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LEGAL ANALYSIS OF DRAFT LAW OF UKRAINE
On Amendments to Certain Legislative Acts of Ukraine on Ensuring National Information Security and Right to Access Reliable Information

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On January 20, 2020, the Ministry of Culture, Youth and Sport of Ukraine released a comparative table of the draft Law of Ukraine On Amendments to Certain Legislative Acts of Ukraine on Ensuring National Information Security and Right to Access Reliable Information (the Draft Law) for public discussion. The authors of the draft law write that the bill "aims to ensure the exercise of citizens' right to access reliable and balanced information by introducing mechanisms to combat misinformation in Ukraine's information space and to increase the level of media literacy among the population in the face of hybrid aggression by the Russian Federation."

Experts from the Human Rights Platform and the Digital Security Lab analyzed the Draft Law and identified key risks of its proposed provisions:

Disseminators of Mass Information and Their Legal Status

- Charging a public authority (the Information Commissioner) to develop a trust index for disseminators of mass information would unduly influence the work of journalists and the media, and runs contrary to the Draft Law's stated purpose of ensuring that consumers of information can select and critically evaluate the information they consume.
- Information disseminators, including ordinary citizens, are bestowed excessive obligations that could lead to self-censorship and have a chilling effect on the public debate regarding issues of public concern.
- The requirement to publicly disclose the identity of all disseminators of mass information is excessive, violates international standards of freedom of speech, and may undermine the rights of whistleblowers of corruption.
- By requiring that disseminators of mass information who distribute news, information, or analytical materials publicize the author's name or pseudonym, lawmakers violate the provisions of international and national copyright law.
- The rights of journalists are arbitrarily diminished compared to those of "professional journalists." While both journalists and "professional journalists" face an equally high risk of attacks, threats, property damage, murders, etc. in the course of their journalistic activities, the Draft Law proposes to introduce different levels of protection for them, without any objective justification.

Self-Regulation by Journalists - Association of Professional Journalists of Ukraine

- Making the distinction between the rights and guarantees given to "journalists" and "professional journalists," depending on their membership in the Association of Professional Journalists of Ukraine, violates the constitutional prohibition on restricting the right to belong or not to belong to civic organizations (Article 36 (4) of the Constitution). This distinction between journalists is a disproportionate restriction of the freedom of expression (Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms) and may be construed as requiring participation in an association and thus a violation of freedom of association standards (Article 11 of the Convention).
- The Draft Law's provisions regulating self-regulation by journalists, which establish legal liability for violations of ethical standards, do not comply with international practices.
- The Draft Law introduces self-regulation by journalists via the Association of Professional Journalists of Ukraine, which, according to the Law, will be the only association of journalists explicitly provided

for by law. This arrangement resembles self-regulation by lawyers in Ukraine. By regulating the Association's structure, activity, and membership, as well as prohibiting its reorganization or liquidation, the Law does not comply with freedom of association standards (Article 11 of the Convention).

Information Commissioner

- The Commissioner's activity is aimed at restricting the right to freedom of expression and not protecting citizens' information rights.
- The procedure for establishing the role of Commissioner, its status, and its functions do not comply with the requirements of the Constitution of Ukraine, which does not empower the Cabinet of Ministers of Ukraine to establish government entities outside the system of executive agencies or to give them broad powers.
- The Commissioner's power to require (via compulsory request) the refutation of information or response to misinformation constitutes undue interference with the freedom of expression. The threat of high penalties for refusing to comply with the Commissioner's requests, the absence of grounds for refusing to publish the Commissioner's response, and limited opportunities to defend one's interests create a chilling effect on the dissemination of information on issues of public interest.
- The Commissioner's responsibility to monitor compliance by disseminators of mass information with the Law's requirement that they publicize the author's name or pseudonym does not comply with international principles allowing for anonymity as a guarantee of the freedom of expression.
- The Draft Law's requirement that the Commissioner participates in civil cases regarding the refutation of inaccurate information threatens to violate citizens' right to a fair trial (Article 6 of the European Convention).

Definition of Misinformation and Responsibility for Its Dissemination

- The definition of misinformation is inconsistent with existing law, is not sufficiently clear, and leaves room for abuse by law enforcement authorities.
- The Draft Law's administrative sanctions (stipulated in amendments to the Law on Information) are excessive and disproportionate, may be applied to an unlimited number of individuals, and reinstate penalties for defamation to Ukrainian law.
- Criminal liability for the dissemination of misinformation does not take into account the threat to the public in determining sanctions for a crime. The proposed safeguard procedure - requesting that the ECtHR issue an advisory opinion - may prove ineffective.

Further details of the experts' opinions and recommendations can be found below.

Disseminators of Mass Information, Their Types, and Legal Status

General Observations

The bill introduces a new term into the Ukrainian legislation – the "disseminator of mass information" (the "disseminator"), which is understood to mean an individual or legal entity, including a media entity that creates and/or collects and disseminates mass information." There are two types of disseminators: media entities and all other persons who create and/or collect and disseminate mass information.

Considering that the bill's authors intended that mass information must be interpreted as any information that is accessible to an unlimited or indefinite number of persons or that can be accessed by any person from any place and at any time at their own choice, including with the consent or permission of the disseminator of such information, the disseminators of mass information may be an unlimited number of persons, even those who disseminate **non-mass-consumer information** (scientific, technical, other information intended for a narrow circle of specialists, etc.). However, the impact of this information on the general public (audience composition, volume, etc.) is not relevant. What is crucial is that this information must be accessible to an unlimited or indefinite number of persons.

The bill **does not determine the scope of rights** of the disseminator of mass information. It, however, introduces a concept such as **a trust index of the disseminators of mass information** (the "trust index").

The trust index can be obtained not only by media entities (media organizations), but also by any other disseminators that disseminate news, other information, or the information and analytical materials. It is optional (the bill states that it can be obtained voluntarily), and, therefore, gaining the trust index can be considered as a right of the disseminator of mass information. However, this right should be given special consideration.

This index is actually a kind of **state-controlled** information labeling, a variety of a quality mark. The fact is that the trust index is obtained in the manner and according to the criteria approved by the Commissioner and the organizations selected by the Commissioner and included in the relevant list (see parts 3 and 4 of Article 22-1 of the draft amendments to the Law on Information).

Therefore, by formulating the criteria that influence the determination of the trust index and selecting the organizations that will assign it, the State represented by its Commissioner will determine the information that can be trusted and how much or not. The fact that the project proposes to shift the current work to "independent organizations" in no way mitigates the risks outlined since the list of these organizations will be drawn up by the state body (the Commissioner) that does not meet the requirements of independence (this issue is covered separately).

All of this leads us to believe that the introduction of this index is aimed at giving the state influence over the activities of journalists and the media and at manipulating public opinion since it is not the public, not each person individually, but the state agency that will determine the level of trust in one or another media. This is directly contrary to the stated purpose – to enable the recipients of the information to make an informed choice of and critically evaluate the information.

