TOOLKIT FOR LEGAL PRACTITIONERS ON RESPONSE TO HUMAN RIGHTS VIOLATIONS DURING THE EXTRAORDINARY CIRCUMSTANCES

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INTRODUCTION

Under the joint European Union and Council of Europe´s Horizontal facility for Western Balkans and Turkey, the action ***Improving procedural safeguards in judicial proceedings in Montenegro*** (action) is being implemented aimed at supporting the Montenegrin authorities to further align the legal framework with the *EU acquis*, thus ensuring that human rights involved in judicial proceedings are effectively protected. The action contributes, *inter alia*, to the implementation of EU legislation (transposition of EU directives) and relevant case law of the European Court of Human Rights (hereafter referred to as "ECtHR").

Montenegro, as many other countries worldwide, was faced with the challenges in seeking to protect its population from the threat of COVID-19. Protective measures required to combat the virus inevitably intrude into rights and freedoms which are an integral and necessary part of a democratic society governed by the rule of law. The right balance between the protective measures and protection of human rights is the main challenge with which all the countries affected by COVID-19 pandemic were faced. Learning from this experience, the action supports the national authorities in ensuing further respect of human rights and rule of law in any potential extraordinary circumstances which might occur in the future. Therefore, the action offers valuable tools, such as this toolkit, to national authorities and citizens to find the best and most sustainable responses to protect public health, while preserving democracy and human rights.

The toolkit for legal practitioners on response to human rights violations during the extraordinary circumstances provides valuable guidelines to legal professionals on how to ensure the respect of the rule of law and human rights during extraordinary circumstances. The principal focus is on the protection of the rights restricted by protective measures such as the right to liberty and security and right to a fair trial, right to the protection of privacy and data protection and freedom of expression. In that context, the toolkit comprises three chapters each written by an international expert covering specific area of human rights protection:

I. The rights to liberty and security of the person and to a fair trial, developed by Mr Jeremy McBride;
II. The right to the protection of privacy, including the protection of personal data, developed by Ms Teresa Alegra Quintel;
III. The right to freedom of expression, developed by Ms Dominika Bychawska.

The national consultant, Ms Jelena Đurišić provided comprehensive support in conducting the desk research and ensuring the harmonised approach during the drafting process.

The toolkit is a concise and comprehensive, "future-oriented" tool which gives a detailed overview of existing EU-level legislation and practice and provides relevant recommendations for each chapter. With an expert review of current EU legislation, wide practice and recommendations as for resolving potential problems, this toolkit will serve as a guide for legal practitioners on how to deal with emergencies which may arise in the future while respecting the human rights and freedoms that exist in any democratic society.

CHAPTER I
THE RIGHTS TO LIBERTY AND SECURITY OF THE PERSON AND TO FAIR TRIAL

General considerations

The existence of extraordinary circumstances – such as those resulting from the COVID-19 outbreak, natural disasters, armed conflict and terrorist activity – can often be the occasion for limiting the rights to liberty and security of the person and to fair trial under Articles 5 and 6 of the European Convention on Human Rights (hereafter referred to as "ECHR" or "Convention") in ways not seen in more normal times.

Apart from the practical difficulties that such circumstances may pose for giving effect to the requirements entailed by these rights (e.g., the necessary personnel or facilities may not be available or accessible), various measures – entailing additional limitations on these rights - may also be adopted in the belief that this will lead to the situation occasioning them being eliminated or mitigated (e.g., to prevent the spread of disease, to protect lives or to maintain order).

Such limitations will not necessarily be incompatible with the rights under Articles 5 and 6. This may because particular limitations - even if not generally employed - might still remain within the margin of appreciation applicable to the implementation of rights that are not absolute or because a derogation made under Article 15 has rendered them admissible, notwithstanding that this would not have been the case in normal times.

However, in all cases *it is essential that there be a legal basis for any limitations on these rights*, whether these result from the inability to fulfil specific requirements or the adoption of certain measures. Moreover, *any measures taken must be proportionate in their effect and, in the case of those taken pursuant to a derogation, no more than strictly required by the situation concerned*. Furthermore, *any arbitrariness in the application of all the measures must be avoided*.

