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The Representative on Freedom of the Media
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LEGAL ANALYSIS ON THE DRAFT LAW OF UKRAINE ON CHANGES TO SOME LEGISLATIVE ACTS OF UKRAINE ON COUNTERING THREATS TO NATIONAL SECURITY IN THE INFORMATION SPHERE

Commissioned by the Office of the OSCE Representative on Freedom of the Media to
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Executive summary

This Legal Analysis examines an English translation of the draft law of Ukraine **On Changes to Some Legislative Acts of Ukraine on Countering Threats to National Security in the Information Sphere** (further on - "the Draft Law"), initiated by Members of Parliament of Ukraine Vinnyk I.Yu., Tymchuk D.B., and Chornovol T.M.

The proposal includes a wide series of provisions, amending different laws already in force in Ukraine. These laws include the Laws of Ukraine "On Fundamentals of the National Security of Ukraine" (2003), "On Combating Terrorism" (2003), "On the Security Service of Ukraine" (1992), "On Sanctions" (2014), and "On Telecommunications" (2004), as well as the Ukrainian Criminal Code (2011), and the Code of Criminal Procedure (2013).

This package introduces a series of provisions aimed at incorporating new principles and criteria into the existing legal framework, and in doing so covers both substantive and procedural aspects, pertaining to the competences and functions of several national institutions in the areas of cybersecurity, cybercrime and threats to national security through information networks.

First, the amendments include a series of new principles and provisions on national security in Ukraine. *Second*, the Draft Law grants new powers and competences to the Security Service of Ukraine, particularly in the area of blocking access to different kinds of online information services. *Third*, the Draft Law reinforces the powers and competences of the National Commission for the State Regulation of Communications and Information as the telecommunications regulatory authority, which becomes the entity in charge of enforcing and implementing the decisions on blocking access to information resources. *Fourth*, the Draft Law also includes a series of provisions aimed at establishing the specific mechanisms to block access to online information services in relation to criminal cases.

According to international standards and best practices, decisions affecting access to and dissemination of content and directly limiting the right to freedom of expression should be adopted by the judiciary and according to due process. Therefore, the role of administrative authorities should be limited and subject to impartial controls and safeguards. These standards are particularly applicable to the institution of the National Security and Defense Council ("NSDC").

It also needs to be noted that the powers of the Council regarding blocking of access to online content are defined in a very broad and general manner. Thus, there is a need for more specific provisions on the cases and circumstances when such a measure should be adopted, beyond the general provisions included in the law on national security.

There are a number of problems with the Draft Law from a freedom of expression perspective. More specifically, there are no provisions in the proposal regarding the procedure to be followed by the abovementioned bodies in the adoption of the decisions which are the subject of this analysis.

Furthermore, the legislator has not introduced any measures aimed at protecting the principles of proportionality and necessity vis-à-vis the adoption of decisions on

blocking access to Internet content resources, which may lead to potential overbroad and excessive measures affecting the dissemination of online content in Ukraine.

Summary of recommendations

a) The proposal grants new powers to the National Security and Defense Council regarding blocking of access to online content, but there are no specific provisions on the cases and circumstances when such measures should be adopted, apart from the general provisions included in the law on national security. Taking into account the impact of a measure such as blocking access to content on fundamental rights, it would be strongly advisable that the law introduces further elaboration in this area, in order to properly identify more specific and concrete threats which, due to their impact, justify the adoption of such an extreme measure.

b) It is advised that specific administrative regulations regarding procedural matters, particularly establishing the rights and safeguards to those affected by the proposed blocking measures, should be included in the Draft Law. Such measures should protect the due process rights and also give service and/or information providers the right to know and contest the grounds and concrete scope of the blocking measures that are foreseen.

c) According to international standards including the case-law of the European Court of Human Rights, the Draft Law should introduce proper and adequate review mechanisms before independent bodies or, preferably, the courts.

d) The Draft Law should include specific provisions aimed at establishing the necessary safeguards to protect the principles of proportionality and necessity vis-à-vis the adoption of decisions on blocking access to Internet content resources.

e) The Draft Law should also provide for the transparency of blocking decisions, through publicly available registers and websites or otherwise. This would enable individuals to know that some sources of information and content are not accessible. Such publication would also need to specify the grounds, scope and duration of corresponding measures.