Obligations of the disseminators of mass information. The bill under review contains several obligations it proposes to impose on **all the disseminators of mass information**. They include the duties to disseminate only reliable information (i.e., only complete information or, otherwise, it will not be reliable); **comply with transparency requirements, post and promptly update their identification or source data**; quickly and appropriately respond to requests for response and refute inaccurate information; inform the recipients of the information of the **trust index** in the cases provided by this bill; and respond, in due time, to requests and statements of the Commissioner, etc.

Obligation to disseminate reliable information. The requirement to disseminate only reliable information involves the verification of its authenticity, which, in turn, according to the bill's authors, includes **the verification of its veracity by the information owner, the establishment of the existence of an official information source and the absence of any statements regarding disinformation on the Commissioner's website** (see Article 22 (6) of the draft amendments to the Law on Information).

Such provision would create significant barriers to discussing the issues of public concern since the mere existence of a statement on disinformation on the Commissioner's website (even if it is found to be unfounded) will be sufficient to treat the information as false and to refuse its dissemination. Similarly, the inability to identify the owner of the information (the Ukrainian legislation no longer contains such term) and the existence of differences with the official versions of events may hinder the information exchange. The said requirements, as referred to above, apply **not only to the media and their employees but also to ordinary citizens** who openly disseminate information to an unlimited circle of persons. In practice, this may limit public discussion since the fear of punishment for spreading false information by failing to fulfill the obligation to verify the information will promote censorship and self-censorship.

Right to anonymity. Compliance with transparency requirements requires to disclose identification information set out in the bill. In particular, non-media disseminators of mass information **are required to post their identification information in a location accessible to the recipients** (on the homepage of their website or at the head of their own web page, in the 'Account Owner Information' section of an information-sharing platform or instant messaging apps, other locations available to the recipient): individuals – fist name, patronymic and surname, e-mail address, or address of other electronic communication means; legal entities – full name, registered address, USREOU (Unified State Register of Enterprises and Organizations of Ukraine) code (if applicable), identification details of the legal entity registration in the country of domicile, registration number in the register, e-mail address or address of other electronic communication means, first name, patronymic, and surname of the person exercising editorial control over the information being disseminated (if there is any such person) (see Article 22 (2) of the draft amendment to the Law on Information).

Since, as specified above, the term "disseminator of mass information" covers virtually all persons who publicly disseminate certain messages (including on their Facebook, Youtube pages, etc.), in practice, this means **prohibiting the anonymous dissemination of information** (even if this information is correct and important to the public).

Such provision will have a negative impact on freedom of expression in many areas of public life, especially in the area of combating corruption, and, in the first place, it will destroy the guarantees for whistleblowers, etc.

Departure from the obligation to protect copyright (repudiation of authorship). Article 22 (4) of the bill proposes to oblige each of the disseminators of mass information who distributes news, information, or the information and analytical materials **to specify the author's surname and first name or pseudonym for each of such materials.**

This provision directly contravenes Article 14 (1) (2) of the Law of Ukraine on Copyright and Related Rights, which guarantees every author[1] the right to anonymity, and is also contrary to the relevant international treaties regulating this issue.

Restriction on media freedom. The bill proposes that journalists and professional journalists shall have the following obligations:

- To create and disseminate **only that information whose origin is known to them**, or, where necessary, **to accompany texts with a relevant note,** not to distort facts or documents (Article 25 (2) (3) of the bill);
- To inform their immediate supervisor or the person who exercises editorial control over the disseminator of mass information **about the possibility of lawsuits** and any other claims stipulated by law that may be brought in connection with the dissemination of the material prepared by them; and
- **Not to disclose restricted information**, except where the consent of the owner of such information is obtained or where the public interest in disseminating such information outweighs the harm from disclosure, etc.

[1] Автору належать особисті немайнові права, зокрема, право забороняти під час публічного використання твору згадування свого імені, якщо він як автор твору бажає залишитись анонімом.

The obligation to create only that information whose origin is known to the journalist is meaningless since the journalist who created the information knows its origin. The requirement to disseminate only that information whose origin is known to the journalist is also strange because if the journalist has collected the information, he also knows from what source. However, these provisions can also be interpreted to imply that the journalist cannot discuss rumors or opinions circulating in the information space, which is an excessive restriction on freedom of speech. The requirement to accompany the texts with a "relevant note" is also not clear and does not meet the criteria of predictability of the law.

The requirement to warn of the possibility of lawsuits is also excessive and can have a "chilling effect" and promote self-censorship since the Ukrainian law does not restrict anyone's right to sue in connection with the dissemination of any message (both true and false), and case-law shows that not all such claims are satisfied.

Imposing on the journalist a duty not to disclose restricted information, i.e., secret, confidential, or proprietary information, is also excessive. A relevant regime of access to information should be provided by the administrator of the information rather than the journalist who may or may not know that certain information is classified as secret. Therefore, the imposition of such duty may result in self-censorship.

Unjustified reduction of the rights of journalists compared to the so-called "professional journalists."

The bill provides for a much narrower scope of rights of ordinary journalists compared to the rights of "professional journalists."

In particular, the right to be personally received within a reasonable time by officials and officers of government authorities and local self-government bodies and the right to collect information in the areas of natural disasters, catastrophes, in places of accidents, mass disorders, hostilities, except in cases stipulated by law, the right to a 36-calendar-day annual leave at the expense of media entities, the right to early retirement, and the right to receive a lump sum financial aid from the state budget **are granted to "professional journalists" only** and partially – to foreign journalists (see Article 25 (1), Article 26 (1) and Article 39 (1) of the bill).

Since, by definition, a professional journalist differs from an ordinary one in that he or she works on a full-time professional basis and is a member of the Association of Professional Journalists of Ukraine, the membership of which can be acquired only by a person with a proven **at least three years'** experience of primary employment as a journalist based on an employment agreement or any other contract with a Ukrainian or foreign media entity, the introduction of such restrictions is unjustified and shows signs of discrimination.

As can be seen from the above, the bill proposes **to restrict the rights of journalists, depending on their length of service** (because it is impossible to become a "professional journalist" and a member of the Association without having worked as a journalist for three years) **and membership in the Association** (for those with an appropriate length of service in journalism).

However, such restrictions have no legitimate, objectively justified purpose, the means of achieving which are appropriate and necessary. They cannot be justified in any way since there is no urgent need for introducing them. The need to combat disinformation cannot justify restricting the rights of this category of persons since the proposed approach does not solve the problem of spreading disinformation, but violates the principle of equality in the exercise of the right to freedom of expression. It also introduces unjustified competitive advantages of the so-called "professional journalists" over ordinary journalists (whose work quality is not directly related to their experience or membership).