As a result, *advance planning for extraordinary circumstances* – whether as regards coping with reduced personnel or facilities or the measures that might need to be adopted - *will always be highly desirable*. In addition, *a revision of existing laws or practices during normal times* can, in some instances, be sufficient to ensure observance of some elements of the rights even in more exacting ones.

Although neither possibility will not always be feasible on account of the specific circumstances concerned, *consideration ought still to be given at the time of adopt-*

ing any measures in response to them as to the requirements of the two rights, including whether there is even a need for a derogation under Article 15.

In addition, there will always be a need for appropriate training and guidance for those responsible for their implementation – ideally beforehand but certainly once the measures are adopted – to ensure that this implementation is not adversely affected by any fears or panic on the part of those involved resulting from the demands of operating in a situation of extraordinary circumstances.

There are no specific European Union standards relating to extraordinary circumstances. However, the meaning and scope of rights guaranteed by the EU Charter of Fundamental Rights which correspond to those in the ECHR – including the right to liberty and security (Article 6) and the right to an effective remedy and to a fair trial (Article 47) – shall be the same as those laid down in that Convention. The provisions of the Charter are addressed to Member States only when they are implementing European Union law. They would thus be especially relevant in the present context for measures affecting the freedom of movement of citizens of the European Union and asylum procedures.

Liberty and security

As was seen in the response to the COVID-19 outbreak, the various measures adopted and actions taken – whether in terms of restricting persons to particular places, taking steps to enforce this and other restrictions on activity and the availability of effective remedies - had the potential to have an adverse impact on the exercise of the right to liberty and security of the person under Article 5, even if this did not necessarily occur.

A similar adverse impact could also potentially result in the event of other extraordinary circumstances leading to such measures and action being respectively adopted and taken. There is thus scope to learn from the experience with COVID-19 so that violations of Article 5 might then be precluded when such circumstances do arise in the future.

The restricting of persons to particular places took four forms: a prohibition on leaving one's residence during certain hours of the day; a requirement to undergo mandatory self-isolation (which effectively meant remaining at home for the entire day for a prescribed period); enforced quarantine in the event of breaching mandatory self-isolation (which was otherwise similar to it apart from the breach giving rise to criminal liability); and institutional isolation (where the confinement was in a facility supervised by health professionals).

The first applied to the population in general whereas the second applied only to those persons who failed to observe self-isolation, the third applied just to those who had come into contact with infected persons, were suspected of having done

so or had arrived from certain countries and the fourth applied to persons with a negative test or a diagnosis of the disease.

Certainly, confinement to one's home (or a health facility) - even though the conditions there may be much better than in a prison – is capable of amounting to a deprivation of liberty for the purpose of Article 5 (see *Buzadji v. Republic of Moldova* [GC], no. 23755/07, 5 July 2016).

However, the European Court of Human Rights (ECtHR) has recognised that there is a difference between a total bar on leaving one's home (or a health facility) and not being able to so, except in case of necessity, between specified hours. The latter would not be regarded as amounting to a deprivation of liberty for the purpose of Article 5 (as in *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017), although it would entail a restriction on the right to freedom of movement for which justification would still be required.

Where the confinement does amount to a deprivation of liberty, ECHR has considered that it could be justified where an infectious disease is involved by reference to the exception in Article 5(1)(e) for detention for the prevention of this being spread (see *Enhorn v. Sweden*, no. 56529/00, 25 January 2005).

However, for such a deprivation of liberty to be justified, it must be demonstrated that that the spreading of the infectious disease is dangerous to public health or safety. Moreover, the detention of the persons concerned must be the last resort in order to prevent the spreading of the disease, with other less severe measures having been considered and found to be insufficient to safeguard the public interest.

In addition, once both these criteria cease to be fulfilled, the basis for the deprivation of liberty consistent with Article 5 will cease to exist.

Consideration thus ought to be given as to whether the circumstances really warrant a total confinement to prevent the spread of an infectious disease or whether this objective might be addressed by the use of a lesser restriction on freedom.