Introduction

The present analysis was prepared by Dr. Joan Barata Mir, independent media freedom expert, at the request of the Office of the OSCE Representative on Freedom of the Media.

This Analysis refers to the draft law of Ukraine **On Changes to Some Legislative Acts of Ukraine on Countering Threats to National Security in the Information Sphere** .

The structure of the Analysis is guided by the tasks formulated by the Office of the OSCE Representative on Freedom of the Media. These tasks include comments on the current version of the Draft Law by: comparing provisions against international media standards and OSCE commitments; indicating provisions which are incompatible with

the principles of freedom of expression and media; and providing recommendations on how to bring the legislation in line with the above-mentioned standards.

The Analysis first outlines general international standards on freedom of expression and freedom of information, and then presents those particularly referring to libel and insult. These standards are those as defined in international human rights treaties and in other international instruments agreed by states under the auspices of the United Nations, the Council of Europe and the OSCE. Part II includes an overview of the Draft Law, focusing on its compliance with international freedom of expression standards. The Analysis highlights the key positive aspects of the Draft Law and elaborates on the drawbacks, offering recommendations for its review before being put to the legislature.

Part I. International legal standards on Freedom of Expression and Freedom of Information, and blocking and filtering of online content

General standards

In Europe, freedom of expression and freedom of information are protected by Article 10 of the European Convention on Human Rights ("ECHR"), which is the flagship treaty for the protection of human rights on the continent within the context of the Council of Europe ("CoE"). This article broadly follows the wording of Article 19 of the International Covenant on Civil and Political Rights ("ICCPR"), and is reflected in the different constitutional and legal systems in Europe.

Article 10 reads as follows:

> **1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.**
>
> **2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.**

Freedom of expression and freedom of information are essential human rights that protect individuals when holding opinions and receiving and imparting information and ideas of all kinds. There are also broader implications given that the exercise of such rights is directly connected with the aims and proper functioning of a pluralistic democracy, as well as the realisation of socio-economic rights and development goals.[1]

[1] See the elaboration of such ideas by the European Court of Human Rights in landmark decisions such as *Lingens v. Austria*, Application No. 9815/82, Judgment of 8 July 1986, and *Handyside v. The United Kingdom*, Application No. 543/72, Judgment of 7 December 1976.

On the other hand, freedom of expression and freedom of information, as well as the other rights protected in the Convention, are not absolute and therefore may be subject to certain restrictions, conditions and limitations. However, Article 10(2) ECHR clearly provides that such constraints are exceptional and must respect a series of requirements, known as the three-part test. This test requires that: 1) any interference must be provided by law; 2) the interference must pursue a legitimate aim included in such provision; and 3) the restriction must be strictly needed, within the context of a democratic society, in order to adequately protect one of those aims, according to the idea of proportionality.[2]

At the OSCE level, there are political commitments in the area of freedom of expression and freedom of information that clearly refer to international legal standards extant in this area. In particular, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE in 1990 proclaims the right to everyone to freedom of expression and states that:

> **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.[3]**

Standards with regards to blocking and filtering of online content

The UN Human Rights Council declared in its resolution 32/13 of 1 July 2016: "(...) the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with articles 19 of the UDHR and ICCPR." In doing so, it recalled its resolutions 20/8 of 5 July 2012 and 26/13 of 26 June 2014, on the subject of the promotion, protection and enjoyment of human rights on the Internet.

Previously, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in his Report of 16 May 2011, outlined the importance of the Internet as a platform that enables individuals to share critical views and find objective information".[4] At the same time, he warned that restrictions on the exercise of the right to freedom of expression through the Internet can take various forms, including blocking and filtering. Such measures may be incompatible with States' obligations under international human rights law and create a broader "chilling effect" on this specific right. Thus, the Rapporteur warned about the fact that:

> **States' use of blocking or filtering technologies is frequently in violation of their obligation to guarantee the right to freedom of expression, as the criteria mentioned under chapter III are not met. Firstly, the specific conditions that justify blocking are not established in law, or are provided by law but in an overly broad and vague manner, which risks content being blocked arbitrarily and excessively. Secondly, blocking is not justified to pursue aims which are listed under article 19, paragraph 3, of the International Covenant on Civil and Political Rights, and blocking lists are**

[2] See for example *The Sunday Times v. UK*, Application No. 6538/7426 Judgment of April 1979.

