

Opinion on the Draft Law No 123 amending some regulatory acts passed by the Parliament of the Republic of Moldova in the first reading on 7 April 2022

18 April 2022

Addressed to Speaker of the Parliament of the Republic of
Moldova

Esteemed Speaker,
Esteemed members of the Committee for Culture, Education,
Research, Youth, Sport and Mass-media,

On 5 April 2022, [the Draft Law No 123 of 05 April 2022](#) amending some regulatory acts (hereinafter *Draft*) was registered with the Parliament and was already passed in the first reading on 7 April 2022. The draft defines some terms, such as 'disinformation', 'false information' and 'information that affects the security of the public information space', the adjustment of administrative and civil penalties, as well as the establishment of other legal norms.

Promo-LEX Association acknowledges the urgency of the problem of disinformation and manipulation, including through the media and websites. We are aware of some groups and individuals in the society who produce and promote untruthful information, thus contributing to the spread of hate speech and incitement to discrimination. Disinformation and spread of false information have intensified, in particular, in the context of the Russian military aggression in Ukraine, which represents a major concern, including for the national

security.

Based on this context, Promo-LEX Association appreciates and supports the efforts of the Parliament of the Republic of Moldova to prevent and counteract the spread and/or use of untruthful public information that infringes the rights and interests of individuals and society in general.

Nonetheless, we cannot admit these particularly important amendments to be carried out hastily without analysing the risks and consequences of the established limitations, of the granted competences and of the response mechanism when some imperative norms of the law are not respected.

Analysing the briefing note and the text of the draft law passed in the first hearing, in the absence of the views and opinions of some key institutions such as the Security and Intelligence Service and the Broadcasting Council, to the extent of competences and expertise available to Promo-LEX Association, please consider this opinion and take note of our arguments and recommendations.

I. In respect to procedures

a. Promo-LEX Association finds **the failure to follow main steps to ensure decision-making transparency**. The Draft should have been put up for public consultations before the first hearing, and the results of the public consultations, together with other acts should have been submitted and presented to the meeting of the Standing Bureau to be included in the agenda (Article 57 of the Parliament Regulation).

b. No justification was provided for the urgency under which the Draft was examined and passed in the first reading, although the General Legal Directorate of the Parliament examined and issued a [notice](#) as a matter of urgency (within 2 days out of 30 working days) and during the plenary session of 7 April 2022, it was declared that the draft was included in the legislative procedure as a matter of priority.

c. At the same time, we note that ***the Government's legal opinion was neither requested nor received before the draft was passed in the first hearing.*** According to the briefing note, the Draft does not require financial expenditure and additional funds from the state budget, but ***given that the Security and Intelligence Service and the Broadcasting Council are assigned new competences, we anticipate that some costs will be incurred in this regard.***

d. ***In the absence of legal opinions from the bodies stated in the law, such as the Security and Intelligence Service and the Broadcasting Council, it is not clear whether they have capacity and experience to handle the new legal duties.*** Similarly, no opinion has been issued by relevant international institutions or well-known organisations involved in human rights protection and monitoring, especially in the area of freedom of expression.

In the light of the above, we would like to note one more time the efforts made by Promo-LEX Association over the past four years to pass in the second reading the draft [Law No 301](#) on the regulation of bias-motivated crimes. Regrettably, we note that the Parliament was not proactive enough and did not pay adequate attention to the Draft Law No 301/2016, as it could also contribute to combating the manipulation of public opinion and disinformation in the society, including the manifestation of these phenomena in the context of the Russian Federation invasion of Ukraine. In this regard, Promo-LEX Association urges the Parliament of the Republic of Moldova to resume the discussion and to pass the Draft Law No 301/2016 in the second reading to solve the issues tangentially, including a number of issues reflected in the briefing note of the Draft Law No 123.

II. In respect to proposed amendments

Promo-LEX Association draws attention to the fact that the solutions proposed to the Draft Law No 123 for the issue of

disinformation and manipulation may fundamentally affect a number of essential acts concerning fundamental freedom in the Republic of Moldova, especially freedom of expression. Moreover, we draw attention to the fact that powers limiting these fundamental rights are being transferred to some institutions that do not have prior experience and abilities to apply such limitations in practice.

In the following, we will try to elaborate on some aspects of the Draft as follows:

a. The amendments to *the Law No 753/1999 on the Security and Intelligence Service of the Republic of Moldova*

The proposal to broaden the powers of SIS for it to apply measures restricting the right to freedom of expression is apparently intended to prevent a possible triggering of some processes that would infringe national security. On the other hand, SIS is proposed to become an authority that can examine and qualify some information as false and therefore limit, in the first place, freedom of expression. Implicitly, SIS will act as a defendant in a court proceeding, which also implies judicial control of these decisions.