For example, requirements – such as the wearing of protective personal equipment in specified places – might be sufficient to prevent the spreading of a disease or, at least, significantly restrict such a possibility. As an immediate response, particularly where such equipment is not immediately available, a curfew of some kind might seem necessary but its extent – as well as its impact on other rights – should always be kept under review to ensure that it remains proportionate in its effect.

It is unlikely that it would be possible to justify confinement amounting to a deprivation of liberty for reasons other than the spreading of infectious diseases (such as to maintain public order or to protect life where there was some form of natural disaster) by reference to the exception in Article 5(1)(b) for detention to secure the fulfilment of an obligation prescribed by law.

This is because the obligation in question must be "specific and concrete", already incumbent on the person concerned, the detention must be to secure the fulfilment of the obligation rather than the obligation itself and the person detained must have first had an opportunity to fulfil it (see *Ostendorf v. Germany*, no. 15598/08, 7 March 2013 and *Rozhkov v. Russia* (No. 2), no. 38898/04, 31 January 2017). Moreover, the detention authorised under Article 5(1)(b) can generally be for just a short duration (see *Vasileva v. Denmark*, no. 52792/99, 25 September 2003).

There would, therefore, probably need to be a derogation under Article 15 in order to provide a justification for a deprivation of liberty in response to extraordinary circumstances where reliance could not be placed on Article 5(1)(e).

However, there would still be a need to demonstrate that any such deprivation of liberty was strictly required as a response to the extraordinary circumstances relied upon in making this derogation. This would not be possible if a lesser restriction would be sufficient for this purpose (e.g., by a prohibition on being in a certain place or a curfew covering only part of the day).

The imposition of a total confinement to a particular place is not the only situation in which a deprivation of liberty might be regarded as occurring. This could also be the result of the use of law enforcement measures taken both to ensure that obligations are being fulfilled and to initiate proceedings where there is a basis for considering that breach of ones entailing criminal liability has occurred.

Thus, where restrictions have been imposed on the ability of persons to be in particular places or to undertake certain activities, a power to stop someone for a short period in order to check whether s/he entitled to be in a given place or to be doing something is likely to come within the exception in Article 5(1)(b) for detention to secure the fulfilment of an obligation prescribed by law (see, e.g., *McVeigh and Others v. United Kingdom* (Rep.), no. 8022/77, 18 March 1981 and *Baisuev and Anzorov v. Georgia*, no. 39804/04, 18 December 2012).

Nonetheless, such a check should only be carried out where it is not clear that the person is complying with the relevant obligation (cf. *Baisuev and Anzorov v. Georgia*, no. 39804/04, 18 December 2012) or is not undertaken for a legitimate purpose (see, e.g., *Shimovolos v. Russia*, no. 30194/09, 21 June 2011).

There is a need, however, to ensure that the obligation to submit to such a check is specific and concrete, including the means by which it is to be fulfilled. In addition, there should appropriate guidance given to those conducting such checks and their exercise of them should be carefully monitored.

Moreover, although it would be legitimate to impose penalties for non-compliance with obligations designed to tackle extraordinary circumstances (such as those requiring face masks to be worn, curfews to be observed, certain places not to be

visited or particular activities not to be undertaken), it does not follow that either arresting or imprisoning persons for such non-compliance would necessarily be appropriate.

Thus, in some cases the objective of tackling the extraordinary circumstances might be more effectively met by not instituting criminal proceedings at all but by simply facilitating compliance with the relevant obligation (e.g., by simply returning the person breaking the curfew to her/his home; cf. *Litwa v. Poland*, no. 26629/95, 4 April 2000). This might be especially so where depriving the person of her/his liberty could, e.g., expose her/him to the disease through overcrowded detention facilities. In such circumstances, a deprivation of liberty that is not really necessary might be regarded by ECHR as arbitrary.