[3] Available at: http://www.osce.org/odihr/elections/14304.
[4] Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

> **generally kept secret, which makes it difficult to assess whether access to content is being restricted for a legitimate purpose. Thirdly, even where justification is provided, blocking measures constitute an unnecessary or disproportionate means to achieve the purported aim, as they are often not sufficiently targeted and render a wide range of content inaccessible beyond that which has been deemed illegal. Lastly, content is frequently blocked without the intervention of or possibility for review by a judicial or independent body.**[5]

The international mandate-holders on freedom of expression, including the UN Rapporteur on Freedom of Opinion and Freedom of 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, in their Joint Declaration of 1 June 2011 on freedom of expression and the Internet[6], and regarding filtering and blocking, state the following:

> **Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.**

Last but not least, it is important to underscore the statements made by the European Court of Human Rights in this area, within the context of the landmark decision in the case of *Ahmed Yildirim v. Turkey*.[7] Affirming that "the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information", the Court also declares that "(i)n matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power". On the other hand, the Court also establishes the need for States to adopt in this area measures that are not only foreseeable, but also that do not impose excessive restrictions and therefore restrict the rights of Internet users and have significant collateral effects.

Part II. Overview of the proposed legal reform

Content and scope of the proposed legislation

The Draft Law includes a wide series of provisions, amending different laws already in force in Ukraine. These laws include the Laws of Ukraine "On Fundamentals of the National Security of Ukraine" (2003), "On Combating Terrorism" (2003), "On the

[5] Paragraph 31, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf
[6] Available at: http://www.osce.org/fom/78309
[7] *Ahmed Yildirim v. Turkey*, Application No. 3111/10, Judgement of 18 December 2012. http://hudoc.echr.coe.int/eng?i=001-115705.

Security Service of Ukraine" (1992), "On Sanctions" (2014), and "On Telecommunications" (2004), as well as the Criminal Code of Ukraine (2011), and the Code of Criminal Procedure of Ukraine (2013).

This package introduces a series of provisions aimed at incorporating new principles and criteria into the existing laws, covering both substantive and procedural aspects, regarding the competences and functions of several national institutions in the areas of cybersecurity, cybercrime, and threats to national security through information networks.

Considering the aims and scope of this legal Analysis, the most relevant provisions are those related to the possibility of blocking access to sources of information using telecommunications networks and services.

If adopted, these new provisions would introduce, for the first time in the Ukrainian legal system, a regime covering Internet filtering and blocking. Currently, most online security threats are dealt with using general legislation in the area of national security, whereas there are no specific regulations establishing definite measures to be adopted in cases of use of information networks to commit serious crimes. There are a number of features of the Draft Law which deserve consideration.

Firstly, the amendments include a series of new principles and provisions on national security in Ukraine. In particular, they identify cyberthreats, cyberattacks, and cybercrimes as threats to national security in the country, thus establishing the need to initiate, develop and enforce all the measures needed to identify, respond, prevent and neutralize them. They also include, in particular, the notion of "technological terrorism" as an independent and autonomous concept, including a wide series of possible criminal actions targeting all sorts of networks and technological infrastructures.

Secondly, the Draft Law grants new powers and competences to the Security Service of Ukraine, particularly in the area of blocking the access to different kinds of online information services. In particular, the Draft Law gives the National Security and Defense Council of Ukraine ("NSDC") the competence of "blocking of access to a certain (identified) information resource (service) in the information and telecommunication networks (systems)". These decisions will need to be adopted following the general procedure already contemplated in the law, which includes a necessary approval by the Parliament and the final binding decision by the President through a Decree.

Thirdly, the Draft Law reinforces the powers and competences of the National Commission for the State Regulation of Communications and Information ("NCSRCI") as the telecommunications regulatory authority, which becomes the entity in charge of enforcing and implementing the decisions on blocking access to information resources adopted by the different competent institutions (including judges, courts, the prosecutor and the investigator, and the NSDC).

Lastly, the Draft Law also includes a series of provisions aimed at establishing the specific mechanisms to block access to online information services in relation to criminal cases.

Analysis of the provisions of the proposal in light of applicable international standards

- The new powers of the NSDC and the NCSRCI

The proposal gives, as it has already been summarized, new competences to the NSDC and the NCSRCI, specifically the power to decide on and to implement measures related to the blocking of online information resources.