Therefore, we draw attention to the fact that ***the criteria for qualifying some information as false, as well as the position of the authority (SIS) regarding the readiness and preparedness to undertake new duties and how to carry out these duties are neither presented clearly nor explained in the Draft Law.*** Thus, ***there is a too wide margin for arbitrary decisions*** and apparently, the broadcaster will be in charge of submitting counter-arguments, whereas according to the Draft Law, a court proceeding does not suspend the content blocking decision. In the same vein, it is not clear how the principles outlined in the Administrative Code will be applied in respect to these procedures, once this act will not be amended.

b. The amendments to *Law No 64/2010 on freedom of expression*

seem to be controversial

The proposed text seeks to define a very abstract notion such as '*false information*'. However, the same article of the law includes a definition that may create even more confusion. The legislator has already defined the phrase – *value judgment without sufficient factual basis* – value judgment that is based on facts that did not occur or on facts that did occur but their disclosure is distorted *to the point of falsity*.

Thus, the introduction of the '*false information*' phrase will create confusion in private relations, whereas the Law aims to 'guarantee the exercise of the right to free expression, as well as a balance between ensuring the right to free expression and the protection of honour, dignity, professional reputation and the private and family life of individuals'. Therefore, we suggest that the definition of '*false information*' be excluded, as it is not a legal definition and is the opposite of '*true information*'.

In respect to other amendments to Article 2 of the Law, by introducing other definitions, we point out that the legislator has already regulated restrictions in the context of freedom of expression (see *Article 3(3) of the Law*). In addition, the provision of Article 3(4/1) of the Law has already established the prohibition to use information that is contrary to public order and national security.

*Concerning the 'information affecting the security of public information space', we point out that **it is exaggerated and dangerous to provide a definition including some information that is 'hostile to democratic values and processes', 'endangers public goods, such as democratic rule, national security, social cohesion, public safety, public health, ecological balance and others' or that 'by its amount and area of dissemination establishes the prevalence of an ideology over others'**. At the same time, the expression 'likely to generate panic, tension or military conflicts' is too general*

and unclear.

Concerning Article 6/1 of the Law, only paragraphs 1 and 2 are to be included, as for the rest, we believe that it is not necessary to define again the role and procedures undertaken by SIS, because these procedures are already defined in Law No 753.

c. Amendments to the *Criminal Code*, like the amendments mentioned above, raise many questions

Regarding the inclusion of new provisions in Article 181 of the Criminal Code – *Hindering the free exercise of election rights or the activities of electoral bodies*, we highlight that during the electoral campaign it is important to ensure the right of citizens and contenders to discuss freely and in all aspects the electoral programmes of electoral contenders, candidates' political, professional and personal qualities, as well as to carry out electoral campaigning during meetings, rallies, meetings with the electorate using means of the media, displaying electoral posters or through other forms of communication (Article 52 of the [Electoral Code](#)).

Thus, during the electoral campaign, ***the abusive designation of information as affecting the informational security space and the restriction of the right to electoral campaigning could lead to the violation of the voters' right to choose and to be elected.*** This norm can affect the right of election observation missions to analyse and criticise election procedures, as it is not clear who will assess the information as true or false and how.

In this context, we draw attention to the fact that the European Court for Human Rights (ECHR) ruled in the case of [Salov v. Ukraine](#) (2005) that the criminal prosecution for 'dissemination of false information' under the electoral law of Ukraine infringed the right to freedom of expression under Article 10 of the European Court for Human Rights (ECHR). In

this case, the Court stated that Article 10 of ECHR 'as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful' (paragraph 113).

At the same time, ECHR ruled on a provision of the electoral law in Poland, whereby election contenders can submit a request to the court to issue an order prohibiting the publication of campaign materials or statements that include 'untruthful data or information' within '24 hours'. Thus, the Court found that national courts 'immediately classified as a lie' the statements made by a local politician during the elections and as a result of such an approach 'national courts deprived him of the protection provided by Article 10' ([Brzeziński v. Poland](#)).

Similarly, with regard to the procedure to eliminate 'false information', in the case of [Kwiecień v. Poland](#) (2007), the Court stated that 'as desirable as the expeditious examination of election-related disputes may be, it should not result in the undue curtailment of the procedural guarantees afforded to the parties to such proceedings, in particular the defendants.' (paragraph 55).

