOMMENDATION

Article 5 and Article 22 Bill T/363 should be deleted, as already proposed with regard to Article 22 by Amendment 18. The system of notification could be retained under four conditions in relation to the printed press, online journals, television and radio channels or the Internet, i.e. provided that the content providers may launch operation immediately after notification; the law clearly specifies what information must be filed with the registering authorities and any action preventing a content provider from continuing operation requires a court order.



### **II.3. Prevention of information monopolies**

#### CONCLUSION

The constitutional aim of preventing information monopolies has not been replaced by equally effective and forceful guarantees that this goal will be pursued actively and with determination, with full support from the State.

#### RECOMMENDATION

The part of Article 61 (4) of the Constitution, listing a potential law about prevention of information monopolies among those requiring a two-thirds majority of Members of Parliament should be reinstated.

### **II.4. Right to information, the obligation to inform**

#### “Appropriate information in relation to public affairs”

#### CONCLUSION

Depending on how “appropriate information” is interpreted, the public may either be informed fully and objectively, or selectively and tendentiously. In the latter case, both public authorities and administration, and the regulatory authorities would fulfil quasi-censorship functions as gate-keepers preventing some information from reaching the public. The very possibility that the Constitution could allow such a situation to arise without violating its letter and spirit is completely unacceptable.

#### RECOMMENDATION

The word “appropriate” should be deleted from Article 61 (3) of the Constitution as soon as possible. In the meantime, Bill T/363 should be supplemented to provide an interpretation of the term “appropriate information” preventing its use for any other purpose than to guarantee for the public full, accurate and objective information in relation to public affairs.

#### Information obligations of content providers

#### CONCLUSION

Obligations imposed on content providers under Article 13 (1) and (2) of Bill

T/363 represent ex ante content regulation and are therefore unacceptable as violating, and not promoting, freedom of expression. Given that the obligation is impossible to implement for most content providers, as well as the wholly disproportionate penalty of possibly withdrawing the consent to provide information that can be imposed by the regulatory authorities, this system cannot be described otherwise than as a “sword of Damocles” hanging over every content provider and capable of falling at any moment, depriving the content provider of the right to continue operation.

## RECOMMENDATION

Articles 13 (1) and (2) should be deleted as a violation of media freedom and to free content providers from an obligation most of them cannot meet. Accordingly, mention of Article 13 should be deleted from Article 23 of Bill T/363. The proposal in Amendment 17 that Article 23 (2) should be deleted deserves support and should be implemented. The general principle expressed in Article 10 of Bill T/363 is sufficient for the purpose of enshrining the right of the public to such information. The Media Council could be given the task, as it implements its media and licensing policy, to ensure that the type of information referred to in Article 13 (1) and (2) is easily available to the general public from the totality of content at the disposal of the public.

An additional issue is that while Article 23 mentions “*the system of sanctions and procedures stipulated in the Act on the regulation of the media,*” in fact that part of the Bill is missing. Parliament is being asked to adopt a law which specifies obligations binding on content providers, but does not specify what penalties they would incur in case of failure to meet them. This is one more reason not to subject this Bill to parliamentary procedure before the missing part has been provided, while most of the Bill is thoroughly reviewed and revised.

## Right of Reply

## CONCLUSION

This new approach to the right of reply can be recognized as reducing the scope of editorial freedom by obliging content providers to publish a potentially unlimited number of replies to statements of opinion. This could overload publications and media with such content, limiting the space for other editorial content. As such, it constitutes a case of interference with media freedom. The extended right of reply to statements of fact and opinions is usually introduced in countries where political figures and public officials refuse to recognize the principle from the CoE “Declaration on freedom of political communication in the



media” that they are “subject to close public scrutiny and potentially robust and strong public criticism through the media over the way in which they have carried out or carry out their functions”.

## RECOMMENDATION

Article 12 (1) and (2) of Bill T/363 should be wholly revised in conformity with CoE and EU standard-setting documents on the right of reply, primarily by reducing the scope of the right to that of rectification. As concerns para. 2, this – as envisaged in Amendment 21 – should mean the deletion of this text.

### Hate speech

## CONCLUSION

The new rule would introduce a restriction stricter than any other in the current legal system. It would add churches, other nations and “any community” to the scope of protected subjects and extend the obligation to printed press and online content. Even unintentional insult or incitement to hatred would be sanctioned: not only media content that is directed to insult or exclusion, etc. but also one which is capable of insulting, excluding, etc. is prohibited.

## RECOMMENDATION

General rules on insult and inciting hatred apply to all media, including internet-delivered media, but those should be applied by courts. The role of the Media Council should be limited to the broadcast media.

The provision should be retained in its present wording in the Criminal Code, as no specific restrictions, administered by the Authority, are needed or justified in the case of the printed press and online media. If Article 3 (3) of the Hungarian RTBA is retained, it should be revised to avoid an over-extensive definition of “hate speech” contained in it, leaving too much room for discretionary interpretation of the term. It should follow the Council of Europe “Recommendation No. R (97) 20 On ‘Hate Speech’”, which defines the term as follow: *“all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”*.

### III. III. THE NATIONAL MEDIA AND TELECOMMUNICATIONS AUTHORITY

#### III.1. Converged Regulator or a Federation of Officials?

##### CONCLUSION

The institutional design of the Authority will not turn it into a converged regulator and is unlikely to ensure its smooth and effective functioning. It consists of too many bodies that are, at least on paper, supposed to be independent of one another and operate at a distance from one another, linked together only by virtue of having the same person, President of the Authority, in charge. It will probably soon be found that much of the Authority's time and effort will be spent on ensuring coordination and cooperation, and eliminating potential or real conflicts among its disparate parts.

##### CONSIDERATIONS

It will not be possible to find a solution to this situation without structural change within the Authority. At first glance, three ideas could theoretically be considered. The first two of these are stopgap solutions:

- The Authority and the Media Council have different chairpersons, with the MC chairperson elected by the members from among themselves. The law creates mechanisms of consultation and coordination between the heads of the two bodies and a mechanism for resolution of conflicts;
- The Authority's President has two deputies: one responsible for the telecom side, the other (who is also the chairperson of the Media Council, elected by the MC members from among themselves) responsible for the media side. The Authority's President cannot dismiss the MC chairperson or overrule the collective decisions of the Council;
- The Authority's structure and organization are completely reformed to make it a truly convergent regulatory authority. In that case, the example of the Italian 9-member *Autorità per le Garanzie nelle Comunicazioni* (AGCOM) could be considered. AGCOM comprises the following organs: the president, the commission for infrastructures and networks, the commission for services and products and the Council. Each commission is a collective body made up of the president and four commissioners. The Council comprises the president and all the commissioners.



### **III.2. III.2 The President of the Authority, the Chairperson of the Media Council**

#### Method of Appointment

#### CONCLUSION

Direct appointment by the Prime Minister is not unusual in the case of heads of telecom regulators. On the other hand, the manner of appointment of the Media Council Chairperson amounts to nothing less than government capture of Parliament. Parliament is left no choice but to vote for the Prime Minister's candidate. Moreover, should it fail to elect that person, its decision will be disregarded in the sense that the President would still chair meetings of the Media Council (with a voice, but not a vote) and the only option left to Parliament would be eventually to elect that same person to this position – or leave the position unfilled, thus considerably weakening the MC. This is very likely if the governing party/coalition does not have a two-thirds majority in Parliament. Then, the solution designed to promote the development of consensus on the chairmanship of the MC could easily turn into an opportunity for obstruction by opposition parties.

The constitutionality of this solution could be open to question, given that under Article 19 (1) of the Constitution “The Parliament is the supreme body of State power and popular representation in the Republic of Hungary”. By adopting these provisions, in which the executive branch imposes its will on the legislative branch, Parliament can be said to have denied its own role of “ensuring the constitutional order of society”.

#### CONSIDERATION

A solution to this problem depends on the choice of solution to the general structural problem discussed above under III.1. In any case, it should sever the direct link between the government and the Authority.

#### Term of office

#### CONCLUSION

In a worst-case scenario, these provisions could turn out to be an “insurance policy” that even if a given parliamentary majority is not returned to power in the next election, “its” people will remain in the Authority and the MC. If that is indeed the case, “cohabitation” between the “old” composition of the Presidency

and Media Council within the Authority and the “new” majority in Parliament and in the government, may put them on a collision course, leading to conflicts. Should another party or coalition be returned to power with a 2/3 majority, this could lead to another change of the law to ensure conformity between the political composition of both sides.

## RECOMMENDATION

The following changes should be adopted:

- The term of office should be reduced to 6 years at most;
- There should be no possibility of re-election after having served a full term;
- Membership of the MC should be staggered.

### The powers of the Authority’s President and of the Media Council

## CONCLUSION

In short, there is not an area in the telecommunications and media/content provision field where the President does not have decisive say or cannot exert very strong influence, either single-handedly, or through voting and decision-making procedures. This simply cannot be described as being compatible with the basic principles of democracy. Moreover, by being involved in both the choice of chief executive officers of PSM organizations, and in the management of their assets, the President and the entire Authority are given a role that goes beyond that of a regulator: they become another governing body for public service broadcasters.

In the European Union, regulatory bodies should be independent both of the government and of the industry they regulate. This requirement may not be met in this case: on the one hand because of the close ties between the Authority and the Prime Minister and the ruling coalition that elected the members of the MC; on the other, because of the close involvement of the Authority in the operation of public service broadcasters. Direct involvement in the appointment of public service media (PSM) CEOs and in the management of PSM assets must mean a closer link between the Authority and PSM organizations and a less than fully objective approach to PSM, whereas the regulator should treat all segments of the regulated industry equally.

## RECOMMENDATION

It is necessary to reduce the scope of those powers. The Authority and the Media Council should assume their proper role as regulatory authorities and not





as another tier of PSM management One way of achieving that is to implement ideas proposed under item III.1 above. Additionally, several steps should be taken:

- The Media Council should lose the power to delegate two members of the Board of Trustees and “suggest” who should chair it. The President should lose the power to propose candidates for the jobs of CEOs of public service broadcasters and the MC the competence to present them to the Board of Trustees. Of any areas of competence, this one has the capacity to politicize both the Presidency and the MC most, as it can ensure a direct link between the Prime Minister and parliamentary parties, and the leadership of public service broadcasters.
- There is no real justification for the existence of the Broadcast Support and Asset Management Fund and for the President’s role in appointing members of its Board of Supervision. Both solutions can only reduce the independence of public service broadcasters. This system should be dropped (see below).

### **III.3. The Media Council**

#### Method of appointment

#### CONCLUSION

In this term of Parliament, the governing party/coalition will be able to propose and adopt a composition of the Media Council that will favour the party or parties in power.

#### RECOMMENDATION

The manner of appointment will be affected by selection of one of the options listed under III.1. As for MC members other than the chairperson, there are no fail-safe methods of electing only competent and apolitical experts to a body like the MC. Nevertheless, progress could be made if the identification of candidates were taken out of the hands of the politicians and Parliament could only consider candidates recommended by institutions of higher learning and appropriate professional, trade and civil society organizations.

#### Areas of competence

#### CONCLUSION

The MC represents the tendency to centralize media governance and regulation

in very few hands. This is bound to have a harmful effect on the Hungarian media scene.

#### RECOMMENDATION

As already noted in section I.1, there should be no basic change or development of the regulatory regime vis-à-vis the press and Internet content. The MC should, however, be given clear tasks related to the development of a self- and co-regulatory system in the printed press and Internet content.

### **III.4. The Telecommunications and Media Commissioner**

#### CONCLUSION

The Office of the Commissioner provides evidence that the Authority has achieved practically no integration between its disparate parts. It will retain the Complaint Commission, regulated in Title 11 of RTBA, and charged with acting on complaints regarding media content. It will have the Commissioner whose mandate should extend to the media, but does not. In addition, the Authority's President is authorized to conclude annual cooperation agreements on behalf of the Authority with the Consumer Protection Authority (FVF), probably in areas which are the responsibility of the Commissioner. Again, the impression is created of the existence of many different bodies with overlapping areas of responsibility, a situation conducive to conflicts and duplication of efforts.

#### RECOMMENDATION

The position of the Commissioner and the Complaint Committee should be merged into a unitary division, responsible for handling all complaints and consumer protection issues. The need for, and scope of, any agreement with the FVF should be reassessed.

## **IV. PUBLIC SERVICE BROADCASTING**

### **IV.1 Constitutional Amendment**

#### CONCLUSION

Article 61 (4) of the Constitution assigns to PSM a role that is much more narrowly defined than is the norm in European countries, as reflected in the RTBA, and than is required by the needs of Hungarian society.



## RECOMMENDATION

In order for the Constitution to define the PSM remit properly, or at least provide constitutional support for such a definition, it should be amended by:

1. Adding in para. (4) that the full and precise definition of the remit is to be found in a relevant statute;
2. Or, by amending para. (4) to reflect the remit fully in line with European standards, as illustrated above. This would be the most complex procedure but also the only one providing legal certainty on what the PSM remit really is.

## **IV.2 The Public Service Foundation**

### The Public Service Corporations

## CONCLUSION

Incorporation of the news agency into the Foundation can only be explained as an attempt to impose political control on it. Its credibility and impartiality may suffer, as it becomes the object of political infighting that has characterized the public service broadcasters.

## RECOMMENDATION

The national news agency should be taken out of the Foundation as soon as possible. The legal and institutional framework within which it operates should be designed to protect its independence and ability to operate impartially and professionally.

### Board of Trustees: Composition and Manner of Appointment

## CONCLUSION

While attempting to deal with at least some deficiencies of the old system, the new solution almost guarantees a repetition of the highly politicized, conflict-ridden situation that has existed so far. It may also give rise to new conflicts, if the composition of Parliament and the government change and the new parliamentary majority is faced with an unfriendly political majority in the Board. This may be part of the same “insurance policy” that was referred to in section

III.2.

RECOMMENDATION

The manner of appointment of the Board should be changed, largely in line with the procedure recommended by Article 19, to create a pluralistic body that represents society as a whole, rather than some parts of the political class. The procedure could involve the use of “nominating organizations”, on the same principle in the case of the Public Service Committee (see below), though in this case the list of organizations could be somewhat different and their role would be to propose candidates for Parliament to vote on.

In addition to Article 19 requirements, the following additional ones could be considered:

- nominees would have to demonstrate professional skills and experience;
- public hearing shall be held with the potential nominees;
- Board members should have staggered, non-renewable terms;

Management of the Foundation

CONCLUSION

The design of the management of the Foundation is clearly inadequate to the tasks of the leadership of a major PSM organization, making it incapable of providing leadership. The Hungarian PSM system has so far been leaderless (even the particular stations have gone without Directors General for months and years on end), and the negative results are clear for all to see.

The system appears to be designed to provide two fig leaves:

- That the requirements of the Act on Business Associations have been met and the Joint Board of Supervision has been created (though its actual tasks and role are unclear);
- And that the constitutional requirement of monitoring “by certain communities of citizens stipulated in legislation” has been fulfilled (though potentially in an ineffective manner).

RECOMMENDATION

Problems identified above could be resolved in part by:

- Extending the tasks of the Board of Trustees so that it would: consider and



approve annual financial plans of the particular corporations and monitor their implementation (inter alia by considering quarterly reports of the Public Service Committee and taking action to correct shortcomings and deficiencies);

- Eliminating the Joint Board of Supervision (shifting its duties to the Board), and derogating in the RTBA from the BAA as *lex specialis* in the case of these special public service corporations;
- Instituting forms of regular contacts and cooperation between the Public Service Committee and the CEOs of the corporations on the one hand, and the Board on the other, with both sides having the duty to respond to the Committee's suggestions and proposals;
- Making it mandatory on the Board either to dismiss the CEO whose annual report has been rejected by the Public Service Committee in a duly reasoned decision, or to explain publicly why it has not done so, and what steps are being taken to remove shortcomings identified by the Committee;
- Instituting forms of public accountability on the part of the Board of Trustees, requiring it to report to the public on its plans, including programme plans of the corporations, and to report on their implementation.

#### The Chief Executive Officers of the Corporations

#### CONCLUSION

Clearly the rules introduced in Hungary may achieve the opposite effect from that proposed by the CoE Recommendation. They may encourage Parliament and government to seek to ensure that the choice of the President of the Authority, members of the Media Council and of the Board of Trustees makes it possible for them to influence the choice of the CEOs. This will inevitably politicize the whole process and result in the imposition of direct political control over it. This is why it is so important to prevent the creation of what may be a seamless “chain of command” leading from the top to the level of the CEO.

#### RECOMMENDATION

The following procedures should be introduced for the appointment of the CEOs:

- The CEOs should be elected by an independent Board of Trustees, by way of an open tender, where he or she has to present his or her business plan and programming plan in a public hearing;
- Both appointment and dismissal should take place by a qualified majority;
- The contractual terms should be defined by the Board of Trustees.

## Assets and Funding of PSM Corporations

### CONCLUSION

The system of asset management and funding has not been created in full. It is also difficult to assess the effects of its introduction, given that so many opportunities for discretionary decision-making have been left open. It can be said, however, that it does not meet a single of the CoE standards cited above. The financial independence of PSM organizations is seriously undercut by the Broadcast Support and Asset Management Fund, which is totally controlled by the chairperson of the Media Council. The assets of the public service broadcasters are collected into this Fund and the conditions under which the broadcasters may use the assets are defined by the Media Council. The whole system appears to be designed to hamper PSM corporations's finances as much as possible and to deprive them of any security in this matter.

### RECOMMENDATION

- The legal fiction of maintaining the licence fee system should be ended. This should be replaced by regulations stating that it is the obligation of the State budget to fund PSM, best by allocating a fixed percentage of GDP for the purpose, with the possibility of providing extra funding if the cost of delivering the remit, as defined in the Public Service Guidelines, is higher than the allocated sum;
- There is no real need for the Broadcast Support and Asset Management Fund. The law should be changed. Assets of the broadcasters should be allocated to the broadcasters themselves or to the Public Broadcasting Foundation, so that the broadcasters can manage their assets and finances independently. The Media Council and the Public Service Foundation should receive budgetary allocations directly from the State budget;
- A separate fund may be created for the sole purpose of providing subsidies for the production and transmission of public service content by independent producers and commercial broadcasters. The monies used for that purpose should not be taken out of the funds earmarked for the financing of the (previously underfunded) PSM corporations;
- When the Public Service Guidelines are prepared, the cost of meeting the requirements they lay down should be calculated and that amount of money should be made available to the PSM organizations for that purpose. The law should provide for the preparation of an expenditure budget, based on cost of fulfilling the public service programming remit, as developed in the Public

Service Guidelines;

- The law should put the State under an obligation actually to allocate funds necessary to cover the approved budget.

## I. SCOPE OF REGULATION

### I.1. Material Scope

The material scope of Bill T/363 (and indeed the whole package) is defined in Article 2: “the act’s effect extends to all kind of media content, for example printed press, traditional radio and television services, non-linear media services and internet content that qualifies as media content”.

At first glance, this represents an interesting response to the two processes that are reshaping the media and mass communication generally: (i) the deinstitutionalization of mass communication (anyone, not only professional media organizations, can be a mass communicator) and (ii) the digitalization and hence “dematerialization” of media content (i.e. its separation from its usual physical form: roll of film, book, tape, etc.), thanks to which it can be delivered via different platforms.

However, this has also other implications.

#### Definition of “media content”

This approach seems to take its cue from the extension of scope of the Television Without Frontiers Directive in the AVMSD, but Bill T/363 adopts a much broader approach. “Media content” is defined in article 1 (5) as *“Content provided by any media service or in printed or Internet-based press publications, whose content is the editorial responsibility of some person, and whose primary objective is the delivery of content consisting of text and images to the public for the purpose of providing information, entertainment or education through electronic telecommunication networks or in a press publication”*. “Content provider” is defined as *“the provider of media services or other media content”*.

Given the volatility and the fast pace of change in the new technologies and new communication services, and given that all “media content” (including, as we will see, blogs, private Internet sites, etc.) is to be subject to regulation within the same regulatory regime, the question immediately becomes whether this approach is well-founded, offers legal certainty and creates an appropriate regulatory framework.

Amendment 17 proposes a shorter definition of “media content” (*“Media content: Content provided by any media service or in printed or Internet-based press publications”*).

This has the advantage of narrowing the scope of the term and leaving out many types of private Internet content providers. On the other hand, it extends the range of media content (by leaving out the qualification, also included in AVMSD, that such content is distributed *“for the purpose of providing information, entertainment or education”*). **So, the amendment goes in two contradictory directions: recognizing as media content, in the traditional way, only that delivered by media outlets, while at the same time removing any constraints what types of content, serving what purpose, can be classified as media content.**

It also proposes a definition of a “press publication” (*“Press publication: the individual issues of daily papers and other periodicals, Internet newspapers and news portals whose content is the editorial responsibility of some person, and whose primary objective is the delivery of content consisting of text and images to the public for the purpose of providing information, entertainment or education in a printed format or through electronic telecommunication networks”*). These proposals should, to some extent, be welcome, but they still do not go far enough to eliminate problems and major objections to the approach taken in Bill T/363.

In the definition of material scope (Article 2: *“This Act is applicable to all media content, for instance the printed press, traditional radio and television broadcasting as well as on-demand media services and Internet content that constitutes media content”*), the words “for instance” indicate that this is not an exhaustive list of media outlets and formats which are to be covered by the package. It is indeed impossible to develop such an exhaustive list. **Thus, the material scope becomes undefined and open-ended, leaving almost full discretion to the regulator to extend regulation in the future to any media formats the authority would see fit.**

**Amendment 17 represents progress in reducing the range of content services to which the Act could be applicable (*“This Act is applicable to all media content, including printed and Internet-based press publications, traditional radio and television broadcasting and on-demand media services”*), but by simply replacing “for instance” with “including” still leaves the scope undefined and open-ended for the future.**

Also the definition of “media content” itself is inadequate in distinguishing media content from other content and in providing clarity and legal certainty, for the





following reasons:

- It fails to note that only services that disseminate content regularly (always a feature of the definition of media) can be recognized as media (this element is present to some extent, but not clearly enough, in Amendment 17). As a result, the law's scope is extended also to one-off cases of distribution of content, as long as it offers information, entertainment or education. As this can be true in one way or another of most content, according to the draft practically all content is media content
- It fails to mention the editorial process (involving securing an in-house and/or external supply of content, gate-keeping and selection of content; editorial and processing of content; decisions about presentation, structuring and packaging; preparation for distribution) as a constitutive feature and criterion whether we have to do with a media outlet or not. Therefore, the law, when adopted, could well violate Article 12 of "Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market", which exempts "mere conduit" from liability for the information transmitted (see also recital 23 of AVMSD). Nor will it be in line with recital 16 of AVMSD, exempting from the concept of "audiovisual media service" services consisting of the provision or distribution of user generated audiovisual content for the purposes of sharing and exchange within communities of interest;
- It fails to mention the intention to reach, and availability to, the general public (the draft law, and Amendment 17, speak of "the public", not "the general public") as a feature of media services, justifying policy and regulatory treatment commensurate with the possible impact of a particular service (see also the next comment);
- It fails to mention influence on public opinion as a necessary and decisive criterion for recognizing a service as a media service (according to recital 12 of AVMSD, audiovisual media services are *"mass media, that is, [they] are intended for reception by, and [...] could have a clear impact on, a significant proportion of the general public"*). Precisely this feature of a content service provides the rationale and justification for regulation. In Bill T/363, this criterion is not mentioned, meaning all content will be subject to the same level of regulation, regardless of how minuscule or even non-existent its audience will be;
- The concept of "editorial responsibility" is not defined in this particular context, so it is not clear whether or not this is understood as in Art. 1(c) of the AVMSD

*“exercise of effective control both over the selection of the programmes and over their organisation ... does not necessarily imply any legal liability under national law for the content or the services provided”*). If so, then this is not satisfactory as a criterion for recognizing content as media content, since normally publishers and broadcasters are obliged to accept full responsibility and legal liability for content, usually resulting in a careful editorial process. Amendment 17 proposes a definition of “editorial responsibility in Article 1 (*“Editorial responsibility: substantial responsibility accruing in the course of the selection and compilation of media content”*)”, but this is close to the AVMSD definition and, as such, insufficient. This definition differs from the description (but not really definition) contained in Article 21 (*“Within the constraints of legislation, content providers make decisions concerning and are responsible for the publication of media content”*) which actually suggests editorial liability for contents. Until these inconsistencies are resolved, the Bill does not provide legal certainty on the question of editorial responsibility;

- While the draft law properly allows for content produced or assembled by non-professional content providers to be covered by the definition, it fails to mention that the requirement of observance of professional and ethical standards should be applied in recognizing content as media content, in distinction to gossip or rambling thoughts disseminated by a blogger.

**Definitions proposed in this draft law would in fact extend the scope of the law, and the regulatory regime it is part of, practically to all Internet content, with the exception of the most subjective or purely artistic forms of self-expression.** This goes far beyond what the international community has come to regard as an appropriate, justified and workable approach to Internet content regulation.

The international community: regulatory restraint in the face of unpredictable change

In short, Bill T/363 does what the European Union has deliberately refrained from doing with the AVMSD. It was intended at one stage to be a “content directive”, covering all audiovisual Internet content. However, as many Member States opposed this plan, its scope was limited to television and TV-like media services, regardless of the delivery platform. A great deal of care was taken in the directive precisely to define (in both a positive and negative manner) which services would be covered by the directive, and which areas of Internet content would not. As we have seen, this is not the case with Bill T/363.

The 1st Council of Europe Conference of Ministers responsible for Media and



New Communication Services, held in Reykjavik, called for “the establishment of criteria for distinguishing media or media-like services from new forms of personal communication that are not media-like mass-communication or related business activities”. The drafters of Bill T/363 may have tried to do that, but if so, they have not achieved their aim.

The OSCE Permanent Council in its Decision No. 633 “Promoting tolerance and media freedom on the Internet” decided that *“Participating States shall take action to ensure that the Internet remains an open and public form for freedom of opinion and expression”*. The CoE has only recently launched reflection on a new notion of media, its definition and the policy and regulatory framework, if any, to be applied to new media. A similar call for reflection and debate was launched by the European Parliament with respect to blogs. Originally, the MEPs wanted to take a more active stance on blogs, but refrained from doing so and in the 2008 “Resolution on concentration and pluralism in the media in the European Union” (2007/2253(INI)), called for *“an open discussion on all issues relating to the status of weblogs”*.

Some countries (like the US and Canada) refuse to regulate Internet content even when they have legal title to do so. Australia applies the broadcasting regulatory regime to the Internet, but relies on self- and co-regulation to implement it. The international community is generally wary of imposing traditional regulatory regimes on Internet content, preferring to promote self- and co-regulation. The Council of Europe Committee of Ministers in its 2003 “Declaration on freedom of communication on the Internet” called in Principle 2 on Member States to encourage self-regulation or co-regulation regarding content disseminated on the Internet (see also “Recommendation Rec (2001) 8 of the CoE Committee of Ministers on Self-Regulation Concerning Cyber Content (Self-Regulation and User Protection Against Illegal or Harmful Content on New Communications and Information Services”).

The European Parliament and Council in their 2006 “Recommendation of the European Parliament and of the Council on the Protection of Minors and Human Dignity and on the Right of Reply in Relation to the Competitiveness of the European Audiovisual and On-Line Information Services Industry”, note that *“on the whole, self-regulation of the audiovisual sector is proving an effective additional measure”*. They acknowledge that self-regulation may not be sufficient to protect minors from messages with harmful content, but call for any measures taken to offer such protection to strike a balance with the protection of individual rights and freedom of expression. These measures should involve cooperation between the regulatory, self-regulatory and co-regulatory bodies of the Member States. Significantly, it also calls for the particularities of each medium to be

taken into account in any action taken.

## CONCLUSIONS ON MATERIAL SCOPE

Bill T/363 creates a seamless content regulation regime for traditional and new Internet media content, **administered by one body and applying the same criteria to all these cases.** It does so in a way that while ostensibly covering only media services, the provisions of the law could in fact be applied practically to all Internet content. It defines the material scope of regulation in an imprecise, open-ended way, giving the National Media and Telecommunications Authority and the Media Council discretionary power to apply the regulatory regime to any future services it sees fit.

The printed press and the Internet have so far been virtually free from content regulation. **This law, if adopted in the present form, will significantly change their situation, subjecting them to a content regulation regime almost without precedent in democratic countries. This constitutes unwarranted and unjustified interference with freedom of expression and of the media, and may create conditions for suppression of this freedom.**

## RECOMMENDATIONS ON MATERIAL SCOPE

The draft law requires urgent revision:

1. The serious flaws in the definition of its scope should be removed, so that it relates (in a way that provides legal certainty) primarily to broadcasting and audiovisual media services (in line with AVMSD) and **retains only general provisions for the print media and for media services on the Internet.**
2. The concept of “media content” should be replaced with the term “media services”, meeting the criteria listed above (whether or not provided by professional communicators), to avoid “mission creep”, in that regulators could successively extend their scope of activity;
3. **A graduated regulatory system** (taking as an example the AVMSD system of introducing a clear difference between levels of regulation for linear and non-linear services) should be introduced, adjusting the degree and methods of regulation to the particularities of each type of media service.
4. Any regulatory regime with regard to the printed press and Internet-delivered media services (unless they are covered by the AVMSD) **should rely primarily the civil and penal code and additionally primarily on self-regulation and co-regulatory schemes (with regulatory intervention reserved only for cases when they cannot be fully effective) , involving the Media Council in multi-stakeholder cooperation with trade and**



**professional associations** as co-regulators, administering codes of conduct and enforcing jointly developed standards and rules.

5. It is not possible to develop “future-proof regulation” in this field. Any such attempt is bound to be ineffective and unworkable. The AVMSD is expected to have a life of 10 years, at best, with further changes needed after that. This is why **internationally accepted standards and the state of international debate on new and not fully defined media services and the policy and regulatory approach to them should be closely followed and applied**. Otherwise, the law, though seeking to cover everything, will leave many new media and services undefined and unregulated, ceding excessive powers to the Authority and Media Council to fill the gaps at their own discretion, and leaving their policies and regulatory practice open to legal challenge, as they will find no clear basis in Bill T/363 and other legislation.

## I.2. Territorial Scope

### Definition of territorial scope

The territorial scope of the draft law is defined in Article 3 in a way modelled on Article 2 of AVMSD, but extended to all “content providers”, i.e. also radio broadcasters, press publishers and Internet content providers.

The draft law adds two provisions in Article 3:

*„(5) The present Act is also applicable to content services provided in other countries if a significant part or the entire content provision service is aimed at the territory of the Hungarian Republic, provided this is rendered possible by the provisions of Directive 89/552/EEC on audiovisual media services and the practice of the European Court, and if the rule whose application is intended serves to maintain media pluralism or some other important issue in the public interest.*

*(6) The present Act is also applicable to the persons and ventures distributing media content within the territory of the Republic of Hungary, and the distribution of media content using equipment installed within the territory of the Republic of Hungary.*

Amendment 17 proposes basically the same text, but without mention of “the European Court” and replacing “media pluralism” with “diversity of media”. The reason for the first proposed change is not clear (in any case it is not immediately obvious, at least in the English translation, which European Court is meant). Also, because neither “media pluralism” nor “media diversity” are defined in the

Bill or Amendment, the significance of this proposal remains to be established. However, the issue itself is crucial in terms of media policy (see II.3 below, where Council of Europe definitions of both concepts are referred to).

The AVMSD (and indeed the European Convention on Transfrontier Television, to which Hungary is a party) contains clear provisions on jurisdiction, the place of establishment and the prevention of double jurisdiction (see Article 2, AVMSD), preventing the receiving country from imposing its legal system on the transmitting country. Therefore, para. (5) cannot be interpreted as applying to audiovisual media services.

Internet content “aimed at” Hungary

**It becomes clear, therefore, that paras. (5) and (6) are primarily intended to apply to Internet content. By virtue of para. (5), Hungarian jurisdiction would be extended to any Internet media content provider, wherever in the world he or she may be, as long as “a significant part or the entire content provision service is aimed at the territory of the Hungarian Republic”.**

**Even if practical application of para. (5) were legally permissible and possible to implement (and neither is the case), it would still be unacceptable. The grounds for interfering with freedom of expression defined in it are so vague and all-encompassing (such action is to “serve to maintain media pluralism or some other important issue in the public interest”) as to justify any action against any content provider. This fails the test of Article 10 (2) of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, which carefully defines the limited number of reasons for which such action could be taken.**

While there may be some indicators of where the intended audience of Internet content is (language, advertisements addressed to consumers in one country, etc.), it will be difficult from a legal or technical point of view to prove where the content is “aimed at”. It is difficult enough to apply this concept to transfrontier television (for which it was originally invented); the difficulties will be multiplied in the case of the Internet. This may leave any action taken on the basis of Article 3 (5) open to legal challenge. More importantly, such extension of jurisdiction to content providers in other countries as envisaged in draft Bill T/363 does not appear to be covered by international law. The 1988 “Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (88/592/EEC), relates precisely to civil and commercial matters, not to content regulation. The Cybercrime Convention in Article 22 littera d. says that “*Each Party shall*



*adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Article s 2 – 11 of this Convention, when the offence is committed [...] by one of its nationals, if the offence is punishable under criminal law where it was committed, or if the offence is committed outside the territorial jurisdiction of any State".* **It is most unlikely for any legal system in a democratic country to regard distribution of content referred to in para. (5) as a punishable offence. In any case, Bill T/363 is meant to apply this provision to all content providers, and not just to Hungarian nationals operating abroad as Internet content providers. Other countries are most unlikely to accept that Hungarian jurisdiction can extend to their citizens.**

**Any chance of using this provision to prosecute content providers operating from abroad must be close to zero, especially if they take the simplest precautions against being identified. Therefore, the real intended practical effect of this provision can only probably be the creation of legal grounds to filter or block the access of Hungarian users to unwanted Internet content provided from home or abroad, e.g. by requiring Internet service providers to do so. The draft law fails to specify whether this could happen by an administrative decision of the Authority or the Media Council, or whether a court order would be required.** In any case, such action would most likely violate Article 3 of "Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market", with its careful definition of the circumstances and criteria which must be met for such action to be taken, again under strict international supervision.

The CSCE, in its Meeting of the Conference on the Human Dimension of the CSCE in Moscow declared the public should enjoy freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts.

Such measures would also run directly counter to Principle 3 of the CoE "Declaration on freedom of communication on the Internet", stating that "*Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers. This does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries*" It would also be difficult to find justification for filtering content for reasons specified in para. (5) in "Recommendation CM/Rec(2008)6 of the CoE Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters". That

Recommendation calls on CoE member states to:

- refrain from filtering Internet content in electronic communications networks operated by public actors for reasons other than those laid down in Article 10, paragraph 2, of the European Convention on Human Rights, as interpreted by the European Court of Human Rights;
- to take such action only if the filtering concerns specific and clearly identifiable content, a competent national authority has taken a decision on its illegality and the decision can be reviewed by an independent and impartial tribunal or regulatory body, in accordance with the requirements of Article 6 of the European Convention on Human Rights;

**Bill T/363 does not provide any guarantees that these principles would be observed, leaving the matter of interfering with the flow of information and of access to it at the discretion of the regulatory bodies**

Internet content uploaded from Hungary

Article 3 para (6) would extend the scope of Bill T/363 to *“the distribution of media content using equipment installed within the territory of the Republic of Hungary”*, e.g. to a situation when a person (of any citizenship) uses a computer or similar equipment on Hungarian territory to upload content onto the Internet.

Again the question becomes of the intended practical effect of this provision. That can only be the creation of a system of **supervision/censorship to prevent “unwanted”, but only vaguely defined (which again runs directly counter to Article 10 (2) of the European Convention on Human Rights) content from being disseminated via the Internet from Hungarian territory. Enforcement of this system would require creating a widespread system of surveillance to identify and take measures against anyone regarded as responsible for such action. While this may not work in practice, it is bound to induce caution and self-restraint, or self-censorship on the part of Internet users uploading content from Hungary, thus reducing the range and volume of content unwanted by the authorities being disseminated via the Internet out of Hungary.**

## **CONCLUSIONS ON TERRITORIAL SCOPE**

In a very unusual approach, the draft law would establish world-wide territorial scope for itself, at least as far as Internet content “aimed at” Hungary, and





originating technically from Hungary, is concerned. In both cases, the objective appears to be to gain the ability to take action against providers of vaguely defined “unwanted” content. In the first case, this could involve seeking to prosecute them abroad and blocking access to such content coming in from abroad. In the second case, the intention seems to be to produce a chilling effect on users seeking to disseminate content worldwide that might turn out to be unwanted by the authorities. Under this law, Hungary would give itself powers which it cannot effectively apply, but which would require instituting a system of surveillance, supervision and possible repression that are unacceptable in a democratic country.

This proposed system represents a serious challenge to freedom of expression on the Internet and would, if adopted, be in obvious violation of international law.

This does not apply to audiovisual media services, as defined in the AVMSD, as its provisions are observed.

## **RECOMMENDATIONS ON TERRITORIAL SCOPE**

Provisions on territorial scope, especially with regard to the Internet, should be thoroughly revised in line with international law. Article 3 (5) and (6) should be deleted, as is already proposed with reference to para. (6) in Amendment 17.

## **II. FREEDOM OF EXPRESSION AND CONTENT REGULATION**

### **II.1. Freedom of (transfrontier) broadcasting**

According to Article 4 (1) of Bill T/363, *“The legal system of the Republic of Hungary respects and protects the freedom of the press and ensures its diversity. Everyone has the right to express their opinions by means of the media”*. This general principle appears to be contradicted by Article 25 of Bill T/363. It repeals Article 3 (1) of the Act on Radio and Television Broadcasting (RTBA), which says: *broadcasting can be exercised freely in the Republic of Hungary, information and opinion shall be forwarded freely through broadcasting, and domestic or foreign programmes intended for public reception shall be received freely”*.