The practicality of such an approach may, of course, be constrained by the way in which breach of the relevant obligations is characterised. In particular, the fact that this can only be viewed as a criminal offence – rather than as a misdemeanour or administrative offence – might lead to unnecessary deprivations of liberty, as seems to have been recognised in the course of tackling the COVID-19 outbreak. This does not mean that a differentiation in approach would not be appropriate for those who repeatedly fail to comply with particular obligations.

Consideration should thus be given to ensuring that the prescription of penalties for non-compliance with obligations imposed in response to extraordinary circumstances sufficiently differentiate between the varying nature of the cases in which such non-compliance can occur.

At the same time, some discretion as to the institution of proceedings should be recognised as appropriate, with law enforcement officers being provided with clear guidance as to how such discretion is to be exercised.

Moreover, decisions not to institute proceedings as much as to institute them should be properly recorded so that the use of this discretion can be properly monitored.

Judicial control over deprivation of liberty is a vital safeguard against abuse. In the absence of a derogation, there can be no departure from normal timelines for bringing an arrested person before a judge with authority to determine whether he or should be released (see *Brogan and Others v. United Kingdom* [P], no. 11209/84, 29 November 1988).

However, even if there was a derogation that could justify some further delay (such as a significant shortage of relevant personnel on account of many of them succumbing to a disease like COVID-19 or being at risk of danger to their lives), it is unlikely that a delay of more than 7 days before such production occurs would be seen as acceptable (see *Aksoy v. Turkey*, no. 21987/93, 18 December 1996 and *Sakik and Others v. Turkey*, no. 23878/94, 26 November 1997).

Furthermore, even in an emergency there can be no departure from the requirement that persons should not be placed in pre-trial detention without any strong evidence that they had committed an offence (see *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018). Similar considerations are applicable to a deprivation of liberty based on assertions that a deprivation of liberty is required for considerations such as the prevention of spreading infectious diseases and the protection of public order (*Enhorn v. Sweden*, no. 56529/00, 25 January 2005).

There is thus a need for judges to expect substantiation for all these forms of deprivation of liberty and to be prepared to consider and take account of evidence to the contrary effect.

Moreover, it would probably be difficult to justify a derogation from the right under Article 5(4) to challenge the legality of detention (the acceptance of one in *Ireland v. United Kingdom* [P], no. 5310/71, 18 January 1978 seems out of line with subsequent developments in international human rights law that would preclude procedural safeguards such as Article 5(4) being made subject to measures that would circumvent the protection of a non-derogable right such as that in Article 3; see the United Nations Human Rights Committee's General Comment No. 29 States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 15). However, the consideration of such a challenge would not have to be as speedy as that expected in normal times (see *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018).

These guarantees can only be effective where detained persons have adequate access to legal advice and assistance (see *Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011).

In exceptional circumstances, particular priority thus always needs to be given to ensuring that judicial control continues to function in accordance with the requirements of Articles 5(3) and 5(4). This may be facilitated by the conduct of hearings through a video link where there are practical difficulties in bringing a detained person physically before a court.

The capability to operate such links should be established in police stations, prisons and other places of detention. The arrangements made for such links should ensure not only that there is a good two-way communication between the detained person and the court but also that there is a separate confidential link between that person and her/his lawyer before, during and after the relevant proceedings.

In the absence of a legislative amendment and a derogation, it would not be possible to disregard any limits on the duration of any deprivation of liberty prescribed in the Criminal Procedure Code or other legislation. Any extension of such limits would need to be shown to be strictly required by the exceptional circumstances and, while a short extension as seen above in the case of the first appearance before a court, this is less likely to be considered justifiable where the person concerned has already been deprived of her/his liberty for a significant period.

There is thus a need to ensure that not only are any extensions of limits on duration of deprivation of liberty are limited but also that particular priority is given to the determination of proceedings in cases where the person concerned has already been deprived of her/his liberty for a significant period.

Fair trial

Concern to protect all involved in justice systems when there are extraordinary circumstances with implications for health and safety will inevitably have an impact on the conduct of proceedings before courts. In particular, there may not be the personnel or the facilities to enable the courts to function as would usually be the case.