Accreditation. The authorities guarantee favorable conditions for conducting professional activities to professional journalists only (their accreditation is introduced for this purpose). Lack of accreditation cannot be the ground for denying access to public events to professional journalists only. State and local authorities, however, have the right not to accredit ordinary journalists and disseminators of information and, thus, deny them access to government events.

Such restrictions do not seem to be proportionate to the purpose of combating disinformation and show the signs of discrimination.

In light of the above, it can be concluded that the bill violates the standards of freedom of expression guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Besides, the above provisions are discriminatory on the grounds of age and membership in a public organization, which is also prohibited by the Constitution of Ukraine and international instruments.

Safety of journalists and its level depending on the status of a journalist

According to the UN Plan of Action on the Safety of Journalists and the Issue of Impunity, "the protection of journalists **should not be limited to those formally recognized as journalists,** but should cover others, including community media workers and citizen journalists and others who may be using new media as a means of reaching their audiences[2]."

Thus, global trends indicate that states must ensure the safety of not only professional journalists, but also a wide range of media participants. Yet, the bill proposes, on the contrary, to limit the number of persons to whom the state provides increased protection in connection with the exercise of the right to freedom of expression.

Special provisions of the Criminal Code of Ukraine, such as Articles 171 (Obstruction of Journalists' Legitimate Professional Activities), 345-1 (Threat or Violence against Journalists), 347-1 (Intentional Destruction or Damage to the Journalist's Property), 348-1 (Attempt on the Life of the Journalist), are proposed to **apply to "professional journalists" only.** Ordinary journalists and other disseminators of information do not fall under those provisions.

It is impossible to explain the need for granting different degrees of protection to "professional journalists" on the one hand and to ordinary journalists and disseminators of information on the other. This is unfounded. These categories of persons are equally exposed to risks in connection with the exercise of their right to freedom of expression. Therefore, safety measures applicable to them should be the same.

In light of the previous considerations, this approach is also discriminatory. But this is only one of the problems.

The creation of this and other advantages mentioned above for some journalists over others is aimed at encouraging journalists to become members of the Association, which the bill requires to establish and the activities of which are fully set out in the law. However, the approaches to implementing this institution do not meet democratic standards (detailed arguments are presented in another section), and, therefore, there is a high risk that the state will use this institution to exert control and pressure on journalists and the media.

This gives grounds to conclude that the proposed amendments constitute an unjustified, disproportionate restriction on freedom of expression in Ukraine.

RECOMMENDATIONS:

- It is recommended to give up on the idea of introducing, at the initiative of the state, the rust index applicable to the disseminators of mass information.
- It is recommended not to violate non-property rights of authors to publish works under the conditions of anonymity and to give up on the idea of mandatory public disclosure of identification information of all the disseminators of information.
- It is recommended not to impose excessive requirements regarding the verification of the authenticity of information before it is disseminated. Each of the disseminators must independently choose the method of verifying the accuracy of the information and be responsible for its inaccuracy.

[2] Див. пункт 10 Принципів, викладених у Додатку до Рекомендації CM/Rec(2016)4 Комітету міністрів державам-членам щодо захисту журналістики й безпеки журналістів та інших працівників ЗМІ) /Збірник документів Ради Європи «Безпека журналістів, 2016, с. 43: https://rm.coe.int/16806b5970

- It is recommended to refuse to divide journalists into ordinary and professional ones, to ensure a level playing field for the profession, to collect and disseminate information without discrimination, and take appropriate measures to ensure the safety of all journalists and other media participants.

Self-Regulation of Journalists - Association of Professional Journalists of Ukraine

The bill proposes to add two sections to the Law of Ukraine on Information for them to serve **as a framework for regulating the self-regulation of journalists in Ukraine**[3]. Articles 28-40, first of all, define the term "self-government of journalists," its principles and objectives, and provide for the establishment and operation of the Association of Professional Journalists of Ukraine (the "Association") as the only professional association of journalists. Second, Articles 41-48 set out the grounds and procedure for imposing disciplinary liability on members of the said Association.

In this part of the analysis, attention should, first of all, be paid to the **identity of and possible confusion between the terms "self-government" and "self-regulation."** Indeed, some of the public debate that is already taking place regarding the content of the bill is mostly about "self-regulation" in the context of ethics, ensuring compliance with professional standards and the need to provide the voluntariness of these processes and the prevention of the state/government from interfering with these processes. However, professional ethics and monitoring of its compliance are only part of the "self-government" tasks stipulated by the bill (Article 28 (3) (5) of the Bill). Others include: 1) ensuring the independence of professional journalists, protecting them from interfering with legitimate journalistic activities; 2) maintaining a high professional level of journalists; 3) creating favorable conditions for journalistic activities; and 4) ensuring the rights and guarantees of professional journalists.

The structure and content of the two sections above suggest that the authors of the "anti-disinformation" bill propose to introduce in Ukraine **a model of self-regulation of journalists that is almost identical to that of lawyers**[4]. However, unlike the international standards of the legal profession[5], which (considering the role, content, and functions of the institution of the legal profession in society) include, among the basic principles, the "corporate self-government" and an obligation of states to "guarantee independence – corporate self-government, lawyers' immunity,"[6] such concept is novel for journalism, and it is not mentioned in any international legal instrument. Additionally, we could not find any examples in other countries where, at least at the level of the law, the state would establish corporate self-government for journalists that is similar to that of lawyers or generally self-governance.

Since the self-government of journalists, as proposed by the authors of the bill also covers the issues of self-regulation, the following should be noted.

"True ethics standards can be created only by independent media professionals and can be obeyed by them **only voluntarily**. Whether passed in goodwill or not, **any attempt to impose standards on journalists by law will result in arbitrary limitation of their legitimate freedoms,** and restriction of the free flow of information in society."[7]

"Self-regulation refers to the ethical guidelines of the professional journalistic community. The self-regulation system with its guidelines **is independent of the state and legislation,** aiming to secure the truthfulness and accuracy of journalism as well as the rights of reporters…"[8].

"Self-regulation is a solemn promise by quality-conscious journalists and media to correct their mistakes and to make themselves accountable. But for this promise to be fulfilled, there must be two conditions:

[3] Розділ IV Самоврядування журналістів України та Розділ V Дисциплінарна відповідальність членів асоціації.
[4] Статті 33-58 Закону України «Про адвокатуру та адвокатську діяльність» https://zakon.rada.gov.ua/laws/show/5076-17.
[5] Хартія ключових принципів Європейського юридичної спільноти, прийнята САЮЮОЕ 24 листопада 2006 р.
[6] Основні положення про роль адвокатів (Basic Principles on the Role of Lawyers), прийняті Восьмим конгресом ООН з попередження злочинів (27 серпня - 7 вересня 1990 г.).
[7] https://www.osce.org/fom/31497?download=true
[8] https://mediaguide.fi/mediaguide/the-self-regulation-system-of-journalism/

journalists and media have to behave ethically, and governments should not interfere in the media or use legal means to monitor and control the work of journalists.[9]"

Therefore, the basic principles of self-regulation of journalists can be called to include **voluntariness, non-interference of the state and special means** of response in case of establishing the facts of violation of ethics codes (moral responsibility). In most cases, various forms and bodies of self-regulation of journalists in European countries are created and funded by journalists (journalists' organizations), publishers (owners).