It is rather difficult to imagine the practical effect of a legal provision that repeals the right to the free exercise of broadcasting and the right to disseminate information freely through broadcasting (and retaining only the free publishing of opinions). Even if it could be argued that the general principle is already

expressed in Article 4 (1) of Bill T/363, that could not explain the provision that repeals the right of free reception of domestic and foreign programmes intended for public reception. In doing so, Hungary denies commitments it has undertaken under the European Convention on Transfrontier Television, the AVMSD directive and a host of other international documents, all of which guarantee the free reception of transfrontier broadcasting.

## CONCLUSION ON FREEDOM OF BROADCASTING

In addition potentially to reducing the range of Hungarian content providers able to launch their activities (see below), Bill T/363 could serve the purpose of depriving Hungarian audiences of access to information available via the Internet media (see above) and from broadcast media, especially transfrontier broadcasting, though Hungary could hardly do so under the international commitments that it has undertaken.

## RECOMMENDATION ON FREEDOM OF BROADCASTING

In order to remove any doubt as to the legislator's intentions and to prevent the appearance of contradiction and conflict between different parts of the legal framework in force in Hungary, Article 25 of Bill T/363 should not annul Article 3 of RTBA.

### II.2. Registration

Article 5 of Bill T/363 says that *"The commencement of the provision of media services and the publication of media content may require registration by the authorities"*. Article 22 makes it clear that the "may" is misleading because it imposes an obligation to register: *"The content providers falling under the present Act shall register with the authority supervising the media"*.

Thus, registration becomes a key condition that must be met to begin exercising the right to free expression through the media. As this would be the duty of all content providers, this obligation could fall also on internet communicators like bloggers and providers of any media-like content.

Amendment 18 introduces a safeguard in this respect: (*"In case of media content whose registration is not stipulated by other legislation, the corresponding rules shall be stipulated by an Act of Parliament"*). In principle, this should be welcome, as it would prevent arbitrary extension of the registration system. However, it does not go far enough, as it does not challenge the very principle of the need for registration. Moreover, and most importantly, since so



far there has been no system of registration (only of notification), the intention behind this amendment is not clear.

“Registration” would replace the system of “notification” now in force in relation to the printed press and cable channels. “Notification” is a purely administrative procedure, requiring no action on the part of the authorities and allowing the content provider to begin operation immediately upon performing notification. “Registration” creates a new situation in that the putative provider must await the decision of the authorities and the decision may be negative, i.e. registration may be denied. **The procedure may thus create a legal and administrative barrier preventing a person or company from actually becoming a content provider and being able to distribute content. The authorities may also decide to cancel the registration of a content provider (such a competence is not mentioned in Bill T/363 or the Institutions Act, but equally there is no provision preventing such action), thereby forcing them to cease operation.**

International opinion is clearly opposed to the introduction of such systems – not only for new communicators, but also in some cases for traditional ones. In a “Joint Declaration” issued in December 2003, the UN, OAS and OSCE special mandates on freedom of expression and media freedom stated: *„Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical”.*

Article 19 has called for the abolition of a registration system, introduced in Kazakhstan’s Mass Media Law, arguing that **such regimes are nonexistent in democratic countries.**

In its Declaration on the Freedom of communication on the Internet, the CoE Committee of Ministers stated that *“the active participation of the public, for example by setting up and running individual websites, should not be subject to any licensing or other requirements having a similar effect”.*

Let us also mention that the creation of a system of enforcing this provision, and thus identifying and sanctioning content providers (especially on the Internet and particularly those operating in foreign countries and aiming their content at Hungary) who operate without registering, would require the establishment of an extensive monitoring and surveillance system. It could hardly be effective, anyway, making these provisions unenforceable to a large extent.

## CONCLUSION ON REGISTRATION

The registration system would create a legal, administrative and potentially also a political barrier to the entry of new content providers into the media landscape, or to the extension of activities by existing providers. It could also be used to silence existing media outlets. While licensing of terrestrial broadcasters must still be maintained, the introduction of the system of registration and its extension to Internet communicators is unacceptable and would place Hungary alongside authoritarian countries seeking to control all forms of social communication.

## RECOMMENDATION ON REGISTRATION

Article 5 and Article 22 Bill T/363 should be deleted, as already proposed with regard to Article 22 by Amendment 18. The system of notification could be retained under four conditions in relation to the printed press, online journals, television and radio channels, i.e. provided that the content providers may launch operation immediately after notification; the law clearly specified what information must be filed with the registering authorities and any action preventing a content provider from continuing operation requires a court order.

### II.3. Prevention of information monopolies

Alongside the question of registration, freedom of expression in Hungary will also be affected by the amendment of the Hungarian Constitution in T/359, removing from it part of Article 61 (4) of the Constitution, which listed a potential law about prevention of information monopolies as one of those requiring a two-thirds majority of Members of Parliament.

If a media market is highly concentrated and controlled by a monopolist, or – more likely – an oligopoly of media operators, then obviously putative new media outlets will find it more difficult to enter the market and provide information and other content. This can deprive many new voices of an opportunity to be heard.

True, the protection of the “diversity of the press” was added to Article 61 (2) of the Constitution. Also, the amended RTBA prescribes the following task for the Media Council: *“[it] protects and maintains freedom of speech through dismantling information monopolies, preventing the formation of new ones and promoting the market entry and the independence of broadcasters. For that purpose, it supervises the media market and adjoining markets, analyses existing competition in the markets concerned and its efficiency, identifies the players in the individual markets concerned and makes the official anti-monopoly decisions stipulated in the Act”*. However, it is not sufficiently clear whether this applies to



all media markets, or to broadcasting alone.

**The Constitutional Court (CC Decision no. 1/2007. (I. 18.) AB) has stated: “2. The prevention of creation of information monopolies is a constitutional aim. [Constitution Article 61, paragraph (4)] Following the rapid development of broadcasting technology, ‘information monopolies’ mean first of all danger of creation of ‘opinion-monopolies’. Hence the Constitutional Court accepts the maintenance of the opinion-pluralism as a legitimate aim”.**

**The prevention of information monopolies is no longer a constitutional aim now. It has been replaced by “protection of the diversity of the press” which is a much softer and less well defined objective. This deprives the Media Council of much-needed support in pursuing this goal which will provoke strong opposition from media operators determined to defend their position and capable of mounting an effective campaign against any such plans. In this sense, efforts to curb media concentration will be much weakened..**

The necessity of anti-monopoly rules in the media field is stressed by the UN-OSCE-OAS-ACHPR “Joint Declaration on Diversity in Broadcasting” (2007) as a means to diversity.

“Recommendation Rec(2007)2 of the CoE Committee of Ministers on media pluralism and diversity of media content” explains the difference between promotion of “structural pluralism” of the media, and content diversity. In pursuing the first goal, *“Member states should seek to ensure that a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public, taking into account the characteristics of the media market, notably the specific commercial and competition aspects. Member states should [also] consider the adoption of rules aimed at limiting the influence which a single person, company or group may have in one or more media sectors as well as ensuring a sufficient number of diverse media outlets”.*

As for “pluralism of information and diversity of media content”, the Recommendation calls for an “active policy” in order to ensure that *“a sufficient variety of information, opinions and programmes is disseminated by the media and is available to the public”.* *The media should be encouraged to “supply the public with a diversity of media content capable of promoting a critical debate and a wider democratic participation of persons belonging to all communities and generations”.* All this calls for active and sustained media policy measures.

## CONCLUSION ON PREVENTION OF INFORMATION MONOPOLIES

The constitutional aim of preventing information monopolies has not been replaced by equally effective and forceful guarantees that this goal will be pursued actively and with determination, with full support from the State.

## RECOMMENDATION ON PREVENTION OF INFORMATION MONOPOLIES

The part of Article 61 (4) of the Constitution, listing a potential law about prevention of information monopolies among those requiring a two-thirds majority of Members of Parliament should be reinstated.

### II.4. Right to information, the obligation to inform

“Appropriate information in relation to public affairs”

According to the newly amended paragraph (3) of Article 61 of the Hungarian Constitution, *“in the interest of establishing a democratic climate of opinion, everyone has the right to appropriate information in relation to public affairs”*.

The wording of this paragraph is highly ambiguous.

In its 2004 “Declaration on freedom of political debate in the media”, the CoE Committee of Ministers reaffirmed *“the pre-eminent importance of freedom of expression and information, in particular through free and independent media, for guaranteeing the right of the public to be informed on matters of public concern and to exercise public scrutiny over public and political affairs, as well as for ensuring accountability and transparency of political bodies and public authorities, which are necessary in a democratic society”*. The “Declaration” further states that *“Pluralist democracy and freedom of political debate require that the public is informed about matters of public concern, which includes the right of the media to disseminate negative information and critical opinions concerning political figures and public officials, as well as the right of the public to receive them”*. It proclaims the freedom to criticise the state or public institutions; the freedom of public debate and scrutiny over political figures and public officials; finally freedom of satire.

Other CoE documents formulate standards relating to access to information held by public authorities; access to official documents, media coverage of elections, etc. Similar standards have been defined by other international bodies.

Article 9 of Bill T/363 puts central government and municipal agencies,



institutions, officials, persons acting on behalf of authorities or performing public duties under an obligation to assist the performance of the information provision tasks of content providers. Amendment 20 takes this further by clarifying that the “assistance” should take the form of provision of information and data within a reasonable deadline. **However, the Constitution leaves them the freedom to decide what the “appropriate” information is that content providers should gain access to.**

**It is presumably public authorities and administration that will decide what is “appropriate” for the public to know about their own activities. It also presumably the regulatory authorities that will decide what is the “appropriate” information about public affairs for content providers to carry.**

**Observance of democratic and international standards could thus be undermined by a way of interpreting the word “appropriate” that would prevent information inconvenient to, or critical of, the authorities or political figures from reaching the public.**

## **CONCLUSION ON “APPROPRIATE INFORMATION”**

Depending on how “appropriate information” is interpreted, the public may either be informed fully and objectively, or selectively and tendentiously. In the latter case, both public authorities and administration, and the regulatory authorities would fulfil quasi-censorship functions as gate-keepers preventing some information from reaching the public. The very possibility that the Constitution could allow such a situation to arise without violating its letter and spirit is completely unacceptable.

## **RECOMMENDATION ON “APPROPRIATE INFORMATION”**

The word “appropriate” should be deleted from Article 61 (3) of the Constitution as soon as possible. In the meantime, Bill T/363 should be supplemented to provide an interpretation of the term “appropriate information” preventing its use for any other purpose than to guarantee for the public full, accurate and objective information in relation to public affairs.

### Information obligations of content providers

Under Article 13 (1) of Bill T/363, *“It is the task of content providers to provide authentic, fast and accurate information about local, national and European public affairs and about events that are significant for the citizens of the Republic of Hungary and the members of the Hungarian nation”.*

This principle is developed in Article 13 (2), which states that *“Linear and on-demand media services shall provide diverse, timely, objective and balanced information about local, national and European affairs in the public interest and events and debated issues that are significant for the citizens of the Republic of Hungary and the members of the Hungarian nation. Failure to provide information about important events of public life may represent an infringement of the obligation to provide information”*.

The principle that media audiences and users have a right to information and should have access to such information in the media as defined in the two paragraphs is of course laudable. It should be one of the tasks of the Media Council to make sure that in the totality of content available to the public there should be sources of such information.

Amendment 22 would reformulate this provision in the following way: *“It is the task of the totality of content providers to provide authentic, fast and accurate information about local, national and European public affairs and about events that are significant for the citizens of the Republic of Hungary and the members of the Hungarian nation”*. The principle is correct, but as a legal provision this would have no effect, as this is not an actionable requirement: it imposes no specific obligation on anybody and creates no mechanism of accountability for its observance. This is why it would be preferable to turn this in a task of the Media Council which has the necessary instruments of promoting this goal in ways adjusted to the features of particular media outlets.

**The imposition of such an obligation on all content providers (possibly including, depending on how the issue of material scope is resolved, bloggers and other unprofessional communicators on the Internet and elsewhere who could be classified as providers of media content) amounts to ex ante content regulation, and as such is unacceptable in principle because it is actually the opposite of freedom of expression and freedom of the media. Such programme requirements could only be justified in the case of public service broadcasters.**

In the case of *Refah Partisi (The Welfare Party) and Others v. Turkey* (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98), the European Court of Human Rights said: *“the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention.”* This principle was amplified in the Court’s ruling in the case of *Özgür Gündem v. Turkey* (Application no. 23144/93). The Court recalled “the key importance of freedom





of expression as one of the preconditions for a functioning democracy”. And it added: *“Genuine, effective exercise of this freedom does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals”* (emphases added).

Under Article 13 (1) and (2) of Bill T/363, **the Hungarian State would not be protecting but violating the freedom of expression of content providers by dictating to them what content they should provide** – all the more so that failure to implement this obligation could bring down sanctions on content providers, as is clear from Article 23 of Bill T/363, which says that *“In cases of infringements of the obligations stipulated in Articles 13-20 of the present Act, the system of sanctions and procedures stipulated in the Act on the regulation of the media may be applied as applicable. The official proceedings may be initiated by anyone”*.

This is one of the traps mentioned above. These provisions would give the regulatory bodies discretionary, indeed arbitrary, powers to sanction content providers, based on their own assessment of whether or not the information distributed by a content provider is “authentic”, “fast”, “accurate”, “diverse”, “timely”, “objective” and “balanced”. They could also form their own judgment as to which events are, and which are not, “significant” or “important”. All these are imprecise, qualitative criteria which are open to widely differing interpretations.

**Regulatory authorities would thus have a free hand in invoking their powers to sanction content providers (but, under Article 23 (2) – also content distributors, which means that contrary to established principles they would be covered by media law) practically at will. Uncertainty as to what regulatory treatment to expect and what editorial content could be found objectionable by the regulator could create an atmosphere of fear among content providers, encourage self-censorship and have a serious chilling effect on the media.**

Under Amendment 22, the last sentence in Article 13 (2) (*Failure to provide information about important events of public life may represent an infringement of the obligation to provide information*) would be deleted. As a symbolic gesture, this would be welcome, but its practical effect could be nil, if nothing is done about Article 23 of Bill T/363 (cited above).

**In addition to being unacceptable in principle, these provisions are also impracticable and unenforceable, and could actually leave the Hungarian State open to legal challenge and claims for material damages:**

- adoption of these provisions would require regulatory authorities unilaterally to change programme requirements contained in licenses to broadcast, potentially imposing on many broadcasters expensive obligations that could undermine their business models. This is true especially of thematic or formatted radio and television channels that may now carry no information at all, and would need to develop news-gathering capabilities and news departments and leave aside broadcasting time for news programmes. This unilateral action would mean that broadcasters would be deprived of rights acquired under valid licenses and would have to meet onerous and expensive new tasks. **This could be grounds for legal action against the State.**
- In the case of unlicensed content providers (the printed press and Internet content providers), the need to impose and enforce such an obligation would require the creation of a legal and administrative system enabling such action and then a system of monitoring and supervision. Especially in the case of Internet content providers, including foreign ones aiming their content at Hungary, this would be expensive and could hardly be successful. **And in any case would go beyond anything acceptable in a democratic media system;**
- it is impossible to require nation-wide and satellite channels to carry sufficient information about local events, and to require regional and local media to provide sufficient information about “country-wide, national, European events”.

## CONCLUSION ON INFORMATION OBLIGATIONS

Obligations imposed on content providers under Article 13 (1) and (2) of Bill T/363 represent ex ante content regulation and are therefore unacceptable as violating, and not promoting freedom of expression. Given that the obligation is impossible to implement for most content providers, as well as the wholly disproportionate penalty of possibly withdrawing the consent to provide information that can be imposed by the regulatory authorities, this system cannot be described otherwise than a “sword of Damocles” hanging over every content provider and capable of falling at any moment, depriving the content provider of the right to continue operation.

## RECOMMENDATION ON INFORMATION OBLIGATIONS

Articles 13 (1) and (2) should be deleted as a violation of media freedom and to free content providers from an obligation most of them cannot meet. Accordingly, mention of Article 13 should be deleted from Article 23 of Bill T/363. The proposal in Amendment 17 that Article 23 (2) should be deleted deserves support and should be implemented. The general principle expressed in Article



10 of Bill T/363 is sufficient for the purpose of enshrining the right of the public to such information. The Media Council could be given the task, as it implements its media and licensing policy, to ensure that the type of information referred to in Article 13 (1) and (2) is easily available to the general public from the totality of content at the disposal of the public.

**An additional issue is that while Article 23 mentions *the system of sanctions and procedures stipulated in the Act on the regulation of the media*, in fact that part of the Bill is missing. Parliament is being asked to adopt a law which specifies obligations binding on content providers, but does not specify what penalties they would incur in case of failure to meet them. This is one more reason not to subject this Bill to parliamentary procedure before the missing part has been provided, while most of the Bill is thoroughly reviewed and revised.**

#### Right of Reply

Another new feature of content regulation that imposes excessive obligations on content providers is represented by Article 12 (1) of Bill T/363 which extends the right of rectification into a full “right of reply”: *“If in media content, false representations are made or disseminated about a person, or if facts associated with a person are presented in a false light, the person concerned may demand the publication of a reply that indicates the falsehoods and the unfounded statements in the original communication as well as those facts that are presented in a false light along with the actual facts of the matter”*. Article 12 (2) applies this right of reply also to any media content that infringes on somebody’s honour or human dignity. By the same token, this regulation would be removed from the Civil Code to media legislation.

**This means that the right of reply is extended from correcting potentially false statements of fact to responding to expressions of opinion – also on blogs and other Internet content – within considerably shorter deadlines than now.**

For this reason, most international documents recognize only a right to rectification. The right of reply set out in Article 23 of AVMSD applies only to assertion of incorrect facts, and not opinions. The CoE “Recommendation Rec(2004)161 on the right of reply in the new media environment” states that *“Any natural or legal person, irrespective of nationality or residence, should be given a right of reply or an equivalent remedy offering a possibility to react to any information in the media presenting inaccurate facts about him or her and which affect his/her personal right”*. The Recommendation allows the medium operator

to refuse to publish a reply for a number of reasons, including “if the reply is not limited to a correction of the facts challenged”.

“Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry” accepts the exercise – also through co-regulatory or self-regulatory measures - of the right of reply (*“by any natural or legal person, regardless of nationality, whose legitimate interests, in particular, but not limited to, reputation and good name, have been affected by an assertion of facts in a publication or transmission”*) in such online media as on-line such as newspapers, periodicals, radio, television and Internet-based news services, and taking into account the particularities of each medium.

### **CONCLUSION ON THE RIGHT OF REPLY**

This new approach to the right of reply can be recognized as reducing the scope of editorial freedom by obliging content providers to publish a potentially unlimited number of replies to statements of opinion. This could overload publications and media with such content, limiting the space for other editorial content. As such, it constitutes a case of interference with media freedom. The extended right of reply to statements of fact and opinions is usually introduced in countries where political figures and public officials refuse to recognize the principle from the CoE “Declaration on freedom of political communication in the media” that they are *“subject to close public scrutiny and potentially robust and strong public criticism through the media over the way in which they have carried out or carry out their functions”*.

### **RECOMMENDATION ON THE RIGHT OF REPLY**

Article 12 (1) and (2) of Bill T/363 should be wholly revised in conformity with CoE and EU standard-setting documents on the right of reply, primarily by reducing the scope of the right to that of rectification. As concerns para. 2, this – as envisaged in Amendment 21 – should mean the deletion of this text.

#### Hate speech

Article 17 of Bill T/363 states that *“media content should not be capable of inciting hatred against any persons, nations, communities, national, ethnic, linguistic or other minorities, or any majority, or any church or religious group; or insulting any community, whether openly or implicitly”*.



At present, the printed and online press is subject only to the general rules of the Criminal Code: (§ 269). As interpreted by Constitutional Court, this section should apply only in cases when the imminent danger of violating individual rights is present as a direct result of the inciting words. Rules of the Civil Code allow only individual complaints for persons infringed individually in their personal rights.

According to the OSCE Permanent Council Decision No. 633 on “Promoting tolerance and media freedom on the Internet”, OSCE would issue early warning when laws or other measures prohibiting speech motivated by racist, xenophobic, anti-Semitic or other related bias are enforced in a discriminatory or selective manner for political purposes. As internet content monitoring is not technically possible, **any strict content rules** – including those on hate speech – **can be enforced only in a discriminatory manner.**

Under the European Convention on Human Rights, a key criterion of whether a legal provision or an action does or does not violate freedom of expression is whether it is necessary in a democratic society. In light of this, it is doubtful whether protecting a church itself, or a majority against incitement to hatred are legitimate aims in a democratic society. There is no precedent of such in the practice of the European Court of Human Rights. On the contrary: in the case of *Giniewski v. France* the Court found that the sanctions imposed on a journalist who criticised the Papal encyclical „Splendor of the Truth” dissuaded the press from taking part in the discussion of matters of legitimate public interest, therefore constituted a violation of Article 10.

The specific protection of a church at the expense of restricting free speech is not necessary in a democratic society. The same is true of protecting “the majority”, as such a provision may be applied in a spirit of nationalism. Action under these provisions would not be proportionate to the benefits of the provision, because it would restrict or prevent public debate on legitimate topics.

## **CONCLUSION ON HATE SPEECH**

The new rule would introduce a restriction stricter than any other in the current legal system. It would add churches, other nations and “any community” to the scope of protected subjects and extend the obligation to printed press and online content. Even unintentional insult or incitement to hatred would be sanctioned: not only media content that is *directed to insult or exclusion, etc.* but also one which is *capable of insulting, excluding, etc.* is prohibited.

## RECOMMENDATION ON HATE SPEECH

General rules on insult and inciting hatred apply to all media, including internet-delivered media, but those should be applied by courts. The role of the Media Council should be limited to the broadcast media.

The provision should be retained in its present wording in the Criminal Code, as no specific restrictions, administered by the Authority, are needed or justified in the case of the printed press and online media. If Article 3 (3) of the Hungarian RTBA is retained, it should be revised to avoid an over-extensive definition of “hate speech” contained in it, leaving too much room for discretionary interpretation of the term. It should follow the Council of Europe “Recommendation No. R (97) 20 On ‘Hate Speech’”, which defines the term as follow: *“all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”*.

### III. THE NATIONAL MEDIA AND TELECOMMUNICATIONS AUTHORITY

#### III.1. Converged Regulator or a Federation of Officials?

The Institutions Act (former Bill T/360) brings the former telecommunications and broadcasting regulatory authorities under one roof and gives them a joint head and office.

That required the resolution of a number of sensitive issues of a political and structural nature. We will examine how that was dealt with below. We begin with some comments on whether the organizational and substantive design of the Authority fulfills the promise of the modernization of the regulatory system to make it capable of discharging its tasks in the convergent digital media landscape.

**Dismantling the two hitherto existing regulatory authorities and creating a new, purpose-built, convergent one would have been a much better way of achieving this aim, enabling the new body to develop policy and regulation in a comprehensive manner. Instead, a fairly mechanical merger was conducted, potentially retaining the separate mindsets and legal and institutional cultures of the two bodies within one organizational framework, not to mention the fact that it is also a marriage of two different political logics: government oversight over the telecom part and**



**parliamentary oversight over the media part within one and the same organization.** Unless a special effort is made, the much-needed fusion of telecom and media perspectives, facilitating a convergent approach to the two areas, will be very difficult to achieve.

According to the amended Act no. C of 2003 on electronic communications (ECA), the Authority has the following units with their “independent scopes of authority”: the Chairperson, , the Media Council (described as an “independent legal entity”), the Office of the National Media and Telecommunications Authority and the Government Frequency Management Authority. If each of those bodies does indeed have an “independent scope of authority”, then **the Authority is more like a federation of different offices than a convergent or even integrated regulator.**

The decision to create the Media Council as a collective, parliament-appointed body responsible for content regulation was probably motivated by concerns that a situation in which the President of the Authority would single-handedly regulate both telecom and media markets would give one person dictatorial powers over the entire communications scene of huge importance from a democratic, cultural and economic point of view. **Nevertheless, the detailed institutional and organizational solutions adopted in the Institutions Act create just such a situation: the President, appointed by the Prime Minister, and chairing also the Media Council, together with the built-in majority of Council members appointed by the governing party or coalition (see below), will enjoy just such dictatorial powers (see below).**

## **CONCLUSION ON THE STATUS OF THE AUTHORITY**

The institutional design of the Authority will not turn it into a converged regulator and is unlikely to ensure its smooth and effective functioning. It consists of too many bodies that are, at least on paper, supposed to be independent of one another and operate at a distance from one another, linked together only by virtue of having the same person, President of the Authority, in charge. It will probably soon be found that much of the Authority’s time and effort will be spent on ensuring coordination and cooperation, and eliminating potential or real conflicts among its disparate parts.

## **CONSIDERATIONS ON THE STATUS OF THE AUTHORITY**

It will not be possible to find a solution to this situation without structural change within the Authority. At first glance, three ideas could theoretically be considered. The first two of these are stopgap solutions:

- The Authority and the Media Council have different chairpersons, with the MC chairperson elected by the members from among themselves. The law creates mechanisms of consultation and coordination between the heads of the two bodies and a mechanism for resolution of conflicts;
- The Authority's President has two deputies: one responsible for the telecom side, the other (who is also the chairperson of the Media Council, elected by the MC members from among themselves) responsible for the media side. The Authority's President cannot dismiss the MC chairperson or overrule the collective decisions of the Council;
- The Authority's structure and organization are completely reformed to make it a truly convergent regulatory authority. In that case, the example of the Italian 9-member *Autorità per le Garanzie nelle Comunicazioni* (AGCOM) could be considered. AGCOM comprises the following organs: the president, the commission for infrastructures and networks, the commission for services and products and the Council. Each commission is a collective body made up of the president and four commissioners. The Council comprises the president and all the commissioners.

### III.2. The President of the Authority, the Chairperson of the Media Council

#### Method of Appointment

According to Article 14(2) of ECA, the President is appointed by the Prime Minister for a period of 9 years. The Authority is *"a central government agency"* and, according to Article 9(1) of ECA *"contributes to the execution of the Government's policy, as stipulated by legislation, in the area of frequency management and telecommunications"*. In line with Article 9 (6) of the same law, the Authority is supposed to *"perform its tasks and exercise its scope of authority independently, in compliance with legislation"*, though it is hard to see how the two principles can go together. **The President may not, according to the law, be given instructions in relation to his/her actions and decisions associated with his/her office, but if it is the Authority's function to execute government policy, then such policies do become a source of instructions for the President.**

**On the other hand, the President appears to enjoy a relatively strong position in that reasons for possible dismissal by the Prime Minister are primarily formal and leave little room for arbitrary decisions in this matter.**

The President of the Authority is also the sole candidate for the position of the





Chairperson of the Media Council, to be appointed by Parliament by a two-thirds majority – also for a 9-year term of office, with no limit on the terms of office he or she can serve in either position.

*Under Article 34 (4) of RTBA, “If Parliament fails to elect the Chairperson of the Authority to be the chairperson of the Media Council, the Chairperson of the Authority shall still call the sessions of the Media Council and shall participate in those meetings with consultation and chairing rights, but he/she shall not participate in decision-making. The right of the Chairperson of the Authority to call and chair sessions shall commence upon being appointed by the prime minister and it shall remain in effect until the Chairperson is elected the fully authorised chairperson of the Media Council”.*

## **CONCLUSION ON MANNER OF APPOINTMENT**

Direct appointment by the Prime Minister is not unusual in the case of heads of telecom regulators. **On the other hand, the manner of appointment of the Media Council Chairperson amounts to nothing less than government capture of Parliament.** Parliament is left no choice but to vote for the Prime Minister’s candidate. Moreover, should it fail to elect that person, its decision will be disregarded in the sense that the President would still chair meetings of the Media Council (with a voice, but not a vote) and the only option left to Parliament would be eventually to elect that same person to this position – or leave the position unfilled, thus considerably weakening the MC. This is very likely if the governing party/coalition does not have a two-thirds majority in Parliament. **Then, the solution designed to promote the development of consensus on the chairmanship of the MC could easily turn into an opportunity for obstruction by opposition parties.**

**The constitutionality of this solution could be open to question, given that under Article 19 (1) of the Constitution “*The Parliament is the supreme body of State power and popular representation in the Republic of Hungary*”. By adopting these provisions, in which the executive branch imposes its will on the legislative branch, Parliament can be said to have denied its own role of “*ensuring the constitutional order of society*”.**

## **CONSIDERATION ON THE MANNER OF APPOINTMENT**

A solution to this problem depends on the choice of solution to the general structural problem discussed above under III.1. In any case, it should sever the direct link between the government and the Authority.

### Term of office

9 years is the longest known term of office for members of equivalents of broadcasting regulatory authorities in Europe. According to a Council of Europe 2003 study “An overview of the rules governing broadcasting regulatory authorities in Europe”, terms of office range between 4 and 6 years (7 years in the case of Italy), with the possibility of re-election limited in most cases (in the relatively few countries where it is available at all) to one additional term of office.

The President and MC members can be reappointed or re-elected an unlimited number of times. **Even if they have only two consecutive terms of office, that amounts to 18 years, a whole era in terms of political, technological and market developments.**

In theory, of the President/Chairperson, and members of the MC, are competent, apolitical officials, a 9-year term of office, extending over more than two terms of Parliament, could ensure stability to the Authority and the media and telecommunications markets, regardless of the results of general elections. **In practice, the apolitical nature of the President and members of the MC will be difficult to achieve, given the manner of their appointment. Nor can competence always be guaranteed.**

## **CONCLUSION ON THE TERM OF OFFICE**

In a worst-case scenario, these provisions could turn out to be an “insurance policy” that even if a given parliamentary majority is not returned to power in the next election, “its” people will remain in the Authority and the MC. If that is indeed the case, “cohabitation” between the “old” composition of the Presidency, Media Council and governance bodies of PSM and the “new” majority in Parliament and in the government, may put them on a collision course, leading to conflicts. Should another party or coalition be returned to power with a 2/3 majority, this could lead to another change of the law to ensure conformity between the political composition of both sides.

## **RECOMMENDATION ON THE TERM OF OFFICE**

The following changes should be adopted:

- The term of office should be reduced to 6 years at most;
- There should be no possibility of re-election after having served a full term;
- Membership of the MC should be staggered.



### The powers of the Authority's President and of the Media Council

The President, appointed by the Prime Minister, has very extensive powers with regard to telecommunications and media, including public service media:

- Regulates telecommunications almost single-handedly;
- Chairs and leads the work of the Media Council (in which he/she has a stronger position than the chairman of the ORTT, due to a change of rules, the reduced number of members and an in-built majority of members representing the governing parties at the time of appointment) which is responsible for the licensing of commercial broadcasters and for regulation, supervision and oversight of all broadcasters, as well as all media content providers;
- Delegates (with the rest of the Council) two members of the PSM Board of Trustees; nominates two candidates for each position of chief executive officer of a public service broadcaster (and then chairs, and votes, during the meeting when the Media Council recommends those candidates to the Board of Trustees for appointment) and appoints the chairperson and 4 members of the Board of Supervision of the Broadcast Support and Asset Management Fund, managed by the Media Council, to be responsible for exercising some owner's rights and obligations associated with the assets of public service broadcasters and the national news agency, and for (co)funding public service broadcasters. The Media Council also adopts the Public Service Guidelines, providing a detailed description of the public service remit requirements, binding on PSM corporations.

### **CONCLUSION ON THE POWERS OF THE PRESIDENT OF THE AUTHORITY**

In short, **there is not an area in the telecommunications and media/content provision field where the President does not have decisive say or cannot exert very strong influence, either singlehandedly, or through voting and decision-making procedures. This simply cannot be described as being compatible with the basic principles of democracy.** Moreover, by being involved in both the choice of chief executive officers of PSM organizations, and in the management of their assets, the President and the entire Authority are given a role that goes beyond that of a regulator: **they become another governing body for public service broadcasters.**

In the European Union, regulatory bodies should be independent both of the government and of the industry they regulate. This requirement may not be met

in this case: on the one hand because of the close ties between the Authority and the Prime Minister and the ruling coalition that elected the members of the MC; on the other, because of the close involvement of the Authority in the operation of public service broadcasters. Direct involvement in the appointment of PSM CEOs and in the management of PSM assets must mean a closer link between the Authority and PSM organizations and a less than fully objective approach to PSM, whereas the regulator should treat all segments of the regulated industry equally.

## **RECOMMENDATION ON THE POWERS OF THE PRESIDENT OF THE AUTHORITY**

It is necessary to reduce the scope of those powers. The Authority and the Media Council should assume their proper role as regulatory authorities and not as another tier of PSM management. One way of achieving that is to implement ideas proposed under item III.1 above. Additionally, several steps should be taken:

- The Media Council should lose the power to delegate two members of the Board of Trustees and “suggest” who should chair it. The President should lose the power to propose candidates. The President should lose the power to propose candidates for the jobs of CEOs of public service broadcasters and the MC the competence to present them to the Board of Trustees. Of any areas of competence, this one has the capacity to politicize both the Presidency and the MC most, as it can ensure a direct link between the Prime Minister and parliamentary parties, and the leadership of public service broadcasters.
- There is no real justification for the existence of the Broadcast Support and Asset Management Fund and for the President’s role in appointing members of its Board of Supervision. Both solutions can only reduce the independence of public service broadcasters. This system should be dropped (see below).

### **III.3. The Media Council**

#### Method of appointment

The Council consists of the President of the Authority and four more members, all to be elected by Parliament by a 2/3 majority. According to Article 33 (3) of RTBA, *“Candidates for membership of the Media Council shall be nominated by unanimous vote of a mandate-proportional nominations committee consisting of one member of each parliamentary faction (hereinafter nominations committee”* (what this means is that delegates of the individual parliamentary factions have



the numbers of votes equal to the numbers of Members of Parliament in their factions).

Under Article 44 (2) of RTBA, the Media Council will have a quorum in the presence of a simple majority of the members (3 members), including the chairperson.

There do not appear to be any safeguards in the legislation against a situation in which the ruling majority does not have a 2/3 majority in Parliament and the opposition chooses to obstruct the election of the Media Council by refusing to support the candidates identified by the nominations committee. Similar situations have in the past resulted in public television and public radio being deprived of presidents for long stretches of time. It appears that in particular situations this may also be the case with the whole Media Council.

### **CONCLUSION ON THE MANNER OF MC APPOINTMENT**

In this term of Parliament, the governing party/coalition will be able to propose and adopt a composition of the Media Council that will favour the party or parties in power.

### **RECOMMENDATION THE MANNER OF MC APPOINTMENT**

The manner of appointment will be affected by selection of one of the options listed under III.1. As for MC members other than the chairperson, there are no fail-safe methods of electing only competent and apolitical experts to a body like the MC. Nevertheless, progress could be made if the identification of candidates were taken out of the hands of the politicians and Parliament could only consider candidates recommended by institutions of higher learning and appropriate professional, trade and civil society organizations.

#### Areas of competence

The MC inherits all the powers of the ORTT and gains new ones (preventing and dismantling information monopolies and “monitoring compliance with the constitutional principles concerning the freedom of the press and provides information about it to Parliament”. Should Bill T/363 be adopted, it will gain extensive new powers of regulating all print and internet media and content.

## **CONCLUSION ON AREAS OF MC COMPETENCE**

The MC represents the tendency to centralize media governance and regulation in very few hands. This is bound to have a harmful effect on the Hungarian media scene.

## **RECOMMENDATION ON AREAS OF MC COMPETENCE**

As already noted in section I.1, there should be no basic change or development of the regulatory regime vis-à-vis the press and Internet content. The MC should, however, be given clear tasks related to the development of a self- and co-regulatory system in the printed press and Internet content.

### **III.4. The Telecommunications and Media Commissioner**

The Commissioner, appointed and employed by the President of the Authority is called upon, under Article 126 or the ECA, to proceed against the actors of the media market (service providers, dealers or vendors), if their activities, services, products, measured characteristics or omissions violate the contractual or lawful rights of a user, or subscriber, or if there is a risk of such a violation. Users, subscribers, consumers' organisations may initiate procedures and file petitions, and the Commissioner may also act *ex officio* if the lawful rights of a user or subscriber are violated. The Commissioner may propose measurements to the Authority. He or she may request any data, information and explanation, but has no right to sanction.

The Commissioner is not expected to concern him/herself with media content, though the title suggests this should be within his/her purview.

## **CONCLUSION ON THE COMMISSIONER**

The Office of the Commissioner provides evidence that the Authority has achieved practically no integration between its disparate parts. It will retain the Complaint Commission, regulated in Title 11 of RTBA, and charged with acting on complaints regarding media content. It will have the Commissioner whose mandate should extend to the media, but does not. In addition, the Authority's President is authorized to conclude annual cooperation agreements on behalf of the Authority with the Consumer Protection Authority (FVF), probably in areas which are the responsibility of the Commissioner. Again, the impression is created of the existence of many different bodies with overlapping areas of responsibility, a situation conducive to conflicts and duplication of efforts.



## RECOMMENDATION ON THE COMMISSIONER

The position of the Commissioner and the Complaint Committee should be merged into a unitary division, responsible for handling all complaints and consumer protection issues. The need for, and scope of, any agreement with the FVF should be reassessed.