In many instances, the impact is likely to be limited to delay in the hearing of cases and thus raise concerns about compliance with the rights under Article 6(1) of access to court and to trial within a reasonable time.

Neither rights are absolute and the external cause of the disruption in the functioning of the courts will mean that it cannot be attributable to the State so long as it has taken all possible steps open to them to mitigate its effect (cf. the situation considered in *Khlebik v. Ukraine*, no. 2945/16, 25 July 2017 resulting from inability to access crucial documents for proceedings on account of part of a State's territory no longer being under its control and also that in *Agga v. Greece* (No. 1), no. 37439/97, 25 January 2000 where there was a failure to take measures to deal with the effects of a strike by lawyers).

For a disruption that is not expected to be prolonged, it may be appropriate to focus resources just on urgent cases, as occurred during the COVID-19 outbreak. However, there is a need for some precision as regards what is considered to be urgent. This should not be a matter for individual judges to decide as that could lead to different outcomes in similar cases.

Undoubtedly, urgent cases should be regarded as covering ones involving deprivation of liberty (discussed above) and other ones in which there are deadlines near expiry. In addition, it would be appropriate to treat as urgent proceedings that are needed to protect individuals, e.g., from domestic violence and sexual abuse since the inability to obtain protective measures from a court could lead to violations of Articles 2 and 3 (cf. *Opuz v. Turkey*, no. 33401/02, 9 June 2009).

There is thus a need to identify, in advance if at all possible, the criteria by which cases are to be regarded as urgent and thus to be given priority in their determination by the courts.

However, allocating priority to certain types of cases is really no more than a short-term response to the disruption that can result from the occurrence of exceptional circumstances. It is desirable, therefore, to look for other ways of conducting pro-

ceedings – in many, if not all, cases - that are not dependent upon traditional processes involving a physical presence in court.

This is something that can be best achieved through planning, procedural changes and the provision of facilities before any exceptional circumstances arise. The resulting adjustments may not need to be put fully into operation in normal times – although many prove to be advantageous - but, by being in place, they will make it more likely that judicial proceedings can be conducted without significant disruption in the event of exceptional circumstances occurring.

Experience in many jurisdictions – both before and during the COVID-19 pandemic – has shown that proceedings can still be conducted effectively through the use of evidence in a digital rather than a physical format, enhanced pre-trial proceedings and of virtual proceedings employing various formats, with some or all of the participants taking part in them remotely.

Taking account of all or some of these possibilities will be important in demonstrating that the available steps to mitigate the effect of extraordinary circumstances have been taken so that it cannot then be claimed that there has been a violation of the right to a fair trial.

The introduction of arrangements to ensure that evidence is, a far a practical, gathered and/or transferred into a digital format has been seen in arbitral and civil proceedings in many jurisdictions and is also becoming more frequent in criminal ones.

Digitisation facilitates the ready transfer of evidence between all involved in the proceedings and enables it to be consulted without the access constraints applicable to a physical case file. It also has the potential for ensuring that proceedings are not disrupted by events that lead to evidence in a physical form being damaged or inaccessible as a consequence of extraordinary circumstances (the situation seen in *Khlebik v. Ukraine*, no. 2945/16, 25 July 2017).

In order to enable evidence in a digital format in all forms of court proceedings, there is a need to adopt an appropriate legal basis for such use. At the same time, appropriate practical arrangements would have to put in place. These would not only have to deal with the digitisation process, including the necessary safeguards for its reliability, but also the physical equipment and software required for its use by the participants in the proceedings. The software would need to include authorisation requirements governing access by different participants.

Even if proceedings are conducted in a virtual format, the existence of extraordinary circumstances may make it difficult for lengthy hearings to be held in all cases. The length of many proceedings can often be reduced by a pre-trial process which enables those involved to identify the points which are really in dispute so that there is no need to hear evidence on matters which are uncontested.

This is increasingly common in arbitral and civil proceedings but is also a feature of criminal proceedings in some jurisdictions. Such a process can be facilitated by early disclosure of evidence and/or the main lines of argument by the parties. In some instances, such disclosure may also lead to a readiness to concede that particular claims or charges are justified, meaning that the hearing only has to focus on issues relating to the remedy or penalty.