In the case of [Kita v. Poland](#) (2008), the Court observes that the Polish courts unreservedly qualified all of them as statements which lacked any factual basis 'without examining the question whether they could be considered to be value judgments groundless' (paragraph 44). ***In conclusion, this norm cannot be promoted as it stands.***

d. **The amendments to the Law No 212/2004 on the regime of the state of emergency, curfew and state of war** which propose the establishment of certain prohibitions, also contain certain interpretable clauses. The providers do not have the needed competences to assess the information and qualify it as false. In addition, in the absence of such assessment and qualification carried out by the National Extraordinary

Committee for Public Health, it will not be possible to ensure uniform application of this provision by all providers, which may have repercussions not only for information security but also for the competitiveness between providers.

e. Amendments to *Article 365/4 of the Contravention Code*

There is a similar dilemma about spreading disinformation or information that affects the information security of the Republic of Moldova, in particular referring to qualifying the action as disinformation and qualifying the information as affecting the public information space. We underline that *spreading disinformation* is a tautology, and that this rule is not clear. It is not clear who should qualify a certain piece of information as inaccurate and determine the extent to which information security is affected. The arguments stated in the above ECHR case-law are relevant, considering the duties assigned to SIS.

f. Amendments to *Code of Audiovisual Media Services*

Note that *the definition of 'disinformation' contains several vague expressions and poses the risk of wrong interpretation and interference with the freedom of expression*. Given the lack of a general international consensus about the definition of 'disinformation', we draw your attention to several elements used by the [European Commission\[1\]](#) to explain this concept: (1) factual and misleading character of the information; (2) intent; (3) harm and (4) economic gain.

Thus, we note that:

- ***The first part of the definition is ambiguous***, referring to *'spreading false information that is disseminated...'* ***It is necessary to clarify what 'disinformation' means: only 'spreading' false information, or 'creating, presenting and disseminating' it.*** We draw the attention that a narrow interpretation of this definition ('spreading') poses a much higher risk to freedom of

expression, as it is not always possible to check an information spread by someone to determine its accuracy and authenticity.

- ***The need for clarifications in the first part of the definition for 'disinformation' is not clear – 'reflected in a distorted manner, with fabricated, exaggerated content taken out of context or placed in another context, (interested) opinions taken over and transformed into valid information, with biased arguments etc.'*, once the legislator recommended to include a definition for 'false information' in Law no. 64/2010 on freedom of expression.**
- ***At the same time, expressions like 'propaganda hostile to democratic values and processes and false information that threatens democratic, political or policy development processes', potential threats to 'public assets', 'information security' are vague and general, and do not help understand and review a potential case of disinformation.***
- ***Spreading false information with the purpose to 'deceive the audience' is a too broad expression used in this context.***
- ***The reference to the effect of 'causing a public damage' broadens the scope to cover any type of false information, including in a commercial context.***

Considering the above, note that the signatory organisations^[2] of [Joint Declaration](#) on freedom of expression and 'fake news', disinformation and propaganda of 2017 underlined that '*general prohibitions on the dissemination of information based on vague and ambiguous ideas, including "false news" or "non-objective information", are incompatible with international standards for restrictions on freedom of expression*'.

Another general principle of the Joint Declaration states that: '*State mandated blocking of entire websites, IP*

addresses, ports or network protocols is an extreme measure which can only be justified where it is provided by law and is necessary to protect a human right or other legitimate public interest, including in the sense of that it is proportionate, there are no less intrusive alternative measures which would protect the interest and it respects minimum due process guarantees'.

We also draw the attention to the fact that the amendments to Articles 55, 63 and 66 are contrary to the European Convention on Transfrontier Television, in particular Article 16, and points 267-277 of the Explanatory Report on this Convention. This was the main argument used by the Constitutional Court to declare non-constitutional a similar provision introduced in Article 66(7), on 23.11.2021. According to the said international acts, the mere fact that a channel runs targeted advertising may not serve as grounds for banning its retransmission.

g. Amendments to *Law on electronic communications*

Lack or incomplete contact data on websites cannot affect the information security, and hence may not serve as grounds to block access to those websites. This is a disproportional measure. Obliging individuals to publish their contact data is inconsistent with the rules on personal data protection.

As for legal entities, the reasons behind the requirement to publish data about the Managing Director are not clear, as the former is not the holder of the website. These contact data belong to the legal entity. To put it differently, the contact data of the Managing Director are the company's data. Blocking a website that does not contain any illegal content on grounds of not displaying any contact data is obviously a disproportionate measure, affecting unduly the freedom of expression and the right to access to information, as well as the right to association.

III. Conclusions

As the Parliament of the Republic of Moldova intends to amend some primordial legislative acts on freedom of expression, we believe that all requirements for a genuine consultation process should be complied with, requesting the legal opinion of bodies affected by these amendments.

We also believe that the proposed definitions for '*false information*', '*information that affects the security of the public information space*' and '*disinformation*' should be redefined, so that there is no room for interpretation, abusive qualification of information as false or affecting the security of the public information space is avoided, and freedom of opinion and freedom of public expression are observed. At the same time, other proposed norms that can be interpreted differently, wrongly and abusively should be removed as well.

[\[1\]](#)Disinformation is 'verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm'.

[\[2\]](#)The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.