## IV. PUBLIC SERVICE BROADCASTING

### IV.1 Constitutional Amendment

As recently amended, Article 61 (4) states: *“In the Republic of Hungary, public service media services assist in the cultivation and enrichment of the national identity, the European identity, Hungarian and minority languages and cultures, in strengthening national coherence and in meeting the requirements of national, ethnic, family and religious communities. Public service media services shall be supervised by an independent public administration authority and owner’s body whose members shall be elected by Parliament. The achievement of the objectives of that authority shall be monitored by certain communities of citizens stipulated in legislation”*.

This amendment should be welcome in that it explicitly gives constitutional status to the existence of public service media (PSM) and ascribes a role for civil society in monitoring their performance. At the same time, it gives grounds for concern because of a much restricted definition of the PSM remit, leaving out what are some of the chief rationales for these medias’ existence.

Concerning the remit, the EU “Amsterdam Protocol on the System of Public Broadcasting in the Member States” states that *“the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism”*. For its part, the CoE “Recommendation Rec(2007)3 to member states on the remit of public service media in the information society” notes that PSM should serve as:

- a. *a reference point for all members of the public, offering universal access;*
- b. *a factor for social cohesion and integration of all individuals, groups and communities;*
- c. *a source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards;*
- d. *a forum for pluralistic public discussion and a means of promoting broader*

- democratic participation of individuals;*
- e. *an active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage.*

Comparing these three definitions of the remit, it is clear that the constitutional definition concentrates primarily on issues of identity, culture, national coherence and meeting the requirements of different communities. It leaves aside many elements of the broader European concept of the remit, including service to democracy, providing a source of impartial and independent information and comment and a forum for pluralistic public discussion and democratic participation of individuals; or contributing to audiovisual creation and production.

The European Commission's 2001 "Communication from the Commission on the application of State aid rules to public service broadcasting" (2001/C 320/04) also mentions the fact that the regulation of PSM has been based on common values, such as freedom of expression and the right of reply, pluralism, protection of copyright, promotion of cultural and linguistic diversity, protection of minors and of human dignity, consumer protection.

True, many of these elements are included in the definition of the remit in the RTBA, but **without grounding in the Constitution, these elements (e.g. referring to service to democracy, freedom of expression, impartial and independent information and comment, pluralistic public discussion, etc.) may at some time in the future be removed from the statute in a way that cannot be challenged on constitutional grounds.**

## **CONCLUSION ON THE CONSTITUTIONAL AMENDMENT**

Article 61 (4) of the Constitution assigns to PSM a role that is much more narrowly defined than is the norm in European countries, as reflected in the RTBA, and than is required by the needs of Hungarian society.

## **RECOMMENDATION ON THE CONSTITUTIONAL AMENDMENT**

In order for the Constitution to define the PSM remit properly, or at least provide constitutional support for such a definition, it should be amended by:

3. Adding in para. (4) that the full and precise definition of the remit is to be found in a relevant statute;
3. Or, by amending para. (4) to reflect the remit fully in line with European standards, as illustrated above. This would be the most complex procedure



but also the only one providing legal certainty on what the PSM remit really is.

## IV.2 The Public Service Foundation

### The Public Service Corporations

The Institutions Act has merged, at the ownership and supervisory level, Magyar Televízió Zrt, Duna Televízió Zrt., Magyar Rádió Zrt. and Magyar Távirati Iroda Zrt., owned by the Public Service Foundation. **The corporations (collectively referred to as the public service corporations) may operate, in theory, according to the general rules of the Act on Business Associations, but with significant differences. Such divergences from the general rules include the fact that a separate body acts as the general meeting of all of them or that they have a joint board of supervision.**

One of the corporations forming part of the Foundation is now Magyar Távirati Iroda, the national news agency, which had operated as a stand-alone news agency since 1950. MTI provides news not only to broadcasters but the entire range of printed and Internet-based press as well in Hungary. It is regulated by a separate statute, Act no. CXXVII of 1997 on the national news agency. Its operation has reportedly been balanced and free of party political conflicts. Previously, it was owned by Parliament, it was supervised by the Owner's Consultation Committee, a body elected by Parliament and based on the principle of party (same number of members delegated by government and opposition parties).

### **CONCLUSION ON THE COMPOSITION OF THE FOUNDATION**

Incorporation of the news agency into the Foundation can only be explained as an attempt to impose political control on it. Its credibility and impartiality may suffer, as it becomes the object of political infighting that has characterized the public service broadcasters.

### **RECOMMENDATION ON THE COMPOSITION OF THE FOUNDATION**

The national news agency should be taken out of the Foundation as soon as possible. The legal and institutional framework within which it operates should be designed to protect its independence and ability to operate impartially and professionally.

### Board of Trustees: Composition and Manner of Appointment

The Institutions Act merges the hitherto existing public service broadcasting foundation into one, exercising the founder's and shareholder's rights in respect of the public service corporations (constituting their general meeting of shareholders), to be run by the Board of Trustees. The Foundation may not determine the programming and the content of the programmes and programme items of public service media providers.

The Foundation is managed by a Board of Trustees. 6 of its 8 members are elected by Parliament by a 2/3 majority for a period of nine years (3 by the governing party/ties; 3 by the opposition). The chairperson and one other member of the Board of Trustees are delegated by the Media Council, also for a term of nine years. The legislation provides safeguards for various contingencies related to the election of the Board, but – given the 9-year term of office – not for situations of changes of government, appearance of new parliamentary parties, or the fact that a Board member may cease to represent the party that originally nominated him/her. The long term of office could theoretically constitute a guarantee of stability in PSM, regardless of the results of successive general elections. However, as the governing party may end up with a majority of Board members at the time of appointment (given that 2 Board members are appointed by the Media Council with its own built-in majority of the governing party at the time of appointment), this may lead to continuous conflicts between various factions within the Board.

Civil society representation in the previous boards of trustees of PSM organizations has been eliminated. Previously, the civil society supervision of public service media was facilitated within the boards of trustees of the three public service media foundations, through 21-23 civil society members (appointed annually by drawing lots), as against no less than 8 members of the politically-appointed Presidency of the board..

**These solutions go against Decisions 37/1992. (V. 26.) and 22/1999. (VI. 30.) of the Constitutional Court which declared that neither Parliament, nor the Government may exercise a significant influence on public service broadcasting. Decision 22/1999 added that the members elected by Parliament may not become a majority on the Board.** The decision explicitly declared that the members of the Presidency, who are elected by Parliament, shall not outnumber the non-governmental delegates, as that would be unconstitutional.

According to the CoE Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting states: *"The rules governing the*



*status of the supervisory bodies of public service broadcasting organisations, especially their membership, should be defined in a way which avoids placing the bodies at risk of political or other interference. These rules should, in particular, guarantee that the members of the supervisory bodies: are appointed in an open and pluralistic manner; represent collectively the interests of society in general”.*

According to Article 19’s Public Service Model Law, members of PSM supervisory boards should be appointed by Parliament in the following procedure:

- a. the process should be open and transparent;
- b. only candidates nominated by civil society and professional organizations should be considered for appointment;
- c. a shortlist of candidates should be published in advance and the public should be given an opportunity to make representations concerning these candidates;
- d. a candidate will be appointed only if he or she receives two-thirds of the votes cast;
- e. membership of the Board as a whole should, to the extent that this is reasonably possible, represent a broad cross-section of the society;

According to Article 19, the Board should appoint its own Chairperson and Vice-Chairperson.

## **CONCLUSION ON THE COMPOSITION AND MANNER OF APPOINTMENT**

While attempting to deal with at least some deficiencies of the old system, the new solution almost guarantees a repetition of the highly politicized, conflict-ridden situation that has existed so far. It may also give rise to new conflicts, if the composition of Parliament and the government change and the new parliamentary majority is faced with an unfriendly political majority in the Board. This may be part of the same “insurance policy” that was referred to in section III.2.

## **RECOMMENDATION ON THE COMPOSITION AND MANNER OF APPOINTMENT**

The manner of appointment of the Board should be changed, largely in line with the procedure recommended by Article 19, to create a pluralistic body that represents society as a whole, rather than some parts of the political class.

The procedure could involve the use of “nominating organizations”, on the same principle in the case of the Public Service Committee (see below), though in this case the list of organizations could be somewhat different and their role would be to propose candidates for Parliament to vote on.

In addition to Article 19 requirements, the following additional ones could be considered:

- nominees would have to demonstrate professional skills and experience;
- public hearing shall be held with the potential nominees;
- Board members should have staggered, non-renewable terms;

### Management of the Foundation

Three bodies are involved in the process of management:

- The Board of Trustees, dealing primarily with organizational and financial management;
- The Joint Board of Supervision, appointed by the Board of Trustees (the Act on Business Associations requires that every share company must have its own board of supervision; its status and tasks are unclear and the impression is created that it was written into the law to satisfy a legal requirement, without giving it a real purpose);
- The Public Service Committee, composed of 14 persons delegated directly by educational, professional and civil society institutions and organizations. The Committee supervises the performance of the public service remit of PSM corporations, as formulated in part in Public Service Guidelines (first adopted by the Media Council, but then open to annual amendments by the Public Service Committee, subject to approval by the Board of Trustees). The Guidelines are legally binding and feature the detailed public service obligations of the individual public service corporations.

It is significant that each of the three bodies performs (if at all) primarily supervisory functions and – with the exception of amending the Public Service Guidelines – provide no strategic or operational leadership in the public service media sector. Their role is largely reactive and bureaucratic.

The role of the Public Service Committee should be crucial in terms of programming, but the legal provisions on its tasks and status are vague and its actual impact on the performance of the remit appears limited, in fact doubtful.

Article 62 of the RTBA states that the Committee *“monitors compliance with the requirements applicable to public services continuously and supervises the*



*compliance of Magyar Rádió Zrt., Magyar Televízió Zrt., Duna Televízió Zrt. and Magyar Távirati Iroda Zrt. (hereinafter the public service corporations) with the provisions of the Guidelines". The law provides for no forms of contact between the Committee and the CEOs of public service corporations, or indeed between the Committee and the Board of Trustees, during which results of monitoring could be used during the year to remove any shortcomings in the performance of the remit. The Committee considers the annual reports of the CEOs of the corporations. Should it reject the report, it "may consider the submission of a proposal to have the chief executive's employment terminated to the Board of Trustees. The Public Service Committee may adopt such a resolution with a two-thirds majority ... If, despite the proposal, the Board of Trustees does not terminate the chief executive's employment, the Public Service Committee shall schedule another hearing of the chief executive for three months later". The purpose of the second hearing is not very clear, but **it is obvious that even formal rejection of a CEO's report, based on a negative evaluation of the performance of the remit, may lead to no consequences for the CEO.***

This is one of the reasons why the composition of the Board of Trustees should be depoliticized and the manner of the appointment of the CEO must be changed. **If the appointment of the CEO (originating with a proposal by the President of the Authority) is conducted along political lines, then the first response of both the President of the Authority and of the Board of Trustees to criticism of the CEO will be to rally on his/her side and to come to his/her defence, as the criticism will be interpreted as a political attack, and not a justified substantive assessment of the CEO's performance. In such circumstances, any motion for the dismissal of the CEO coming from the Public Service Committee would have little chance of being given serious consideration.**

## **CONCLUSION THE MANAGEMENT OF THE FOUNDATION**

The design of the management of the Foundation is clearly inadequate to the tasks of the leadership of a major PSM organization, making it incapable of providing leadership. The Hungarian PSM system has so far been leaderless (even the particular stations have gone without Directors General for months and years on end), and the negative results are clear for all to see.

**The system appears to be designed to provide two fig leaves:**

- **That the requirements of the Act on Business Associations have been met and the Joint Board of Supervision has been created (though its actual tasks and role are unclear);**

- **And that the constitutional requirement of monitoring “by certain communities of citizens stipulated in legislation” has been fulfilled (though potentially in an ineffective manner).**

## **RECOMMENDATION ON THE MANAGEMENT OF THE FOUNDATION**

Problems identified above could be resolved in part by:

- Extending the tasks of the Board of Trustees so that it would: consider and approve annual financial plans of the particular corporations and monitor their implementation (inter alia by considering quarterly reports of the Public Service Committee and taking action to correct shortcomings and deficiencies);
- Eliminating the Joint Board of Supervision (shifting its duties to the Board), and derogating in the RTBA from the BAA as *lex specialis* in the case of these special public service corporations;
- Instituting forms of regular contacts and cooperation between the Public Service Committee and the CEOs of the corporations on the one hand, and the Board on the other, with both sides having the duty to respond to the Committee’s suggestions and proposals;
- Making it mandatory on the Board either to dismiss the CEO whose annual report has been rejected by the Public Service Committee in a duly reasoned decision, or to explain publicly why it has not done so, and what steps are being taken to remove shortcomings identified by the Committee;
- Instituting forms of public accountability on the part of the Board of Trustees, requiring it to report to the public on its plans, including programme plans of the corporations, and to report on their implementation.

### The Chief Executive Officers of the Corporations

The CEOs of the corporations are appointed by the Public Service Board of Trustees, on a recommendation of the President of the Authority and the whole Media Council. No tender procedures are called for. The terms and conditions of the employment contracts of the chief executive officers shall be prescribed by the Media Council. Such contracts could conceivably contain provisions regarding possible dismissal of the CEO, irrespective of what any statute says on the subject. This could limit the CEO’s independence.

The chief executive officer is entitled and obliged to appoint two deputy chief executive officers. The Board of Trustees approves the conditions of the employment contracts of the deputy chief executive officers.



The CEO can be dismissed upon a motion of the Public Service Committee by simple majority of the Board of Trustees, if the public service remit is not fulfilled. His/her contractual terms are defined by the Media Authority, and the Board accepts the contract together with the person of the CEO.

Council of Europe “Recommendation No. R (96)10 on the Guarantee of the Independence of Public Service Broadcasting” provides that rules governing the status of members of boards of management or persons assuming such functions in an individual capacity should be defined in a manner which avoids placing the boards at risk of any political or other interference.

Article 19 Public Service Model Law recommends that the Managing Director of a public service broadcasting organization be appointed by a two-thirds majority of the Board, and that the Managing Director should have the right to appeal against any removal from office.

## **CONCLUSION ON THE CEOs**

**Clearly the rules introduced in Hungary may achieve the opposite effect from that proposed by the CoE Recommendation. They may encourage Parliament and government to seek to ensure that the choice of the President of the Authority, members of the Media Council and of the Board of Trustees makes it possible for them to influence the choice of the CEOs.**

This will inevitably politicize the whole process and result in the imposition of direct political control over it. This is why it is so important to prevent the creation of what may be a seamless chain of command leading from the top to the level of the CEO.

## **RECOMMENDATIONS ON THE CEOs**

The following procedures should be introduced for the appointment of the CEOs:

- The CEOs should be elected by an independent Board of Trustees, by way of an open tender, where he or she has to present his or her business plan and programming plan in a public hearing;
- Both appointment and dismissal should take place by a qualified majority;
- The contractual terms should be defined by the Board of Trustees.

### Assets and Funding of PSM Corporations

According to the Institutions Act, Parliament is to issue a resolution regulating

the part of the assets of the Public Service Foundation and public service corporations that is to be transferred to state ownership free of charge, and in whose respect the totality of owner's rights and obligations shall be exercised and discharged by the Broadcast Support and Asset Management Fund, to be managed by the Media Council. The corporations shall only be entitled to use the assets in accordance with the principles stipulated in the parliamentary resolution and with the conditions stipulated by the Media Council.

According to Article 77 (1) of the RTBA, *"The Broadcast Support and Asset Management Fund (hereinafter the Fund) is a separate asset management and financial fund whose task is to provide support to public service broadcasting, national news services, the broadcasters of public broadcasts and non-profit broadcasters, public service programmes and productions, to protect and enrich culture, to support a diversity of programmes, to manage and enrich the assets..."*.

The parliamentary resolution regulating the transfer of assets shall stipulate the guidelines concerning the utilisation and the management of the assets transferred prescribed for the Media Council. Based on those guidelines, the Media Council shall stipulate the detailed rules of the utilisation and the management of the assets transferred, including the conditions with which the individual asset items, components, assets may be used by the public service corporations. for the performance of their public service duties.

In addition to directly funding PSM corporations, the Foundation and the Media Council (*"Parliament may supplement, at the cost of the Fund, the budget of the Media Council by up to 5% and the budget of the Foundation by up to 3% of the licence fees received by the Fund under any title"*), the Fund will also allocate money for returnable or non-returnable subsidization, via open tenders, of public service programmes produced by the broadcasters in Hungary, in compliance, in particular, with the provisions governing cinema productions (with PSM organizations eligible for up to one third of the amount).

The financing of the public service media system has not been transformed substantially, the institution of the licence fee (paid from the state budget since 2002) also remains in place.

The greatest part of the financing of public service media in Hungary is actually derived from the central budget, with only a small part coming from the business revenue of individual broadcasters (including possible advertising and sponsorship revenue).

The Media Council will be free to manage the assets taken from the media





corporations, but also to re-allocate the funds designated by Parliament for individual purposes, regardless of the original budgetary intention at any time.

**The Act breaks with the previous rule that determined fixed percentages of the licence fee to be allocated to broadcasters. It determines the minimum amounts at lower levels, while allocation of the remainder is delegated to the Media Council. In the case of Magyar Televízió, the previous figure of 40% is reduced to 35%, in the case of Magyar Rádió, the percentage is removed from 28% to 23% while in the case of Duna Televízió, it is reduced from 24% to 19% – these are the minimum percentages of the licence fee that must be allocated to the broadcasters under the Act,** although they may also receive a part of the remainder. This implies that the Media Council shall be free to allocate 15% of the total amount (in 2010, this is expected to amount to HUF 3.6 billion, approximately 13 million euros) to the broadcasters, but it may also decide not to allocate that amount to any of them but to use it for some other purpose.

In Resolution No. 1 “The Future of Public Service Broadcasting”, the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994), participating states undertook *“to maintain and, where necessary, establish an appropriate and secure funding framework which guarantees public service broadcasters the means necessary to accomplish their missions”*.

Then, the CoE “Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting” laid down in its Appendix rules on the matter that include the following:

- *member states undertake to maintain and, where necessary, establish an appropriate, secure and transparent funding framework which guarantees public service broadcasting organisations the means necessary to accomplish their missions. the decision-making power of authorities external to the public service broadcasting organisation in question regarding its funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the organisation;*
- *the level of the contribution or licence fee should be fixed after consultation with the public service broadcasting organisation concerned, taking account of trends in the costs of its activities;*
- *payment of the contribution or licence fee should be made in a way which guarantees the continuity of the activities of the public service broadcasting organisation and which allows it to engage in long-term planning;*
- *where the contribution or licence fee revenue has to be shared among several public service broadcasting organisations, this should be done in a way which*

*satisfies in an equitable manner the needs of each organisation.*

## **CONCLUSION ON ASSETS AND FUNDING**

The system of asset management and funding has not been created in full. It is also difficult to assess the effects of its introduction, given that so many opportunities for discretionary decision-making have been left open. It can be said, however, that it does not meet a single of the CoE standards cited above.

The financial independence of PSM organizations is seriously undercut by the Broadcast Support and Asset Management Fund, which is totally controlled by the chairperson of the Media Council. The assets of the public service broadcasters are collected into this Fund and the conditions under which the broadcasters may use the assets are defined by the Media Council.

The whole system appears to be designed to hamper PSM corporations's finances as much as possible and to deprive them of any security in this matter.

## **RECOMMENDATION ABOUT ASSETS AND FUNDING**

- The legal fiction of maintaining the licence fee system should be ended. This should be replaced by regulations stating that it is the obligation of the State budget to fund PSM, best by allocating a fixed percentage of GDP for the purpose, with the possibility of providing extra funding if the cost of delivering the remit is higher than the allocated sum;
- There is no real need for the Broadcast Support and Asset Management Fund. The law should be changed. Assets of the broadcasters should be allocated to the broadcasters themselves or to the Public Broadcasting Foundation, so that the broadcasters can manage their assets and finances independently. The Media Council and the Public Service Foundation should receive budgetary allocations directly from the State budget;
- A separate fund may be created for the sole purpose of providing subsidies for the production and transmission of public service content by independent producers and commercial broadcasters. The monies used for that purpose should not be taken out of the funds earmarked for the financing of the (previously underfunded) PSM corporations;
- When the Public Service Guidelines are prepared, the cost of meeting the requirements they lay down should be calculated and that amount of money should be made available to the PSM organizations for that purpose. The law should provide for the preparation of an expenditure budget, based on cost of fulfilling the public service programming remit, as developed in the Public Service Guidelines;



- The law should put the State under an obligation actually to allocate funds necessary to cover the approved budget.

## **A NOTE ON THE AUTHOR**

Dr. Karol Jakubowicz worked as a journalist and executive in the Polish press, radio and television for many years. He has been Vice-President, Television, Polish Radio and Television; Chairman, Supervisory Board, Polish Television and Head of Strategic Planning and Development at Polish Television, and then Director, Strategy and Analysis Department, the National Broadcasting Council of Poland, the broadcasting regulatory authority (2004-2006). He has also taught at universities in Poland and abroad.

In 2008-2010 he was Chairman, Intergovernmental Council of the Information for All Programme, UNESCO. In 2007-2008 he was member of the Council of the Independent Media Commission of Kosovo.

He has been active in the Council of Europe, in part as former Chairman of the Committee of Experts on Media Concentrations and Pluralism (1995-1996), Vice-Chairman and Chairman of the Standing Committee on Transfrontier Television (1995-2002), and as Chairman of the Steering Committee on the Media and New Communication Services (2005-2006).

He has been involved in policy-making and regulation in the field of broadcasting in Poland and internationally, through his contribution to writing Poland's Broadcasting Act of 1992, and its subsequent revisions, and to the revision of the European Convention on Transfrontier Television in 1998, as well as of the "Television Without Frontiers" directive (in part as a member of two focus groups appointed by the European Commission).

He has been a member of the Digital Strategy Group of the European Broadcasting Union and contributed to writing its report "Media with a purpose. Public Service Broadcasting in the digital era". He helped write the report "Public Service Broadcasting in Europe" which was adopted by the Parliamentary Assembly of the Council of Europe on Jan. 27, 2004.

He wrote the background report "A new notion of media? Media and media-like content and activities on new communication services" for the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services, Reykjavik 2009. In 2010, he published „The Right to Public Expression. A Modest Proposal for an Important Human Right” on the Media Policy website of the Open Society Institute Media Program and the Open Society Institute's EU

Monitoring and Advocacy Program. .

As a Council of Europe, European Union and OSCE expert, he has taken part in many missions to advise on the development of broadcasting legislation in a number of countries and has written (sometimes with other authors) analyses of drafts or existing broadcasting laws in a number of post-Communist countries (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, Kazakhstan, Italy, Lithuania, Macedonia, Former Yugoslav Republic of, Moldova, Montenegro, Republika Srpska (Bosnia and Herzegovina), Russia, Serbia, Slovenia, Ukraine). He has also been a member of a team of experts which performed monitoring missions for the CoE Secretary General concerning compliance of CoE member States with their commitments in the area of freedom of expression and information (Georgia, Romania, Russia, Ukraine).

His scholarly and other publications have been published widely in Poland and internationally. They include the books Rude Awakening: Social And Media Change in Central and Eastern Europe. Cresskill, N.J.: Hampton Press, Inc., 2007; Public Service Broadcasting: The Beginning of the End, or a New Beginning? (2007; in Polish); Media Policy and the Electronic Media (2008; in Polish); and The EU and the Media: Between Culture and the Economy (2010; in Polish).







## **Report of the OSCE Representative on Freedom of the Media on Turkey and Internet Censorship**

*Prepared by Dr. Yaman Akdeniz, Associate Professor, Human Rights Law Research Center, Faculty of Law, Istanbul Bilgi University. (lawya@cyber-law.org)*

### **Executive Summary**

The following survey was commissioned by the office of the OSCE Representative on Freedom of the Media. It analyzes Law No. 5651, widely known as the Internet Law of Turkey which has served since 2007 as the basis of a mass blocking of websites in Turkey. The report offers recommendations on how to bring the law in line with international standards protecting freedom of expression. The aim of the survey is to provide a useful tool to the Turkish authorities in their current efforts to reform the much-debated legislation. The Turkish government enacted Law No. 5651, entitled Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication, in May 2007. The enactment of this law followed concerns about defamatory videos available on YouTube involving the founder of the Turkish Republic Mustafa Kemal Atatürk, combined with increasing concerns for the availability of child pornographic, and obscene content on the Internet, and websites which provide information about suicide, or about illegal substances deemed harmful or inappropriate for children.

Since then, up until December 2009, access to approximately 3700 websites have been blocked under Law No. 5651. This includes access to a considerable number of foreign websites- including prominent sites such as YouTube, Geocities, DailyMotion, and Google- that have been blocked in Turkey under the provisions of this law, by court orders and administrative blocking orders issued by the Telecommunications Communication Presidency (TIB). Similarly, websites in Turkish, or addressing Turkey related issues have been subjected to blocking orders since Law No. 5651 came into force. This is particularly prevalent in news sites dealing with south-eastern Turkey, such as Özgür Gündem, Keditör, and Günlük Gazetesi. However, Gabile.com and Hadigayri.com, which combine to form the largest online gay community in Turkey with approximately 225,000 users, were also blocked. Furthermore, access to popular web 2.0 based services such as Myspace.com, Last.fm, and Justin.tv have been blocked on the

basis of intellectual property infringement.

This study therefore provides a review of the implementation and application of Law No. 5651, and includes an analysis of the current legal provisions under Law No. 5651, an analysis of the Law's application by the courts and by TIB, an assessment of related Internet website blocking statistics, the identification of the legal and procedural defects of Law No. 5651, and an assessment with regards to Article 10 of the European Convention on Human Rights.

The detailed study shows that the impact of the current Turkish regime and related procedural and substantive legal deficiencies are widespread, affecting not only the freedom to speak and receive information, but also the right to receive a fair trial, so far as blocked websites are concerned.

The study further shows that lack of judicial and administrative transparency, with regard to blocking orders issued by the courts and TIB, continue to be a major problem. Furthermore, the fact that TIB has not published the blocking statistics since May 2009 is a step backwards.

As this study outlines, at least 197 court ordered blocking decisions were issued outside the scope of Article 8 of Law No. 5651. As of December 2009, the extent of this breach and blocking remains unknown, as TIB did not publish the blocking decisions beginning in May 2009.

The study argues that there could be a breach of Article 10 of ECHR if blocking measures or filtering tools are used at state level to silence politically motivated speech on the Internet, or the criteria for blocking or filtering is secret, or the decisions of the administrative bodies are not publicly made available for legal challenge. Based on such concerns, and ongoing censorship of the YouTube website since May 2008, an appeal has been lodged with the European Court of Human Rights by INETD (The Society for Internet Technology). INETD challenged the YouTube blocking order issued by the Ankara 1st Criminal Court of Peace having exhausted all the possible national legal remedies.

As will be argued in this study, blocking orders issued and enforced indefinitely on certain websites could result in "prior restraint". In this connection, it is argued that prior restraint and bans imposed on the future publication of entire newspapers, or for that matter websites such as YouTube, are incompatible with the European Convention standards.

Based on legal and procedural deficiencies related to Law No. 5651 practice, the study will conclude that the government should urgently bring Law No.





5651 in line with OSCE commitments and other international standards on freedom of expression, independence and pluralism of the media, and the free flow of information. If kept in its present form, the law should be abolished. It will be argued that the government should commission a major public inquiry to develop a new policy which is truly designed to protect children from harmful Internet content while respecting freedom of speech, and the rights of Turkish adults to access and consume any type of legal Internet content.

## **Introduction and background to Internet Censorship in Turkey**

As a right, freedom of expression is recognized and protected by the Turkish Constitution through Article 26<sup>1</sup>, and comprehensive human rights treaties to which Turkey is a party. Turkish law and court judgments are also subject to the European Convention on Human Rights and are bound by the judgments of the European Court on Human Rights. Turkey has been found in breach of Article 10 of the ECHR by the European Court of Human Rights several times.

In terms of Internet content regulation, unlike many other countries, the Turkish government adopted a hands-off approach to the regulation of the Internet until 2001. At that time there were no specific laws regulating the Internet. It was thought that the general legal system regulating speech related crimes was adequate. In May 2002, the Parliament approved the Bill Amending the Supreme Board of Radio and Television and Press Code (Law No. 4676). This Law included provisions that would subject the Internet to restrictive press legislation in Turkey. Critics maintained that the rationale behind these provisions appeared to be in an effort to silence criticism of the Members of the Turkish Parliament and to silence political speech and dissent.<sup>2</sup> However, apart from a single reported case, this particular law was never used by the prosecutors, or the courts.

Turkish government enacted Law No. 5651 entitled Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication on 4 May, 2007.<sup>3</sup> The enactment of this law followed concerns for the availability of defamatory videos involving the founder of the Turkish Republic Mustafa Kemal Atatürk through YouTube, combined with increasing concerns for the availability of child pornographic, obscene, and Satanist content on the Internet, and websites which provide information about suicide, or about illegal substances deemed harmful or inappropriate for children. The

1 According to Article 26 "everyone has the right to express and disseminate his thought and opinion by speech, in writing or in pictures or through other media, individually or collectively."

2 See further Statement by Dr. Yaman Akdeniz in relation to the Internet related provisions of the Turkish Supreme Board of Radio and Television (RTUK) Bill (No 4676), 15 May, 2002, at <[http://www.cyber-rights.org/press/tr\\_rtuk.htm](http://www.cyber-rights.org/press/tr_rtuk.htm)>.

3 Law No 5651 was published on the Turkish Official Gazette on 23.05.2007, No. 26030.

Telecommunications Communication Presidency (TIB) was chosen as the organisation responsible for executing blocking orders issued by the courts, and has been given authority to issue administrative blocking orders with regards to certain Internet content hosted in Turkey, and with regards to websites hosted abroad in terms of crimes listed in Article 8.

Since then, access to approximately 3700 websites have been blocked under Law No. 5651 by December 2009, and access to a considerable number of foreign websites including popular websites such as YouTube, Geocities, DailyMotion, Google Sites, and Farmville<sup>4</sup> have been blocked from Turkey under the provisions of this law by court orders and administrative blocking orders issued by the TIB. Similarly, websites in Turkish, or addressing Turkey related issues, especially news sites dealing with south-eastern Turkey such as Özgür Gündem, Keditör, and Günlük Gazetesi, as well as gabile.com and hadigayri.com which in combination form the largest online gay community in Turkey with approximately 225,000 users have been subjected to blocking orders since Law No. 5651 came into force. Furthermore, access to popular web 2.0 based services such as myspace.com, Last.fm, and Justin.tv have been blocked by courts and Public Prosecutors' Office with regards to intellectual property infringements subject to the Supplemental Article 4 of the Law No. 5846 on Intellectual & Artistic Works.

This report will therefore provide a review of the implementation and application of the Turkish Law No. 5651 entitled Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication.

This review will include:

- an analysis of the current legal provisions under Law No. 5651,
- an analysis of the Law's application by the courts and by the Telecommunications Communication Presidency,
- an assessment of related Internet website blocking statistics,
- the identification of the legal and procedural defects of Law No. 5651,
- and an assessment with regards to Article 10 of the European Convention on Human Rights; and other relevant international standards.
- Finally, recommendations on how to bring legislation in line with international standards will be made.

### **Websites blocking practices until the enactment of Law No. 5651**

There was no systematic legal approach to controlling the dissemination of

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<sup>4</sup> An online game developed by Zynga.com which is accessible and played through Facebook.



content deemed illegal by Turkish law until the enactment of Law No. 5651 in May 2007. Until then the courts were able to rely on any legal measure, whether criminal or civil to issue blocking orders. In terms of its Internet censorship history, websites were taken down or blocked as early as in 2000 in Turkey, and between 2000-2007 several blocking orders were issued by courts and enforced by the then dial up Internet Service Providers (ISPs). At that time, the majority of the websites ordered to be blocked were outside the Turkish jurisdiction, and in terms of content, these websites included allegations of corruption within the Turkish government and army, anti-Turkish sentiments, terrorist propaganda, defamation, and gambling. Such content triggered court actions and blocking orders that were communicated to the Turkish ISPs via the State Prosecutors Office. Currently some of these websites no longer exist, some of them are still blocked and not accessible from Turkey, and a few are no longer subject to blocking orders.

More recently, in March 2007, a video clip that included defamatory statements and images about the founder of the Turkish Republic Mustafa Kemal Atatürk and scenes disparaging the Turkish Flag was published on YouTube. This resulted in the Istanbul 1st Criminal Court of Peace<sup>5</sup> issuing an order to block access to YouTube at domain level, which led to a total access ban of the popular video-sharing website from Turkey. The video clip in question was deemed illegal under Law No. 5816 on Crimes Against Atatürk,<sup>6</sup> and Article 300 of the Turkish Criminal Code.

The availability of defamatory videos involving Atatürk through YouTube combined with increasing concern for the availability of child pornography,<sup>7</sup> as well as the availability of obscene, and Satanist content on the Internet, and websites that provide information about suicide, all of which deemed harmful to children, resulted in the development of a new law regulating Internet content by the Turkish government.

### **Development and enactment of Law 5651**

The Turkish government enacted Law No. 5651, entitled Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication, on 4 May, 2007. The law aims to combat certain online crimes and regulates procedures regarding such crimes committed on the Internet through content, hosting, and access providers. The former President

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<sup>5</sup> Decision of the Istanbul 1st Criminal Court of Peace 2007/384 Misc., dated 07 March, 2007.

<sup>6</sup> Law on the Crimes Committed Against Atatürk (Atatürk Aleyhine İlenen Suçlar Hakkında Kanun), No. 5816. Official Gazette No. 7872, 31.07.1951.

<sup>7</sup>

of Turkey, Ahmet Necdet Sezer promulgated the law on 22 May, 2007. Certain parts of the law came into force immediately on 23 May, 2007, while articles 3 and 8 came into force on 23 November, 2007.

The Prime Ministry prepared and published three related by-laws to coincide with the law coming into force. These Regulations were prepared subject to article 11(1) of Law No. 5651. Firstly, on 24 October, 2007, the government published the Regulations Governing the Access and Hosting Providers which includes the principals and procedures for granting activity certificates for such providers. An amended version of these Regulations was published on 01 March, 2008. On 01 November, 2007 the government published the Regulations Governing the Mass Use Providers including the Internet cafes. Finally, on 30 November, 2007, the government published the Regulations Governing the Internet Publications which included the detailed principals and procedural matters with regards to the application of Law No. 5651. A further set of Regulations with regards to duties and responsibilities of TIB was published in August 2009.

### **Specific Provisions of Law No. 5651**

The explanatory note of the Law referred to article 41 of the Turkish Constitution states that, “the state shall take the necessary measures and establish the necessary organisation to ensure the peace and welfare of the family, especially where the protection of the mother and children is involved”. The Parliament essentially explained that they had a duty to protect ‘our families, children, and the youth’.

In terms of its content and regulatory requirements, Article 3 introduced an **“information requirement”** which imposes a duty on content, hosting, and access providers to make available to the recipient of that service certain information through their websites. Article 3(2) provides that content, hosting, and access providers who fail to provide the required information could face an administrative fine by TIB between 2,000YTL and 10,000YTL.

**Content providers** are regulated through Article 4, which states that content providers are responsible for the content they create, and publish through their own websites. However, they are not liable for third party content that they provide linkage to. According to Article 4(2), if it can be understood from the presentation that the content provider adopts the content as its own or aims to deliberately make the content reachable, the provider can be held responsible according to the general principles.

In terms of **hosting providers' liability**, Article 5 introduced a notice-based



liability system and the provision states that there is no general obligation to monitor the information which the hosting companies store, nor do they have a general obligation to actively seek facts or circumstances indicating illegal activity. This provision is consistent with Article 15 of the EU E-Commerce Directive. However, through Article 5(2) the hosting companies are obliged to take down illegal or infringing content once served with a notice through TIB, or subject to a court order with regards to Article 8 of Law No. 5651. There are, as of May 2009, 1214 commercial hosting companies, and 505 companies which provide hosting services within their own organizations which obtained the required “activity certificate” from the Telecommunications Communication Presidency. These hosting companies may be prosecuted under Article 5(2) if they do not remove the notified content consistent with the terms of the EU E-Commerce Directive.

On the other hand, **access and Internet Service Providers** are regulated through Article 6, and as of November 2009, 109 ISPs obtained the required “activity certificate”. This provision is similar to that of hosting companies and is in line with the EU E-Commerce Directive provisions. Under Article 6(1)(a) the access providers are required to take down any illegal content published by any of their customers once made aware of the availability of the content in question through TIB, or subject to a court order. Article 6(2) provides that access providers do not need to monitor the information that goes through their networks, nor do they have a general obligation to actively seek facts or circumstances indicating illegal activity with regards to the transmitted data.

Article 7 regulates the **mass use providers**, including Internet cafes. The providers can only operate subject to being granted an official activity certificate obtained from a local authority representing the central administration. The providers are required under Article 7(2) to deploy and use filtering tools approved by the Telecommunications Communication Presidency to block access to illegal Internet content. Providers who operate without an official permission would face administrative fines between 3,000YTL and 15,000YTL. Under related Regulations, they are also required to record daily the accuracy, security, and integrity of the retained data using the software provided by TIB, and to keep this information for one year.