In contrast to these principles, the bill proposes the self-regulation that is regulated in detail at the level of the law, with restrictions for journalists to participate in the establishment of bodies and their activities[10] and disciplinary (legal) liability for violation of ethical standards. **The imposition of such liability will result in losing the status of a "professional" journalist and forfeiting a significant part of the rights and guarantees of professional activity.** The bill is also not clear about who falls within the ambit of the Association's activity: both "journalists" and "professional journalists" or "professional journalists" only. The fact is that both terms occur equally often in different articles of the two sections.

Ø Giving the status of "professional journalists" to the Association members only and consequently giving them more rights than to ordinary "journalists" directly violate Article 36 (4) of the Constitution of Ukraine, which says that: **"No one may be forced to join any association of citizens or be restricted in his right to belong or not to belong to political parties or public organizations."**

As to the compliance with the standards and requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms, it should be noted as follows: **"While the exercise of freedom of association may involve a number of Convention rights, Article 11 has a particularly close relationship with Articles 9 and 10 of the Convention."[11]**

Therefore, two more general issues from which the discussion on the future fate of this part of the bill should start include as follows:

- compliance of the establishment and activities, based on the special provisions of the Law, of the unified self-governing organization of journalists with the standards of Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (freedom of assembly and association);
- no violation of the rules of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (freedom of expression) against "journalists" who are not members of the Association and are therefore not "professional journalists" and will not enjoy a large number of professional rights and guarantees.

As to the first item, the answer will depend first and foremost on the role of the state in this organization and on how truly self-governing it will be. In this context, considering that journalism is not a legal profession or a judicial branch, the provisions of the bill may show possible violation of Article 11 of the Convention to the extent that the Association is the "only professional organization of journalists" (Article 29 (1) of the Bill) with the Law setting out in detail the structure, requirements for members, operating rules and prohibition of liquidation or reorganization. Only through it can journalists exercise their self-government (Article 28 (4) of the Bill). In particular, such construction and content may be found not to meet the following standards: "the organizational autonomy of associations constitutes an important aspect of their freedom of association protected by Article 11"(Lovrić v. Croatia, § 71), "Associations have the right to draw up their own rules and administer their affairs" (Cheall v. the United Kingdom, Commission decision).

Qualifying as "self-government" the issues of self-regulation in respect of the observance of ethics by journalists, development and implementation, amendment of the code(s) of ethics, together with the provisions saying that the Association is the only association that may exercise such self-government and

[9] https://rm.coe.int/16806da54a

[10] Передбачений Законом перелік конкретних організацій-засновників Асоціації, вимоги до членів Асоціації.

[11] Посібник за статтею 11 Конвенції про захист прав людини та основоположних свобод https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf

prohibiting other associations of journalists from carrying out such activities, or denying the registration of new associations for such purpose, is also most likely to be found to violate Article 11 of the Convention.

As to the second issue, **the lawmaker's double standards about the scope of the journalist's rights and guarantees, depending on whether or not the journalist has a status of a "professional journalist," is a disproportionate interference in the freedom of expression and violates the standards of Article 10 of the Convention.** Besides, this difference in status can be interpreted as a duty to join the association and can be used as an additional argument for a violation of also Article 11 of the Convention by the state.

RECOMMENDATIONS:

- It is recommended that an extended discussion be held with journalists, journalistic movements and organizations, media organizations about the necessity of introducing the self-government of journalists and its model.
- It is recommended to ensure that journalists' self-regulation initiatives are consistent with international approaches and practices.

Information Commissioner

General Observations

It should be noted at the outset that the proposed position of the Information Commissioner has nothing to do with the institution of the Information Ombudsman, which exists in many countries worldwide to protect citizens' information rights. Important features of these bodies are their **independence and focus specifically on protecting the rights of citizens, not on restricting them.** The Paris Principles relating to the Status of National Institutions that were adopted by the UN General Assembly[12] also pay much attention to the **involvement of civil society representatives, academics and scientists in the establishment** and **operation** of such body and even exclude a penal sanction from the mandate of the human rights institution.

Despite the Bill stating the purpose of the creation of the institution of the Commissioner to promote the protection of the rights of Ukrainian citizens and society as a whole to have access to reliable, objective and complete information, both the procedure for appointing the Commissioner and his powers evidence the creation of actually not a human rights institution, but a new controlling administrative body in the area of dissemination of information. The key functions of the Commissioner are to apply measures of influence (**to submit requests for response or refutation**) and to initiate **bringing offenders to justice.**

Appointment procedure and status of the Commissioner are contrary to the Constitution

According to the bill (proposed Article 50 of the Law on Information as restated by the bill), the Commissioner **shall be appointed and dismissed by the Cabinet of Ministers of Ukraine** for a term of 5 years with the right to be re-elected (but only once). Candidates for the position may be proposed by the Ukrainian Parliament Commissioner for Human Rights, the Minister of Justice and the Minister of Culture of Ukraine (one candidate from each). The bill does not contain **any procedures for the selection of the candidates by those persons who propose them** (except for requirements for candidates), nor **does it provide any requirements for public discussion or public participation in the selection** and appointment of candidates for the position of the Commissioner.

As advised by the Commissioner, the Cabinet of Ministers of Ukraine shall also appoint his **representatives,** whose number is not specified in the bill, but who, in particular, are vested with his powers **to apply to a court in case of finding** any violations (Article 285-1, which proposes to supplement the Code of Administrative Proceedings of Ukraine).

[12] Principles relating to the Status of National Institutions (The Paris Principles) (Adopted by General Assembly resolution 48/134 of 20 December 1993):
https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx

The bill stipulates that the Commissioner **shall carry out his activities independently from other state bodies and officials** (Article 49 (2) of the Law on Information as restated by the bill). Such a definition of the status of the Commissioner, given his selection procedure, **is contrary to the Constitution of Ukraine**. Indeed, the Constitution in Article 116 provides that the Cabinet of Ministers of Ukraine has the authority to form, in compliance with law, ministries and other central executive authorities, acting within the limits of funds allocated for the maintenance of executive authorities; and to appoint chief officers of central executive authorities not included in the Cabinet of Ministers of Ukraine, upon the submission of proposal by the Prime Minister of Ukraine.

According to the Constitution, the listed powers of the Government are not exhaustive and may be supplemented by other laws. However, pursuant to the Law of Ukraine on the Cabinet of Ministers of Ukraine, the Government of Ukraine is the supreme body in the system of executive bodies and exercises executive powers directly and through the ministries, other central executive bodies, the Council of Ministers of the Autonomous Republic of Crimea and local state administrations, and directs, coordinates and controls the work of these bodies.