The necessary arrangements for such a pre-trial process would need appropriate amendments to the relevant procedural codes.

ECHR has recognised that the use of some form of video link for an individual's participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing (see *Marcello Viola v. Italy*, no. 45106/04, 5 October 2006 and *Sakhnovskiy v. Russia* [GC], no. 21272/03, 2 November 2010). However, it has also emphasised that the individual must be able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided.

There has not yet been a case before ECHR in which all the parties or the majority of them took part in the proceedings through some form of video link. However, there is no reason to consider that it would not also regard such proceedings as compatible with the notion of a fair and public hearing if the arrangements were such that all could participate effectively and there was, in addition, some provision for them to be observed by members of the public and the media.

A decision as to form or forms of video link to be used would need to take account of the resources available not only in the courts, the prosecution and the legal profession but also on the part of others who may be involved in the proceedings, including witnesses and persons and the media who wish just to observe the proceedings. Such a link would also need to be one that would allow effective interpretation to be provided in cases where this is required for a participant in the proceedings.

Furthermore, arrangements would need to be made as to how to ensure the authenticity of testimony by witnesses and the practicalities of them being cross-examined.

Moreover, effective participation is unlikely to be ensured without the development of guidance notes for the use of the video link that has regard to the different needs and capabilities of those taking part in the proceedings. In this connection, particular consideration being given to the needs of vulnerable persons and the difficulties that might result from a temporary interruption to the link.

In addition, the public nature of the proceedings would be dependent on the making of arrangements that would not only allow them to be observed but also ensure that the public and the media are aware that they are taking place at a par-

ticular time (cf. *Riepan v. Austria*, no. 35115/97, 14 November 2000 and *Hummatov v. Azerbaijan*, no. 9852/03, 29 November 2007. Observation might be through live streaming, but it might also be achieved through a recording of the proceedings that could be accessed subsequently. In any event, such a recording would be useful in all cases in the event of there being an appeal.

As already noted in the previous section, effective and confidential communication between a party and her/his lawyer will need to be assured in all virtual proceedings, especially where they are taking part in them from two different locations.

Some adjustment might also need to be made to the procedural rules for the conduct of the hearing itself. In particular, the arrangements for allowing participants to intervene as well as for stopping them would have to take account of the technical means being used. Finally, consideration would need to be given as to the suitability of conducting proceedings virtually – whether in their entirety or partially - for particular types of cases. Early experience suggests that this is an approach that works well in cases that are not especially complex but that could change as technology develops.

The extraordinary circumstances resulting from the COVID-19 outbreak led to some use of virtual proceedings, sometimes with the experience already gained in arbitral and civil proceedings being adapted for use in criminal ones.

However, the range of considerations discussed above could only be addressed on a very experimental basis. This points to the need to a need to gain greater experience as to what works well in more normal times for the conduct of proceedings in a virtual environment - drawing upon the approach adopted in other jurisdictions – so that there is a better foundation for their conduct this way when exceptional circumstances make this a necessity.

Recommendations

In all cases limiting the rights to liberty and security of the person and to fair trial under Articles 5 and 6 of the European Convention on Human Rights, it is essential that there be a legal basis for any limitations on these rights.

Any measures taken must be proportionate in their effect and no more than strictly required by the situation concerned.

Any arbitrariness in the application of all the measures must be avoided.

The detention must be the last resort in order to prevent the spreading of the disease, with other less severe measures having been considered and found to be insufficient to safeguard the public interest.

Consideration thus ought to be given as to whether the circumstances really warrant a total confinement to prevent the spread of an infectious disease or whether this objective might be addressed by the use of a lesser restriction on freedom.

There would, probably need to be a derogation under Article 15 in order to provide a justification for a deprivation of liberty in response to extraordinary circumstances where reliance could not be placed on Article 5(1)(e).