### **Article 8 Blocking Measures**

Article 8 includes the blocking measures of Law No. 5651. Under Article 8(1) **access to websites are subject to blocking if there is sufficient suspicion that certain crimes are being committed** on a particular website. Although a broad range of crimes to be included within the ambit of Law No. 5651 were

discussed by the Parliament, only a “limited number of crimes” are included within the scope of article 8. The eight specific crimes that are included in Article 8 are: encouragement of and incitement to suicide, sexual exploitation and abuse of children, facilitation of the use of drugs, provision of substances dangerous to health, obscenity, gambling, and crimes committed against Atatürk. Article 8 blocking provisions are also applicable with regards to football and other sports betting websites and websites that enable users to play games of chance through the Internet which are based outside the Turkish jurisdiction without having a valid permission.

Article 8 blocking measures will be critically assessed later in this study, but it should be noted that the law does not require these crimes to be committed on the websites, and a ‘sufficient suspicion’ is enough for a court or for TIB to issue a blocking order. **The Article 8 provisions do not clarify or establish what is meant by ‘sufficient suspicion’.**

### **Criminal prosecutions, and fines for ISPs**

The directors of hosting and access providers who do not comply with the blocking orders issued through a precautionary injunction by a Public Prosecutor, judge, or a court, could face criminal prosecution and could be imprisoned between 6 months to 2 years under Article 8(10). Furthermore, Article 8(11) states that access providers who do not comply with the administrative blocking orders issued by TIB could face fines between 10,000YTL (EUR 4,735) and 100,000YTL (EUR 47,350). If an access provider fails to execute the administrative blocking order within twenty-four hours of being issued an administrative fine, the Telecommunications Authority can revoke the access provider’s official activity certificate.

### **Private Law Disputes and Remedies**

Article 9 of Law No. 5651 deals with private law matters and provides measures of content removal and right to reply. Under this provision, individuals who claim their personal rights are infringed through content on the Internet may contact the content provider, or the hosting company if the content provider cannot be contacted, and ask them to remove the infringing or contested material. The individuals are also provided with a right to reply under Article 9(1), and can ask the content or hosting provider to publish their reply on the same page(s) the infringing or contested article was published, in order for it to reach the same public and with the same impact, for up to a week.

However, unlike Article 8, **the provisions of Article 9 do not provide for**



**“blocking orders” as a remedy for the individuals whose personal rights are infringed.** Therefore, the courts can only order the removal or take-down of the infringing content from a website rather than access blocking.

The content or hosting providers are required to comply with a ‘removal (take down) order’ within 48hrs of receipt of request. If the request is rejected or no compliance occurs, the individual can take his case to a local Criminal Court of Peace within 15 days and request the court to issue a take down order and enforce his right to reply as provided under Article 9(1). The Judge residing at the local Criminal Court of Peace would issue its decision without trial within 3 days. An objection can be made against the decision of the Criminal Court of Peace according to the procedure provided under the Criminal Justice Act. If the court decides in favour of the individual applicant, the content or hosting providers would be required to comply with the decision within two days of notification. No compliance could result in a criminal prosecution and the individuals who act as the content providers or individuals who run the hosting companies could face imprisonment between 6 months to 2 years. If the content provider or hosting provider is a legal person, the person acting as the publishing executive or director would be prosecuted.

This particular provision has been aptly criticised for being irrelevant.

### **The Role of the Telecommunications Communication Presidency**

Telecommunications Communication Presidency (“TIB”) was established within the Telecommunications Authority in August 2005, and became fully functional in July 2006. The main purpose of its formation was to centralize, from a single unit, the surveillance of communications and execution of interception of communications warrants subject to laws No. 2559, No. 2803, No. 2937, and No. 5271. Under Law No. 5651, the Presidency was chosen as the organisation responsible for monitoring Internet content and executing blocking orders issued by judges, courts, and public prosecutors.

The Presidency also has the authority to issue administrative blocking orders with regards to certain Internet content hosted in Turkey, and with regards to websites hosted abroad in terms of crimes listed in Article 8. The Presidency is also responsible for the co-ordination of efforts to combat crimes listed under Article 8 of Law No. 5651 in co-operation with the Ministry of Transportation, law enforcement agencies, ISPs, and related NGOs. Power to monitor Internet content and develop preventative measures with regards to Article 8 catalogue crimes has been granted to the Presidency by Law No. 5651. With regards to this issue, the Presidency has been given powers to determine the nature,

timing, and procedures concerning the content monitoring systems on the Internet, and is responsible for establishing the minimum criteria concerning the production of hardware or software for filtering that would be used by mass use providers, screening and monitoring purposes.

TIB published detailed statistics about the work of its hotline (see below) as well as the blocking decisions it enforced between May 2008 and May 2009. However, TIB recently did not publish and did not reveal the detailed official blocking statistics with regards to Law No. 5651; the last monthly statistics were made publicly available in May 2009. Since then, in November 2009, TIB published its second annual report. However, compared to its more detailed 2008 report which included the blocking statistics for 2008, **TIB did not publish information with regards to the blocking statistics and decisions in its 2009 report.** TIB has been contacted for the purposes of this study commissioned by the OSCE, and a request has been made to obtain more recent statistics. However, TIB did not provide the more recent statistics subsequent to a freedom of information request made by the author of this study.

**Therefore, the below statistical analysis with regards to the TIB hotline as well as the blocking statistics covers the period between May 2008 and May 2009.**

### **TIB Hotline**

Article 10(4)(d) of the Law No. 5651 required the Presidency to establish a hotline to report potentially illegal content and activity subject to Article 8(1). The hotline was established by the Presidency. Any allegation to the effect that the Law is violated can be brought to the attention of the hotline via e-mail, telephone or SMS address provided at the website of the hotline.

It is reported that the hotline has become popular in a very short time, and the most recent statistics released on 11 May, 2009 show that a total of 81,691 calls (the number was 25,159 on 01 October, 2008) were made to the hotline.

34,294 of these notifications were considered to be actionable under Article 8. While 31,484 were repetitive reports, or previously actioned reports, 15,913 were non-actionable reports, or content deemed not to be illegal subject to Article 8 provisions. The number of domains to contain allegedly illegal content was 21,735 as of May 2009. The majority of the 34,294 actionable reports involved obscenity with 61.2% (21,016) while 4845 (14,1%) involved sexual exploitation of children, 2972 (8,6%) involved crimes committed against Atatürk, and 2861 (8,3%) involved prostitution.

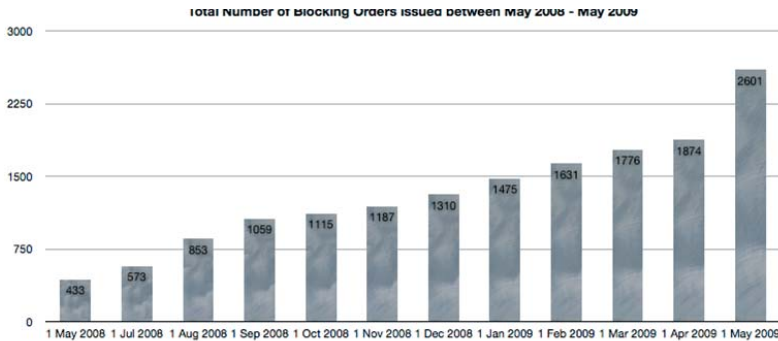




As can be seen from the above hotline statistics, there seems to be major concern in Turkey about the availability of certain types of Internet content deemed to be objectionable, or allegedly illegal.

### Statistics for blocked websites from Turkey

Since the Law No. 5651 came into force in November 2007, several websites were blocked by court orders and administrative blocking orders issued by TIB. In terms of the blocking statistics, **it was revealed by TIB that as of 11 May, 2009, 2601 websites were blocked from Turkey under the provisions of Law No. 5651.**



As can be seen above, **while a total of 433 (140 of which were issued by the courts) websites were subjected to blocking in May 2008, over 2600 websites were subject to blocking a year later, in May 2009.** Therefore, approximately 2200 websites were blocked during the 12 months (May 2008 to May 2009 period) TIB regularly published the detailed blocking statistics.

**While 475 (18%) of the 2601 websites are blocked by court orders, the majority, with 2126 websites (82%), were blocked via administrative blocking orders issued by TIB.**

In terms of the 475 court orders issued by May 2009, 121 websites were blocked because they were deemed obscene (Article 226 of the Turkish Penal Code), 54 websites were blocked because they involved sexual exploitation and abuse of children (Article 103(1) of the Turkish Penal Code), 19 websites were blocked because of provision of gambling (Article 228 of the Turkish Penal Code), 20 were blocked because they involved betting, and 54 websites were ordered to be blocked in relation to crimes committed against Atatürk

(Law No. 5816, dated 25/7/1951). 32 of these 54 crimes committed against Atatürk related blocking orders were recurring orders involving approximately 17 websites (majority involved YouTube) issued by different courts around the country. With regards to 158 illegal items containing crimes committed against Atatürk, TIB successfully requested that content and hosting providers take down these items from their servers. As a result of this co-operation, their websites were not subjected to access blocking orders. Furthermore, 5 websites were blocked in relation to prostitution (Article 227, Turkish Criminal Code), and one website was ordered to be blocked in relation to the facilitation of the use of drugs (Article 190 of the Turkish Penal Code).

More importantly, while **197 websites were blocked by courts for reasons outside the scope of Law No. 5651, the detailed breakdown behind these orders was not provided by TIB in its published statistics.** It is, however, understood that TIB executed the blocking orders as it is legally obliged to even though they do not involve the catalogue crimes listed in Article 8. The number of websites blocked outside the scope of Article 8 by the courts was 69 in May 2008 but reached nearly 200 by the end of May 2009.

In terms of the 2126 administrative blocking orders issued by TIB, the majority, with 1053 blocking orders involved sexual exploitation and abuse of children (Article 103(1) of the Turkish Penal Code), 846 involved obscenity (Article 226 of the Turkish Penal Code), 117 involved football and other sports betting websites (Law No. 5728, article 256), 74 involved gambling sites (Article 228 of the Turkish Penal Code), 20 involved prostitution websites (Article 227 of the Turkish Penal Code), 11 involved websites facilitating the use of drugs (Article 190 of the Turkish Penal Code), 2 involved crimes committed against Atatürk (Law No. 5816, dated 25/7/1951), and one involved encouragement and incitement of suicide (Article 84 of the Turkish Penal Code).

According to the data provided by the TIB, 25 websites were issued a written warning (mainly pornographic websites situated in Turkey which provided free access to everyone including adults and children) by May 2009, and subsequently their compliance with Law No. 5651 was insured. Furthermore, 380 notices were issued for taking down specific content deemed illegal under Article 8, which was found on websites that were not deemed illegal as a whole. 300 of these notices related to crimes committed against Atatürk (Article 8(1)(b)), and the majority of these were with regards to video clips on YouTube. The remaining 80 notices were related to obscenity (Article 8(1)(a)(5)).

According to the May 2009 statistics, only 54 court issued blocking orders, and 10 TIB issued administrative blocking orders were subsequently revoked (64 in



total). Therefore, **as of 11 May, 2009 a total of 2537 websites were blocked from Turkey.** Furthermore, in terms of blocking orders, some sites are blocked by DNS poisoning while others are blocked by both DNS poisoning and by their IP addresses. TIB statistics revealed that 483 IP addresses were blocked in addition to 2054 unique website addresses as of May 2009 from Turkey.

It is hereby speculated by the author of this study that, based on the May 2008 – May 2009 period (averaging 180 blocked websites monthly), **access to approximately 3700 websites would have been blocked** from Turkey as of December 2009 under Law No. 5651. **Although this is a ‘speculative number’ calculated on the basis of TIB’s previous action, the Presidency’s decision to withhold the blocking statistics and other detailed information contributes to speculation that the number of blocked websites are constantly increasing rather than decreasing.**

### ***Critical Assessment and Application of Law No. 5651***

This section of the report will provide a critical assessment of the application of the Law No. 5651 since November 2007. The new law, for example, triggered persistent access restriction to YouTube, beginning in May 2008. Similarly, access to Google has been blocked within Turkey since June 2009, and Geocities remains inaccessible due to a blocking order issued in February 2008, until Yahoo decided to cease its service in October 2009.

There are a number of different legal measures that could be used to block access to websites that contain allegedly illegal content in Turkey. This assessment will predominantly concentrate on the provisions and application of Law No. 5651, and the blocking powers allowed in Article 8.

#### **I. Blocking Orders issued by the Courts of Law under Article 8 of Law No. 5651**

As briefly mentioned above, under Article 8(1), access to websites are subject to blocking if there is ‘sufficient suspicion’ that certain limited number of crimes are being committed on a particular website. The eight specific crimes that are included within the parameters of Article 8 are:

- encouragement and incitement of suicide (Article 84 of the Turkish Penal Code),
- sexual exploitation and abuse of children (Article 103(1) of the TPC),

- facilitation of the use of drugs (Article 190 of the TPC),
- provision of dangerous substances for health (Article 194 of the TPC),
- obscenity (Article 226 of the TPC),
- prostitution (Article 227 of the TPC),
- gambling (Article 228 of the TPC), and
- crimes committed against Atatürk (Law No. 5816, dated 25/7/1951).

Article 8 blocking provisions were extended in January 2008, and are applicable in matters concerning football and other sports betting websites. Websites which enable users to play games of chance via the Internet, which are based outside the Turkish jurisdiction and lack valid permission, are also susceptible. However, certain crimes such as the **dissemination of terrorist propaganda** (Articles 6 and 7 of the Turkish Anti-Terror Law No. 3713), or **crime of ‘denigrating Turkishness’**, (Article 301, Criminal Code), or hate crimes (Article 216 of TPC) **are not included within the scope of Article 8**. Therefore, neither the Courts nor TIB can block access to websites based on reasons outside the scope of Article 8.

Websites that carry content subject to Article 8 could be taken down if hosted in Turkey, or blocked and filtered through Internet access and service providers if hosted abroad.

Blocking orders would be issued by a judge during a preliminary investigation and by the courts during trial. During preliminary investigation the Public Prosecutor can issue a blocking order through a precautionary injunction if a delay could be prejudicial to the investigation. Article 8(2) states that the Public Prosecutor must take his injunction decision to a judge within 24hrs, and the judge needs to decide on the matter within 24hrs. The precautionary injunction would be immediately lifted by the Public Prosecutor, and access to the website in question restored, if the decision is not approved within the said time period.

Furthermore, if during preliminary investigation it is decided that no prosecution will take place, the blocking order issued through a precautionary injunction would be automatically removed. Similarly, if a provider is found not guilty, the blocking order issued by the court would be removed. Finally, if the content found to be illegal, and thereby subject to the blocking order, is removed from the website, the blocking order would be then removed by the Public Prosecutor

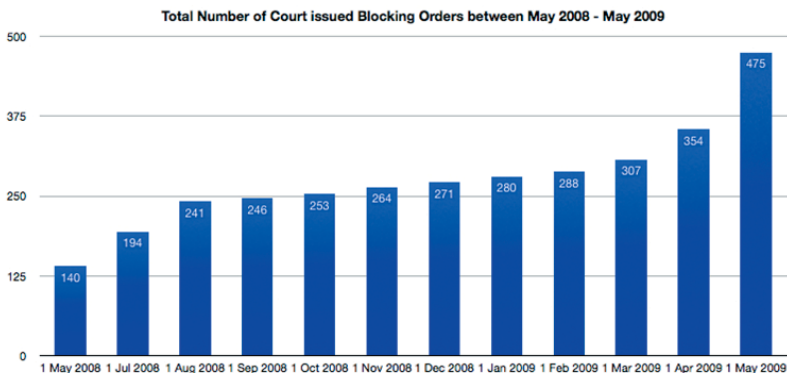


during investigation and by a court during prosecution.

Subject to Article 8(2), objections to the blocking decision rendered as a precautionary measure should be brought to the Court that issued the blocking order, pursuant to the Criminal Procedure Act (Law No. 5271) by the interested parties. However, **identification of an interested party is not clearly specified by law**. Usually, an interested party would be the owner of a website, or the author of a blog but the procedure followed under Law No. 5651 does not give an opportunity to the content providers to have knowledge about the charges or the blocking orders. The law does not require the authorities to inform the accused about the Article 8(2) procedure. No other procedural guarantee to counterbalance this deficiency is envisaged either. Although an objection can be made pursuant to the Criminal Procedural Act, an interested party that wants to invoke this legal provision will not be able to know the details of such an accusation. Usually, content providers are caught by surprise when they learn that their websites are inaccessible from Turkey.

Although the court decisions with regards to the catalogue crimes in Article 8 are immediately communicated to TIB for the execution of the blocking orders, they are often not communicated to the content/hosting providers, and the content/hosting providers do not necessarily know what triggered the blocking orders.

TIB, responsible for the execution of the precautionary measure, is authorised to bring objections against the precautionary orders issued by the courts. However, there is no available statistical information concerning the Presidency's decisions to bring objections against court orders, and, therefore, the underlying criteria that is behind decisions to bring or not to bring forward an objection is unknown.



As can be seen above, the total number of blocking orders issued by the courts reached 475 by May 2009, the majority of which involved blocking orders issued outside the scope of Article 8 with 197 such blocking decisions (41%). This category (which will be dealt separately below) is followed by obscenity (121 blocking decisions, 25%), and sexual exploitation and abuse of children (54 blocking decisions, 11%), and crimes committed against Atatürk (54 blocking decisions, 11%). **As TIB has not published the blocking statistics since May 2009, more recent data is not available for assessment.**

### **YouTube related Blocking Orders**

Perhaps the most well known application of Law No. 5651 by the Courts concern the infamous blocking orders issued with regards to the Google owned popular video-sharing web 2.0 platform YouTube. Between March 2007 and June 2008, Turkish courts issued 17 blocking orders with regards to YouTube, and since May 2008, access to YouTube from Turkey has been blocked constantly. Ankara's 1st Criminal Court of Peace issued the final blocking order on 05 May, 2008, and this latest blocking order is still in force at the time of this writing in December 2009.

Presidential statistics dated 26 May, 2008 revealed that 67 out of 111 videos which were deemed illegal by the blocking orders were removed by YouTube. As mentioned previously, YouTube was subject to highly publicised court ordered blockings in Turkey prior to the enactment of Law No. 5651, and the availability of certain videos involving crimes committed against Atatürk (Law No. 5816, dated 25/7/1951) was one of the main reasons triggering the blocking approach adopted in Law No. 5651.

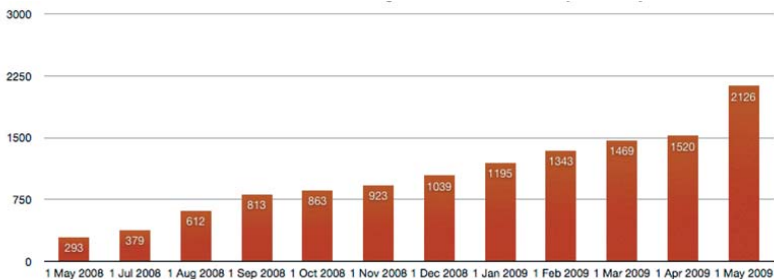
Recently, in December 2009, INETD, the Society for Internet Technology based in Ankara, lodged an appeal with the European Court of Human Rights challenging the YouTube blocking order issued by the Ankara's 1st Criminal Court of Peace, having exhausted all the possible national legal remedies. INETD claimed a review of the Turkish decision with regards to Article 10 of the European Convention on Human Rights arguing that the decision is disproportionate and infringes upon their right to speak freely, and express themselves, and access and receive information from YouTube. It is argued that even though Article 8 and Law No. 5651 provide a legal basis for access blocking, the necessity of such a disproportionate measure (blocking access to a whole website), in a democratic society, would be the basis of such a challenge in Strasbourg.



## II. Administrative Blocking Orders issued by TIB under Article 8

Law No. 5651, through Article 8(4), enables TIB to issue “administrative blocking orders” ex-officio. These orders can be issued by the Presidency with regard to the crimes listed in Article 8(1) when the content and hosting providers are situated outside the Turkish jurisdiction. The Presidency can also issue administrative blocking orders with regards to content and hosting companies based in Turkey if the content in question involves sexual exploitation and abuse of children (Article 103(1) of the Turkish Penal Code), or obscenity (Article 226 of the Turkish Penal Code).

According to the Regulations Governing the Publications on the Internet (which included the detailed principals and procedural matters of the application of Law No. 5651), if the decision involves sexual exploitation and abuse of children or obscene content hosted in Turkey, the Presidency needs to obtain an administrative blocking decision approved by a judge. A judge is then required to rule on the administrative decision within twenty-four hours. When such an administrative blocking order is issued, the Presidency would contact the Turkish access providers to execute the blocking order within twenty-four hours. If the Presidency can establish the identities of those responsible for the content subject to the blocking orders, the Presidency would request the Chief Public Prosecutor’s Office to prosecute the perpetrators.



As can be seen above, the total number of administrative blocking orders issued by the Presidency reached 2126 by May 2009, the majority of which involve obscenity (846 blocked websites, 40%), and sexual exploitation and abuse of children (1053 blocked websites, 50%).

TIB administrative blocking decisions can be challenged subject to Article 11 of the Turkish Code of Administrative Procedure. TIB then would have 60 days to review its decision. If no response is provided, or the objection is rejected, an

interested party can then take his/her objection to an administrative court for judicial review, and request a suspension of execution order subject to Article 27 of the Code of Administrative Procedure. It should, however, be noted that according to Article 22(3) of the Turkish Constitution, decisions to interfere with the freedom of communication and right to privacy can only be given by the judiciary. This embodies one of the leading principles of fundamental rights system of the Turkish Constitution. The possibility to appeal to the administrative courts does not rectify this deficiency.

Based on this constitutional argument, two associations, namely, the All Internet Association (“TID”) and the Turkish Informatics Association (“TBD”) have brought cases to the Council of State, to annul all the Regulations based on Law No. 5651 claiming that powers given to the TIB are unconstitutional. Since constitutional complaint is not recognised under the Turkish Constitution, the two associations could not assert the unconstitutionality of the Law No. 5651 before the Constitutional Court. However, the two associations have a right to claim the annulment of the Regulations before administrative courts. In such a case, the claimant can also demand that the Court send constitutionality claims to the Constitutional Court for review. In its application, the TID relied upon Article 22 of the Constitution, which provides for freedom of communication. Pursuant to this provision, unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorised by law in cases where delay is prejudicial, based on the above-mentioned grounds, communication shall not be impeded nor its secrecy be violated. The TID has claimed that the Regulations and Law No. 5651 breach this provision by giving the TIB the authority to block access to websites without a court order through the process of issuing administrative blocking orders. A decision has not been reached as of this writing.

### **Gabile.com, Hadigayri.com, and Shemaleturk.com incidence**

There has been further criticism of the administrative blocking orders issued by TIB. In October 2009, the Presidency issued a blocking order with regards to [gabile.com](#) and [hadigayri.com](#), which combine to form the largest online gay community in Turkey, at approximately 225,000 users. [Shemaleturk.com](#) was also blocked, as this website shared the same IP address with [gabile.com](#) but was not named in the blocking order. At first, there was no publicly available information as to why TIB issued the blocking order as the Presidency did not get in touch with the website operators to issue its order even though both sites are operated within Turkey and the content on these pages are provided in





Turkish. Both sites alleged that the decision was homophobic and had no legal basis.

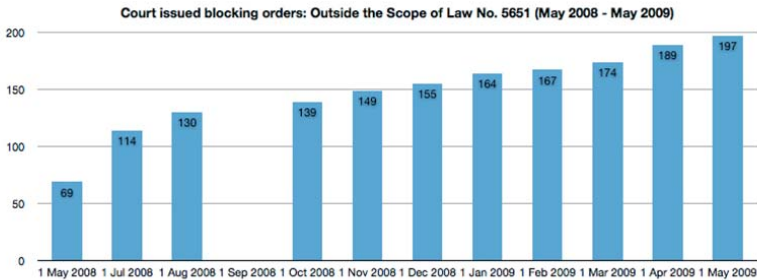
A TIB decision was challenged for the first time by these two websites' operators, and they found that 'encouragement to prostitution,' under Article 8(1)(6) of Law No. 5651, was the reason used for blocking access to the websites. TIB wrote to the website operators that the Presidency suspected encouragement to prostitution based on their technical review of the websites, subsequent to several complaints by the public. After six days, subject to major media coverage both domestically, and abroad, TIB overturned its own decision and stopped blocking access to these social networking websites without further explanation. While hadigayri.com made some changes to their website, Gabile.com announced that it did not make any amendments to its website, and asked the Ministry of Transportation, which is responsible to oversee TIB's activities to investigate the matter, to issue disciplinary sanctions for those responsible. The review is still ongoing at the time of this writing.

It should be noted that there could be a breach of Article 10, ECHR if blocking measures or filtering tools are used at state level to silence politically motivated speech on the Internet, or if the criteria for blocking or filtering is secret, or if the decisions of the administrative bodies are not publicly made available for legal challenge. The gabile.com and hadigayri.com blocking decisions highlighted these concerns.

### **III. Websites blocked for unknown reasons outside the scope of Article 8**

Although the Turkish Parliament claimed that the aim of Law No. 5651 was to protect children and families from accessing harmful content, blocking orders given so far demonstrate that there are a considerable number of blocking orders issued by the courts based on reasons other than the ones included within the scope of Article 8.

Access to a considerable number of websites of a political nature are blocked by relying on Anti-Terror Law No. 3713, or crime of 'denigrating Turkishness' under Article 301 of the Turkish Criminal Code, and other laws, even though such crimes are not part of the catalogue crimes provided under Article 8 of Law No. 5651. As the court decisions remain secret and unpublished, the courts' reasoning of its blocking orders generally remain unknown. As of 11 May, 2009 **there were 197 blocking orders issued by the courts and executed by TIB which are outside the scope of Article 8.**



As TIB has not published the blocking statistics since May 2009, it is difficult to quantify the exact number and nature of blocking activity taking place outside the scope of Article 8 of Law No. 5651. **It is however speculated by the author of this study that approximately 300 such websites are blocked as of December 2009.**

The research for this report identified several websites that have been denied access by the Turkish courts outside the scope of Article 8 of Law No. 5651. By way of example, Indymedia Istanbul website at <istanbul.indymedia.org> was subjected to a blocking order during March 2008. Indymedia Istanbul has been active since January 2003 in Turkey providing independent news on its website. Access to <istanbul.indymedia.org> was blocked by a decree of General Staff Presidency Military Court in March 2008 based on an Article 301 Criminal Code offence of insulting Turkishness. The decision was enforced by TIB, and Indymedia Istanbul described the blocking as an attempt to silence the organization by censorship.

Furthermore, certain leftist, pro-Kurdish news websites are blocked from Turkey. Some of the websites keep changing their domain names to overcome blocking orders rather than fighting such orders through the courts and through the legal system. For instance, the website of the daily newspaper Gündem blocked by different Assize Court decisions seven times since March 2008. However, their most recent domain at <<http://www.gundem-online.net/>> is currently accessible from Turkey. Similarly, access to the website of Firat News Agency at <firatnews.eu> has been blocked since January 2008. An alternative website at <[www.firatnews.com](http://www.firatnews.com)> was also blocked on 9 May, 2008. Other blocking orders outside the scope of Article 8 include the following websites; Yeni Özgür Politika, and atilim.org, both of which are daily news sources and newspapers; the Ankara Socialist Youth Association ; Keditor.com , a web based alternative media source predominantly dealing with south-eastern Turkey matters including



the Kurdish issues; and *Günlük Gazetesi*, the website of a daily newspaper dealing with the Kurdish issues, to name a few. It is believed (based on the domain names) that most of these orders have been issued subject to Articles 6 and 7 of the Turkish Anti-Terror Law No. 3713 with regards to the crime of dissemination of terrorist propaganda, a crime currently not listed under Article 8 of Law No. 5651. A number of left wing websites including *Mazgirt.Net*, *devrimcikarargah.com*, and right wing and Islamist websites including *hilafet.com*, *kokludegisim.com*, *hizb-ut-tahrir.org*, *19.org*, *yuksel.org*, and *susaningulleri.org* have also been blocked outside the scope of Article 8 of Law No. 5651.

**Although clearly blocked outside the scope of Article 8, the owners or operators of these websites do not seem to challenge the blocking decisions through the courts.** Similarly, blocking orders seem to be the only ‘legal action’ taken by the public prosecutors and the courts, and no prosecutions seem to take place with regards to the ‘alleged or suspicion of crimes’ taking place on these websites.

### ***Other Blocking Measures***

Although this study concentrates on the implementation and application of Law No. 5651 and the blocking decisions related to that law, it is also worth mentioning certain other legal developments, which also lead to the blocking of access to websites based in Turkey.

Precautionary Injunctions issued by the Civil Courts

Article 9 of Law No. 5651, detailed above, provides a new procedure for Internet content in violation of personal rights. Accordingly, the individual alleging that his/her rights have been infringed by a website is encouraged to seek the removal (take down) of the content from the website, but not the blocking of the website carrying the allegedly illegal content. Article 9 does not contain any provisions on “blocking,” and private law matters can only result in “removal” (take down of the particular infringing article) together with the publication of an “apology” if the courts deem it necessary. Therefore, the courts are not empowered by law to issue blocking orders since Article 9 provisions have been brought into force on 23 May, 2007.

Article 9 of Law No. 5651 has therefore rendered the provisions of the Law on Civil Procedure inapplicable concerning the Internet related violations of personal rights. Bearing in mind the clear wording of this specific provision, **courts can no longer rely upon the general provisions of the Civil Code to ban access to websites.**

Despite the new legal regime, precautionary injunctions are issued by civil courts over violation of personal rights, such as privacy and reputation. Many defamation claims resulted with the obtainment of precautionary injunctions for blocking access to websites carrying allegedly defamatory statements since 2007. Islamic creationist author Adnan Oktar has become iconic using this general civil law provision to get a considerable number of websites (over 50 between 2005-2008 including Wordpress, Google Groups, and Richard Dawkins' website ) supporting evolution theory, or websites criticizing Adnan Oktar's views, blocked from Turkey.

Law No. 5651, through its Article 9, has removed the possibility for blocking access to websites from the Turkish legal system with regards to disputes on personal rights apart from intellectual property disputes. Based on this view, it is submitted that the blocking orders issued in high profile cases such as WordPress (August 2007 – April 2008), Google Groups (March 2008), Richard Dawkins' website (<<http://richarddawkins.net/>> September 2008), and more recently the blocking order involving <<http://egitimsen.org.tr>> (September 2008), and the daily newspaper Vatan (<<http://gazetevatan.com>> October 2008), all with regards to personal rights disputes involving defamation, were illegal and should not have been issued by the courts.

### **Intellectual Property Law related blocking orders**

Furthermore, it should be noted that apart from the Article 8 provisions of Law No. 5651, provisions of Law No. 5846 on Intellectual and Artistic Works can also be used to obtain blocking orders through the courts. Supplemental Article 4 of the Law No. 5846, introduced in March 2004, provides a two-stage approach. Initially, the law requires the hosting companies, content providers, or access providers to take down the infringing article from their servers upon 'notice' given to them by the right holders. The providers need to take action within 72hrs. If the allegedly infringing content is not taken down or there is no response from the providers, the right holders can ask the Public Prosecutor to provide for a blocking order, and the blocking order is executed within 72hrs. This legal remedy is therefore predominantly issued with regards to websites related to piracy (e.g. The Pirate Bay), and IP infringements (e.g. Justin.TV), and media reports suggest that at least 3,000 websites are blocked under Law No. 5846 from Turkey, the majority of which are blocked indefinitely.

More recently, on 18 September, 2009, access to popular social networks Myspace.com and Last.fm were blocked from Turkey. The blocking order was issued by the Beyoğlu Chief Public Prosecutor's Office. The blocking order was



issued following a request made by Mu-yap, the Turkish Phonographic Industry Society, accusing these two sites of intellectual property infringement.

An appeal was made in this case by Dr. Yaman Akdeniz, the author of this survey, based on a 'user argument,' because neither Myspace nor Last.fm appealed against the decision of the Beyoğlu Chief Public Prosecutor's Office. Akdeniz argued that Internet users' right to access and receive information available from these websites has been denied by the blocking order, and blocking access to an entire website is a "disproportionate" response based on Article 10 of the European Convention on Human Rights and the related jurisprudence of the European Court of Human Rights. Furthermore, Akdeniz argued that the intellectual property law which was used as a legal measure to issue the blocking order was unconstitutional. It was argued that Turkish Constitution, in consistence with ECHR, requires that any suspension of the exercise of fundamental rights and freedoms can only be carried out under the rulings of a court of law, and not by a Public Prosecutor.

Akdeniz's appeal to overturn the blocking decision was first rejected by the Chief Public Prosecutor's Office, and then by the Beyoğlu Criminal Court of Peace. His subsequent appeal to a higher specialized court, to the Intellectual Property Court – Crime Division was also unsuccessful. The Beyoğlu Intellectual Property Court – Crime Division ruled (single judge) in October 2009, and rejected his appeal on procedural and legal grounds. As the decision of the Intellectual Property Court – Crime Division is final, and as the available national legal remedies are exhausted Akdeniz will be taking his case to the European Court of Human Rights, citing Article 10 of the European Convention on Human Rights for infringement within the next few months. The blocking decision concerning Myspace.com was removed on 06 October, 2009 as the media reports suggested that Mu-yap and Myspace.com settled out of court and reached a contractual agreement.

Blocking access to any of these Web 2.0 based applications and systems have significant side effects. These kind of blocking orders not only result in the blocking of access to the allegedly illegal content (usually a single file or page), but they also result in the blocking of millions of legitimate pages, files, and content under the single domain that these systems operate. Blogger, Blogspot, Myspace.com and Last.fm blocking orders, as in the case of the YouTube blocking, highlight the problems associated with blocking access to Web 2.0 based applications and their detrimental impact on freedom of expression.

### ***Assessment with regards to Article 10, ECHR***

The Law No. 5651 may have serious repercussions on a number of fundamental rights protected under the Turkish constitution and international human rights law. In fact, Law No. 5651 has both substantive and procedural defects. These defects and problems associated with Law No. 5651 will be assessed below.

#### ***Substantive Aspects – Freedom of Expression***

As a right, freedom of expression is recognised and protected by the Turkish Constitution and comprehensive human rights treaties, to which Turkey is a party. Despite such protection, Turkey has been found in violation of international standards for suppressing alternative mass media organisations in the past. Newspapers voicing opposition views continue to face harsh penalties mostly because of the on going conflict in the South-East region of the country. While a 'degree of control' is still possible for traditional media outlets - including newspapers, radio and TV stations -, it has become harder for the government and government institutions to counter alternative ideas spread through various Internet communication tools and social media platforms.

Obviously, freedom of expression is not an absolute right and might be subject to limitations provided in the Turkish Constitution and international treaties. Both the Constitution and international jurisprudence require a strict 3-part test to which any content based restriction must adhere, and these are:

- a. whether the interference is prescribed by law;
- b. whether the aim of the limitation is legitimate;
- c. whether the limitation is 'necessary in a democratic society'.

The Turkish Constitution is even more comprehensive in this field. Pursuant to Article 13 of the Constitution, fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality. The limitations prescribed by the Turkish Constitution have also been developed in the case-law of the European Court.

The Strasbourg case law requires that a three-fold test should be met to determine whether the restriction is provided by law. **First**, the interference with



the Convention right must have some basis in national law. **Secondly**, the law must be accessible. **Thirdly**, the law must be formulated in such a way that a person can foresee its consequences for him, and be compatible with the rule of law.

### **Legal Basis (prescribed by law)**

Any restriction on freedom of expression should be prescribed by law. In Turkish law only a law enacted by the Parliament can be invoked to restrict freedom of expression. Although Law No. 5651 meets this requirement and it is accessible, it is questionable whether the text and the implementation of the Law comply with the foreseeability condition.

As was outlined above, the Law No. 5651 has led to the blocking of over 2600 websites as of May 2009, and it is speculated by the author of this study that as of December 2009 the number is even higher. However, neither TIB nor the courts have given clear guidance on what kind of web content results in this most restrictive type of measure. Those visiting blocked websites in Turkey could only see that the website is blocked due to a court order or TIB decision. The notices provided on the blocked pages do not provide any information on which catalogue crime (Article 8 of Law No. 5651) has been committed or suspected on that website, or information on any other legal provision triggering the blocking orders.

The Strasbourg Court jurisprudence shows that the condition of legality is satisfied when an individual has access to the provisions of the law and, if need be, can understand the law with the assistance of the national courts' interpretation of it with regards to what acts or omissions will result in legal liability. However, the reasons for the blocking decisions are not made public, nor declared to the content providers or website owners. For example, TIB did not communicate its blocking decision to the operators of gabile.com, and hadigayri.com even though these websites were run by Turkish citizens in Turkey. Furthermore, research conducted by Akdeniz & Altiparmak revealed that the courts often fail to provide clear reasons for the blocking decisions they issue. This lack of guidance leads to uncertainty and arbitrary application of Law No. 5651 by the courts and TIB with regards to its administrative decisions. Research conducted by Akdeniz & Altiparmak has also shown that **some blocking orders given by the Courts have no legal basis under Law No. 5651**, and are issued outside the scope of the new provisions as was previously mentioned in this study. As of December 2009, the extent of this breach and blocking outside the scope of Law No. 5651 remains unknown as TIB did not reveal the blocking decisions since May 2009.

## Legitimate Aims

Even if a restriction has a legal basis (e.g. Law No. 5651), the basis must be enacted to meet one of the specified legitimate aims listed in the Constitution and ECHR. The catalogue crimes (taken from the Criminal Code) incorporated to Article 8 fit with the category which is “those designed to protect the public interest (national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals).”