Thus, **the Cabinet may not be empowered to create any position outside the system of executive bodies and to confer such broad functions on them.** The ability of the Cabinet of Ministers to independently create any government entities that are independent of state bodies **is contrary to fundamental constitutional principles regarding the division of state power in Ukraine into legislative, executive and judicial** (Article 6 of the Constitution of Ukraine).

The creation of the institution of the Commissioner with similar functions is possible only by amending the Constitution with the determination of the special status of such a body. The introduction of such a position in the manner established by this bill will be contrary to the principle of legality.

The powers of the Commissioner constitute an excessive interference in the freedom of expression

The "special" status of the Commissioner is complemented by a vast range of powers, without providing sufficient guarantees of protection against human rights violations, in particular, the right to freedom of expression, which is contrary to the requirements of "necessity in a democratic society," as provided by Article 10 of the Convention on Human Rights and Fundamental Freedoms and the relevant case-law of the European Court of Human Rights.

Requests for Response or Refutation of Disinformation.

Pursuant to the draft law, the Commissioner shall independently determine whether the disseminated information is disinformation and shall be entitled to request that the disseminators of the information refute such information or publish the Commissioner's response. The Commissioner shall submit his response **through a specially created "online trust system."** Disseminators shall also be required to post in this system the results of consideration of the request. The bill is not clear about how this system will work and whether all the disseminators of mass information need to register with this system. However, **all-time limits for consideration of the Commissioner's requests shall start from the moment of their publication in the system**, rather than from the moment of the actual receipt of such requests or the disseminator's acquaintance with them.

The bill stipulates that a response or refutation can be disseminated either voluntarily or by a court decision. However, **in actual fact, the Commissioner's requests are binding in nature.**

Disseminators will be required to inform of the results of consideration of the request **no later than four days** of the date the request is placed in the online trust system. **If the disseminators of the information fail to respond on the Internet** or through instant messaging apps, the Commissioner may apply to a court **for a restriction of access to the respective information.** It should be noted here that restricting access to a single publication without access to website administration may not always be technically implemented. In some cases, access to information can only be restricted by restricting access to the entire website, which is a disproportionate measure and should not be applied, especially for the reasons stated above.

All the disseminators of mass information **who will fail to respond to the Commissioner's request** for response or refutation will also **be liable to a fine of 5 times the minimum wage for each case (about UAH**

23 thousand). In addition, by failing to comply voluntarily with the refutation or response requirement, the disseminators of information will face the risk of **being fined to the tune of UAH 9.5 million** if the court ultimately finds that the Commissioner's request was legitimate. Such rules will certainly have a "chilling effect" on the media and other disseminators of information since even if they do not agree with the Commissioner's assessment that their publications constitute disinformation, the threat of such an extremely high fine will make them delete information and comply with the Commissioner's requirements.

The bill specifies only **two grounds for refusing to comply with the Commissioner's refutation request:** if the disseminator of mass information has a confirmation that the disseminated information is true and accurately reflects the facts, events or phenomena concerned, with the mandatory provision of the respective evidence and justification to the Commissioner; or if the disseminated information is the literal reproduction of public statements or communications, public information of state authorities, local self-government bodies, their officials and officers, with the provision of sources of such information.

The bill does not specify any grounds at all for refusing to comply with the Commissioner's request for response, which must also be posted or published within 24 hours (or no later than the next business day – for broadcasters, and in the next publication - for print media) and may exceed 5 times (but not more) the amount of stated "disinformation."

The requirements to **label publications in respect of which a refutation request was filed** are also binding. The disseminators of mass information must place a warning near the disputed material on the Internet or through instant messaging apps, within 24 hours of the date the request was posted in the system, such warning saying that the material is being verified and the Commissioner's request was submitted in respect of it, with a relevant link to the online system. Such labeling must be retained when the information is disseminated again, including by other disseminators. The relevant labeling shall be maintained until the Commissioner's claims are satisfied until the request is rejected (with the consent of the Commissioner himself or by a court decision) or one year after the request is submitted unless the case is pending in court.

The bill prohibits the disseminators of information on the Internet from changing the material after the Commissioner's request was submitted, i.e., the disseminators are limited in their ability to correct false information by themselves. The disseminator can only restrict access to the information if the Commissioner's request concerns refutation.

In fact, the right to freedom of expression is not absolute. Article 10 of the European Convention provides for certain legitimate restrictions on freedom of expression. However, these exceptions, in view of the European Court, must be interpreted clearly and unambiguously, and the need for any restrictions should be clearly established[13][1]. Pursuant to Article 10 of the European Convention and the case-law of the European Court, any restriction on the freedom to disseminate information must pursue a legitimate aim, be prescribed by law, and "be necessary for a democratic society" (correspond to a pressing social need and be proportionate). The law and law enforcement practice must **provide safeguards against undue interference, in particular through the existence of independent control over the body applying the restriction, the setting of time limits for the restriction, the possibility of its fair appeal, etc.**

The restrictions introduced by this bill do not comply with these principles, both in terms of legitimacy and proportionality of interference. The bill, through the Commissioner's powers, which contravene the Constitution and do not provide for effective control mechanisms, **imposes on the disseminators of mass information a duty to remove, refute and publish a response to disseminated information under the threat of unjustifiably high fines and even restriction of access to disseminated information or even to the entire information resource.**

Ensuring Transparency of the Disseminators of Mass Information

Pursuant to the bill, the Commissioner's tasks include "promoting transparency of the disseminators of mass information."

[13] Мирський проти України (№ 7877/03), пара. 42, 20 травня 2010

The bill provides for the **an obligation of all the disseminators of information** (other than the media for which similar requirements are established by the law on media) **to post their identification information "in a location accessible to the recipients"** (on the website homepage, in the 'Account Owner Information' section, etc.). The absence of the information may be the ground **for the court to restrict access to the relevant website,** web page, or account based on the Commissioner's application. In this case, the restriction case shall be considered by the court within three days from the receipt of the Commissioner's application and an appeal against the blocking decision shall not prevent the execution of the decision.

Such requests as well as granting the Commissioner **the right to access identification information of the disseminators of information, without any restrictions** are contrary to European standards

Declaration on freedom of communication on the Internet[14] calls on the Member States, in particular, to abide by the **anonymity principle**, which says that: "In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member States **should respect the will of users of the Internet not to disclose their identity**. This does not prevent the Member States from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police."

Considering the broad definition of "disseminators" and "mass information," the requirement of mandatory public disclosure of the identification information of all users, in the manner prescribed by the bill, does not meet this principle. Although the anonymity principle is not absolute, the disclosure of the identity of Internet users should be **demanded only in specific cases associated with the investigation of a crime or other pressing need to protect national security, public order, or human rights.**

An alternative may be to prescribe in law the proper procedure for disclosing identification information of the disseminator of illegal information **at the request of the relevant investigating authority.** Such an approach was, in particular, considered by the European Court of Human Rights in its judgment in K.U. v Finland[15]. In particular, the Court emphasized that the State should specify in its legislation the appropriate provisions to strike a balance between guarantees of confidentiality and anonymity, in the context of Articles 8 and 10 of the European Convention, and the interest of conducting an effective investigation and bringing offenders to justice, which, in turn, must also respect the due process.