There is a need to ensure that the obligation to submit to such a check as to a person's compliance with any restrictions imposed is specific and concrete, including the means by which it is to be fulfilled. In addition, there should appropriate guidance given to those conducting such checks and their exercise of them should be carefully monitored.

In some cases, the objective of tackling the extraordinary circumstances might be more effectively met by not instituting criminal proceedings at all but by simply facilitating compliance with the relevant obligations. This might be especially so where depriving the person of her/his liberty could, e.g., expose her/him to the disease through overcrowded detention facilities. In such circumstances, a deprivation of liberty that is not really necessary might be seen as arbitrary.

Consideration should be given to ensuring that the prescription of penalties for non-compliance with obligations imposed in response to extraordinary circumstances sufficiently differentiate between the varying nature of the cases in which such non-compliance can occur.

Some discretion as to the institution of proceedings should be recognised as appropriate, with law enforcement officers being provided with clear guidance as to how such discretion is to be exercised.
Decisions not to institute proceedings as much as to institute them should be properly recorded so that the use of this discretion can be properly monitored.

Judicial control over deprivation of liberty is a vital safeguard against abuse. This may be facilitated by the conduct of hearings through a video link where there are practical difficulties in bringing a detained person physically before a court.

The capability to operate such links should be established in police stations, prisons and other places of detention. The arrangements made for such links should ensure not only that there is a good two-way communication between the detained person and the court but also that there is a separate confidential link between that person and her/his lawyer before, during and after the relevant proceedings.

There is a need for judges to expect substantiation for all forms of deprivation of liberty and to be prepared to consider and take account of evidence to the contrary effect.

Any extension of limits on the duration of deprivation of liberty would need to be shown to be strictly required by the exceptional circumstances. Particular priority needs to be

given to the determination of proceedings in cases where the person concerned has already been deprived of her/his liberty for a significant period.

Concern to protect all involved in justice systems when there are extraordinary circumstances with implications for health and safety will inevitably have an impact on the conduct of proceedings before courts. For a disruption that is not expected to be prolonged, it may be appropriate to focus resources just on urgent cases.

Undoubtedly, urgent cases should be regarded as covering ones involving deprivation of liberty and other ones in which there are deadlines near expiry.

In addition, it would be appropriate to treat as urgent proceedings that are needed to protect individuals, e.g., from domestic violence and sexual abuse since the inability to obtain protective measures from a court could lead to violations of Articles 2 and 3.

There is thus a need to identify, in advance if at all possible, the criteria by which cases are to be regarded as urgent and thus to be given priority in their determination by the courts.

To make the judicial proceedings without significant disruption in the event of exceptional circumstances occurring, it is necessary to have planning, procedural changes and the provision of facilities before any exceptional circumstances arise.

The proceedings can still be conducted effectively through the use of evidence in a digital rather than a physical format, enhanced pre-trial proceedings and of virtual proceedings employing various formats, with some or all of the participants taking part in them remotely.

Digitisation facilitates the ready transfer of evidence between all involved in the proceedings and enables it to be consulted without the access constraints applicable to a physical case file.

In order to enable evidence in a digital format in all forms of court proceedings, there is a need to adopt an appropriate legal basis for such use. At the same time, appropriate practical arrangements would have to put in place.

The length of many proceedings can often be reduced by a pre-trial process which enables those involved to identify the points which are really in dispute so that there is no need to hear evidence on matters which are uncontested.

A decision as to form or forms of video link to be used would need to take account of the resources available not only in the courts, the prosecution and the legal profession but also on the part of others who may be involved in the proceedings, including witnesses and persons and the media who wish just to observe the proceedings. Such a link would also need to be one that would allow effective interpretation to be provided in cases where this is required for a participant in the proceedings.

Arrangements would need to be made as to how to ensure the authenticity of testimony by witnesses and the practicalities of them being cross-examined

In addition, the public nature of the proceedings would be dependent on the making of arrangements that would not only allow them to be observed but also ensure that the public and the media are aware that they are taking place at a particular time.
Effective and confidential communication between a party and her/his lawyer will need to be assured in all virtual proceedings, especially where they are taking part in them from two different locations.