## Proportionality

The requirement of proportionality is divided into three subheadings in the Turkish constitutional law, which are also enshrined under the Strasbourg jurisprudence:

- **Suitability test:** The means used to restrict fundamental rights must be suitable to realize the legitimate aim.
- **Necessity test:** There should be a pressing social need to interfere with the fundamental rights.
- **Proportionality test:** The interference must be proportionate to the legitimate objective pursued.

These three tests will be assessed below with regards to Law No. 5651.

### **Suitability Test - Circumvention is possible: Law No. 5651 is not effective**

The adoption of an access blocking policy through Law No. 5651 is evidently problematic. An examination of the known blocked websites from Turkey, including YouTube and others, show that in almost all cases circumvention is possible, and the court issued blocking orders or administrative blocking orders issued by TIB are not effective. Furthermore, it is also a known fact that the YouTube ban is not effective, nor enforced when YouTube is accessed from certain mobile devices in Turkey. These include the BlackBerry handheld sets as well as the popular Apple iPhones, as YouTube uses a different server for mobile access which seems not to be blocked from Turkey. Therefore, it is argued that the restriction provided by law is not suitable for the aim pursued.

### **Necessity Test: No other options are invoked**

According to the ECtHR, ‘necessity’ within the meaning of Article 10(2) implies the existence of a ‘pressing social need’. However, under national law, pressing social need should be satisfied with the least restrictive alternative available.





Having said this, it is undoubtedly more difficult to satisfy the necessity test for Internet content, because users seldom encounter illegal content accidentally. In other words, the risk of encountering undesirable or illegal content on the Internet is much lower than in traditional media. Therefore, the burden is higher for the government to prove that pressing social need exists to restrict such content on the Internet. Furthermore, a necessity test is not satisfied, if, as the US Supreme Court has stated, “less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve”.

Law No. 5651 does not require a stricter or compelling test of necessity for the crimes listed in the Turkish Criminal Code. It seems that, for the courts, the standard for printed material also applies to the Internet content. Research by Akdeniz & Altıparmak did not come across any examples in which the Turkish courts or TIB evaluate the different nature of the Internet technology to determine whether pressing social need exists to interfere with Internet publications. Undoubtedly the Internet is substantially different than the printing press and therefore its borderless and evolving nature (for example the development of web 2.0 based technologies) should be considered accordingly by the courts. It is argued that even if a pressing social need exists, a less restrictive option other than access blocking can be invoked to satisfy such need. However, it is pertinent to note that no alternative options for content regulation were considered by the legislators while drafting Law No. 5651, such as various self-regulatory solutions to protect children from accessing illegal and harmful content, by filtering software on home based computers, in schools, or in Internet cafes.

Certain practices adopted by TIB, such as the issuing of warnings and notices to websites situated in Turkey for subsequent take down of infringing content (rather than issuing a blocking order for the whole website), could be seen as an example of a less restrictive alternative approach in addressing a pressing social need. However, considering that the amount of blocked websites outnumbers those put on notice, the criteria for this approach needs further clarification. Additionally, notice and take down as a practice is not widely used by the courts. Courts usually issue blocking orders without considering this less restrictive procedure. Without a doubt the practice known as ‘notice and take down’ has its own procedural problems, and can be used as a tool for censorship, and therefore its use is recommended with caution in this report.

### **Proportionality Test: Over-blocking**

The courts or public prosecutors do not always require domain-based blocking,

but the current technical infrastructure for Internet connection in Turkey is not designed for censorship or blocking. The DNS blocking/tampering and IP address blocking methods currently used in Turkey for the execution of blocking orders result in massive over-blocking as all the content on a specific server is blocked. These methods are easy to deploy, and their maintenance is cheap compared to other more complicated proxy based blocking systems. The effect of these blocking methods is somewhat questionable because circumvention is possible. There are currently no perfect technical solutions available, and the deployment and use of cost intensive proxy based blocking systems or hybrid systems such as Cleanfeed would be equally problematic.

**An assessment of the blocking orders issued so far shows that massive over-blocking is witnessed in Turkey.** In most cases, a single file, web page, blog entry, or 30 second video clip containing the alleged illegal content results in domain/IP based blocking of domains and web servers as a whole. This- as in the cases of YouTube, Geocities, WordPress, and more recently in the cases of Blogger and Blogspot, and Google Sites, Google Pages, Myspace, Last.fm, Hadigayri, and Gabile- resulted not only in blocking the alleged illegal content, but also millions of web pages carrying perfectly legal content through those blocked domains. For example, in the cases of Hadigayri and Gabile, 225,000 users were unable to access their accounts during the six days blocking period initiated by a TIB decision that was later overturned. Reputable companies such as YouTube, Google owned Blogger, Myspace, Last.fm, Hadigayri, and Gabile are not known to promote illegal content and activity, even though their services may from time to time contain content which may be deemed undesirable or illegal by Turkish law and other state laws around the world. However, a majority of the content provided is user-driven information sharing, and such collaborative sites have a social reason to be legally accessed by millions around the world.

**In these cases, the courts (as well as TIB) issued the blocking orders to address the suspected illegality on such sites. However, Akdeniz & Altiparmak's research have not come across any case in which consideration for freedom of expression has been given,** or the constitutionality of a blocking order has been questioned by the courts (or by TIB) even though their decisions often lead into the blocking of whole domains, as in the cases of YouTube, Geocities, WordPress, Blogger, Blogspot, Google Groups, Google Sites, Myspace, Last.fm, Hadigayri, and Gabile. Access to YouTube, Geocities (even though Yahoo has terminated this service), Last.fm, and Google Sites is still blocked from Turkey as of this writing.

As mentioned previously, these sites are not known to promote illegal content. For instance, YouTube has been closed down several times for movie clips



insulting Atatürk. However, along with other useful information, hundreds of videos approving Atatürk and his reforms could also find place on YouTube. Despite that, many people might feel uncomfortable by the clips humiliating the founder of Turkey. However, the fact that society may find speech offensive, vulgar, or shocking is not a sufficient reason for suppressing that content, or access to millions of other types of content in the case of YouTube. In fact, as will be further addressed in the next heading, such speech and content may be protected by Article 10, ECHR, and the related jurisprudence of the European Court of Human Rights. The blocking policy undoubtedly has a very strong impact on freedom of expression, which is one of the founding principles of democracy. It is also worth noting that the concerned content or suspected illegality does not vanish as a result of blocking access to websites. Those who live outside Turkey or those who know how to access YouTube and other banned websites from within Turkey can still access the suspected illegal content that prompted the blocking order in the first place.

It is the submission of this study that **the domain based blocking of websites that carry legal content such as YouTube could be incompatible with Article 10, and could be regarded as a serious infringement on freedom of speech, and too far-reaching than reasonably necessary in a democratic society.**

### **Democratic society**

The European Court of Human Rights held in numerous decisions that freedom of expression constitutes one of the essential foundations of a democratic society. That is why Article 10 is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or treated with indifference, but also to those that offend, shock or disturb. Such are the requirements of pluralism, tolerance and broadmindedness- without which there is no “democratic society”. The Court has also made clear that “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention”. This leads to the conclusion that the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. This strict criterion also applies to other matters of public concern.

Obviously when certain remarks (including remarks over the Internet) incite violence against an individual, a public official, or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression. The joint concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve in *Süreç v. Turkey* (No. 4) stated that “it is only by a careful examination of the context in which the

offending words appear that one can draw a meaningful distinction between language which is shocking and offensive – which is protected by Article 10 – and that which forfeits its right to tolerance in a democratic society.”

There is, therefore, no doubt that such a decision to suppress speech calls for strict scrutiny on the part of national courts. Furthermore, the Strasbourg Court's supervision will be strict in such cases because of the importance granted to freedom of expression. While the state measures taken need not be shown to be “indispensable”, the necessity for restricting the right must be convincingly established to be compatible with Article 10.

The ECtHR jurisprudence shows that Turkish courts failed to meet the Strasbourg disposition concerning political expression in a considerable number of cases. Although serious measures have been taken to improve the situation, the prosecution and conviction for the expression of non-violent opinions under certain provisions of the Turkish Criminal Code, show that more needs to be done to change the Turkish judiciary's approach. It seems that the application of Law No. 5651 is no exception to this traditional approach. Akdeniz & Altıparmak's research found that a number of progressive and alternative websites, including gundemonline.net, anarsist.org, devrimciler.com, Indymedia Istanbul, firatnews.eu, and keditor.com are systematically faced with blocking orders. The reasons behind such blocking orders are often unknown, and no further prosecutions seem to take place against the authors' of such publications, or owners of such websites in Turkey. It is therefore difficult to distinguish whether a specific crime has been committed by these websites and the publications that appear on such sites, or if the blocking orders are issued to silence speech. **The use of the blocking orders to silence speech amounts to censorship and a violation of Article 10 of ECHR. The Turkish public should have “the right to be informed of different perspectives on the situation in south-east Turkey, however unpalatable it might be to the authorities.”** On the contrary, the Turkish government has a positive obligation to protect its citizens' right to receive information in the absence of any plausible justification, or legitimate aim based on Article 10(2) criteria.

Furthermore, banning socially useful websites such as YouTube, Google Sites, and others carries very strong implications for political expression. These sites provide a venue that is popular across the world for alternative and dissenting views. According to the Strasbourg Court, **while political and social news “might be the most important information protected by Article 10, the freedom to receive information does not extend only to reports of events of public concern, but covers in principle also cultural expressions as well as pure entertainment.”**



Finally, banning orders issued and enforced indefinitely on such websites result in “prior restraint”. Although the Strasbourg Court does not prohibit the imposition of prior restraints on publications, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.

The same principles also apply to new media and Internet publications. In this area, it is argued that prior restraint and other bans imposed on the future publication of entire newspapers, or for that matter websites such as YouTube, are incompatible with the Convention rights. The Strasbourg Court requires the consideration of less draconian measures such as the confiscation of particular issues of publications including newspapers, or restrictions on the publication of specific articles. It stems from the Strasbourg principles that by suspending access to websites such as Özgür Gündem, Fırat News Agency, Yeni Özgür Politika, Keditör, Günlük Gazetesi and other news sites indefinitely, “the domestic courts have largely overstepped the narrow margin afforded to them, and unjustifiably restricted the essential role of the press as a public watchdog in a democratic society”. The practice of banning the future publication of entire websites goes beyond “any notion of ‘necessary’ restraint in a democratic society and, instead, amounts to censorship”.

### ***Procedural Aspects***

#### **Defence Rights and Procedural Equality**

Law No. 5651 is about suppression of content crimes committed through the Internet. So far as the legal procedural issues are concerned, the public authorities bring a charge against the web authors or content providers if they believe that a content crime is suspected under Article 8 of Law No. 5651.

The procedure followed under Law No. 5651 does not give an opportunity to the content providers to have knowledge about the charge. According to Article 8(2), blocking orders would be issued by a judge during preliminary investigation and by the courts during trial. During preliminary investigation the Public Prosecutor can issue a blocking order through a precautionary injunction if a delay could be prejudicial to the investigation. The law does not require the authorities to inform the accused about this procedure. No other procedural guarantee to counterbalance this deficiency is envisaged either. Although, an objection can be made pursuant to the Criminal Procedural Act, an interested party who wants

to invoke this legal provision will not be able to know the details of such an accusation.

Usually, content providers are surprised when they learn that their websites are inaccessible from Turkey because website owners are not notified of the blocking decision in due time, and they are not allowed the right to defend themselves.

Although the court decisions relating to catalogue crimes in Article 8 are immediately communicated to the TIB for the execution of the blocking orders, they are often not communicated to the content/hosting providers and the content/hosting providers do not necessarily know what triggered the blocking orders.

### **Presumption of innocence**

It is one of the fundamental principles of international human rights law that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Therefore, precautionary measures should be exceptional and more importantly temporary. Indeed, criminal procedural law limits the implementation of all precautionary measures and burdens the State to solve the criminal cases in the shortest time possible.

As of May 2009, 2601 blocking orders have been issued in Turkey. **Out of the 2601 orders, only about 64 of them have been lifted.** Although no explanation is provided, it is believed that decisions to lift those orders have not been issued as a result of non-guilty verdict as required by Article 8(8) of the Law. Banning orders are usually lifted due to removal of impugned part of the blocked websites as was witnessed in the cases of Google Groups (March 2008), Eğitim Sen (September 2008), and the daily newspaper Vatan (October 2008). Furthermore, in the majority of those decisions, the perpetrators have not been given the chance to defend themselves. **In the majority of the cases, no further prosecutions seem to take place with regard to the authors' of such publications or owners of such websites in Turkey.** In other words, **although Law No. 5651 labels these as precautionary measures, blocking decisions seem to become permanent, and in some instances remain indefinitely.** Therefore, websites and content are blocked and 'presumed guilty' based in most cases on 'mere suspicion,' even though the legality or illegality of content on such sites has not been established by a court of law.

### **Precautionary Measures Become Final Judgments**

Furthermore, in practice, blocking orders issued as precautionary measures



become final judgments. Precautionary measures issued under Law No. 5651 are supposed to be provisional in nature and should be used only under exceptional circumstances. By way of analogy, under both Article 109 of the Law of Civil Procedure and the Law of Criminal Procedure, precautionary measures are issued on a provisional basis. According to the Court of Cassation “precautionary measures which solve the substance of the case cannot be ordered. The measure must be ordered to prevent a considerable damage. A measure meeting one party’s needs while damaging substantial number of others cannot be ordered.” **The current practice of banning in Turkey is in contradiction with these important principles. Precautionary measures do not seem to be provisional in practice.**

One reason for that stems from the Law. According to Article 8(6) of Law No. 5651, if TIB can establish the identities of those who are responsible for the content subject to the blocking orders, the Presidency would request the Chief Public Prosecutor’s Office to prosecute the perpetrators. It follows then, if the identities of those who are responsible for the content cannot be identified, no prosecution shall be pursued and precautionary measures that must be provisional would become permanent.

### **Transparency and Reasoned Decisions**

With regards to the courts issued blocking orders only the state prosecutors, judges, courts, and the TIB know the reasons for the blocking orders. With regard to administrative blocking orders issued by the TIB, only the Presidency knows why the blocking orders are issued.

Furthermore, according to Akdeniz & Altiparmak’s research and cases examined by the researchers, **reasoned decisions seem to be rare and exceptional.** However, this is against the principle of reasoned decision, which is protected under Article 141(3) of the Constitution which states that “the decisions of all courts shall be made in writing with a statement of justification.” As the Constitution does not differ between final decisions and precautionary measures, all Law No. 5651 decisions fail to satisfy this important constitutional requirement. The Strasbourg organs have long held that where a convicted person has the possibility of an appeal, the lower court must state in detail the reasons for its decision, so that on appeal from that decision the accused’s rights may be properly safeguarded”. **The Strasbourg Court is clear that an authority is obliged to justify its activities by giving reasons for its decisions.** It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.

Although it is undesirable to publish the exact location of the allegedly illegal content (web address or URL), the notices published on the blocked pages should lay down the reasons for blocking. The public has a right to know, and transparency would lead to a better understanding of why a blocking order has been issued. Transparency would also make it possible to challenge decisions taken by public prosecutors, the courts, and by TIB.

### **Administrative blocking orders issued by TIB**

The law through Article 8(4) enables the Telecommunications Communication Presidency to issue “administrative blocking orders” ex-officio. These orders can be issued by the Presidency with regards to the crimes listed in Article 8(1) when the content and hosting providers are situated outside the Turkish jurisdiction. The Presidency can also issue administrative blocking orders regarding content and hosting companies based in Turkey if the content in question involves either sexual exploitation, abuse of children, or obscenity. **Under the Turkish Constitution, decisions that interfere with the freedom of communication and right to privacy can only be given by the judiciary.** This embodies one of the leading principles of fundamental rights system of the Turkish Constitution. **The possibility to appeal to the administrative courts does not rectify this deficiency.**

### **Conclusion and Recommendations**

As this study has shown, access to at least 3,700 websites is currently blocked under Law No. 5651 from Turkey. The impact of the current regime and related deficiencies are wide, affecting not only the freedom to speak and receive information, but also the right for blocked websites to receive a fair trial.

### **Turkish Law should respect OSCE commitments and other international human rights principles**

Regulation of the Internet should respect OSCE commitments, especially the governmental duty to uphold independence and pluralism of the media, and the free flow of information, as defined in Decision No. 193 of the Permanent Council of the OSCE, 5 November 1997, and constantly developed ever since. It should also be in conformity with other international human rights principles, especially freedom of expression and privacy of communication. Restrictions introduced by law should be proportional and in line with the requirements of democracy as was argued in this study. Within this context, the decision of the European Court of Human Rights in the case of *Ürper and Others v. Turkey* with regard to issues surrounding prior restraint and indefinite banning of alternative





media publications, including websites, should be noted. The Turkish law should conform to the jurisprudence of the Strasbourg court, as the practice of banning future publications and access to websites such as Özgür Gündem, Fırat News Agency, Yeni Özgür Politika, Keditör, Günlük Gazetesi goes beyond any notion of “necessary” restraint in a democratic society.

### **Blocking Decisions should be made public**

It should be recalled that openness, transparency, and accountability are elements of a healthy democratic system. Therefore, blocking decisions issued by the courts and TIB and the reasons for such decisions should be made public, so that the public as well as the content, and website operators are better informed about the blocking decisions.

### **TIB should inform the public about the blocking decisions and statistics**

The study has shown that lack of judicial and administrative transparency with regards to the blocking orders issued by the courts and by TIB continues to be a major problem. Furthermore, TIB’s decision not to reveal the blocking statistics is a step backwards, and in the absence of information, openness, and transparency it is difficult to monitor and assess the legal practices of the current regulatory regime in Turkey. Therefore, TIB, as a ‘public administrative body’ should continue to inform the public and publish blocking statistics on a regular basis as the administrative body did between May 2008 and May 2009.

Furthermore, it is argued that there could be a breach of Article 10 of ECHR if blocking measures or filtering tools are used at state level to silence politically motivated speech on the Internet, or if the criteria for blocking and/or filtering is secret, or if the decisions of the administrative bodies are not made publicly available for legal challenge. Administrative blocking decisions issued with regard to Gabile.com and Hadigayri.com websites confirmed these concerns.

### **Illegal blocking outside the scope of Law No. 5651 should be ceased**

As this study outlined, at least 197 politically motivated, court ordered blocking decisions were issued outside the scope of Article 8 of Law No. 5651. As of December 2009, the extent of this breach and blocking remains unknown as TIB does not publish the blocking decisions since May 2009. The Turkish public should have “the right to be informed of different perspectives on the situation in south-east Turkey.” The Turkish government has a duty to protect its citizens’ right to receive information in the absence of any plausible justification, or legitimate aim based on Article 10(2) criteria. The practice of blocking access

to websites outside the scope of Article 8 should be reviewed by the Ministry of Justice.

### **Censorship of web 2.0 based social networks should be avoided**

It is argued in this study that banning socially useful networks such as YouTube, Google Sites, and others also has very strong implications on political expression. Those sites provide a venue that is widely used around the world for alternative and dissenting views. According to the Strasbourg Court, while political and social news “might be the most important information protected by Article 10, the freedom to receive information does not extend only to reports of events of public concern, but covers in principle also cultural expressions as well as pure entertainment.” If such blocking practice continues, there will be more applications against Turkey at the European Court of Human Rights level with censorship claims.

### **Reform or abolish Law No. 5651**

Finally, based on the analysis of the Law No. 5651 practice in this study, it is argued that the state response to Internet content and publications is evidently problematic, and blocking orders issued by the courts and TIB could result in blocking access not only to allegedly illegal content but also to legal content and information. The necessity of such interference within a democratic society based on Article 10, ECHR and the related jurisprudence of the European Court of Human Rights is raised in this study. It is the submission of this study that the domain based blocking of websites that carry legal content could be regarded as a breach of Article 10, and as a serious infringement on freedom of speech, and more far-reaching than necessary in a democratic society.

Based on legal and procedural deficiencies identified in this study, the government should urgently bring Law No. 5651 in line with international standards on freedom of expression, or otherwise consider abolishing the law. It is also recalled that the law was designed to protect children from illegal and harmful Internet content. However, the adoption of a “web based blocking policy” does not necessarily achieve the government’s important mission of protecting its children. As proposed by Akdeniz & Altıparmak, the government should instead commission a major public inquiry to develop a new policy which is truly designed to protect children from harmful Internet content while respecting freedom of speech, and the rights of Turkish adults to access and consume any type of legal Internet content.

In conclusion, it is worryingly noted that the development of a state sponsored



Turkish search engine which will reflect upon ‘Turkish sensitivities’ has been announced by the Information and Communication Technologies Authority (BTK). This could be used as a tool for censorship in the near future. Furthermore, while the Turkish government and the responsible administrative bodies continue to be concerned about the availability of certain types of content on the Internet, to this point, similar attention has not been shown with regards to the availability of hate speech and racist content on the Turkish Internet sphere, or encouragement of hate crimes or discrimination through certain websites towards minority groups based in Turkey.

## **Projects 2010**



## **Training activities**

### ***Training for Moldovan Journalists on Internet Media***

My Office organized, in co-operation with the OSCE Mission to Moldova, a two-day seminar on Internet media in Chisinau on 20-21 September. Twenty journalists from central and regional newspapers and broadcasters, including those from Gagauzia and Transnistria, discussed the legal context, professional advantages and risks, as well as the sustainability of Internet media. The seminar offered practical solutions to challenges the Internet presents to small markets.

## **Projects**

### ***Expert workshop of media legislation drafting in Tajikistan***

On 30 September my Office supported an expert workshop, organized by the OSCE Office in Tajikistan, to facilitate a public debate on draft amendments to the law on press and other mass media. The workshop, which brought together media law experts, parliamentarians, representatives of civil society and academia, prepared specific proposals to improve the existing law and presented them to the Parliament. I commended this public debate and the openness of members of Parliament to listen to arguments of national and international media law experts as an excellent exercise in media lawmaking.

### ***Conflict-sensitive election reporting in Kyrgyzstan***

My Office supported a project on conflict-sensitive election reporting conducted by the DW-AKADEMIE (Deutsche Welle) in Kyrgyzstan. The project consisted of two modules that took place in September and November aimed at enhancing print and online journalists' skills in election coverage and adopting a set of guidelines for conflict-sensitive reporting. I hope that the guidelines drawn up by the journalists will serve as the basis of their coverage during elections in the future. I supported this media initiative as a follow-up to my meeting in Bishkek on 19 July with President Roza Otunbaeva during which we discussed practical ways of how my Office could support Kyrgyzstan's efforts to strengthen independent journalism.

### ***Joint project with UNESCO to promote self-regulation in South East Europe***

From October to November 2010, my office supported a joint project with

UNESCO to promote media self-regulation in South East Europe. This project was a follow-up of another project implemented in 2009 and already funded by my Office and UNESCO through an EU grant. The synergy of efforts of these international organizations to coordinate and streamline the support to media freedom in South East Europe was very much welcomed during a time of global economic crisis.

Approximately 280 media professionals, experts, publishers and regulators attended the round tables on media self-regulation held in Skopje, Dubrovnik, Istanbul, Sarajevo, Pristina, Novi Sad, Tirana and Podgorica. International experts participated in the events in order to implement recommendations adopted during the first part of the project in 2009 and to build capacities of media professionals wishing to consolidate media self-regulation mechanisms in their countries.

### ***South Caucasus Media Conference in Tbilisi***

My Office's 7th South Caucasus Media Conference took place in Tbilisi on 11-12 November. It brought together more than 80 journalists, media experts, government officials, parliamentarians, scholars and civil society representatives from Georgia, Armenia and Azerbaijan. The two-day event offered participants an opportunity to discuss issues related to access to information, the free flow of information on the Internet and regional media developments with international media experts.

Conference participants adopted a declaration on access to information and new technologies in the South Caucasus which is available in English and Russian at:

[http://www.osce.org/documents/rfm/2010/11/47629\\_en.pdf](http://www.osce.org/documents/rfm/2010/11/47629_en.pdf) (English version)

[http://www.osce.org/documents/rfm/2010/11/47629\\_ru.pdf](http://www.osce.org/documents/rfm/2010/11/47629_ru.pdf) (Russian version)

Like all previous conferences, this year's event was financed by extra-budgetary contributions. My thanks go to the delegations of Germany, the Netherlands, Norway, Sweden and the United States. Regional media conferences, which my Office organizes twice a year in the South Caucasus and Central Asia, offer participating States a unique opportunity to engage in a constructive dialogue on media-freedom issues.

### ***Guide to the Digital Switchover***

My Office has just published "The Guide to the Digital Switchover", in English and Russian. The guide is an update of the guide published in 2009 by my



predecessor, Miklós Haraszti. As the switchover is the challenge of the coming years for many OSCE participating States, this guide aims to offer practical help to all stakeholders for the switchover process and to find ways to strengthen media freedom in the digital age.

The guide explains, in simple terms, a technological process that enables us to gain access to a previously unimaginable amount of information through television and radio. This development also makes it possible to impart information to others more easily than ever before. To what extent such technology is used to benefit people, how it can assist in creating a pluralistic electronic media and to what extent it can break down the information gap that still exists in many areas of the OSCE region very much depends on the media laws and policies governing the switch.

If carried out properly, the digital switchover can safeguard human rights, including freedom of the media and the right of access to information. If all parties involved in the process co-operate, including broadcasters, producers, resellers and consumer associations, the result is a media landscape that protects plurality of opinion and freedom of expression.

But in the digital age, OSCE participating States must deliver on what they have subscribed to in the analogue world: to provide their citizens with pluralistic information, which strengthens democracies. Well-informed people make well-informed decisions, which are the indispensable foundation that democracies can build upon.

The guide is a comprehensive examination of issues to be considered by all stakeholders involved in the switchover process, including the successes and pitfalls encountered. It gives us a list of “Dos and Don’ts” of the switchover, which raises attention to the main difficulties and opportunities of the switch. The guide is available at:

[http://www.osce.org/publications/rfm/2010/11/47821\\_1571\\_en.pdf](http://www.osce.org/publications/rfm/2010/11/47821_1571_en.pdf) (English)

[http://www.osce.org/publications/rfm/2010/11/47821\\_1571\\_ru.pdf](http://www.osce.org/publications/rfm/2010/11/47821_1571_ru.pdf) (Russian)

### ***Journalism education***

As a follow up to the 6th South Caucasus Media Conference held in Tbilisi on 19-20 November 2009, my Office produced a publication “Journalism education – improvement of the quality of education and new technologies”. The book compiles papers of international and national experts on the developments in journalism education and challenges that members of the media face in South

Caucasus.

The publication is available in English and Russian at:

[http://www.osce.org/fom/item\\_11\\_47770.html](http://www.osce.org/fom/item_11_47770.html)

### ***Baku seminar on government-media relations***

On 19-20 April, my Office conducted a two-day training seminar in Baku on government-media relations in a democratic society. The seminar was part of my Office's training program that has already covered more than 10 OSCE participating States and attracted approximately 600 participants since 2005.

This was the third training event of this kind held in Baku, jointly with the OSCE Office. It looked into the Azerbaijani and international legal aspects of freedom of information and freedom of expression, including best practices in successfully managing government-media relations.

Sixteen heads of press and information offices of the ministries and government agencies, and 16 editors-in-chief of media outlets attended the training seminar.

### ***Tashkent television training***

My Office recently co-organized a television training course in Tashkent in co-operation with the OSCE Project Co-ordinator in Uzbekistan and Uzbekistan's National Association of Electronic Mass-Media (NAESMI). The training took place from 30 June through 5 July. It brought together 35 cameramen, editors and journalists from various Uzbek regional television stations. NAESMI already has expressed its desire for more advanced training in the future.

### ***Co-operation with UNESCO on journalism education***

As a follow up to the 2009 Central Asia Media Conference devoted to journalism education, my Office and the UNESCO Almaty Cluster Office for Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan jointly supported a project to develop the Russian version of the UNESCO Model Curricula for Journalism Education. The curriculum focuses on practical skills and the role of journalism in society, business, politics, human development and other areas. The courses are designed to be adapted by universities and media organizations to meet national and local conditions.

The project, implemented by the Institute for International Journalism at Ohio





University in the United States, involves compiling lists of Russian-language readings and resources for all courses, having the lists peer-reviewed by a panel of leading journalism educators and researchers, and working with journalism faculties and professional media trainers to incorporate courses into their programs.

### ***Central Asia Media Conference***

During our 12th Central Asia Media Conference in Dushanbe on 25-26 May, I had the opportunity to meet many journalists, representatives of media organizations and public officials from Central Asia to discuss issues related to access to information, free flow of information on the Internet and general media developments in the region.

Journalists and representatives of governments and civil society from Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, as well as a journalist from Afghanistan, participated in the Conference. The two-day event provided a forum for discussion on media developments and challenges that journalists face in the region, with a focus on issues related to access to information and new technologies, including the Internet. Agenda topics included international standards on access to information, Internet development and regulation and access to information in Central Asia.

Conference participants adopted a declaration on access to information and new technologies in Central Asia, which is available in English and Russian at:

English version [http://www.osce.org/documents/sg/2010/06/44316\\_en.pdf](http://www.osce.org/documents/sg/2010/06/44316_en.pdf)

Russian version [http://www.osce.org/documents/sg/2010/06/44316\\_ru.pdf](http://www.osce.org/documents/sg/2010/06/44316_ru.pdf)

I called for more transparency and easier access to government-held information in my opening statement at the Conference. The full version of the speech is available at:

English version [http://www.osce.org/documents/rfm/2010/05/44261\\_en.pdf](http://www.osce.org/documents/rfm/2010/05/44261_en.pdf)

Russian version [http://www.osce.org/documents/rfm/2010/05/44261\\_ru.pdf](http://www.osce.org/documents/rfm/2010/05/44261_ru.pdf)

As in previous years, my Office holds two annual media conferences financed by extra-budgetary contributions. I would like to thank those Delegations that have provided financial support for the event in Central Asia: Sweden, the United States and Lithuania. The conferences provide a unique opportunity for participating States to engage in a constructive dialogue on media-freedom issues.

# Interventions 2010



## Interventions 2010

### Albania

#### *Interventions*

28 June: Letter to Albanian authorities regarding the “Pango” defamation case expressing concern about a €400,000 judgment against Top Channel TV for moral damages caused to former Minister of Tourism, Ylli Pango.

6 December: Letter to Foreign Minister Edmond Haxhinasta expressing concern about an assault on journalist Piro Nase of the newspaper Panorama, who was beaten by two assailants after having received threats for his reporting.

#### *Visit*

16 July: Informal meeting with Minister of Foreign Affairs Ilir Meta during the Informal Ministerial Meeting in Almaty to discuss the Pango case and convey a letter on the issue to President Bamir Topi.

#### *Press Release*

29 June: OSCE media freedom representative express concern over 'chilling effect' of libel damages awarded to Albanian politician

### Armenia

#### *Intervention*

31 March: Delivery of an analysis of the “Concept Paper on Migrating to Digital Radio and Television Broadcasting in Armenia,” which set out shortcomings in the law and included recommendations that the public participate in the discussion over the law.

#### *Press Releases*

18 May: OSCE media freedom representative meets Armenian President, encourages public discussion and transparency in broadcast reform

1 June: OSCE media freedom representative calls for amendments to Armenia's draft broadcast law to promote media pluralism

15 June: Armenian broadcasting law fails to guarantee media pluralism, says OSCE media freedom representative

## **Azerbaijan**

### ***Interventions***

25 March: Letter to Foreign Minister Elmar Mammadyarov welcoming President Ilham Aliyev's decision to pardon Ganimat Zahidov, chief editor of Azadliq newspaper.

15 June: Letter to President Aliyev asking him to secure the release of journalist Eynulla Fatullayev who was convicted of defamation, incitement to ethnic hatred and tax evasion, and bloggers Emin Milli and Adnam Hacizade, who were convicted of hooliganism and battery.

### ***Press Releases***

22 April: OSCE media freedom representative calls on Azerbaijani authorities to comply with European court ruling, release journalist Fatullayev

6 July: OSCE media representative condemns new sentencing of Azerbaijani journalist

18 November: OSCE media freedom representative welcomes release of Azerbaijani blogger and calls for release of other two imprisoned journalists

19 November: All journalists imprisoned because of their work should be set free, OSCE media freedom representative says

## **Belarus**

### ***Interventions***

27 January: Letter to Minister of Foreign Affairs Sergei Martynov to provide more information on amendments to a proposed law concerning Internet service providers and websites.

25 March: Letter to Belarusian authorities to express concern about intimidation by law enforcement officials of Natalia Radina, editor of the Charter97.org website; Irina Khalip, Minsk correspondent for Novaya Gazeta and Svetlana



Kalinkina and Marina Koktysh of Narodnaya Volya.

6 May: Letter to Minister Martynov restating concerns over the treatment of the journalists, a pending criminal defamation investigation against Charter97.org and the adoption of implementing guidelines to a presidential decree on Internet use.

### ***Visit***

25-27 October: Meetings with high-level officials, including Minister Martynov, regarding a variety of Internet-related issues as well as the accreditation of foreign journalists.

### ***Press Releases***

10 May: OSCE media freedom representative criticizes pressure against independent media in Belarus, offers to support discussion of new Internet legislation

6 September: OSCE media freedom representative calls for thorough and independent investigation into death of opposition website director in Belarus

27 October: OSCE media freedom representative: Belarus needs media pluralism

21 December: OSCE media freedom representative condemns arrests and assaults on journalists following Belarus election

## **Bulgaria**

### ***Intervention***

7 January: Letter to then Minister of Foreign Affairs, Rumiana Jeleva, seeking information about the murder of Bobi Tsankov, an author and journalist, who reported on organized-crime issues.

## **Canada**

### ***Interventions***

26 February: Letter to Canadian authorities asking for information about the investigation into the 21 February vandalizing of the office of the Uthayan

newspaper in Scarborough, Ontario, which came on the heels of a threatening phone call to Logan Logendralingam, its editor.

12 May: Letter to authorities welcoming a Supreme Court ruling that confirmed the right of journalists to protect confidential sources.

5 July: Letter to authorities expressing concern about reports of mistreatment of journalists covering the Group of 20 Summit in Toronto.

## **Croatia**

### ***Intervention***

12 August: Letter to authorities expressing concern about an attack on a television crew of the public broadcaster HTV, which had been covering a Victory Day celebration in a small town.

## **Cyprus**

### ***Intervention***

12 January 2010 letter to Cypriot authorities to request updates on the investigation into the murder of Andis Hadjicostis, chief executive officer of the Dias Media Group.

## **Estonia**

### ***Intervention***

25 March: Letter to Urmas Paet, Minister of Foreign Affairs, and Ken-Marti Vaher, Chairperson of the Legal Affairs Committee of Parliament to enquire about a draft law on protection of confidential sources, expressing concern that the proposed law contained many exceptions to the right.

## **France**

### ***Interventions***

2 November: Letter to authorities expressing concern about alleged mistreatment of journalists covering street protests.

23 November: Letter to authorities requesting a thorough investigation of the



circumstances surrounding the theft of journalists' computers from for separate locations.

10 December: Letter to the president of the French National Assembly raising concerns about problematic amendments to xxxxx.

### ***Press Release***

14 January: OSCE media freedom watchdog welcomes France's new law allowing journalists to protect confidential sources

## **Georgia**

### ***Interventions***

29 October: Letter to Davit Bakradze, Chairman of the Parliament, to welcome his call for legislation providing for media ownership transparency.

23 November: Letter to Foreign Minister Grigol Vashadze requesting information about an attack on a director of a Telavi television station, Tanamgzarvi.

### ***Visit***

16 April meeting with high government officials welcoming steps to decriminalize defamation and reform funding for the Public Service Broadcaster.

### ***Press Releases***

19 January: OSCE media freedom representative welcomes reforms of public television financing in Spain, Georgia

15 March: OSCE media freedom representative calls on Georgian broadcasters to abide by ethical standards of journalism

14 April: OSCE media freedom representative to open media forum in Tbilisi, meet Georgian officials

## **Germany**

### ***Interventions***

6 May: Letter to Minister of Justice Sabine Leutheusser-Schnarrenberg

expressing appreciation for her support of a legislative to strengthen protection of journalists' confidential sources.

23 September: Letter to Minister of Justice Sabine Leutheusser-Schnarrenberger expressing concern over the conviction of two journalists, Arndt Ginzel and Thomas Datt, for libelling two judges.

## **Greece**

### ***Interventions***

7 May: Letter to Greek authorities regarding an official warning issued to Tele Radio, which broadcasts in Turkish, that the primary broadcasting language should be Greek.

19 July: Letter to authorities condemning the murder of journalist Socratis Giolias and requesting a thorough investigation of the incident.

Press Release

19 July 2010: OSCE media freedom representative condemns murder of Greek political blogger

## **Hungary**

### ***Interventions***

5 February: Letter to Minister of Foreign Affairs Peter Balazs concerning a civil libel suit won by then former Prime Minister Viktor Orban against a politician and the newspaper Nepszava, which reported on the politician's public statement.

23 June: Letter to Hungarian authorities asking them to stop the process of adopting new media laws and begin public hearings to modify the drafts which could breach OSCE standards guaranteeing free expression and media freedom.

3 September: Letter to Minister of Foreign Affairs Janos Martonyi presenting a legal analysis of a package of media laws that, if left unchanged, could seriously restrict media pluralism and curb the independence of the press.

21 October: Letter to Minister of State for Government Communication Zoltan Kovacs reiterating that the legal review performed by this Office suggests numerous elements in the law should be reconsidered.