Note should also be taken of the provisions of the Convention on Cybercrime. In particular, Article 18 of the Convention on Cybercrime says that **Internet service providers may be ordered to submit subscriber information**, which "means any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services other than traffic or content data and by which can be established, in particular, the subscriber's identity, postal or geographic address, telephone, and other access number, billing and payment information, available on the basis of the service agreement or arrangement. At the same time, pursuant to Article 15 of the Convention on Cybercrime, the application of such measures **shall be accompanied by adequate protection of human rights and freedoms and be proportionate** and include **judicial or other independent supervision,** grounds justifying application, and limitation of the scope and the duration of such power or procedure.

Participation in Civil Cases for the Protection of Honor, Dignity and Business Reputation

Of serious concern is **the requirement stipulated by the bill to involve the Commissioner as a third party in the cases regarding the refutation of false mass information.** In view of the civil law nature of relations regarding the protection of honor, dignity, and goodwill, the Commissioner's participation may adversely affect the observance **of the principles of adversarial proceedings** and, consequently, of the right to a fair trial.

[14] Declaration on freedom of communication on the Internet (Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies); Українською: https://cedem.org.ua/library/deklaratsiya-pro-svobodu-komunikatsij-v-internet/

[15] K.U. v Finland (no.2872/02), para. 48-49, 2 December 2008.

The bill is silent as to which category of "third parties" the Commissioner is proposed to be assigned to – whether or not the Commissioner will raise separate claims regarding the subject matter of the dispute. If he will, this will actually change the legal nature of the dispute from private to public, which does not correspond to the substance of the dispute regarding the protection of the person's honor, dignity, and business reputation. If he will not, then he must be involved in the case on the side of the plaintiff or the defendant (most likely the latter). In any case, this will **violate the principle of equality of arms** since the parties will have **different legal possibilities to collect evidence and prove the circumstances** to which they refer. More specifically, in this context, it should be taken into consideration that the bill proposes to supplement the Law of Ukraine on the Security Service of Ukraine **with the duty of the SBU to assist the Commissioner in obtaining evidence of violation of the Law of Ukraine on Information by the disseminators of mass information,** i.e., of the requirements of this bill regarding the dissemination of false information or disinformation.

For example, the European Court in its judgment in Dombo Beheer B.V. v. the Netherlands, also Yvon v. France[16]) noted that the principle of equality of arms implies that "each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[17][6]. Participation in civil proceedings of an officer with broad powers of access to restricted information and with the "support" by the SBU obviously threatens "placing a party at a substantial disadvantage vis-à-vis his opponent."

RECOMMENDATIONS:

1. Instead of creating the position of the Commissioner, as proposed in the bill, it is recommended to discuss the feasibility of establishing an authority to monitor and analyze the threats of disinformation and develop strategic plans to counteract information aggression. Such body may be established pursuant to the Constitution of Ukraine by the Cabinet of Ministers of Ukraine and may involve representatives of other state bodies, academics, and experts in its activities. The powers of such a body must comply with the requirements of the Constitution and the laws of Ukraine.

2. It is recommended to give up on mandatory public identification of all the disseminators of mass information by default. The public identification requirement is permissible in respect of media entities, but may not be automatically extended to all other disseminators of mass information (especially in the proposed broad wording). Internet users who disseminate mass information should be identified at the request of the competent investigating authority, in accordance with the procedure and on the grounds which must be clearly stated by law and contain a safeguard against abuse and protection guarantees.

Liability for Violations Related to Disinformation

The Draft Law of Ukraine On Amendments to Certain Legislative Acts of Ukraine on Ensuring National Information Security and Right to Access Reliable Information proposes to impose a number of restrictions on the disseminators of false information. In particular, it introduces for the first time in the Ukrainian legislation a concept of "disinformation," provides for liability (both administrative and criminal) for its dissemination and changes the grounds for exemption from liability. However, many of these restrictions are unlikely to meet international human rights standards and, in particular, a three-part test for restrictions of human rights.

Let us start with the description of the amendments the bill proposes to introduce. **Disinformation** is characterized as **false information on issues of public interest, in particular regarding national security, territorial integrity, sovereignty, defense capacity of Ukraine, the right of the Ukrainian people to self-determination, life and health of citizens, environment**. The lawmakers propose to exclude from disinformation:

[16] Yvon v. France (no. 44962/98), para. 31, 24 April 2003

[17] Dombo Beheer B.V. v. the Netherlands (no. 14448/88) para. 33, 27 October 1993

- value judgments, including critical ones, provided there is a minimal factual basis behind them;
- satire and parody if it is clearly stated during dissemination that the information published is of a satirical or parody nature; and
- unfair advertising.

Meanwhile, **false information is untrue information about persons, facts, events, phenomena that did not exist at all or that existed, but information about them is incomplete or distorted.**

The draft amendments to the legislation, in the newly introduced Article 21-1 of the Bill, provide for a prohibition on the dissemination of both disinformation and false information, which entails a liability provided by law. Such liability shall be imposed for:

1. disseminating disinformation, provided that the disseminator agrees to refute it, starting with the third fact of posting disinformation within one year – 1,000 times the minimum wage (UAH 4,723,000) for each incident of the violation;
2. disseminating disinformation, provided that the disseminator refuses to refute it, – 2,000 times the minimum wage (UAH 9,466,000) for each disinformation incident;
3. failing to respond to disinformation at the Commissioner's request or warning of the submission of the Commissioner's request for refutation of the disinformation – 20 times the minimum wage (UAH 94,660) for the first ten days of non-posting the response and one minimum wage (UAH 4,723) for each subsequent day of non-posting, starting from the eleventh day;
4. posting a trust index by a media entity where there is no information on the assignment of such index on the Commissioner's official website or after the index has expired – 20 times the minimum wage (UAH 94,660) for each violation (for print media – every issue of a publication, and for other media – every day of violation);
5. changing an address (hyperlink) at which the material was posted regarding which the Commissioner's request was submitted or failure to save the original record or a copy of the original material, which contained information regarding which the Commissioner submitted his request – 5 times the minimum wage (UAH 23,615) for each violation incident;
6. failing to respond to the Commissioner's statement or request – 5 times the minimum wage (UAH 23,615) for each violation incident;
7. sif in the course of hearing a case based on a claim brought by an individual or legal entity regarding refutation of false information about such person that has been disseminated on a mass scale, the court has established that information about such person is false or inaccurate, the court shall issue a decision imposing a fine on the disseminator(s) of mass information in the amount of 10-100 times the minimum wage (UAH 47,230-472,300) for each violation incident.