Such powers are not unlimited and need to be interpreted in the light of other provisions included in the Draft Law. In this sense, and as it has already been noted, the decision of the NSDC on the possible blocking of access to online content is subject to the approval of the President and the Parliament. In the case of the NCSRCI, its specific role is the effective enforcement of blocking decisions adopted by other authorities and institutions. Therefore, the former has no discretion or capacity to decide on blocking content resources. Due to its competences and position as the telecommunication regulation, the NCSRCI has the sole responsibility of adopting the measures that will allow the effective enforcement of decisions adopted by other bodies.

In conclusion, despite the fact that, according to international standards and best practices, decisions affecting access to and dissemination of content and therefore directly limiting the right to freedom of expression should be adopted by the judiciary and following a due process, in this case, the role of administrative authorities is limited and subject, particularly in the case of the NSDC, to important controls and safeguards.

This being said, it also needs to be noted that, when defining the powers of the NSDC regarding blocking of access to online content, there are no specific provisions on the cases and circumstances when such a measure should be adopted, apart from the general provisions included in the law on national security. Despite the fact that the legal provisions now refer to and mention, as we have seen already, cyberthreats, cyberattacks, and cybercrimes as threats to national security , they are still considerably vague and broad. It is obvious that threats to national security, including cyber-threats, can take different forms and may vary and change over time. Considering the impact on fundamental rights of a measure like blocking access to content, however, the Draft Law should be revised in order to properly identify more specific and concrete threats which, due to their impact, justify the adoption of such an extreme measure. Otherwise, the legislator would be giving an unacceptably broad discretion to competent bodies to prevent access to certain sources of information in any case or circumstance deemed to be considered to represent a threat to national security in a way that would be incompatible with international standards.

- Procedural aspects

Regarding the powers of the NSDC and the NCSRCI, and apart from what has already been expressed in the previous paragraphs, the Draft Law provides no indication of the procedure that ought to be followed by such bodies in the adoption of the decisions which are the subject of this analysis. This absence is in contrast with the amendments introduced in the Code of Criminal Procedure, where these provisions have been included vis-à-vis penal cases.

The Draft Law should therefore be revised to introduce specific administrative regulations regarding procedural matters, particularly establishing the rights and safeguards to those individuals affected by the proposed blocking measures. Such measures shall protect their rights to fair trial and access to justice, and also relatedly give the service and/or information provider the right to know and contest the grounds and concrete scope of the blocking measures that are foreseen. Moreover, according to the international standards including the case law of the European Court of Human Rights, the proposal should also need to introduce proper and adequate mechanisms before judicial or other independent oversight bodies.

- The need to respect the principle of proportionality

The final issue concerning the Draft Law is the need to properly include and guarantee the principle of proportionality in the adoption and implementation of any decision regarding the blocking of online information resources by the administrative bodies, but also by the judges, courts, prosecutors and investigators also empowered by the law.

International standards including the case law of the European Court of Human Rights emphasise the need to guarantee, in every single case, that the measure adopted does not only constitute the least restrictive option to protect the interests and values at stake, but that it also affects to the minimum extent the dissemination of content through the Internet. This requires, according to the Court, that the legislator limits the powers of competent bodies and obliges them to consider, in all cases, the impact that any decision will have on the right to freedom of expression and freedom of information, particularly with regards to access and dissemination of lawful and protected speech.

The legislator has not introduced any measure of this kind, which may lead to potential overbroad and excessive measures affecting the dissemination of online content in Ukraine, even if those measures may be deemed to serve the legitimate aim of national security It is therefore recommended to introduce specific provisions aimed at establishing the need to protect the principles of proportionality and necessity vis-à-vis the adoption of decisions on blocking access to Internet content resources. Otherwise, there are evident risks of excessive intervention over the dissemination of online content and even the restriction of access to legitimate speech, and this may also have a general chilling and intimidating effect on speakers.

Finally, it is recommended that the Draft Law is adapted in accordance with best international practices to ensure that the transparency of blocking decisions by making them public through publicly available registers and websites. This would enable individuals to be aware that some sources of information and content have become non-accessible. Such publication would also need to specify the grounds, scope and duration of those corresponding measures.