## ***Press Releases***

8 February: OSCE media freedom representative criticizes 'misuse' of libel laws to muzzle the press in Kazakhstan, Tajikistan, and Hungary

24 June: OSCE media freedom representative calls on Hungarian Government to halt media legislation package, start public consultations

7 September: Hungarian media legislation severely contradicts international standards of media freedom, says OSCE media freedom representative

22 December: Hungarian media law further endangers media freedom, says OSCE media freedom representative

## **Ireland**

### ***Press Release***

12 January 2010: OSCE media freedom representative welcomes Ireland's decriminalization of defamation, calls for crime of 'blasphemy' to be abolished

## **Italy**

### ***Interventions***

Letters of 4 June and 15 June 2010 asking legislators to drop a draft law on electronic surveillance and eavesdropping which could seriously hinder investigative journalism by criminalizing the publishing of documents related to court proceedings, police investigations or leaked wiretapped materials before the beginning of a trial.

### ***Press Release***

15 June 2010: OSCE media freedom representative urges Italy to amend bill on electronic surveillance

## **Kazakhstan**

### ***Interventions***

4 February: Letter to Minister of Foreign Affairs Kanat Saudabayev about a court-

ordered seizure of all print runs of Respublika, Goloos Respubliki, Kursiv, Kursiv-News and Vzglyad which contained letters sent to the country's authorities by exiled former government minister Mukhtar Ablyzaov.

23 April: Letter to authorities regarding Internet issues, including the annulment of a requirement that websites be hosted by servers within the country and the interruption of service on websites, including a forum of the newspaper Respublika and YouTube.

5 July: Letter to Minister Saudabayev summarizing pending media issues

3 November: Letter to Foreign Minister Saudabayev expressing concern about tax inspections at independent newspapers and the confiscation of property and seizure of the bank account of another newspaper.

### **Visit**

30 June meetings with several high-level officials, including Chairperson-in-Office Kanat Saudabayev, on the Yesergepov case.

### **Press Release**

8 February: OSCE media freedom representative criticizes 'misuse' of libel laws to muzzle the press in Kazakhstan, Tajikistan, and Hungary

## **Kyrgyzstan**

### **Interventions**

16 March: Letter to Minister of Foreign Affairs Kadyrbek Sarbaev, expressing concern over several issues, including the removal of RFE/RL from the air, blocking of certain websites, the seizure of the press run of the newspaper Forum and a physical attack on Abdurahab Moniev, editor of the website Press.kg.

2 June: Letter to Rosa Otunbayeva, then Chairperson of the Kyrgyz provisional government, welcoming efforts to restore media freedom in the nation and offering assistance in the area of media reform, including the provision of legal analysis.

30 July: Letter to President Otunbayeva regarding the Supervisory Board for the Public Service Broadcaster and safety of journalists issues.



30 August: Letter to President Otunbayeva commending the appointment of the Supervisory Board.

7 September: Letter to President Otunbayeva expressing concern over criminal charges filed against Ulugbek Abdusalomov, editor of an Uzbek language newspaper, for his alleged role in the June events.

### ***Visit***

Meeting on 19 July with now President Otunbayeva on several issues, including reform of the Public Service Broadcaster.

### ***Press Releases***

7 April: Access to information in Kyrgyzstan should be immediately restored, says OSCE Media Freedom Representative

19 April: OSCE media freedom representative acknowledges Kyrgyzstan's commitment to freedom of media, urges immediate compliance

12 May: OSCE media freedom representative offers support to restore public broadcasting in Kyrgyzstan

19 July: OSCE media freedom representative meets Kyrgyz President Rosa Otunbayeva, offers support for further media reforms

30 August: OSCE media freedom representative commends appointment of supervisory board for Kyrgyzstan's public service broadcaster, urges swift reform

10 November: OSCE media freedom representative calls on new Parliament in Kyrgyzstan to decriminalize defamation, continue media reform

### ***Latvia***

#### ***Interventions***

20 April: Letter to authorities expressing concern and asking for additional information about the murder of Grigorijs Nemcovs, founder and publisher of the newspaper Million and owner of a television station in Daugavpils.

20 May: Letter to Minister of Foreign Affairs Aivis Ronis expressing concern

about the search of a home and confiscation of a computer belonging to journalist Ilze Nagla.

## **Moldova**

### ***Press Release***

20 September: OSCE promotes professional internet journalism in Moldova

## **Portugal**

### ***Intervention***

9 September: Letter to Luis Filipe Marques Amado, Minister of Foreign Affairs, and Alberto Martins, Minister of Justice, to express concern about fines levied against journalists and a newspaper that allegedly violated court confidentiality rules.

## **Russian Federation**

### ***Interventions***

5 May: Letter to authorities to express concern over an attack against Arkady Lander, chief editor of Mestnaya, a newspaper known for its critical stance toward regional authorities.

31 May: Letter to authorities regarding attacks against journalists in Daghestan, St. Petersburg, Tomsk and Krasnodar and information on Aleksei Dudko, a blogger who had been arrested in Moscow on weapons and drugs charges.

8 November: Letter to Foreign Minister Sergei Lavrov condemning an attack on Oleg Kashin, a correspondent for Kommersant.

### ***Visits***

15-16 June 2010 meeting with high-level government officials regarding several topics, including the decriminalization of defamation and the switch to digital broadcasting.

At the Astana Summit in December 2010 I meet with Deputy Minister of Foreign Affairs Aleksandr Grushko to discuss many issues, including violence against journalists.



## ***Press Releases***

16 June: OSCE media freedom representative, on a visit to Moscow, welcomes Russian Supreme Court's resolution on media law

21 September: OSCE Media freedom representative welcomes Russian Supreme Court's resolution on civil libel lawsuits

8 November: OSCE media freedom representative condemns brutal attack on Russian journalist

8 November: OSCE media representative appalled by another attack on journalist in Russia

## **Serbia**

### ***Press Releases***

26 July: OSCE media freedom representative strongly condemns brutal attack on Serbian journalist

6 August: OSCE media freedom representative welcomes Serbia's swift investigation of attacks against journalists

## **Slovenia**

### ***Intervention***

15 February: Letter to Foreign Minister Samuel Zbogar expressing concern about criminal defamation charges filed against Finnish journalist Magnus Berglund stemming from an Finnish program, rebroadcast by RTV Slovenia, alleging that then-members of the Slovenian government had accepted bribes from a Finnish defense contractor.

## **Spain**

### ***Interventions***

20 January: Letter to authorities to expressing concern over the sentencing of two Internet journalists for "revealing secret information." The journalists received suspended sentences and were fined for posting on a website the names of

allegedly irregular members of the Popular Party.

11 June: Letter to authorities regarding a decision by the European Court of Human Rights ruling in favour of journalist Jose Luis Gutierrez, who was found liable by a court in 1997 of defaming the late king of Morocco, Hassan II.

### ***Press Release***

19 January: OSCE media freedom representative welcomes reforms of public television financing in Spain, Georgia

### **Tajikistan**

#### ***Press Releases***

8 February: OSCE media freedom representative criticizes 'misuse' of libel laws to muzzle the press in Kazakhstan, Tajikistan, and Hungary

18 October: Media pluralism in Tajikistan in danger, OSCE media freedom representative warns

### **Turkey**

#### ***Interventions***

26 March: Letter to authorities regarding the high number of criminal prosecutions against journalists who cover issues of a sensitive nature and stressing that it is the media's task to inform the public on matters of concern.

20 April: Letter to authorities seeking information on the death of Metin Alatas, an employee of a Kurdish newspaper, Azadiy Welat, who was found hanging from a tree.

18 June: Letter to authorities to restore access to YouTube and other services offered by Google and also bring the country's Internet law in line with international standards on free expression.

9 September: Letter to Foreign Minister Ahmet Davutoglu asking for cooperation in effort to stem pressure on journalists based on their writing. Also addressed was the issue of journalists being imprisoned or threatened with imprisonment and government restrictions on writing about issues related to terrorism.

**Visit**

18 January visit, upon invitation of several universities and the Ankara Bar Association, authorities were asked to bring the country's Internet law in line with OSCE commitments and international standards on freedom of expression.

**Press Releases**

18 January: Turkey's Internet law needs to be reformed or abolished, says OSCE media freedom representative

22 June: OSCE media freedom representative asks Turkey to withdraw recent Internet blocking provisions, calls for urgent reform of law

14 September: OSCE Media Freedom Representative calls upon Turkey to release imprisoned journalists, reform media legislation

1 November: OSCE media freedom representative welcomes Turkish court decision to lift ban on YouTube, encourages further media reforms

**Ukraine****Interventions**

1 April: Letter to Minister of Foreign Affairs Konstyantyn Hryshchenko to express concern about an attack on editor Vasyl Demyaniv of the newspaper Kolomoyskiy Visnyk.

22 April: Letter to President Viktor Yanukovich welcoming his pledge to uphold media pluralism and honour OSCE media-freedom commitments.

16 June: Letter to Minister Hryshchenko regarding a possible visit to Ukraine and expressing concern about recent court rulings regarding licenses that could have potentially negative effects on broadcast pluralism.

20 August: Letter to Minister Hryshchenko expressing concern over the disappearance of editor Vasyl Klymentyev of Novy Stil.

9 September: Letter to the Minister asking for information on an attack on the offices of Silske Zhittya and its editor.

***Visit***

11-13 meetings with high-level government and legislative officials about violence against journalists and reform of media laws, including public service broadcasting.

***Press Releases***

23 April: OSCE media freedom watchdog welcomes Ukrainian President's pledge to support media pluralism, warns of negative developments

20 August: OSCE media freedom representative concerned about missing Ukrainian journalist; welcomes authorities' prompt reaction

13 October: OSCE media freedom representative: Ukraine should take swift and resolute measures to entrench its exemplary record in media pluralism

**United States**

***Intervention***

22 November: Letter to Secretary of State Hillary Clinton condemning the arrest of Russia Today journalists covering a demonstration on public streets outside the Fort Benning military base in Georgia.

***Press Releases***

26 August: OSCE media freedom representative commends US law against 'libel tourism'

23 November: OSCE media freedom representative condemns arrest of journalists covering protest at U.S. military base

**Uzbekistan**

***Interventions***

1 February: Letter to Minister of Foreign Affairs Vladimir Norov expressing concern that six independent reporters affiliated with foreign media outlets were summoned for questioning by the Office of the Tashkent Prosecutor. Also, the case of Hayrullo Khamidov, deputy editor-in-chief of Champion sports newspaper, was detained in January and charged with violating laws relating





to religious organizations. Also raised was the fate of imprisoned journalists Dilmurod Saiid and Solijon Abdurakhmanov who had not had their sentences reconsidered nor been pardoned.

2 June: Letter to Minister Norov continuing to express my concern over the prison sentence handed down on Khamidov and raised the case of photographer and filmmaker Umida Akhmedova who was found guilty of defaming the Uzbek people by her photography and a documentary film.

22 September: Letter to Foreign Minister Vladimir Norov expressing concern about judicial pressure exerted on independent journalists, including a freelance reporter for Voice of America and the editor of a Russian language website as well as continuing to raise objections to jailed journalists.

20 October: Letter to Minister Norov welcoming the fact that two journalists charged with criminal defamation will not spend time in jail.

### ***Press Releases***

2 February: OSCE media freedom representative concerned about persecution of journalists in Uzbekistan

24 September: OSCE media freedom representative expresses concern over continuing harassment of journalists in Uzbekistan

## **Meetings and Conferences 2010**



- The Representative on Freedom of the Media or staff members participated in the following events in 2010:
- 13-14 January: The Representative visited Turkey upon the invitation of the Ankara Bar Association and several universities to speak about the Internet law of Turkey.
- 27-28 January: The Representative addressed the Council of Europe Parliamentary Assembly in Strasbourg to speak on freedom of the media.
- 18-19 February: The Office participated in a workshop in Berlin regarding access to information organized by the Network for Reporting on Eastern Europe.
- 22-23 February: The Office attended a self-regulation conference in Istanbul organized by UNESCO.
- 16-17 March: The Office briefed scholars at a meeting on “Roma and the media: countering prejudices and promoting tolerance” organized by ODIHR in Warsaw.
- 24-26 March: The Representative lectured a Master Class in Broadcast Regulations for Elections organized by UNESCO and Albany Associates in Paris.
- 15-16 April: The Representative visited Tbilisi on the occasion of a conference promoting effective guarantees for freedom of expression in the South Caucasus, Moldova and Ukraine, organized by the Council of Europe.
- 27-28 April: The Representative travelled to Almaty to participate in the 9th Eurasian Media Forum, participating in the opening session “Kazakhstan as chair of the OSCE: significance, expectations and opportunities” and in the session “Media Law and Media Freedom: Anxieties and Realities.”
- 3 May: The Representative participated in World Press Freedom Day events in Berlin where the “The Legal Leaks Toolkit” was launched. The publication was prepared by Access Info Europe and Network for Reporting on Eastern Europe and funded by my Office.
- The Representative also met with the German Foreign Office and the head of the German Delegation to the OSCE Parliamentary Assembly.

- 11 May: The Representative contributed to a conference titled “Independent media in Bosnia and Herzegovina under severe pressure” with an address given in absentia. The event was organized by the BH Journalists Association in Sarajevo.
- 13 May: The Representative attended and chaired the 31st meeting of the European Platform of Regulatory Authorities in Barcelona.
- 17-18 May: The Representative travelled to Yerevan on the occasion of a round table on Armenia’s digital switchover, co-organized with the OSCE Office in Yerevan.
- 18-19 May: The Office participated in the OSCE Asian Partners for Co-operation conference in Seoul.
- 25-26 May: The Office and the OSCE Office in Tajikistan hosted the 12th Central Asia Media Conference in Dushanbe.
- 8 June: The Office spoke at a Balkans Forum meeting on the state of media freedom in South East Europe organized by the European Policy Center, a think-tank in Brussels.
- 9 June: The Representative testified before the U.S. Helsinki Commission in Washington, D.C. on “Threats to free media in the OSCE region.”
- The Representative also met with U.S. Department of State officials Michael Posner, Assistant Secretary of the Bureau of Democracy, Human Rights and Labor, Nancy McEldowney, Principle Deputy Assistant Secretary of the Bureau of European and Eurasian Affairs and Anthony Pahigian, OSCE Coordinator. She also met with Catalina Botero, Special Rapporteur for Freedom of Expression of the Organization of American States.
- 16-17 June: The Office participated in a preparatory meeting on the human dimension for the incoming chairmanship in Vilnius.
- 15-16 June: The Representative was invited by Mikhail Fedotov, secretary of the Russian Union of Journalists, to address an international media conference in Moscow to mark the 20th anniversary of the Russian Federation’s 1991 Media Law.
- The Representative also met with Deputy Foreign Minister Aleksandr Yakovenko and Deputy Communications and Mass Communications Minister Aleksei Malinin.



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- 17 June: The Representative participated in an Expert Meeting on Human Rights and the Internet organized by the Swedish Ministry of Foreign Affairs, the Raoul Wallenberg Institute of Human Rights and Frank La Rue, the UN Special Rapporteur on the right to freedom of opinion and expression in Stockholm.
- 21 June: The Office participated in European Commission consultations on the preparation of the EU's 2010 enlargement package in Brussels.
- 28 June: The Office contributed to the civil society preparatory meeting ahead of the High level conference on Tolerance and Non-discrimination held in Astana.
- 29-30 June: The Representative spoke at the High level conference on tolerance and non-discrimination in Astana on the role of independent media in addressing manifestations of intolerance.
- 8-9 July: The Representative participated in informal discussions in Vilnius on Lithuania's preparations for the 2011 Chairmanship.
- 16-17 July: The Representative participated in an Informal Ministerial Meeting in Almaty.
- 19 July: The Representative visited Bishkek for meetings with President Rosa Otunbayeva and media and civil society representatives.
- 29-30 August: The Representative, on invitation from the Slovenian Foreign Minister, attended and participated in the Bled Strategic Forum titled "the global outlook for the next decade" and spoke on the topic of the transformative power of the Internet.
- 13 September: The Representative delivered the keynote speech in Vienna at the dinner and award ceremony for 60 World Press Heroes of the International Press Institute World Congress.
- 14-15 September: The Office attended the Regional Meeting of Heads of Field Operations in the South Caucasus in Baku.
- 16 September: A staff member from the Office spoke in Kyiv at an Article 19 sponsored event: "10 Years On – No Justice for Georgiy Gongadze: The Need to Find New Ways to Fight Impunity."

- 7 October: The Representative spoke at the media freedom special session of the OSCE Review Conference in Warsaw. The session focused on violence, imprisonment and all forms of harassment committed against journalists.
- 6-8 October: The Office participated in a European Platform of Regulatory Authorities meeting in Belgrade.
- 12 October: The Office took part in a seminar in Vienna organized by the Austrian Ministry of Justice which brought together representatives from the legal and media fields to discuss whether there is a need to change Austrian law protecting the confidentiality of newsroom activities.
- 11-13 October: The Representative visited Kyiv and met with Parliament Speaker Volodymyr Lytvyn; Foreign Minister Konstyantyn Gryshchenko; Hanna Herman, Deputy Head of the Presidential Administration; Andriy Shevchenko, Head of the Parliamentary Committee on Freedom of Speech and Information, civil society and journalists.
- 13 October: The Representative delivered a keynote speech at a conference in Kyiv organized by the Council of Europe and the European Union on “Safeguards to Media Pluralism in Ukraine”. The participants of the conference discussed European standards regarding media pluralism and practical measures of safeguarding it in Ukraine.
- 15 October: The Representative addressed the European Council Working Party on the OSCE and Council of Europe in Brussels.
- 25-27 October: The Representative visited Minsk on invitation from the government of Belarus and participated in the round-table event on Internet regulation and held meetings with high-ranking officials including Foreign Minister Sergei Martynov, Information Minister Oleg Proleskovsky, Vsevolod Yanchevsky, Aide of the President and Head of the Chief Ideological Department of the Presidential Administration, and Lidiya Yermoshina, Head of the Central Electoral Commission.
- 1 November: The Representative gave a lecture on press freedom at Columbia University in New York City at the event “A Free Press for a Global Society.”
- 4-5 November: The Office participated in the annual meeting in Amsterdam of the Alliance of International Press Councils in Europe.



- 10 November: The Office participated in a seminar in Brussels organized by the broadcasting regulatory authority CSA-Belgium on the topic of excluding extremist political parties from live broadcast debates.
- 18 November: The Office participated in a Council of Europe expert hearing on “Defamation and jurisdiction shopping” in Strasbourg.
- 26-28 November: The Representative attended the OSCE Review Conference in Astana in the run-up to the Summit and spoke at the Working Session specifically devoted to freedom of expression on the Internet and the digital switchover in broadcasting.
- 1-2 December: The Representative attended the 2010 Summit in Astana.
- 2 December: The Office participated in the second Working Group (comprised of OSCE, OHR and EU representatives) meeting in Sarajevo with the aim of identifying how to advance media-reform measures in Bosnia and Herzegovina.
- 10 December: The Representative participated in the Austrian chapter of the Reporters Without Borders awards ceremony in Vienna.
- 13 December: The Representative participated in a panel discussion on Security and Human Rights at an OSCE Roundtable in Vienna.

## **Press Releases 2010**





## **OSCE media freedom representative welcomes Ireland's decriminalization of defamation, calls for crime of 'blasphemy' to be abolished**

VIENNA, 12 January 2010 - The OSCE Representative on Freedom of the Media, Miklos Haraszti, welcomed today Ireland's amended Defamation Act which went into effect at the start of the year, but criticized the introduction of a new "blasphemy" provision.

The Defamation Act decriminalized speech offences, making Ireland the second Western European country after the United Kingdom to abolish criminal libel. In those countries, only civil courts are allowed to deal with offences like defamation and libel.

"I welcome Ireland's initiative. Decriminalization reform should be adopted by more countries which continue to treat journalistic mistakes as crimes, exerting a 'chilling effect' on critical journalism," Haraszti said. "Most European Union member states have long stopped using their criminal defamation or libel provisions, heeding the jurisdiction of the European Court of Human Rights in Strasbourg. Ireland made the logical and welcome next step by dropping those crimes from the books."

"As welcome as the Irish reform is, however, introducing a renewed version of the antiquated 'crime' of blasphemy is a step backward and sends the wrong signal to the international community."

Haraszti noted that the blasphemy provision, which penalizes statements that are "grossly abusive or insulting in relation to matters held sacred by any religion", is contrary to Ireland's stance in the UN Human Rights Council, where the country has consistently voted against motions that define "defamation of religion" as a crime.

"Defamation of religion is a concept that, if criminalized, restricts free dialogue in society as much as the other types of defamation which have now been repealed," Haraszti said. "Therefore, I call on the Irish authorities to also repeal this provision as quickly as possible."

## **OSCE media freedom watchdog welcomes France's new law allowing journalists to protect confidential sources**

VIENNA, 14 January 2010 - The OSCE Representative on Freedom of the Media, Miklos Haraszti, welcomed today a new French law that strengthens the

protection for journalists who keep the identity of their sources confidential even in courts of law.

"The confidentiality of journalists' sources is a main precondition for strong investigative journalism in the service of democracy," said Haraszti.

"The adoption of the long-awaited measure is of utmost importance for the French media, and it strengthens internationally, too, the public's right to information."

The law, which took effect on 4 January, allows journalists to keep their confidential sources secret in court cases, unless a "preponderant need of public interest" can be demonstrated and "and only if the measures are strictly necessary and proportionate to the pursued legitimate aim". It also reinforces the protection concerning searches of journalists' home offices and cars.

"Although France had some safeguards in place already to protect the confidentiality of journalists' sources, the regular use of search warrants in such cases in recent years proved that further legal changes were needed in order to comply with international standards," said Haraszti.

"The law could have gone even further, but I hope that only very few cases will be seen as exceptional by the courts and that the law will boost investigative journalism by protecting its sources."

### **Turkey's Internet law needs to be reformed or abolished, says OSCE media freedom representative**

VIENNA, 18 January 2010 - Miklos Haraszti, the OSCE Representative on Freedom of the Media, today asked the Turkish authorities to bring Turkey's internet law in line with OSCE commitments and other international standards on freedom of expression.

"In its current form, Law 5651, commonly known as the Internet Law of Turkey, not only limits freedom of expression, but severely restricts the citizens' right to access information," said Haraszti, commenting on a new report commissioned by his office on the blocking measures provided by the law.

The report, prepared by Yaman Akdeniz, an internationally renowned expert on cyber rights, contains a legal review and detailed recommendations.

"At present, 3,700 Internet sites are blocked in Turkey, including YouTube,



GeoCities, and Google sites. Even as some of the content that is deemed 'bad', such as child pornography, must be sanctioned, the law is unfit to achieve this. Instead, by blocking access to entire websites from Turkey, it paralyzes access to numerous modern file sharing or social networks," said Haraszti.

Haraszti, who presented the report at Bilgi University in Istanbul, Ankara State University and at the International Law Congress of the Ankara Bar Association on 13 and 14 January, noted that, while in Turkey, he was unable to access even the OSCE's YouTube website.

"The results make the means unjustifiable," he said. "Blocking access inside of Turkey is an affront to the public's right to the entirety of the Internet. Additionally, some of the official reasons to block the Internet are arbitrary and political, and therefore incompatible with OSCE's freedom of expression commitments."

He added: "Besides pointing out the dangers of the Internet law, I also have to repeat that the Turkish legal framework still fails to protect freedom of expression. Numerous Criminal Code provisions are applied against media workers, and as a result, journalists risk imprisonment for carrying out their work."

"Therefore 'reform or abolish' the Internet Law is our main recommendation. I hope that the Turkish authorities will soon remove the blocking provisions that prevent Turkish citizens from being part of today's global information society."

The report is available at [www.osce.org/fom](http://www.osce.org/fom).

### **OSCE media freedom representative welcomes reforms of public television financing in Spain, Georgia**

VIENNA, 19 January 2010 - The OSCE Representative on Freedom of the Media, Miklos Haraszti, welcomed today recently implemented broadcast financing reforms in Spain and Georgia, commending both countries for "making public television both more independent and more in service of the public".

"I am pleased to see that an increasing number of OSCE participating States have decided to support the independence of public-service television by establishing a financing method that automates the flow of its revenues, guarantees it for years ahead and weakens dependence on advertising," he said.

On 1 January, Spain removed advertising from TVE, the national public broadcaster. The reform guarantees TVE several financial resources for three consecutive years, including from taxes levied on frequency users, commercial

broadcasters and telecommunications operators. It will also be guaranteed a state subsidy.

"The Spanish reform not only eliminates advertising on public channels, but it also strengthens their ability to perform their public duties," Haraszti said.

Moreover, in the first 10 days of the new regime, general audience share jumped from 16 to 20 per cent, and in prime time from 22 to 30 per cent, according to a study cited by Spanish newspaper El Pais.

In Georgia, the Parliament amended the Law on Broadcasting, which now stipulates that annual funding of the Georgian Public Broadcaster should be equal or superior to 0.12 per cent of the country's gross domestic product.

Georgia had a similar system until 2008, with 0.15 per cent of GDP guaranteed as the broadcaster's revenue. Prime-time advertisements are banned on Georgian public television, except during sport events.

"Georgia had pioneered the GDP-based financing of public television, and I am glad it has returned to this method, albeit with a lesser amount guaranteed. I see this as an affirmation of the principle that television must be exempt from government influences," Haraszti said.

"Along with a similar reform in France already in motion, the Spanish and the Georgian financing ideas demonstrate new, innovative ways to secure public-service broadcasting as an essential institution of democracy."

### **OSCE media freedom representative concerned about persecution of journalists in Uzbekistan**

VIENNA, 2 February 2010 - The OSCE Representative on Freedom of the Media, Miklos Haraszti, said today that he was deeply concerned by the continuing harassment of journalists in Uzbekistan.

"In spite of the constructive dialogue that has been developing between my Office and the Uzbek authorities, there has been no improvement in Uzbekistan's press freedom situation," Haraszti wrote in a letter sent yesterday to Uzbekistan's Foreign Minister Vladimir Norov.

"As recent developments show, arrests of journalists and other forms of harassment are still taking place in violation of OSCE media freedom commitments."



In his letter, Haraszi cited the case of two jailed journalists and pointed to recently initiated criminal procedures that "punish and threaten Uzbekistan's few independent voices".

"As of today, journalists Salidzhon Abdurakhmanov and Dilmurod Saiid remain behind bars, serving harsh sentences. Both were convicted on dubious charges in closed trials," he wrote.

Abdurakhmanov, a contributor to Uznews.net and a former RFE/RL's Uzbek Service correspondent, was convicted to 10 years in jail on drug possession charges in October 2008. Saiid, a correspondent for the Central Asian Voice of Freedom website, was sentenced to 12.5 years in prison on extortion and forgery charges.

"I am saddened that the repeated assurances given by Uzbek authorities that both cases will be re-examined did not translate into action," Haraszi said. Haraszi also raised the cases of two journalists who were prosecuted in January: Khairullo Khamidov, the deputy editor-in-chief of the Champion sports newspaper, who was arrested and charged with violating legislation on religious associations, and Umida Akhmedova, a photojournalist who was indicted for defaming the Uzbek people and its traditions in a book of photographs and a documentary film.

"The Office of the OSCE Representative on Freedom of the Media will continue to monitor the fate of Saiid, Abdurakhmanov, Khamidov and Akhmedova. I call on the Uzbek government to act in line with OSCE media freedom standards," Haraszi said.

### **OSCE media representative, other global free speech rapporteurs highlight ten key challenges to freedom of expression**

VIENNA, 4 February 2010 - The OSCE Representative on Freedom of the Media together with freedom of expression rapporteurs of the United Nations, the Organization of American States and the African Commission on Human and Peoples' Rights released today a declaration on the 10 key challenges facing freedom of expression in the next decade.

"The Declaration on Ten Key Threats to Freedom of Expression" was adopted at a joint meeting held Tuesday in Washington with the assistance of the media freedom group Article 19: Global Campaign for Free Expression, and the Centre for Law and Democracy.

"Enormous challenges still exist in giving full effect to the right to freedom of expression, including restrictive legal regimes, commercial and social pressures, and a lack of tolerance of criticism on the part of the powerful," the four rapporteurs said.

Miklos Haraszti, the OSCE Representative on Freedom of the Media, said: "Media freedom has, by many accounts, deteriorated in parts of the OSCE area during the almost six years I have served as OSCE Representative.

"The free press faces a severe safety crisis as governments fail to address unabated violence against journalists. More and more countries introduce restrictive Internet regulations that endanger the freedom of the global medium.

"In many post-Soviet countries, the greatest structural challenge to media freedom comes from total government control over television content."

The 10 threats listed in the four representatives' declaration are:

- Governments continue to exert direct or indirect control over the media;
- Laws criminalizing journalistic errors such as defamation, insult, or slander remain in force in most countries;
- Violence against journalists remains widespread, and governments generally fail to address it adequately;
- Limits continue to be imposed on the right to information, including through the application of secrecy laws to journalists and others who are not public officials;
- Restrictions to the right to freedom of expression still exist for historically disadvantaged groups;
- The growing concentration of ownership, the fracturing of the advertising market, and other commercial pressures threaten the ability of the media to disseminate public interest content;
- Public broadcasters do not enjoy sufficient financial support, while many of them have not been given a clear public service mandate;
- Security concerns and vaguely worded definitions of what constitutes terrorism or extremism are often used to limit critical or offensive speech;
- Some governments are trying to control or limit the Internet, including through the use of jurisdictional rules that allow cases, particularly defamation cases, to be pursued anywhere;
- A majority of the world's population still have no or limited access to the Internet.

Since 1999, the four representatives have issued 11 joint declarations, which



have all served as references for their member states.

The signatories are:

- The UN Special Rapporteur on Freedom of Opinion and Expression, Frank LaRue
- The OSCE Representative on Freedom of the Media, Miklos Haraszti
- The Organization of American States Special Rapporteur on Freedom of Expression, Catalina Botero
- The African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression, Faith Pansy Tlakula.

The joint declaration is available at: [http://www.osce.org/documents/rfm/2010/02/42638\\_en.pdf](http://www.osce.org/documents/rfm/2010/02/42638_en.pdf)

### **OSCE media freedom representative criticizes 'misuse' of libel laws to muzzle the press in Kazakhstan, Tajikistan, and Hungary**

VIENNA, 8 February 2010 - Miklos Haraszti, the OSCE Representative on Freedom of the Media, condemned today as "dangerous attempts at censorship" lawsuits initiated by high-ranking government officials in Kazakhstan, Tajikistan and Hungary against domestic media outlets for reporting on critical statements made by other public figures.

"In order to freely exercise their right to report, media outlets should not be held liable for publishing statements made by identified sources. If the actual statements are found offensive, legal procedures should only be initiated against their authors, not against the media which published them," Haraszti said.

"Shooting the messenger of bad news is an old habit of autocracy that democratic media freedom standards have banned as a dangerous attempt at censorship."

He added: "In Kazakhstan, Tajikistan, and Hungary, the law should preclude the possibility of involving the media in libel disputes between public figures."

- In Kazakhstan, a court on 1 February ordered the seizure of all copies of editions of five independent papers - Respublika, Golos Respubliki, Kursiv, Kursiv-News and Vzglyad - in which letters sent to the country's authorities by exiled former government minister Mukhtar Ablyazov had been published. The letters contained accusations of corruption against Timur Kulibayev, a well-known Kazakh public figure. The court also banned all media outlets from carrying reports that could damage Kulibayev's "honor and dignity".

- In Tajikistan, three judges recently brought a combined 900,000 euro-lawsuit against the Asia-Plus, Farazh, and Ozodagon newspapers for re-printing public accusations brought against them by a lawyer. These legal proceedings come in addition to more than 200,000 euros in libel suits brought by government agencies against the Millat and Paykon newspapers. Should these sentences be enforced, the publications would be forced to close down.
- In Hungary, an appeals court on 22 January ordered that former Prime Minister Viktor Orban be paid 1,800 euros in compensation for a defamatory statement made by government official Janos Veres. The court also obliged the Népszava daily, which had reported about the dispute between the two politicians, to share the fine with Veres and publish an apology.

"In all these cases, high-ranking plaintiffs are seeking to punish the media for doing their most basic job - informing the public about public issues," Haraszti said.

"In the case of Kazakhstan and Tajikistan, the particularly harsh punishments sought by the plaintiffs endanger the very existence of the few critical-minded media outlets that remain in these two countries."

### **Monitoring crucial for press freedom, says OSCE media freedom representative in final report**

VIENNA, 4 March 2010 - Monitoring of the kind that takes place within the OSCE is crucial to encourage countries to uphold press freedom commitments, stressed Miklos Haraszti, the OSCE's Representative on Freedom of the Media, as he delivered his last report to the Permanent Council today.

Haraszti, whose second three-year term ends 10 March, highlighted the need for universal press freedom standards - a theme he has promoted consistently during his mandate.

"The greatest challenge has been upholding the very notion of universal standards. Media-freedom problems are not only omnipresent, they perpetually re-emerge," Haraszti said.

"These six years in the job have strengthened my conviction about how indispensable international scrutiny is for the fate of human rights. As democracy ultimately only can be accomplished by the people who live in a country, the international community must give unconditional and public support to those individuals who have decided to be the internal carriers of our common values





and goals."

The Office of the Representative on Freedom of the Media was established in 1997 to observe relevant media developments in OSCE participating States and to advocate and promote full compliance with OSCE principles and commitments in respect of freedom of expression and free media.

Haraszi was appointed in 2004, replacing Freimut Duve. He was reappointed in 2007. OSCE regulations limit OSCE Representatives on Freedom of the Media to two terms.

Haraszi, a Hungarian writer, journalist, human-rights advocate and university professor, co-founded the Hungarian Democratic Opposition Movement in 1976.

Haraszi's final Regular Report to the Permanent Council will be available at [www.osce.org/fom](http://www.osce.org/fom)

His successor will be named in a consensus decision by all 56 OSCE participating States.

The Permanent Council is one of the OSCE's main regular decision-making bodies. It convenes weekly in Vienna to discuss developments in the OSCE area and to make appropriate decisions.

### **Press freedom promoter from Bosnia and Herzegovina named OSCE Representative on Freedom of the Media**

VIENNA, 11 March 2010 - The 56 OSCE participating States appointed today Dunja Mijatovic from Bosnia and Herzegovina as the OSCE Representative on Freedom of the Media.

Mijatovic was appointed for a three-year term that can be renewed once. She starts work in the Vienna-based office of the OSCE Representative on March 11, succeeding Miklos Haraszi.

"The appointment of Dunja Mijatovic as the OSCE Representative on Freedom of the Media with unanimous consent of all participating States of the Organization is a testament to our common commitment to further progress in promoting the freedom of the media," said the OSCE Chairperson-in-Office, Kazakh State Secretary and Foreign Minister Kanat Saudabayev. "We wish Dunja Mijatovic success in this important job and call on all OSCE participating States to render her all needed support in her activities."

Mijatovic is an expert in media law and regulation. In 1998, as one of the founders of the Communications Regulatory Agency of Bosnia and Herzegovina, she helped to create a legal, regulatory and policy framework for the media in a complex post-war society. She was also involved in setting up a self-regulatory Press Council and the first Free Media Helpline in South East Europe.

Since 2007 she has been Chairperson of the European Platform of Regulatory Authorities - EPRA. She was the first non-EU Member State representative and the first woman to hold this post. Previously, she chaired the Council of Europe's Group of Specialists on freedom of expression and information in times of crisis. During her Chairmanship, CoE Committee of Ministers adopted the Declaration by the Committee of Ministers on the protection and promotion of investigative journalism and Guidelines on protecting freedom of expression and information in times of crisis. As an expert on media and communications legislation, she has worked in Armenia, Jordan, Serbia, Montenegro, Slovenia, the United Kingdom, Austria, Morocco and Iraq.

The Office of the Representative on Freedom of the Media was established in 1997 to observe relevant media developments in OSCE participating States and to advocate and promote full compliance with OSCE principles and commitments in respect of freedom of expression and free media.

### **Access to information in Kyrgyzstan should be immediately restored, says OSCE Media Freedom Representative**

VIENNA, 7 April 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, today called for restoration of information flow by allowing journalists to report on the situation in the country.

Referring to reports that online, print and broadcast media in Kyrgyzstan have been prevented from reporting on the events taking place in the country, the OSCE Representative on Freedom of the Media, Dunja Mijatovic, said:

"The media freedom situation has dramatically deteriorated - information Internet sites have been blocked, media outlets have been closed down and journalists have been attacked. Local and international media should be able to exercise their professional duty of reporting without any hindrances, so that citizens' right to information is respected."



## **OSCE media freedom representative to open media forum in Tbilisi, meet Georgian officials**

VIENNA, 14 April 2010 - Dunja Mijatovic, the OSCE Representative on Freedom of the Media, will be in Tbilisi tomorrow to open a conference promoting effective guarantees for freedom of expression in the South Caucasus, Moldova and Ukraine.

The conference, organized by the Council of Europe, will be held on 15 and 16 April.

"This international forum will bring together senior media professionals and policymakers from Azerbaijan, Armenia, Georgia, Moldova and Ukraine. I welcome the initiative of the Council of Europe to stimulate a debate on media freedom in an international context and appreciate this opportunity to exchange views with journalists and officials from the South Caucasus, Moldova and Ukraine," said Mijatovic.

During her first visit to Georgia, the Representative will also meet Georgian officials and journalists, including the Speaker of Parliament, Davit Bakradze, the Minister of Education and Science, Dimitri Shashkin, the Deputy Foreign Minister, David Jalagania, the Chairman of Committee on Foreign Affairs of the Parliament, Akaki Minashvili, and the Chair of the Georgian National Communications Commission, Irakli Chikovani.

The media freedom representative will also hold the 7th annual OSCE South Caucasus Media Conference in Tbilisi in autumn.