All of these sanctions (except for the latter, the procedure for imposing which is not clearly defined) shall be imposed by a court based on the Commissioner's application. The author of the information and its disseminator shall be jointly and severally liable for the dissemination of the information. If the author cannot be identified or the information is anonymous, the liability will be borne by the disseminator of the information, and if the disseminator cannot be identified – liability will be borne by the person who made it technically possible to disseminate the information.

The law also sets out the grounds for exempting from liability the disseminators of information (who, in turn, are defined as persons creating and/or collecting and disseminating mass information):

1. if this information was contained in official communications or received in writing from state authorities, local self-government bodies;
2. if this information is a literal citation of statements and speeches (oral and written) by officials of state authorities and local self-government bodies, candidates for the post of the President of Ukraine, candidates for members of Ukraine's Parliament and for deputies of councils of all levels, candidates for positions of rural, settlement, city heads during an election campaign;
3. if this information was disseminated without a prior record and was contained in the speeches of persons who are not employees of the disseminator of mass information;
4. if the person voluntarily disseminated a response to disinformation following the Commissioner's statement or request.

5. for journalists – regarding the dissemination of false information if the court has established that the disseminator acted in good faith in accordance with the code of professional ethics for journalists and verified the information.

Any cases concerning bringing to justice based on the Commissioner's applications will be considered by the Sixth Administrative Court of Appeal in the city of Kyiv, while the Cassation Administrative Court within the Supreme Court will consider these cases as an appeal instance. In addition to the time limits for hearing the respective cases, amendments to the Code of Administrative Proceedings provide for **the possibility of restricting access to information** disseminated on the Internet or in messengers, **in the case of late response, failure to respond to a request for response or refutation,** as well as to an account, web page, website or information disseminated on the Internet or in messengers **in the absence of the owner's identification information.** In the latter case, this should be done by hosts, information sharing platform providers, or other technical intermediaries. A court shall decide on the restriction of access **within 3 days from the day of the application**, **and the appeal will not stop the execution of the court order.** Access can be restored at the owner's request if the violations have been removed. It is important to note that in various cases, the Commissioner may submit a request for response or refutation within a period of 6 months to 3 years.

The authors of the bill also propose amendments to the Criminal Code, to which new Article 114-2 "Dissemination of Disinformation" is introduced. Pursuant to this article, disinformation is now defined as **systematic, deliberate mass dissemination of knowingly false reports of facts, events or phenomena that threaten national security, public security, territorial integrity, sovereignty, defense capacity of Ukraine, the right of the Ukrainian people to self-determination, life and health of citizens, and environment** and entails a penalty of 5,000-10,000 times the non-taxable minimum personal income (UAH 85,000-170,000) or corrective labor for 1-2 years. This provision will apply temporarily – until Ukraine restores full control over its state border. Aggravated crimes entail a prohibition on dissemination of disinformation using bots, a special group of accounts or means of falsifying information sources – with a penalty of 2-5 years in prison, financing disinformation activities – 3-5 years in prison, and disseminating disinformation and its financing repeatedly committed by an organized group of persons or if it resulted in grave consequences or large-scale material damage (200+ times the non-taxable minimum personal income – UAH 210,200) – 5-7 years in prison with disqualification from holding positions for an indefinite period). Measures of a criminal nature for the violation of the provisions of this article may be applied to legal entities, and the investigation of this crime will be transferred to investigators of the Security Service of Ukraine. In considering cases under this Article, it is compulsory to apply to the European Court of Human Rights for an advisory opinion in accordance with the procedure laid down in Protocol 16 to the European Convention on Human Rights. Hearing of the case is suspended for the time of application.

In addition to these amendments, the authors also propose to clarify a number of articles of the Criminal Code to add the use of media as a qualifying feature (to Articles 110, 295, 436) and to extend special provisions on the protection of journalists that are existing in the code to professional journalists only.

What is wrong with all this? **Let us consider the issues of concern in the proposed provisions in the following blocks:**

1) definition of disinformation and false information;
2) administrative liability in accordance with the amendments to the Law on Information;
3) criminal liability in accordance with the amendments to the Criminal Code of Ukraine; and
4) liability of intermediaries for disseminating false information.

Definitions. Indeed, disinformation is a new phenomenon that has been identified in a small number of documents. However, a number of features of this definition can be deduced from the analysis of the EU Code of Practice against Disinformation[18] and of the Joint Declaration on Freedom of Expression and "Fake News," Disinformation, and Propaganda[19]:

[18] https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454
[19] https://www.osce.org/fom/302796?download=true

1) verifiably false information;

2) created for economic gain or to intentionally deceive the public;

3) may cause public harm;

4) does not include misleading advertising, satire, and parody, reporting errors, or clearly identified partisan news and commentary.

This definition is narrow enough and includes a number of cumulative elements that, in aggregate, make it possible to differentiate disinformation from the dissemination of false information such as defamation.

The definition proposed by the bill is **too broad and contrary to the case-law of the European Court of Human Rights under Article 10 of the Convention**. It should be recalled that the duty of the media is *"to impart information and ideas on all matters of public interest"* (§ 102, *Von Hannover (No 2) v Germany*)[20], and ***"Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful;*** *to suggest otherwise ... would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention"* (§ 113, *Salov v Ukraine*)[21].

Another issue of concern is the **definition of false information**. Although taken from the current Supreme Court Plenum Resolution[22], it is doubtful whether it is logical to include incomplete or misleading information into it: such information may well be reliable. Deducing the definition of disinformation through such a definition of false information (which may also apply to a person) enables to interpret disinformation broadly also as information that causes harm to a person. If so, this **threatens parallel application to the same situation** of **both provisions on the protection of honor, dignity and business reputation and provisions on disinformation.**

What is also unclear is the need **for the clear identification of a parody or a satire: with such identification, the latter makes no sense**. Additionally, there is **a discrepancy between the definition** of disinformation for the purposes of the Law on Information and the Criminal Code, with the latter definition being more in line with that given within the EU and referred to above. Definition of disinformation as false information on issues of public interest rather than as information that may cause public harm is directly contrary to Article 10 of the European Convention on Human Rights.

Administrative Liability

The bill prohibits the dissemination of false information and disinformation and also provides for the imposition of sanctions by the Law on Information, which should be imposed within administrative proceedings based on the Information Commissioner's application.

At the same time, the bill provides some detail about the exemption from liability for the dissemination of information – although it is unclear from the comparative table whether the bill retains the provisions such as the exemption from liability for the dissemination of value judgments and restricted information if it is of public interest.

As to sanctions, they will be imposed both for violation of technical requirements for the placement of information about submission of the Commissioner's request, change of a publication placement address, etc. and for the dissemination of disinformation and false information about persons. Although the lawmaker's choice to include these provisions not in the Code of Administrative Offenses but in the dedicated law is hardly justified, let us dwell on the last two points.

