

Ref: CommHR/DM/sf 007-2021

Mr Mateusz MORAWIECKI
Prime Minister of the Republic of Poland
Warsaw, Poland

Strasbourg, 8 March 2021

Dear Prime Minister,

I am writing to you regarding two draft laws on the media sector currently being developed by your government, which have the potential to significantly impact media freedom and pluralism, citizens' ability to express themselves freely, and the right to respect for privacy. Freedom of expression and media freedom are a central aspect of my work as Council of Europe Commissioner for Human Rights. As media play a crucial role in providing access to diverse information to the public, states have a positive obligation to create an environment that is favourable to media pluralism.

In January this year, your government unveiled a draft bill concerning an advertising revenue tax on media outlets. While the bill concerns the entire media sector, and is presented as introducing a "solidarity fee" mainly affecting big internet companies, its varying tax rates specifically target the revenue sources that are the lifeline of many privately-owned publishers and broadcasters. I am concerned that the proposed tax would, in practice, lead to the suffocation of independent media outlets, thereby limiting the public's ability to choose the content of their interest and unduly restricting their freedom to receive information.

I understand that this proposal is currently being redrafted by the government, following expressions of concern from media companies, political figures and civil society. I urge you to take this opportunity to ensure that any measure will not be discriminatory, whether in letter or in practice: it must not have the effect of stifling a sector of society whose work is so essential to ensuring an open and diverse media environment.

I also note that the proposed taxes would help raise funding for healthcare and culture in Poland, heavily hit, like in many other European countries, by the pandemic. Whatever solution your government may devise to this end, it should not trample on media pluralism nor restrict access to diverse information and ideas, in line with Article 10 of the European Convention on Human Rights.

This is especially salient given other developments related to media freedom in Poland: the worsening problem of political influence on public service media (an issue already raised in 2016 in a [report](#) of my predecessor), and more recently the announced takeover of one of the largest media groups by a state-controlled company and public comments by political leaders on the need to curtail foreign ownership of media.

The draft law on "protection of freedom of speech of social media users", also unveiled earlier this year, attempts to tackle an important question facing our societies: the leeway of large social media companies in determining what is allowed to be shared online. It envisages, among other things, the establishment of a "Freedom of Expression Council", whose task would be to review appeals against internet companies' decisions to restrict access to certain content.

It is essential that any such law be fully in line with Article 10 of the European Convention on Human Rights (freedom of expression) and relevant Council of Europe standards: to this end, I urge you to ensure that all types of content regulation foreseen by the draft law are based on clear and predictable provisions, pursue a legitimate aim, and are necessary in a democratic society. It is further essential

that effective remedies are available against all decisions related to user content and data, in full compliance with Article 13 of the Convention.

Specifically, the current draft raises concerns on a number of fronts. First, the draft is overly broad in defining what constitutes illegal content for the purposes of the work of the “Freedom of Expression Council”: any decision on user content should not depend on vague notions of “disinformation” or “decency”, nor rely too generally on national law. Second, the ability of the Council to order the restoration of content which it considers not to be illegal raises issues in light of persisting gaps in the legal framework in force in Poland regarding hate speech. Third, while it would be important to ensure the independence of a body regulating freedom of expression on social media, the proposed appointment procedure for the Council raises serious questions about its ability to withstand political pressures.

Further, the draft law introduces a data retention obligation (internet data) of 12 months for online services. I wish to draw your attention to the [Issue Paper](#) published by my Office in 2014, according to which “[s]uspicionless mass retention of communications data is fundamentally contrary to the rule of law, incompatible with core data-protection principles and ineffective. Member states should not resort to it or impose compulsory retention of data by third parties”. I urge you to ensure that the draft law complies with the requirements of Article 8 of the European Convention on Human Rights (right to respect for private and family life) and guarantees the rights of the data subject in full compliance with the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108), to which Poland is a party. The Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries also contains useful guidelines in this regard.

The COVID-19 pandemic’s effects on the healthcare and cultural sectors, as well as the increasing role of large social media companies in enabling the exercise of our right to receive and impart information in practice, are significant challenges facing Council of Europe member states today. In addressing them, it is important not to lose sight of European human rights standards, specifically related to freedom of expression and data protection. I count on your government’s ability to find adequate solutions and to demonstrate your commitment to a free, independent and pluralistic media – a core element of a healthy democracy.

I look forward to continuing a constructive dialogue with you on this and other issues.

Your sincerely,

A handwritten signature in black ink, appearing to read 'Dunja Mijatović', with a large, stylized flourish at the end.

Dunja Mijatović