## **OSCE media freedom representative acknowledges Kyrgyzstan's commitment to freedom of media, urges immediate compliance**

VIENNA, 19 April 2009 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, welcomed today the first steps made by Kyrgyzstan's provisional government to restore media freedom and emphasized the need for further media reforms.

According to Mijatovic, urgent steps included the need to improve media legislation, restore the independence of public-service broadcasting and ensure media pluralism and transparency of media ownership.

"Making public assurances that media freedom is one of the main prerequisites of a stable democracy and the willingness to move ahead in complying with the

OSCE media freedom commitments are crucial, although not sufficient, steps," said Mijatovic, referring to the statement made by the provisional government on 16 April.

"I very much welcome the fact that the Kyrgyz language service of Radio Free Europe/Radio Liberty radio and television programmes are finally back on air after having been suspended since October 2008. At the same time, disturbing reports have recently been received about alleged attempts to exercise a priori censorship of media content, and regarding a raid of the offices of the 24kg online news agency."

"Media freedom standards have to be complied with even in times of crisis. My Office will continue to closely follow the media freedom situation and stands ready to provide support, as offered by the OSCE Chairmanship, by assisting Kyrgyzstan in its efforts to restore the respect for freedom of expression and free media," added Mijatovic.

**OSCE media freedom representative calls on Azerbaijani authorities to comply with European court ruling, release journalist Fatullayev**

VIENNA, 22 April 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, called upon Azerbaijani authorities today to comply with a European Court of Human Rights (ECtHR) ruling and immediately release journalist Eynulla Fatullayev from custody.

"My Office has always demanded that Fatullayev's case be handled with two dimensions in mind - freedom of the media and due legal process. Now that the European Court of Human Rights has ruled in favour of the jailed journalist, there can be only one outcome - his immediate release," Mijatovic said.

The ECtHR today said Fatullayev had been wrongfully sentenced and asked Azerbaijan to immediately release him from custody. The Court said it had found Azerbaijan in violation of Article 10 and Article 6, paragraphs 1 and 2 of the European Convention on Human Rights. Azerbaijan ratified the Convention in 2002.

The editor-in-chief of the now-closed independent Russian-language weekly Realny Azerbaijan and Azeri-language daily Gündalik Azərbaycan, Fatullayev was sentenced in 2007 to a cumulative eight-and-a-half years in prison on charges on defamation, incitement of ethnic hatred, terrorism and tax evasion.

On 24 November 2009, the Committee to Protect Journalists honoured

Fatullayev with its annual International Press Freedom Award.

## **OSCE media freedom watchdog welcomes Ukrainian President's pledge to support media pluralism, warns of negative developments**

VIENNA, 23 April 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, welcomed today the pledge by Ukrainian President Viktor Yanukovich to uphold media pluralism and honour OSCE media freedom commitments.

"I trust that your Administration will uphold and further develop Ukraine's great achievements in the field of media freedom and pluralism. Ukraine should persevere in its efforts toward achieving genuine media pluralism by, among other things, granting the opposition full and unhindered access to the media," wrote Mijatovic in a letter sent to President Yanukovich on 22 April.

The Representative also commended the new Administration's pledge to combat violence against the media as timely and expressed hope that it would translate into vigorous and resolute action to conclude the investigations into old and new cases of violence against media workers, including the murder of Ukrainska Pravda journalist Georgiy Gongadze in 2000.

Mijatovic also highlighted negative developments that could threaten media pluralism. They included Yanukovich's decision to dissolve the national free speech commission, which was part of the presidential administration, on 2 April, and a change to the legal status of the new head of the state television.

"I would like to ask for your personal support in ensuring that this important advisory body, consisting of highly respected lawyers and media professionals who actively drafted liberal legislation and defended journalists, continues to operate. I also hope that the change of the legal status of the new head of the state television will not affect its independence and editorial policy," she said.

Mijatovic said her office would continue to follow developments in Ukraine, and offered support for reform of the media law. She added that Ukraine should complete the adoption of laws on public service broadcasting, access to information, privatization of media and ownership transparency.

"In order to achieve all this, it is of great importance that the Head of the Parliament's Committee on Freedom of Speech and Information is a representative of the parliamentary opposition. This long-established democratic tradition in the Verkhovna Rada has always been a guarantee for the adoption of

advanced media legislation," said Mijatovic.

### **OSCE media freedom representative in Berlin to launch guide on access to information on World Press Freedom Day**

VIENNA, 29 April 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, will be in Berlin on 3 May, World Press Freedom Day, to launch a guide for journalists on access to information.

The guide, called Legal Leaks Toolkit, was prepared by the Access Info Europe and Network for Reporting on Eastern Europe n-ost non-governmental organizations and co-funded by the OSCE Representative's office. It aims to help journalists access government-held information by informing them of the rules of access, appeal procedures and other important aspects of free access to information in Europe, Russia, the South Caucasus, Canada and the United States.

Journalists are invited to the news conference and launch of the Legal Leaks Toolkit with the OSCE Representative on Freedom of the Media, Dunja Mijatovic, at 10:30 am on Monday, 3 May, at the ARD-Hauptstadtstudio (Wilhelmstraße 67a, 10117 Berlin).

### **OSCE media freedom representative launches guide on access to information on World Press Freedom Day**

BERLIN, 3 May 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, launched a guide for journalists on how to access government information today, marking World Press Freedom Day.

"The Legal Leaks Toolkit" was prepared by the non-governmental organizations Access Info Europe and Network for Reporting on Eastern Europe n-ost with financial support from the OSCE Representative's office.

"Promoting a culture of access to information on an international level is an effective method to increase government transparency, while raising awareness and promoting investigative journalism. I will ensure that access to information remains high on the intergovernmental agenda and keep reminding the governments of the OSCE participating States of its importance," Mijatovic said.

The guide informs about the rules of access, appeal procedures and other important aspects of access to information in the 45 OSCE participating States that have access to information laws.



Marking the first World Press Freedom Day since she was appointed the OSCE Representative in March 2010, Mijatovic said that she would spare no effort to defend media freedom.

"To fulfil my Mandate as the only intergovernmental media watchdog, I will not hesitate to knock on governments' doors to remind them of their OSCE media freedom commitments. I look forward to an open and constructive dialogue with the 56 OSCE participating States and I call on all governments to ensure that violence and legal harassment against media are effectively prevented. In addition, authorities must refrain from any forms of censorship," said Mijatovic.

### **OSCE media freedom representative criticizes pressure against independent media in Belarus, offers to support discussion of new Internet legislation**

VIENNA, 10 May 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, today expressed concern about recent reports of pressure against independent media in Belarus. She also expressed disappointment that Internet legislation was adopted without public consultation, and offered the assistance of her Office to review the new bylaws.

In a letter to the Foreign Minister of Belarus, Sergey Martynov, Mijatovic said: "Intimidation of journalists exerts a 'chilling' effect on already weakened investigative journalism in Belarus. The authorities should vigorously investigate cases of harassment and honour their OSCE commitments to protect the media."

Most recently, journalists who had reported on the so-called "hunters' case" were persecuted by law enforcement agencies. In March Natalia Radina, the editor of the Charter97 website, Irina Khalip, Minsk correspondent of the Russian newspaper Novaya Gazeta, and Svetlana Kalinkina and Marina Koktysh of daily Narodnaya Volya were interrogated, their apartments and offices raided and their equipment and materials confiscated, with Natalia Radina assaulted during the search. On 28 April, investigators informed the journalists that their computers would be examined further to obtain access to their e-mail and Skype accounts.

"I already brought the attention of the Belarusian authorities to these cases in March. I am concerned that the pressure on them has recently increased, even though the four media workers are not suspects but merely witnesses in the ongoing investigation," said Mijatovic.

In the letter to Minister Martynov, Mijatovic also criticized the recently launched criminal defamation investigation against the Charter97 website based on its users' comments to an article published last year in Sovetskaya Byelorussiya.

Regarding recently adopted bylaws on the implementation of the Presidential decree "On Measures to Improve the Use of the National Segment of the Internet", which her Office reviewed earlier this year, the Representative expressed disappointment that they had been adopted without public consultation.

Mijatovic also requested the texts of the bylaws. "I look forward to receiving the texts of the bylaws and hope that our recommendations were taken into account," she wrote in the letter.

The OSCE Representative offered to organize a roundtable meeting with the participation of governmental representatives, civil society and international experts to discuss the implementation of the newly adopted Internet legislation.

### **OSCE media freedom representative offers support to restore public broadcasting in Kyrgyzstan**

VIENNA, 12 May 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, today welcomed efforts by the interim Kyrgyz government to restore public service broadcasting (PSB), and offered support in this endeavour.

"I see the reinstatement of public service broadcasting as a vital guarantee for media pluralism," Mijatovic said, while commending the Decree issued by the interim government on 30 April to establish public service broadcasting in the country. "PSB can play a significant role, especially in the society which has been going through political turmoil, by offering fair and impartial information, providing objective news reporting and transmitting diverse, high-quality programming to the citizens," she added.

The Representative also emphasized the importance of creating a broadcasting framework that guarantees editorial autonomy, long-term sufficient funding and an independent oversight mechanism.

"I am pleased to learn that representatives of the civil society and media community are actively involved in the renewed efforts to restore public service broadcasting," Mijatovic said.

To support the process, the Office of the OSCE Representative on Freedom of



the Media has offered the interim authorities a legal analysis of the Decree on public broadcasting, including recommendations on how to ensure compliance with international standards and OSCE commitments.

"Together with the Kyrgyz authorities and the OSCE Centre in Bishkek, my Office is ready to assist with the reform of public service broadcasting and other media reforms as needed. As part of our support, we are now developing concrete plans for co-operation, and I look forward to discussing progress on their implementation during my forthcoming visit," she concluded.

### **OSCE media freedom representative meets Armenian President, encourages public discussion and transparency in broadcast reform**

YEREVAN, 18 May 2010 - Dunja Mijatovic, the OSCE Representative on Freedom of the Media, discussed Armenia's ongoing media reforms, including a transformation from an analogue to a digital broadcasting system in a meeting today with Armenian President Serzh Sargsyan.

"It is essential that the digital switchover is carried out in a transparent manner and that the tendering procedures are made public well in advance to ensure broadcast pluralism," Mijatovic said. She asked the authorities to guarantee that the broadcast reform is carried out with the active involvement of the public.

"The digital strategy of Armenia will define the broadcasting landscape for many years to come. It is essential that the legislation to be adopted grants access to diverse information and high quality programmes," she said.

"I am pleased by the readiness of the authorities to consider the OSCE's assessment of the recently introduced amendments to the draft Law on TV and Radio Broadcasting before its final adoption. I encourage all stakeholders to use this opportunity to present their views and recommendations," she added.

Mijatovic also met National Assembly Deputy Chairman Samvel Nikoyan, Economy Minister Nerses Yeritsyan, Deputy Foreign Minister Arman Kirakosyan and the President of the National Commission for TV and Radio, Grigor Amalyan.

During the two-day visit, Mijatovic participated in a public discussion on Armenia's digital switchover, chaired by the Head of the OSCE Office in Yerevan, Ambassador Sergey Kapinos. The event brought together government officials, parliamentarians, as well as broadcasters, non-governmental organizations and international human rights organizations.

"Digital convergence is a major technological development that has a strong impact on the media in the country," Kapinos said. "Thus it is very important that the digital switchover policies to be adopted by the Government will promote and safeguard media pluralism in Armenia."

Regarding further media legislation developments, the Representative commended the Armenian authorities on their steps to decriminalize defamation, and expressed hope that the OSCE's recommendations will be reflected in the relevant legislation, to be adopted in the near future.

Mijatovic concluded her visit by offering her Office's assistance in providing further expertise on Armenia's legislation covering all areas of media reform, to bring it in line with international standards and good practices.

### **OSCE to host media conference in Dushanbe on access to information and new technologies**

DUSHANBE, 24 May 2010 - The 12th Annual Central Asia Media Conference hosted by the OSCE Representative on Freedom of the Media, Dunja Mijatovic, and the OSCE Office in Tajikistan will start tomorrow in Dushanbe.

The two-day event will provide a forum for discussion on media developments and challenges that journalists face in the region, with a focus on issues related to access to information and new technologies, including the Internet. Agenda topics include international standards on access to information, Internet development and regulation and access to information in Central Asia.

International and regional experts, civil society representatives and academics will take part in the event. Journalists and representatives of governments and civil society from all five Central Asian republics and a journalist from Afghanistan are expected to attend.

The conference provides an opportunity to co-ordinate efforts to promote fulfillment of media-freedom commitments made by the 56 participating States of the OSCE, which include all five Central Asia countries.

Conference participants are expected to draft and adopt recommendations in a Conference Declaration, which will be used as a base for follow-up activities. Mijatovic will address the conference on Tuesday morning.

Journalists are invited to the conference, which starts at 9.00 a.m. on 25 May at the Hyatt Regency Dushanbe, Prospekt Ismoili Somoni 26/1.



## **OSCE media freedom representative calls for improved access to information at conference in Dushanbe**

DUSHANBE, 26 May 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, called for more transparency and easier access to government-held information in a speech delivered at the 12th OSCE Central Asia Media Conference, which ended in Dushanbe today.

Speaking to participants from the five Central Asian states: Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan as well as from Afghanistan, Mijatovic called on Central Asian governments to improve access to information.

"Governments are not compiling data just for the sake of keeping it. They do it for the benefit of the public, which elected them as their representatives. The culture of confidentiality is outdated, especially with the widespread use of the Internet," Mijatovic said. "What we need now is a new culture of transparency that takes full advantage of the easy distribution methods new media can offer.

Such an approach will increase trust between the authorities, civil society and citizens."

The two-day event was organized by the office of the Representative on Freedom of the Media, in co-operation with the OSCE Office in Tajikistan and supported by OSCE field operations in the region.

"New technologies offer quicker access to information, which enables citizens to make informed choices. This is the basis for democratic development", said Ambassador Ivar Vikki, Head of the OSCE Office in Tajikistan. "In Tajikistan, which is building up its capacity for new technologies, the OSCE Office has helped increase newspaper print runs by approximately 10 percent."

Conference participants adopted a declaration on access to information and new technologies in Central Asia, which will be available soon in English and Russian at [www.osce.org/fom](http://www.osce.org/fom).

Sweden, the United States and Lithuania financed the conference. Preceding the conference, Mijatovic spoke at an expert meeting on broadcast media policy development for representatives of the Tajik government and civil society that was organized by the OSCE Office in Tajikistan.

## **OSCE media freedom representative calls for amendments to Armenia's draft broadcast law to promote media pluralism**

VIENNA, 1 June 2010 - Dunja Mijatovic, the OSCE Representative on Freedom of the Media, today urged the Armenian authorities to bring the country's draft broadcast law in line with OSCE and international standards before it is adopted.

"If adopted in its present form, the law would not guarantee pluralism in the broadcasting sector. The draft also fails to offer a solid basis for the upcoming process of digitalization," Mijatovic said. "A good draft can safeguard independence of the broadcasters, thus promoting media freedom and at the same time stimulate a competitive and economically vibrant broadcasting sector in Armenia."

Mijatovic said that Armenian President Serzh Sargsyan had reassured her during a recent visit that the recommendations of her Sargisyan and those from civil society would be taken into account when finalizing the law. She welcomed the fact that the draft law was publicly discussed in the Parliament.

On 20 May, the draft law was adopted by the Armenian Parliament in a first reading, shortly after it was made public. Four days later, before the public parliamentary hearing of the draft, Mijatovic's office provided a legal review of the latest amendments to the law, detailing several areas of concern. The review, submitted to the Armenian authorities, also includes recommendations for amendments.

According to the review, shortcomings in the draft include:

- A failure to oblige the National Commission for TV and Radio (NCTR) to explain any rejections of applications for broadcasting licenses;
- An indefinite delay to set up private digital channels while terminating analogue broadcasting by 20 July 2013. This can violate competition rules;
- It does not oblige the NCTR to make its frequency plans public at least once a year. This can make the procedure of licensing and tenders, the exact capacity and number of frequencies subject to different interpretations;
- A lack of clear rules for satellite, mobile telephone and online broadcasting, and an attempt to place all forms of broadcasting under a strict regime of licensing or permission by the NCTR;
- It does not follow international standards in the selection and appointment of members of the Council for Public Television and Radio, and
- A limit to the number of broadcast channels without any explanation

The text of the review in English and Armenian is available at [www.osce.org/fom](http://www.osce.org/fom)



## **OSCE media freedom representative, in speech at U.S. Helsinki Commission, condemns murders and imprisonment of journalists**

WASHINGTON, 9 June 2010 - Dunja Mijatovic, the OSCE Representative on Freedom of the Media, called on governments to denounce violence against journalists, to release imprisoned journalists and to better protect media freedom on the Internet in a speech delivered today at the U.S. Helsinki Commission.

"Violence against journalists and imprisonment for defamation and other journalistic mistakes have a threatening effect on journalism," Mijatovic said.

"There is no true press freedom as long as journalists have to fear for their lives while performing their work. OSCE commitments oblige all participating States to provide safety for their journalists. I ask the OSCE governments to strongly denounce and punish violent attacks against journalists, to refrain from using imprisonment as a punishment for written or spoken words and to bring their legislation in line with international standards on free expression."

Mijatovic condemned murders of journalists in Azerbaijan, Croatia, Kyrgyzstan, Montenegro, the Russian Federation, Serbia, Turkey and Ukraine. She also criticized the imprisonment of journalists in several OSCE participating States, including Azerbaijan, Kazakhstan and Uzbekistan.

She also called on participating States to safeguard and enhance media pluralism and the free flow of information on the Internet, saying that numerous participating States suppress Internet freedom and restrict access to information. She also called on countries to use the opportunities presented by the switchover from analogue to digital terrestrial broadcasting.

With regards to the United States, she called for the adoption of a federal shield law that would allow journalists to protect confidential sources, saying that imprisoning journalists who refuse to reveal the identity of their sources hindered investigative journalism.

"This reform would send a very strong message to protect media freedom beyond the borders of the United States. We need such a signal," Mijatovic said.

## **OSCE media freedom representative urges Italy to amend bill on electronic surveillance**

VIENNA, 15 June 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, today called on Italy to drop a draft law on electronic surveillance - also known as the 'wiretap law'- backed by the Italian government or revise it to bring amendments in line with international standards of freedom of expression and OSCE commitments.

On 10 June, the Italian Senate passed the bill on electronic surveillance and electronic eavesdropping (Law No. 1611) in a controversial vote boycotted by opposition senators.

"I am concerned that the Senate approved a bill that could seriously hinder investigative journalism in Italy despite several warnings from my Office. It marks a trend towards criminalizing journalistic work," said Mijatovic.

"Journalists must be free to report on all cases of public interest and must be able to choose how they conduct a responsible investigation. The draft law in its current form contradicts OSCE commitments, especially as it prohibits the use of some confidential sources and materials which may be necessary for meaningful investigative journalism in the service of democracy," Mijatovic said.

According to Mijatovic, problematic amendments of the draft law include:

- Severe restrictions on the publishing of documents related to court proceedings or police investigations prior to the beginning of a trial;
- The introduction of a penalty of up to 450,000 euros for publishers and 30 days in jail and a penalty of up to 10,000 euros for journalists who publish leaked wiretapping materials before the beginning of a trial;
- The possibility of a prison sentence for anyone who is not a "professional journalist" who records or films a person without their prior approval.
- The amendment still needs to be approved by the lower house of parliament and signed by the President of Italy to become law.

## **Armenian broadcasting law fails to guarantee media pluralism, says OSCE media freedom representative**

VIENNA, 15 June - Despite amendments, Armenia's new Law on Television and Radio fails to promote broadcast pluralism in the digital era, the OSCE Representative on Freedom of the Media, Dunja Mijatovic, said today.

The law, adopted by Parliament on 10 June, would need a presidential signature

to take effect.

Mijatovic said Armenian authorities had discussed the law draft with civil society and the international community, and that her Office had provided a legal review of the draft.

"Although some recommendations from the legal review have been addressed, other recommendations that are of crucial importance for a smooth transition from analogue to digital broadcasting have not been taken into account," she said.

Mijatovic said that the law's shortcomings included a limit to the number of broadcast channels; a lack of clear rules for the licensing of satellite, mobile telephone and online broadcasting; the placement of all forms of broadcasting under a regime of licensing or permission by the Regulator; the granting of authority to the courts to terminate broadcast licences based on provisions in the law that contain undue limitations on freedom of the media; and a lack of procedures and terms for the establishment of private digital channels.

"Armenia should not lose the opportunity to adopt forward-looking media legislation. New technologies, including digital broadcasting, should be used by governments to strengthen media pluralism. These technologies can improve access to information and enable the public to seek, access and impart information," she said.

Mijatovic emphasized that her office is ready to continue its support to the authorities in all legislative reforms related to media freedom.

The full text of the OSCE review and a recent addendum, in English and in Armenian, are available at: [www.osce.org/fom](http://www.osce.org/fom)

### **OSCE media freedom representative, on a visit to Moscow, welcomes Russian Supreme Court's resolution on media law**

MOSCOW, 16 June 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, who is on a two-day visit to Moscow, welcomed today the Russian Supreme Court's adoption of a resolution instructing lower courts how to interpret and implement the 1991 Media Law.

"This landmark resolution is a commendable effort to bring Russian court practice in line with international media freedom standards," Mijatovic said.

The "Resolution on the Practical Judicial Implementation of the Law of the Russian Federation on Mass Media" was adopted on 15 June at a plenary session of the Supreme Court. All 78 Supreme Court judges in attendance voted in support of it. Mijatovic attended the session as a guest.

Among other instructions, the Supreme Court resolution refers Russian courts to the basic principles of the European Convention of Human Rights on Freedom of Expression and Freedom of the Media, and to the principles of the Helsinki Final Act of the Conference on Security and Cooperation in Europe (now OSCE).

One of the provisions of the Supreme Court resolution says that only courts can request journalists to reveal their sources of information, and only when all other ways to obtain the relevant information have been exhausted and "when the disclosure of these sources presents an overriding public interest."

Another provision says that the federal regulation agency can only issue warnings to online media outlets over unlawful readers' comments if they fail to comply with official requests to delete or edit the comments. Prior to the adoption of the resolution, authorities had the option of closing online media outlets for comments on their forums, even if the comments were not endorsed by the outlet.

"I hope that the Russian courts will fully implement the Supreme Court's resolution, which offers journalists and online media outlets enhanced judicial protection," Mijatovic said.

Noted Russian media experts - among them Mikhail Fedotov, the secretary of the Russian Union of Journalists and co-author of the 1991 Media Law, and Andrei Richter, the director of the Moscow-based Media Law and Policy Centre - helped draft the Supreme Court resolution.

Today Mijatovic addressed an international conference co-organized by the Russian Union of Journalists and the Moscow-based Centre for Extreme Journalism to mark the 20th anniversary of the 1991 Media Law. Yesterday, she held talks with Russia's Deputy Foreign Minister Aleksandr Yakovenko and Deputy Communications and Mass Communications Minister Aleksei Malinin. During the meetings, Mijatovic urged the Russian government to take pro-active and resolute measures to curb violent attacks on journalists and prosecute those responsible for the violence. She encouraged authorities to initiate a process towards decriminalizing defamation and discussed Russia's plans to switch to digital terrestrial broadcasting by 2015.





"I am encouraged by the Russian government's responsiveness and interest in working with my Office and I look forward to our future co-operation," Mijatovic said.

### **OSCE media freedom representative asks Turkey to withdraw recent Internet blocking provisions, calls for urgent reform of law**

VIENNA, 22 June 2010 - Dunja Mijatovic, the OSCE Representative on Freedom of the Media, today urged the Turkish authorities to restore access to YouTube and other services offered by Google, and bring the much-criticized Law No. 5651 - known as the Internet Law - in line with international standards on free expression.

"I ask the Turkish authorities to revoke the blocking provisions that prevent citizens from being part of today's global information society. I also ask them to carry out a very much needed reform of Law No. 5651," said Mijatovic.

In a letter sent to Turkish Foreign Minister Ahmet Davutoglu, Mijatovic expressed concern about new blocking provisions imposed earlier this month.

"I am alarmed by the decision of the Turkish Telecommunications Communication Presidency to block access to dozens of Internet Protocol addresses related to YouTube and Google services. As a result, since early June several services related to Google - including popular services like Analytics or Translate - have been either unattainable, or access to them has become very slow," she wrote.

The alleged reason behind the block is an unsettled tax dispute between the Ministry of Transport and Communication and Google, the owner of YouTube.

"But even the widely criticized Internet Law does not include tax disputes among the reasons that it cites as cause for blocking websites," the Representative said.

"My Office has been promoting the urgent reform of Law No. 5651, because it considerably limits freedom of expression and severely restricts citizens' right to access information," she added.

"More than 5,000 websites have been blocked in Turkey during the last two years. The recent blocking is a worrisome indicator that instead of allowing free access to the Internet, new ways have emerged that can further restrict the free flow of information in the country."

The legal review of Law No. 5651, commissioned by the OSCE in January 2010, can be downloaded here: <http://www.osce.org/item/42294.html>

**OSCE media freedom representative calls on Hungarian Government to halt media legislation package, start public consultations**

VIENNA, 24 June 2010 - Dunja Mijatovic, the OSCE Representative on Freedom of the Media, appealed to the Hungarian Government today to halt draft media legislation that is to be voted on in Parliament next week, and to start public consultations involving professional stakeholders to modify the draft laws.

"The proposed laws are highly worrisome regarding media freedom in your country," the Representative wrote in a letter to Foreign Minister Janos Martonyi.

"Their adoption could lead to all broadcasting being subordinated to political decisions."

The planned legislative changes aim at a comprehensive overhaul of the current media governance system. Under the new legislation, two new bodies would be created - the National Media and Telecommunications Authority and the Media Council, which will be the new licensing body supervising both private and public broadcasting.

The President of the Authority would be appointed by the Prime Minister, and the law envisages Parliament electing the same person as President of the Council. Direct parliamentary nomination of members of the media licensing body, the public-service broadcasting board and the executives of individual public service outlets - public TV, radio and the only national news agency - is foreseen by the new legislation.

The party in power has more than two-thirds of parliamentary seats. The adoption of the new legislation could lead to governmental control over both the private and the public-service broadcasters in Hungary, warned Mijatovic.

The media package was tabled in Parliament on 11 June, complemented by an amendment to the Constitution that authorizes these modifications. The Government plans to adopt these changes in an expedited procedure on 28 and 29 June. "This would leave no time for public debate, which is common international practice for such legislation and must involve the professional stakeholders in Hungary," Mijatovic wrote in her letter.

"Although the Government has the parliamentary power to change the



Constitution and the laws regulating freedom of expression, it is very important that Governments do not use such power to weaken the guarantees of media freedom and subordinate the media to governmental control, and by doing so breach international and OSCE standards guaranteeing freedom of expression and freedom of the media," she added.

"A pluralistic governance system for broadcast media, involving key stakeholders and civil society, is a prerequisite for media pluralism, which is a basic OSCE media freedom commitment."

Mijatovic offered her Office's assistance in providing a detailed legal review of the media package.

### **OSCE media freedom representative express concern over 'chilling effect' of libel damages awarded to Albanian politician**

VIENNA, 29 June 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, expressed concern today over libel damages that a national broadcaster in Albania has been ordered to pay to a politician, saying the fine was disproportionately high.

In a letter to Albanian Foreign Minister Ilir Meta and Justice Minister Bujar Nishani, she emphasized that "moral damages awarded should be proportionate to the actual harm and the economic situation of the media or journalist concerned and should not lead to a 'chilling' effect on the media".

On 18 June, the Tirana District Court ordered the TV station Top Channel to pay 400,000 euros in damages to former Culture Minister Ylli Pango for airing secretly filmed footage which allegedly showed the minister requesting favours in return for a ministry job and which subsequently led to his dismissal. The court argued that the footage had been obtained illegally and violated Pango's right to privacy.

"The right to privacy has to be balanced against the media's duty to inform citizens about developments which are in the public interest," Mijatovic said.

"The media's watchdog role in any true democratic society demands investigative journalism, including the scrutiny of the professional and ethical conduct of government officials. The broadcaster's reporting aimed exactly at that - it intended to shed light on the professional behavior of a public official and his alleged abuse of public positions.

## **OSCE media representative condemns new sentencing of Azerbaijani journalist**

VIENNA, 6 July 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, condemned an additional jail sentence of 2.5 years handed down today to Eynulla Fatullayev, one of Azerbaijan's most prominent investigative journalists.

"I am deeply disappointed with today's sentencing, which is yet another attempt at silencing free media in Azerbaijan on questionable criminal charges," Mijatovic said.

A district court in Baku today sentenced Fatullayev, the founder and chief editor of the now-closed Realny Azerbaijan and Gundelik Azarbaycan newspapers, to 2.5 years in a maximum-security prison colony on drug possession charges.

Fatullayev, who is already serving a combined 8.5 year prison term on other controversial charges, denies the new accusations brought against him, saying the drugs allegedly found in his personal belongings during a search of his prison cell were planted.

Mijatovic said she found it particularly disturbing that the verdict came just months after a the European Court of Human Rights overturned Fatullayev's initial sentencing and demanded that he be immediately released from custody. The deadline for Azerbaijan to fulfil the court's judgment expires on 22 July.

She said she also was concerned about Emin Abdullayev (Milli) and Adnan Hacizade, two video bloggers who in November 2009 were sentenced to 2 and 2.5 years in jail respectively on charges of hooliganism and inflicting light bodily injuries. An appeals court in March 2010 upheld both sentences.

"As I wrote in a letter to President Ilham Aliyev on 15 June, I call on Azerbaijani authorities to ensure that Fatullayev and the two video bloggers are set free," Mijatovic said. "By keeping independent-minded journalists behind bars, Azerbaijan demonstrates that it is unwilling to meet OSCE media freedom commitments."

## **OSCE media freedom representative meets Kyrgyz President Rosa Otunbayeva, offers support for further media reforms**

BISHKEK, 19 July 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, met today with Kyrgyz President Roza Otunbayeva to promote



the establishment of a public service broadcaster and support further media reforms in Kyrgyzstan, including improving the legal framework for media, in particular to protect journalists.

"I welcome the pledge of President Otunbayeva to continuously support and further develop media freedom in Kyrgyzstan," said Mijatovic, who is visiting Kyrgyzstan to meet government officials as well as media and civil society representatives.

She added: "I hope that the observation board of the public service broadcaster will be appointed as soon as possible so that it can start its important work, particularly in light of the forthcoming October parliamentary elections. Free, fair and credible election results are only possible if every citizen can be well informed and has access to sufficient information representing a diversity of views."

During her meeting with the President, Mijatovic raised the issue of protecting journalists and explored possibilities to assist in developing a training strategy that could be offered to journalists in Kyrgyzstan.

"The safety of journalists is a key component of media freedom. I hope that the authorities will do their utmost to protect media professionals working for the benefit of people's right to know in all parts of the country," she said.

"I look forward to continuing my dialogue with the Kyrgyz authorities to further improve the media freedom situation. Freedom of the media is a key component to guaranteeing stability and peace."

### **OSCE media freedom representative condemns murder of Greek political blogger**

BISHKEK, 19 July 2010 - Dunja Mijatovic, the OSCE Representative on Freedom of the Media, today condemned the killing of journalist Socratis Giolias and urged the Greek authorities to carry out a rapid and thorough investigation into the murder.

Giolias was the administrator of the most popular political and social blog in Greece, "Troktiko" (Rodent), and the information director of radio station Thema 98.9. He was shot today in front of his home in Athens by unknown assailants.

"Mr. Giolias was a well-known political blogger in his country, an investigative journalist often very critical of the previous government," said Mijatovic, who is on

a visit to Kyrgyzstan. "As the motives of his killing are still unclear, I ask the Greek authorities to ensure that his murder is investigated rapidly and thoroughly, and the public is continuously informed of this process."

"The Oslo Declaration adopted last week by the Parliamentarians of the 56 OSCE participating States, including Greece, emphasized the unique and vital role of investigative journalism in strengthening democracies. It also called upon participating States to vigorously prosecute all of those responsible for the murder of investigative journalists," wrote Mijatovic in a letter to the Greek authorities. "I hope that the perpetrators of this horrifying murder will be very soon brought to justice."

### **OSCE media freedom representative strongly condemns brutal attack on Serbian journalist**

VIENNA, 26 July 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic today condemned brutal attack on a Serbian journalist, Teofil Pancic.

Pancic, political columnist for the weekly Vreme known for his critical stance against nationalism and sports hooliganism, was brutally beaten on 24 July and was rushed to hospital suffering from brain concussion and arm injuries.

"I am very concerned about recent physical attacks against journalists in Serbia. These attacks silence critical and courageous journalism and undermine democratic values of the country," Mijatovic said.

Mijatovic welcomed the strong condemnation of the attack by President Boris Tadic, Culture Minister Nebojsa Bradic and Interior Minister Ivica Dacic.

"Only by taking a joint stance within the government against all forms of physical and verbal attacks against journalists, and by ensuring swift prosecutions will it be possible to improve the working environment for media in Serbia," Mijatovic said.

"I am encouraged by the pledges of the government and law enforcement agencies to put all their efforts into resolving this and all previous attacks against journalists, including unresolved murders, and I welcome the decision by the police to declare the investigation into this case a priority," Mijatovic stated.

"Violence against journalists equals violence against society and democracy and should be met with harsh condemnation and prosecution of the perpetrators.



There is no true press freedom, as long as journalists have to fear for their life while performing their work," Mijatovic concluded.

### **OSCE media freedom representative to brief journalists after delivering first report to OSCE Permanent Council**

VIENNA, 27 July 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, will deliver her first report to the OSCE participating States on Thursday.

Following the presentation at the OSCE Permanent Council, she will brief journalists about the challenges ahead and the status of media freedom within OSCE region. The report is Mijatovic's first since she assumed her post in March.

The mandate for the Representative states that she should report regularly to the Permanent Council, one of the OSCE's main regular decision-making bodies. It convenes weekly in Vienna to discuss developments in the OSCE area and to make appropriate decisions.

Journalists are invited to the press briefing, to be held at 13:00 on Thursday, July 29, in room 210 at the Hofburg Congress Centre. The report will be distributed at the briefing and will also be available on [www.osce.org/fom](http://www.osce.org/fom)

For admittance to the Hofburg Congress Centre, please bring your OSCE press badge or a valid press card to the security desk (main entrance from the Heldenplatz).

### **OSCE media freedom representative welcomes Serbia's swift investigation of attacks against journalists**

VIENNA, 6 August 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic today welcomed Serbia's quick and efficient investigation into the attacks against two journalists.

"I am glad to see the increased attention of the Serbian authorities to cases of attacks against media and hope that the government will continue doing its utmost to ensure the safety of journalists and to protect freedom of expression as a basic democratic value", Mijatovic said.

On 3 August, the First Municipal Court in Belgrade had ordered the arrest of two men suspected of having physically attacked journalist Teofil Pancic. Pancic, political columnist for the weekly Vreme, was brutally beaten on 24 July in

Belgrade and rushed to hospital suffering from arm and head injuries.

A day later, on 4 August, the Belgrade First Basic Court convicted to 16 months in prison a football fan for pronouncing death threats against B92 journalist Brankica Stankovic in December 2009.

"Crimes against media coupled with impunity of perpetrators and the authorities' passivity in investigating these murders breeds further violence and represent the greatest threat to media freedom across the OSCE region."

"I call upon all governments to treat any crimes against journalists with the highest priority. Firm public condemnation of such attacks by all sides is one of the indicators of media freedom in a democratic society", Mijatovic said.

Mijatovic expressed hope that the authorities will also soon be able to shed light on several unsolved cases of killings and attempted murders of Serbian journalists: in 1994, Dada Vujasinovic, a journalist of Duga magazine, was found dead in her apartment, Slavko Curuvija of Dnevni Telegraf daily was murdered in 1999, Milan Pantic of Vecernje Novosti daily was killed in 2001, and in 2007 two hand grenades were thrown into the house of Dejan Anastasijevic, a journalist of Vreme weekly.

### **OSCE media freedom representative concerned about missing Ukrainian journalist, welcomes authorities' prompt reaction**

VIENNA, 20 August 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, today expressed grave concern over the disappearance of Ukrainian journalist Vasil Klymentyev and welcomed the prompt reaction of the Ukrainian authorities.

"I welcome the personal attention of President Viktor Yanukovich in the investigation of this case, and his call for Ukrainian law enforcement to do everything possible to find Vasil Klymentyev," said Mijatovic.

Mijatovic also wrote a letter to Ukrainian Foreign Minister Kostyantyn Gryshchenko commending the Kharkiv Dzerzhinsky District Police Department's decision to immediately open a criminal case classified as 'premeditated murder': "This allows the investigators to use more efficient tools to search for the journalist. I hope that all these efforts will bring swift results."

Klymentyev, chief editor for the Kharkiv-based weekly Novyi Stil, disappeared on 11 August and is still reported missing. Although small in circulation, Novyi





Stil was popular because of its in-depth investigative reports, and his colleagues have expressed concern that Klymentyev's disappearance is connected to his professional work.

"Keeping in mind the unsolved murder of Georgy Gongadze, I trust the Ukrainian authorities will conduct a swift and transparent investigation in the case of Klymentyev," said Mijatovic.

"Possible violence against journalists in reprisal for their work should be investigated by the authorities with full vigour not only to fulfil the country's OSCE media freedom commitments, but to also publicly recognize the important role journalists play in a democratic society."

### **OSCE media freedom representative commends US law against 'libel tourism'**

VIENNA, 26 August 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, commended today the law signed recently by U.S. President Barack Obama to protect journalists, authors and publishers from "libel tourists".