For disseminating disinformation, the disseminator may be fined in the amount of UAH 4,723,000 or UAH 9,466,000 (nearly USD 193,000 or USD 388,000, respectively). It is to be recalled that the disseminator of information can be virtually any person. **Such sanctions for the dissemination of false information are absolutely inadmissible and disproportionate.** In addition, an administrative sanction for disseminating

[20] Von Hannover (No 2) v Germany: http://hudoc.echr.coe.int/eng?i=001-109029
[21] Салов проти України*:* http://hudoc.echr.coe.int/eng?i=001-70096
[22] https://zakon.rada.gov.ua/laws/show/v_001700-09

disinformation is less than the sanction provided by the Criminal Code, which **does not meet the principles of establishing liability for an act depending on its public danger**, and also threatens the imposition of two types of liability on a person for one act. This constitutes a direct violation of Article 61 of the Constitution of Ukraine and Article 7 of the European Convention on Human Rights, both of which prohibit bringing a person to liability twice for the same offense.

The dissemination of false information against a person is penalized by a fine of UAH 47,230-472,300 (nearly USD 1,940-19,400, respectively). Despite the administrative nature of this provision, according to the Engel criteria formulated by the ECtHR in Engel and Others v the Netherlands[23], **such liability for the dissemination of false information is criminal in nature.** In light of this, **the introduction of this provision reinstates in the criminal law defamation**, which was abolished back in 2001. Many international organizations, including the Council of Europe[24] and the OSCE[25], have called for the abolition of criminal defamation.[8]

Criminal Liability

The proposed wording of Article 114-1 of the Criminal Code, which introduces liability for the dissemination of disinformation, in contrast to the definition of disinformation as proposed by the Law on Information, **takes into account** individual EU approaches to include **signs of intentionality and systematicity**. However, it provides for liability for disseminating **false reports** of facts, events or phenomena, rather than **false information or untrue facts**. Thus, criminal liability may arise even if the facts stated in the publication are true but concern threats to national security, public security, territorial integrity, sovereignty, defense capacity of Ukraine, the right of the Ukrainian people to self-determination, life and health of citizens, environment. Such wording allows the provision to be used **to restrict public debate** on issues that directly or indirectly related to national or public security, territorial integrity, sovereignty, etc.

It is also unclear why the introduction of the said restrictions is needed to protect the right of the Ukrainian people **to self-determination**. Such a category is not found in either the Constitution of Ukraine or international human rights instruments. Applying this ground for bringing to justice will be contrary to the principle of legitimacy and legality of restriction.

Provisions introducing criminal liability for disinformation in the proposed form do not meet international standards and have to be substantially refined, considering the need to ensure clear definitions in accordance with the criterion of low quality and the need to take into account the public danger of acts.

Provisions regarding the application of criminal liability for disseminating disinformation also provide for an additional procedural guarantee: when a case will be heard, it will be compulsory to apply to the European Court of Human Rights for an advisory opinion. Hearing of the case will be suspended for the time of application.

The said procedure was introduced by Protocol No. 16 to the European Convention on Human Rights, which was ratified by Ukraine in 2017. Pursuant to its provisions, the Supreme Court (designated by Ukraine as a competent authority during ratification) may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. The requesting court shall give reasons for its request and shall provide the relevant legal and factual background of the pending case. Thereafter, the Strasbourg Court shall decide whether to accept the request and, if accepting the request, shall deliver its advisory opinion.

While this mechanism may indeed be a safeguard, there are several things worth considering. First, the Protocol does not establish admissibility criteria for such opinions. Similarly to case admissibility criteria for courts, it can be predicted that the ECtHR is unlikely to deliver its opinions to interpret the same provision of the Ukrainian law more than once.

[23] http://hudoc.echr.coe.int/eng?i=001-57479
[24] https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en
[25] https://www.osce.org/fom/99558?download=true

Second, Article 5 of Protocol No. 16 expressly specifies that such opinions are not binding. Even assuming that the Ukrainian courts will take the opinion into account, it seems that this safeguard will work only for the first case in each crime under Article 114-2 of the Criminal Code.

Third, in order for the Supreme Court to file a request for the opinion, the case must be pending before this court. In other words, the possibility of seeking such opinion will exist at the cassation stage of proceedings only - which, considering the current Ukrainian justice system, may begin years after the dissemination of information. In view of this, while the idea of the safeguard is interesting, the use of such safeguard is unlikely to be effective.

Liability of Intermediaries

The proposals of the Ministry of Culture, Youth, and Sports of Ukraine also address a sensitive issue in the Ukrainian context regarding the liability of Internet intermediaries for the information content. It should be recalled that, as a general rule, intermediaries are protected from liability for user-generated content, as long as they did not modify transmitted information[26].

The bill duplicates the provisions of the aforementioned Supreme Court Plenum Resolution[27] and stipulates that if the author or the disseminator of information cannot be identified or the information is anonymous, the liability shall be borne by the person who made it technically possible to disseminate the information (i.e., in essence, a website owner or an information-sharing platform). This, in turn, is contrary to international intermediary liability standards.

In 2011, Special Rapporteurs of international organizations on freedom of expression issued a Joint Declaration on Freedom of Expression and the Internet[28], which emphasized in Principle 1 (c) the need for developing a special regulation for the Internet. As to intermediaries, Principles 2 (a) and 2 (b) of the Declaration says as follows:

1) No one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content; consideration should be given to insulating fully other intermediaries from liability for content generated by others;

2) Intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression.

Recommendation CM/Rec(2018)2[29] of the Committee of Ministers to the Member States on the roles and responsibilities of internet intermediaries also emphasizes the importance of applying the three-part test for the legitimacy of restrictions in the context of intermediaries (legitimacy, legality, necessity).

RECOMMENDATIONS:

- It is recommended to bring the definition of disinformation, false information and other definitions of the bill in line with the requirements of legal certainty (quality of law);
- It is recommended to remove provisions that reinstate in the Ukrainian legislation an administrative or criminal liability for disseminating false information within defamation proceedings (criminal defamation);
- It is recommended to further elaborate provisions on the introduction of liability for the dissemination of disinformation, taking into account the public danger of the relevant crimes and the temporary nature of such provisions;

[26] https://www.eff.org/files/2015/07/08/manila_principles_background_paper.pdf#page=19
[27] https://zakon.rada.gov.ua/laws/show/v_001700-09
[28] Joint declaration on freedom of expression and the Internet: https://www.osce.org/ru/fom/78310
[29] Рекомендація Комітету Міністрів Ради Європи CM/Rec(2018)2 щодо ролей та відповідальності Інтернет-посередників: https://rm.coe.int/1680790e14

- It is recommended to limit the range of entities that may be held liable for the dissemination of disinformation to media entities since it is the media that play an amplifying role in the context of a negative impact of false information;
- It is recommended to give up on bringing to justice the intermediaries so long as they are not involved in modifying the content.