Libel tourism is a term used to describe the practice by plaintiffs to file defamation lawsuits in jurisdictions where the law provides as easier path to monetary damages.

"The US has decided not to recognize foreign judgments for defamation that are inconsistent with the First Amendment to the U.S. Constitution. This is important for preventing powerful individuals from filing defamation suits in countries where they expect to get the most favourable ruling," said Mijatovic.

The bill was passed by Congress in July and signed by the President earlier this month.

Mijatovic said she hoped that the new legislation would stimulate other OSCE participating States to reform their defamation laws to offer more protection to free speech and foster accountability of public figures.

### **OSCE media freedom representative commends appointment of supervisory board for Kyrgyzstan's public service broadcaster, urges swift reform**

VIENNA, 30 August 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, commended today the appointment of a supervisory board for Kyrgyzstan's public service broadcaster and called on the board to move rapidly

to provide viewers with fair and impartial news coverage.

"It is hard to overestimate the importance of quality reporting by the public service broadcaster, particularly in light of the forthcoming parliamentary elections. Elections can only be credible if the voters are able to make informed choices based on objective news offered by an impartial and pluralistic media," she said.

"Additionally, a professionally run public service broadcaster can promote tolerance and understanding in a society by reflecting ethnic, religious, cultural and language diversity in its everyday work."

Kyrgyzstan's President Roza Otunbaeva appointed the 15 members of the Supervisory Board in a decree signed on 26 August.

"I look forward to working with the Board and its chair, media expert Elvira Sarieva," Mijatovic said, reiterating her Office's earlier pledge to provide legal advice and practical assistance to the board and the broadcaster. "I hope that Kyrgyzstan will take this opportunity to establish Central Asia's first well-functioning, politically and financially independent public broadcaster."

### **OSCE media freedom representative calls for thorough and independent investigation into death of opposition website director in Belarus**

VIENNA, 6 September 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, said today she was troubled by the recent death of one of the leading journalists behind the Belarusian opposition website Charter97 and called for a thorough and independent investigation.

Oleg Bebenin, 36, was found dead on Friday in his country house near Minsk. Belarusian law enforcement made a preliminary conclusion that Bebenin had committed suicide.

"The death of Bebenin is a great loss to Belarusian journalism. His embattled website remains one of a few non-governmental sources of information, and its staff was subject to continued administrative pressure," said Mijatovic.

"I welcome the General Prosecutor's Office's investigation into other possible versions of the journalist's death, despite the preliminary conclusion that the journalist committed suicide.

"I call on the Belarusian authorities to conduct an independent investigation into



this tragic death. This is particularly important to avoid exacerbating the chilling effect on Belarusian media that questions over his death would have."

Mijatovic offered her condolences to Bebenin's family, colleagues and friends.

### **Hungarian media legislation severely contradicts international standards of media freedom, says OSCE media freedom representative**

VIENNA, 7 September 2010 - Dunja Mijatovic, the OSCE Representative on Freedom of the Media, announced today that she has presented the Hungarian Government with an expert legal analysis of recently adopted laws and draft legislation on media and telecommunications, and asked that the Government reconsider and amend the package.

"The media package is cause for very serious concern," wrote Mijatovic in a letter to Foreign Minister Janos Martonyi. "If left unchanged, it would seriously restrict media pluralism, curb the independence of the press, abolish the autonomy of public-service media and impose a chilling effect on freedom of expression and public debate, all essential for democracy."

The expert legal review was commissioned by the office of the Representative and prepared by Karol Jakubowicz, one of Europe's most prominent media scholars. It examines both the already adopted laws of the package, as well as Bill 363 on content regulation which is scheduled to be voted on by Parliament in September, in light of OSCE, Council of Europe and European Union standards on free expression.

"I ask Parliament and the Government to initiate an urgent revision of the media package and take into consideration the detailed recommendations of the analysis when rewriting the legislation. My Office stands ready to assist the authorities in these efforts at every step of this process," Mijatovic said.

She said that the analysis underlined the concerns the OSCE media freedom representative already voiced in June and July: "The changes put into place a new legal, institutional and regulatory framework for media regulation and supervision that can be easily misused for political purposes and that could contradict the principle of the separation of powers and of the checks and balances typical of liberal democracies. Public-service media are especially at risk of direct political control."

"The study also warns that the current legislative attempt mainly extends the traditional regulatory framework to the new media, including most Internet

content originating in Hungary as well as content hosted abroad but of relevance to Hungarian users, which is widely regarded as inappropriate, and dangerous for free social communication on the Internet."

### **OSCE Media Freedom Representative calls upon Turkey to release imprisoned journalists, reform media legislation**

VIENNA, 14 September 2010 - Dunja Mijatovic, OSCE Representative on Freedom of the Media, called upon Turkey today to release imprisoned journalists and implement the much needed media legislation reform in the country.

"My Office has been monitoring with growing concern the increase in number of ongoing lawsuits that threaten journalists with imprisonment in Turkey," Mijatovic wrote in a letter to Foreign Minister Ahmet Davutoglu. "Currently there are more than 40 journalists in prison, and hundreds of others are facing lawsuits with potential imprisonment if convicted."

"These figures make reporting on issues of public interest especially dangerous. The threat of prison can hinder critical reporting, which is indispensable in a democracy," she added.

Mijatovic said she was pleased that on 3 September Minister Davutoglu announced to work on the necessary legal amendments in order to avoid trials on freedom of expression at the European Court of Human Rights. She offered her Office's assistance in this endeavour.

The Representative said that many journalists face prison sentences for reporting on sensitive issues, for publishing classified documents, or for speech critical of the authorities. She stressed the need of a balanced approach to reporting on sensitive issues, including terrorism: "My Office fully acknowledges the threat posed by terrorism to national security and the need to fight it; at the same time, we also stress the right of the public to know of matters of public importance. Combating terrorism should not be used by governments to restrict media freedom."

Referring to prison sentences for publishing classified information, Mijatovic said that "criminal sanctions for breach of secrecy should only apply to the officials who have a duty to protect the secrets. The criminalisation of breach of secrecy committed by non-officials, including journalists, could deprive the people of important information of public interest, and thus it endangers investigative journalism."



## **OSCE media freedom representative, Council of Europe hold forum on preserving freedom of Internet while countering hate speech**

VILNIUS, 15 September 2010 - The international community must work to identify effective ways to address hate speech on the Internet without endangering freedom of expression, said the OSCE Representative on Freedom of the Media, Dunja Mijatovic, and Maud de Boer-Buquicchio, the Deputy Secretary General of the Council of Europe, today at the Joint OSCE-Council of Europe Open Forum on Hate Speech vs. Freedom of Expression in Vilnius.

The meeting focused on possible alternatives to relying solely on governmental or legislative approaches to address the problem of hate speech without infringing on freedom of expression and silencing legitimate criticism.

"We have to identify effective ways to address hate speech on the Internet without endangering freedom of expression. I am confident that this impressive group of leading international experts gathered under the umbrella of the OSCE and the Council of Europe will help the international community advance in this field," said Mijatovic.

De Boer-Buquicchio said: "Hate speech is a direct attack on the right to be and to think differently. It might not stop at rhetoric, as it has the potential to shape the minds and attitudes of individuals who will believe they have the right to undermine other people's rights. A democratic society cannot afford the freedom to oppress. Instead, we have to identify how to strike the adequate balance between rights and freedoms."

The event was held as part of the Internet Governance Forum, a global platform, and was jointly organized by the Representative's Office and the Council of Europe. This was the first initiative of this scale implemented by the two international bodies promoting free expression.

The forum was facilitated by leading experts representing academia, international bodies and the private sector involved with Internet policies.

For more information, see the leaflet about the event: <http://www.osce.org/item/45996.html>.

## **OSCE promotes professional internet journalism in Moldova**

CHISINAU, 20 September 2010 - An OSCE training seminar that started in Chisinau today aims to promote a professional and profitable internet media.

"Internet media provides journalists with the opportunity to deliver a message that can be viewed from anywhere in the world. This seminar focuses on how an internet media outlet can be both professional and successful," said Philip Remler, the Head of the OSCE Mission to Moldova.

The seminar, jointly organized by the Office of the OSCE Representative on Freedom of the Media and the OSCE Mission to Moldova, brings together 20 participants from across Moldova, including representatives from the Transnistrian region.

"Sustainability and marketability have a specific character for internet-based media," Remler said. "Small markets, such as the one in Moldova, present a challenge to media in remaining financially viable and independent."

The United States financed the seminar, which is being taught by international and Moldovan experts.

## **OSCE Media freedom representative welcomes Russian Supreme Court's resolution on civil libel lawsuits**

VIENNA, 21 September 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, welcomed today the adoption by the Supreme Court of the Russian Federation of a resolution that protects media in civil defamation lawsuits.

"This ruling is a significant step toward ensuring the media's right to seek and impart information," Mijatovic said.

The Supreme Court resolution, which was made public on 17 September, says the amount of damages awarded by courts in civil libel lawsuits should be "reasonable and justified" and "should not be conducive to media-freedom violations."

The resolution also says that civil defamation lawsuits should serve only to decide on damages for physical or moral harm, and that they should not restrict individuals' right to express opinions, to receive and impart information without authorities' interference.



"By preventing abuses and setting reasonable limits on compensation, this resolution should deter ill-wishers from suing media outlets for political or economic incentives. It should also contribute to eliminating self-censorship and protecting a free and vibrant public debate," Mijatovic said.

"It is now up to the Russian courts to fully implement this new resolution and offer journalists and the media adequate protection and defence."

The new resolution complements a 15 June 2010 Supreme Court ruling that instructed lower courts to implement the 1991 Media Law in line with international media freedom-standards.

### **OSCE media freedom representative expresses concern over continuing harassment of journalists in Uzbekistan**

VIENNA, 24 September 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, said today that she is alarmed by the unrelenting judicial pressure exerted on independent journalists in Uzbekistan.

In a letter sent to Uzbekistan's Foreign Minister Vladimir Norov, Mijatovic expressed her concern over the fate of two prosecuted journalists: Abdumalik Boboyev, a freelance reporter for the U.S.-funded broadcaster Voice of America; and Vladimir Berezovsky, the chief editor of the Russian-language Vesti.uz information website and Central Asia correspondent for Russia's Parlamentskaya gazeta newspaper.

Boboyev is awaiting trial on multiple charges that include libel, insult, violating border regulations, and producing and distributing materials that represent a threat to public security and order. Berezovsky, a Russian citizen, is on trial on accusations of defamation.

"The cases of Boboyev and Berezovsky are yet another indication that the press freedom-situation in Uzbekistan continues to deteriorate, and I urge the authorities to reverse this trend," Mijatovic said.

In her letter to Minister Norov, Mijatovic also addressed once again the cases of three journalists who are serving jail sentences of between six and 12.5 years. They are:

- Dilmurod Saiid, an independent news writer;
- Solijon Abdurahmanov, a former reporter for the U.S.-funded Radio Free Europe/Radio Liberty broadcaster and the uznews.net information website;

- Hairullo Khamidov, the deputy chief editor of Champion sports newspaper.

"Non state-media in Uzbekistan continue to be the target of unrelenting judicial harassment and this is a matter of serious concern to me. It is my duty to remind the Uzbek authorities that journalists should be free to pursue their professional activities without hindrance in line with OSCE media freedom commitments and principles," Mijatovic said.

### **In Warsaw, OSCE review conference begins with calls on states to live up to their human rights commitments**

WARSAW, 30 September 2010 - The Warsaw segment of the OSCE's Review Conference got underway today with calls on participating States to live up to the human rights and democracy commitments they have promised to adhere to as part of the Organization.

Representatives of the 56 OSCE participating States have gathered in Warsaw to review the progress they have made in implementing commitments relating to human rights and fundamental freedoms, the rule of law, democracy, and tolerance and non-discrimination. The Warsaw segment, which ends 8 October, is the first part of a 17-day review process leading up to the OSCE Summit in Astana on 1-2 December.

Ambassador Janez Lenarcic, the Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) noted the progress made in strengthening human rights and democracy in the OSCE region, but also said that the "uneven and incomplete" implementation of commitments remained a serious problem.

He stressed that states' specific histories and traditions can be no justification for putting off democratic reform: "There is no such thing as unpreparedness in a people's desire for freedom and the protection of their human rights."

Lenarcic also said that intolerance is a growing problem in the OSCE region, including a worrying increase in anti-Roma rhetoric. "Time and again, the Roma have to pay the price for politicians trying to make capital by stirring up public anger against this minority."

The OSCE High Commissioner on National Minorities, Knut Vollebaek, said the work of his institution remained as relevant today as when it was established in 1992.





"The situation in Kyrgyzstan is a reminder that long-term stability cannot be achieved if minority communities are left on the margins of society and the root causes of their exclusion are not addressed," he said. "The risk of destabilization is particularly high in countries that lack stable and strong institutions. In such a climate, nationalist discourse is likely to flourish, with the risk of alienating minority communities from the State and ensuing destabilization."

The OSCE Representative on Freedom of the Media, Dunja Mijatovic, said that challenges to media freedom were prevalent in most OSCE participating States, adding that the upcoming Summit offered a unique opportunity to reverse negative trends.

"Many argue that freedom of media is in decline across the OSCE region. In some aspects, I subscribe to this," she added, stressing that the safety of journalists is of particular concern. "Perhaps now more than ever, it is dangerous to be a journalist. In many parts of the world it is dangerous to be a monitor of our time and it is dangerous to be a human being who speaks his or her mind freely."

With several hundred participants from governments, civil society and international organizations, the Warsaw part of the Review Conference is the largest regional human rights event in Europe this year.

Civil society groups have full access to working sessions and can discuss challenges with government representatives on an equal footing.

On the margins of the meeting, close to 50 side events organized by governments, non-governmental organizations and OSCE institutions and field operations will highlight specific topics of concern and country situations.

### **OSCE media freedom representative: Ukraine should take swift and resolute measures to entrench its exemplary record in media pluralism**

KYIV, 13 October 2010 - Ukraine has achieved a great level of media freedom but it must take urgent steps to safeguard it, Dunja Mijatovic, the OSCE Representative on Freedom of the Media, said today.

Mijatovic, speaking at the end of a visit following an open invitation from President Victor Yanukovich, welcomed the Ukrainian authorities' openness and readiness for dialogue on a highest level, saying it was clear that media freedom remains priority on the country's political agenda.

She commended the determined public calls of the authorities to preserve media freedom, but cautioned that results were lacking and that recent cases of violence and intimidation of journalists, including the 11 August disappearance of Novy Styl reporter Vasyl Klymentiev and a growing number of physical attacks against journalists, have a chilling effect on the media climate.

"Concrete action is needed before the current negative developments become a permanent indicator of the deteriorated media climate in the country," said Mijatovic.

"To restore the trust of the Ukrainian society and of the international community, the authorities should continue to publicly condemn and, more importantly, swiftly investigate all cases of violence and intimidation of journalists, giving priority to the case of Klymentiev, who is still missing."

She welcomed the reopening of the investigation into death in 2000 of journalist Georgiy Gongadze, saying he, his family and colleagues deserved justice: "Ensuring the safety of media workers should be a priority task of the government of Ukraine," Mijatovic said.

Commenting recent reports by respected national and international watchdogs and international organisations, she called on the government "to refrain from any attempt to influence or censor media content to comply with their international media freedom standards and OSCE media freedom commitments."

Mijatovic discussed the urgent need for legal reform, welcoming a recent concept for Public Service Broadcasting in Ukraine and greeted assurances that a legal framework needed to establish a public service broadcaster would be concluded by the end of the year.

"A viable, politically and financially independent public service broadcaster is the only safeguard for broadcasting pluralism," said Mijatovic.

She also urged Parliament to adopt an access-to-information law during its current session. "Ukraine remains one of very few European states without comprehensive access-to-information legislation. The tabled draft has all the provisions needed to ensure access to government-held information, and I hope it will be enacted next week," said Mijatovic.

Laws on transparency of ownership and privatization of state print media are also needed, she said: "Lack of transparency of media ownership raises



questions about affiliation of media with political or business groups. State-owned media are inheritance of the past and should be privatized or liquidated."

She also called on lawmakers to amend the Law on TV and Radio Broadcasting to ensure the political and financial independence of the media regulator, the National TV and Radio Broadcasting Council.

Mijatovic said her Office would continue to closely monitor the developments in Ukraine and offered its continued support and expertise in promoting media freedom.

The Representative's conclusions and recommendations came at the end of a two-day visit that included meetings with Parliament Speaker Volodymyr Lytvyn; Foreign Minister Konstyantyn Gryshchenko; Hanna Herman, Deputy Head of the Presidential Administration; Andriy Shevchenko, Head of the Parliamentary Committee on Freedom of Speech and Information, and other top officials as well as media and civil society representatives.

### **Media pluralism in Tajikistan in danger, OSCE media freedom representative warns**

VIENNA, 18 October 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, said today that she was concerned about recent developments limiting media access and freedom and increasing pressure on independent media in Tajikistan.

In a letter to the Foreign Minister of Tajikistan, Hamrokhon Zarifi, the OSCE Representative wrote: "The practices of blocking websites, preventing newspapers from printing and launching tax or prosecutorial inspections by the authorities are serious non-compliance with Tajikistan's OSCE media freedom commitments."

Since 29 September, several Tajik and foreign information websites have been inaccessible in the country. At the same time, tax inspections took place in several independent newspapers and printing houses following which the printing houses refused to print a number of independent newspapers, citing technical reasons.

In her letter to Minister Zarifi, Mijatovic raised again the pending cases against the newspapers Aziya Plus, Farazh, Ozodagon, Paykon and Millat. If the court decision to award disproportionate damages in libel lawsuits brought on by public officials are not reconsidered by the higher courts, these publications

could face closure.

"If these newspapers are closed, this would severely diminish pluralism in print media in the Tajikistan," she wrote in the letter.

"I am very concerned and hope that the Tajik authorities will take on board my appeal, recognize the importance of maintaining media pluralism and thus reverse the ongoing deterioration of the media freedom situation in Tajikistan," said Mijatovic.

### **OSCE media freedom representative: Belarus needs media pluralism**

MINSK, 27 October 2010 - Belarusian media and society need media pluralism, the OSCE Representative on Media Freedom, Dunja Mijatovic, said today, adding that her office is ready to offer support and advice as the country liberalizes and modernizes its media policy.

Speaking at the end of a visit to Belarus at the invitation of the government, Mijatovic said she was "encouraged by the readiness of high-level officials to discuss the problems faced by independent media in Belarus in an open and constructive manner" but added that there was a "lack of progress in bringing the media situation more in line with the OSCE commitments".

Mijatovic said improvement was sorely needed as pluralism was non-existing in the broadcasting sector, restricted in the print media and vulnerable on the Internet.

"I urged my counterparts to lift all current administrative restrictions applied against independent media. Warnings and closures of newspapers have an enormous chilling effect and should not be used or provided for in the law. The authorities should also take urgent measures to support the much weakened independent media and enable the creation of independent self-regulatory mechanisms that are not part of the government bodies," she said.

She said she was encouraged by a common understanding about the need for a gradual overhaul of the media legislation.

"The legislative framework for the media should foster pluralism. I hope that in the future we can work together on amendments of the current media law, on privatization of the state broadcast media, on decriminalisation of defamation and the adoption of an access to information law."



Mijatovic took part in a roundtable discussion on Internet developments, organized jointly by her Office and the Information Ministry, during which participants discussed how Belarus newly adopted Internet legislation compares to international standards.

"I raised my concerns about some provisions of the new legislation, such as the requirement for mandatory identification of all users, and the vaguely defined limitations and bans on illegal information I called upon the government not to design or apply new legislation that would limit freedom of the media on the Internet," she said, adding that the Belarusian side agreed to consult her Office and civil society when reviewing current and adopting future Internet legislation.

She also welcomed the Belarusian authorities' invitation to the OSCE to review the investigation of the death of Belarusian journalist Aleh Byabenin, the founder of Charter97.org. Two experts sent by the OSCE are in Belarus to examine and review evidence related to the death.

Mijatovic met with Foreign Minister Sergei Martynov, Information Minister Oleg Proleskovsky, Presidential Aide Vsevolod Yanchevsky, Central Electoral Commission Head Lidiya Yermoshina and civil society representatives during her three-day visit. She also visited the Belarusian Association of Journalists and the independent newspaper Narodnaya Volya and met with journalists.

### **OSCE media freedom representative welcomes Turkish court decision to lift ban on YouTube, encourages further media reforms**

VIENNA, 1 November 2010 - Dunja Mijatovic, the OSCE Representative on Freedom of the Media, today welcomed the lifting of a YouTube website ban in Turkey, calling it a positive and long-awaited decision by the Turkish judiciary system.

"I am pleased to hear that after three years, people in Turkey can once again freely access YouTube," said Mijatovic. "The ban prevented Internet users in Turkey from being part of the global information society."

An Ankara court ruled on 30 October to end a ban on the Internet video website that began in 2007. Before the ban, the website had been among the most popular sites in Turkey.

"I hope that this breakthrough is only the first in the lifting of bans on Internet websites in Turkey," Mijatovic said. "I encourage Turkey to continue in this direction by reforming its Internet law and lift remaining website bans."

Mijatovic's office has long been calling for the reform of Turkey's Internet law, also known as Law No. 5651, which has served since 2007 as the basis for mass blockings of websites in the country.

### **OSCE media freedom representative condemns brutal attack on Russian journalist**

VIENNA, 8 November 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, condemned today a recent brutal attack on Russian journalist Oleg Kashin and called on Russian authorities to swiftly act and bring its perpetrators and masterminds to justice.

Kashin, a correspondent for the Moscow-based Kommersant daily, was assaulted by two unidentified attackers on 6 November. He was rushed to a hospital with multiple injuries. Investigators and colleagues say they believe the journalist was likely assaulted in connection with his writing.

"I am saddened by this brutal assault, which confirms a worrying trend of continuous violence against journalists," Mijatovic wrote in a letter to Russian Foreign Minister Sergey Lavrov.

Mijatovic has on numerous occasions called the Russian authorities' attention to attacks against journalists, including Anastasia Baburova, Mikhail Beketov, Igor Domnikov, Dmitry Kholodov, Paul Klebnikov, Vladislav Listyev, Anna Politkovskaya, Ivan Safronov, Yury Shchekochikhin, Magomed Yevloyev and many others.

She has also raised the cases of five journalists or media executives who were either killed or wounded in attacks this year: Shamil Aliyev, Arkady Lander, Aleksandr Leonenko, Mark Minin and Pavel Netupsky.

"I take note of and welcome the fact that Russian President Dmitry Medvedev instructed the Prosecutor-General's Office and the Interior Ministry to pay special attention to the investigation into the Kashin case," Mijatovic said.

She said she was encouraged by a recent announcement by Aleksandr Bastykin, the head of the Investigative Committee of the Prosecutor-General's Office, that several cases of murdered journalists would be reopened and further investigated.

"I call on Russian authorities to finally turn their declarations into real action so



that they fulfil one of their most important OSCE media freedom commitments, namely to ensure the safety of journalists."

"This wave of violence makes Russian journalists fear for their safety and puts Russia in a bad light as one of the OSCE participating States with the highest number of attacks against journalists," Mijatovic said.

### **OSCE media representative appalled by another attack on journalist in Russia**

VIENNA, 8 November 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic is appalled by reports of a violent attack on another Russian journalist today.

Anatoly Adamchuk, a reporter with the Zhukovskiy vesti newspaper, was assaulted by two unidentified attackers and had to be hospitalized with head injuries.

"This new assault, less than 48 hours after the brutal attack on Kommersant reporter Oleg Kashin, is yet another proof that impunity leads to further violence," Mijatovic said.

"Failure to prosecute those responsible for attacks against journalists breeds violence and has a chilling effect on investigative journalism. Russian law enforcement agencies should act urgently to investigate this and all other cases of violence against the media," she said.

Adamchuk's colleagues say they believe the attack is linked to the victim's professional activities. He was reporting on the arrests of children protesting against the cutting down of Khimki forest, near Moscow.

In a letter sent earlier today to Russian Foreign Minister Sergey Lavrov, Mijatovic condemned the brutal assault on Oleg Kashin, calling on Russian authorities to act swiftly and bring the perpetrators and all those responsible to justice.

### **OSCE media freedom representative to host conference in Tbilisi on access to information and new technologies**

TBILISI, 9 November 2010 - The 7th Annual South Caucasus Media Conference, hosted by the OSCE Representative on Freedom of the Media, Dunja Mijatovic, will open on 11 November in Tbilisi.

The two-day event will provide a forum for discussion on media developments and challenges facing journalists in the South Caucasus region.

Topics for discussion include international standards on access to information, Internet development and regulation and access to information in the South Caucasus.

Government officials, international and national media experts, as well as journalists and civil society representatives from Armenia, Azerbaijan, and Georgia will take part in the conference. Two media experts from Kazakhstan will participate.

Conference participants are expected to draft and adopt recommendations for inclusion in a declaration, which will be used as a base for follow-up activities.

Journalists are invited to cover the beginning of the conference, which begins at 10.00 a.m. on 11 November at the Radisson Blu Iveria Hotel, Tbilisi, Rose Revolution Square, 1. Mijatovic will address the opening of the conference.

### **OSCE media freedom representative calls on new Parliament in Kyrgyzstan to decriminalize defamation, continue media reform**

VIENNA, 10 November 2010 - On the occasion of the constitutive session of the Parliament of Kyrgyzstan, the OSCE Representative on Freedom of the Media Dunja Mijatovic called on the newly elected Parliamentarians to decriminalize defamation and to continue media reform.

"I hope that reforming media legislation will be a high priority for the new Parliament of Kyrgyzstan. Decriminalization of defamation, as stipulated in the new Constitution, is an essential first step in this direction."

The Constitution, adopted on 27 June 2010, paves the way to decriminalization as it states that "no one shall be prosecuted by criminal law for disseminating information that is defamatory or denigrating to one's honour and dignity."

"I hope that the Members of Parliament will adapt the Criminal Code articles on defamation and insult, to bring them in line with the Constitution. This will be great achievement for media freedom as it will ensure that journalists are not imprisoned for their work. With this amendment in place, Kyrgyzstan would be the first country in Central Asia and the 12th in the OSCE family to ban criminal persecution for defamation," said Mijatovic.





"I offer my office's full support and expertise in this, and further reforms of the media legislation in the country, to bring them in line with the OSCE media freedom commitments".

### **OSCE media freedom representative calls on South Caucasus states to fully implement access to information laws**

TBILISI, 12 November 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, today called on the authorities of Armenia, Azerbaijan and Georgia to respect the right of people's access to government-held information by implementing their countries' laws in this field.

"We need to change the culture of secrecy and confidentiality for a culture of transparency," Mijatovic told the 7th OSCE South Caucasus Media Conference, which ended today in Tbilisi.

"Media freedom and freedom of speech in the digital age mean giving everyone - not just a small number of people who own the dominant modes of mass communication, but everyone - an opportunity to use new technologies to participate in decision-making processes, to interact with each other and with public institutions and to share information about politics, public issues and popular culture."

She said the Internet was an open space for debate to which governments should facilitate wider access.

"Minimum state interference in online, as well as in off-line media content, is a guarantee for pluralism, development and trust," she said.

Akaki Minashvili, the chair of the Georgian Parliament's Foreign Affairs Committee said the OSCE South Caucasus Media Conference, hosted by Georgia for the seventh consecutive year, functioned as a very important forum for discussion between governments and civil societies in the region.

The two-day event was organized by the Office of the OSCE Representative on Freedom of the Media. It brought together more than 80 government officials, parliamentarians, journalists, media experts and civil society representatives from Armenia, Azerbaijan, and Georgia. Two media experts from Kazakhstan also attended.

Participants adopted a declaration on access to information and new technologies in the South Caucasus, which is available in English and Russian at

[www.osce.org/fom](http://www.osce.org/fom).

Germany, the Netherlands, Norway, Sweden, and the United States funded the conference.

While in Georgia, Mijatovic also held talks with Minashvili and First Deputy Foreign Minister Giorgi Bokeria. During a separate meeting with Parliament Speaker Davit Bakradze, Mijatovic welcomed plans by Georgian legislators to draft a bill on media ownership transparency and offered her Office's support for this and other media related-legislative reforms.

### **OSCE media freedom representative welcomes release of Azerbaijani blogger and calls for release of other two imprisoned journalists**

VIENNA, 18 November 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, welcomed the release today of jailed blogger Adnan Hacizade and called on the Azerbaijani authorities to also set free imprisoned editor Eynulla Fatullayev and blogger Emin Milli.

Hacizade was released after the Baku Appellate Court ruled that he should not serve the remainder of his prison term.

"I am relieved that Hacizade was finally released. This had been a long-standing request of my Office and many international organizations and non-governmental organizations world wide. I have raised this issue on numerous occasions with Azerbaijani officials. I hope he will be eventually cleared of all charges brought against him," Mijatovic said, repeating her call on authorities to also release Milli and Fatullayev.

"I also call on the Azerbaijani authorities to decriminalize defamation so that journalists can exercise their profession free without fear of imprisonment no matter how provocative, satirical or sensitive their expressed views are."

### **All journalists imprisoned because of their work should be set free, OSCE media freedom representative says**

VIENNA, 19 November 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic welcomed Azerbaijani authorities' release today of a second jailed Azerbaijani blogger and urged that authorities also set free a journalist who remains imprisoned.

A district court in Baku today ordered that blogger Emin Milli be set free after



serving more than half of a prison term handed to him following a conviction on contested hooliganism and other charges. The Baku Appellate Court yesterday took a similar decision with regard to another jailed blogger, Adnan Hacizade. However, journalist Eynulla Fatullayev remains in prison.

"I am encouraged by these positive developments. The Azerbaijani authorities should now build on this trend and release Fatullayev from custody without delay," Mijatovic said.

"Our societies should not be afraid of written and spoken words. With the OSCE Summit in Astana approaching, all OSCE participating States that keep in jail people whose only crime is to express their opinions should set them free."

### **OSCE media freedom representative condemns arrest of journalists covering protest at U.S. military base**

VIENNA, 23 November 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, today condemned the detention and arrest over the weekend of several journalists covering demonstrations outside the Fort Benning military base in Columbus, Georgia, U.S.

A television crew from Russia Today, Kaelyn Forde and Jonathan R. Conway, on Monday were found guilty of violating city ordinances. Each paid a \$290 fine.

Mijatovic wrote to U.S. Secretary of State Hillary Clinton to express her disappointment with the actions of local police.

"The fact that local police officers would detain, handcuff and arrest members of the press as they engaged in their duty to report on a public event is disturbing," Mijatovic said.

"While it is clear that police play a crucial role in maintaining order during public demonstrations, the indiscriminate rounding up of media and bringing charges against them goes well beyond what is necessary to keep the peace," Mijatovic said.

She asked for a thorough and independent investigation of the incident. Mijatovic also noted that her office had a special report, Handling of the media during political demonstrations, and offered to share the expertise of her office with law-enforcement agencies.

## **OSCE officials discuss human rights violations**

ASTANA, 26 November 2010 - The third and final part of the OSCE Review Conference, which focuses on the human dimension of security, began in Astana today and concludes Sunday. Previous parts of the Conference, held in Warsaw and Vienna, focused on the human, economic-environmental and politico-military dimensions of security.

Topics in focus at the Astana segment include freedom of the media, intolerance against migrants, combating human trafficking - particularly of children.

Madina Jarbussynova, Ambassador-at-large for Kazakhstan, which holds the 2010 OSCE Chairmanship, said the discussion of human-rights related matters at the Review Conference "unfortunately indicate that human rights are still violated in the OSCE region. The discussion of various aspects of these challenging issues will help us assess the situation and develop concrete operating mechanisms."

Dunja Mijatovic, the OSCE Representative on Freedom of the Media, called on OSCE participating States to use the Summit to reaffirm their media freedom commitments with today's reality in mind, including commitments to ensure that the Internet remains an open and public forum for freedom of opinion and expression.

"We are far from achieving it. More and more governments in the OSCE area harm media freedom by curbing the rights of those who use new - or traditional - media to present critical, satirical, controversial and provocative views," she said. "It seems that policy makers in many OSCE countries not only want to apply the same restrictions to the Internet as to traditional media; they even favour the adoption of especially restrictive laws to control a medium that is, by its nature, uncontrollable."

States should use proportional responses that are in line with democratic requirements to deal with legitimate concerns about harmful content, or Internet use to conduct crimes, she said. Mijatovic also discussed the switch from analogue to digital broadcasting, saying handling this correctly could result in "a media landscape that protects plurality of opinion and freedom of expression."

"Well-informed people make well-informed decisions, which are the indispensable foundation that democracies build upon," she said.

During the 17-day Review Conference, which started in September,



representatives from OSCE participating States and more than 500 non-governmental organizations review how OSCE countries are fulfilling the commitments they have undertaken to prepare for the 1-2 December OSCE Summit, also to be held in Astana.

### **OSCE heads of institutions emphasize importance of rights in discussions on Euro-Atlantic and Eurasian security**

ASTANA, 1 December 2010 - Respect for human rights and fundamental freedoms must underpin sustainable security in the Euro-Atlantic and Eurasian area, emphasized the heads of OSCE institutions on human rights and democratic institutions, media freedom and national minorities at the OSCE Summit which began in Astana today.

"As Heads of State at the Astana Summit begin the intensive process of agreeing a framework for action for the OSCE, it is critical that we take advantage of the OSCE's great strength - its comprehensive approach, which recognizes that respect for human rights, fundamental freedoms, democracy and the rule of law constitutes one of the key foundations of security within and among States," said the Director of the OSCE's Office for Democratic Institutions and Human Rights, Janez Lenarcic.

OSCE Representative on Freedom of the Media Dunja Mijatovic said: "There is no security without the free flow of information. Freedom of expression and a free media play important roles in fostering meaningful debate on hard security matters, and can help us to effectively address new challenges such as transnational threats. Now more than ever it is essential that we renew, revitalize and reinvigorate our basic commitments in the human dimension - including those regarding media freedom."

OSCE High Commissioner on National Minorities Knut Vollebaek said: "The OSCE area still faces threats to stability stemming from tensions in state-minority relations, interethnic strife and unresolved conflicts. What is needed is the political will to implement existing recommendations and commitments to effectively address these challenges. We must strengthen the capacity of States to fulfil their responsibilities with respect to the protection of human rights, including those of minorities, for the sake of our collective security in the OSCE area."

The Astana Summit brings together Heads of State and Government from the 56 OSCE participating States and 12 Partners for Co-operation, as well as from other international and regional organizations. The Summit is the OSCE's first

since the Istanbul Summit in 1999.

Plenary sessions will continue until 2 December. For more information visit the OSCE Summit website, available in all six official OSCE languages: [summit2010.osce.org](http://summit2010.osce.org).

### **OSCE media freedom representative condemns arrests and assaults on journalists following Belarus election**

VIENNA, 21 December 2010 - The OSCE Representative on Freedom of the Media, Dunja Mijatovic, today condemned detentions and assaults of Belarusian and international journalists in Minsk following the 19 December presidential election.

"Violence against the media is unacceptable. The police should assist reporters who cover public events - not beat or intimidate them, damage their equipment and imprison them. I call on authorities to immediately release all jailed journalists."

Many journalists were detained or sentenced up to 15 days in prison and numerous reporters were injured and had their equipment damaged by the police in the Belarusian capital on 19 and 20 December.

"Although a record number of journalists were accredited to cover the elections, and their working conditions had been improved, brutal treatment of media representatives by law-enforcement agencies in the aftermath of the election shattered signs of progress," said Mijatovic.

### **Hungarian media law further endangers media freedom, says OSCE media freedom representative**

VIENNA, 22 December 2010 - Hungary's new media law violates OSCE media freedom standards and endangers editorial independence and media pluralism, Dunja Mijatovic, the OSCE Representative on Freedom of the Media, said today.

"I am concerned that Hungary's parliament has adopted media legislation that, if misused, can silence critical media and public debate in the country," Mijatovic said, referring to the "Law on media services and mass communication", adopted on 20 December.

"The law regulates all media content - broadcast, print and online - based on identical principles, which runs against OSCE standards on free media. It



also gives unusually broad powers to the recently established media authority and media council, which are led exclusively by members supported by the governing party," Mijatovic said.

Traditionally, regulatory authorities govern broadcast media only, but the new law in Hungary empowers the authorities to also govern print and online media content.

"Such concentration of power in regulatory authorities is unprecedented in European democracies, and it harms media freedom," Mijatovic said.

"Regulating print media can curb free public debate and pluralism. Even though regulating online media is considered technologically impossible, it introduces self-censorship."

Mijatovic said that the law leaves numerous key terms undefined, such as the protection of public order, which, if violated, requires journalists to reveal their sources.

"In the absence of clearly defined guidelines, it is impossible for journalists to know when they are in breach of the law," she said.

She also criticized a provision of the law that requires all media - broadcast, print and online - to be registered with the media authority; violations of many kinds, including unbalanced coverage, would be punishable by very high fines.

"The new system also endangers the political independence of public service media," she said, adding that the governing party had nominated all new heads of public service media, and the media authority now controls the budget of all public service media.

The OSCE Representative on Freedom of the Media's office analyzed a draft of the law and warned Hungarian authorities more than five months ago of its shortcomings. In a report to the OSCE Permanent Council and in public statements, Mijatovic called on the authorities to halt this legislation and start public discussions to develop a media law in line with OSCE commitments.

[www.osce.org/fom](http://www.osce.org/fom)

THE REPRESENTATIVE ON FREEDOM OF THE MEDIA