Some adjustment might also need to be made to the procedural rules for the conduct of the hearing itself. In particular, the arrangements for allowing participants to intervene as well as for stopping them would have to take account of the technical means being used.

CHAPTER II
THE RIGHT TO THE PROTECTION OF PRIVACY, INCLUDING THE PROTECTION OF PERSONAL DATA

General considerations

The right to the protection of privacy, including the protection of personal data, is provided for by primary law in Montenegro.[1] In addition, Montenegro is Member to the Council of Europe and signatory of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ('Convention 108'). The latter was modernized in 2018 and renamed into Convention 108+. What is more, the Council of Europe adopted soft law instruments specifically targeting the processing of personal data in the area of law enforcement. On the one hand, Recommendation No. R (87) 15[2] served as a general guidance for the processing of personal data in the context of law enforcement. On the other hand, in February 2018, the Council of Europe issued a practical guide on the use of personal data in the police sector ('Council of Europe Police Guidelines')[3], which is of non-binding nature, but may nevertheless serve as useful tool when police and other law enforcement authorities are processing personal data. Montenegro joined the Council of Europe in May 2007 as 47th Member State after having signed and ratified Convention 108 already in 2005. Both ECHR[4] and Convention 108[5] entered into force in Montenegro on 6 June 2006 respectively.

In June 2020, Montenegro opened the final chapter in talks to join the EU, which means that the level of approximation of Montenegrin laws to EU law should be relatively high. Already in 2013, the country had opened Chapter 24 on justice, freedom and security, which also includes the right to privacy and data protection.[6] Hence, Montenegro should have adapted its national data protection laws to be more or less in compliance with both Regulation (EU)2016/679 (General Data

1 Constitution of Montenegro, *Official Gazette of Montenegro, no. br. 1/2007 and 38/2013 – Amendments I-XVI,* available at: https://www.paragraf.me/propisi-crnegore/ustav-crne-gore.html.

2 Recommendation No. R (87) 15 of the Committee of Ministers to the Member States – Regulating the use of Personal Data in the Police Sector. Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Minister's Deputies. For an in-depth anaylsis, see Cannataci, J. A., & Caruana, M. M. (2013) 'Report : recommendation R (87) 15 – twenty–five years down the line', available at: https://www.um.edu.mt/library/oar/handle/123456789/26402

3 Practical guide on the use of personal data in the police sector, 15 February 2018; https://rm.coe.int/t-pd-201-01-practical-guide-on-the-use-of-personal-data-in-the-police-/16807927d5.

4 Country Facsheet, https://rm.coe.int/168070975a.

5 Chart of signature and ratifications of Treaty 108, status of 1 August 2020, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures.

6 European Commission, 'European Neighbourhood Policy And Enlargement Negotiations – Montenegro'; https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/montenegro_en; accessed 2 August 2020.

Protection Regulation, 'GDPR')[7] and Directive (EU) 2016/680[8], which is applicable in the police and criminal justice context when competent authorities process personal data for the prevention, investigation, detection and prosecution of criminal offences (Law Enforcement Directive, 'LED').[9]

As was seen in the response to the COVID-19 outbreak, the various measures adopted and actions taken in Montenegro – whether in terms of (1) publishing a list of persons ordered self-isolation on a governmental website, (2) using that list to prosecute persons who did not comply with the self-isolation measures or (3) the use of the personal data on that list for the creation of a tracing app- had the potential to adversely affect the right to privacy and the protection of personal data. Those three measures will be set against established data protection standards and outlined below.

Data Protection

Everyone has the right to respect for his private and family life, his home and his correspondence. Compliance with key data protection principles, including an adequate legal basis, clearly defined processing activities, the solid implementation of data subject rights and strict supervision by an independent authority are of utmost importance to ensure fundamental rights standards.

The key data protection principles that are enshrined in Convention 108+, the GDPR, as well as in the LED are the following:

- personal data shall be processed lawfully, fairly and in a transparent manner [lawfulness, fairness and transparency];
- personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes [purpose limitation];[10]
- personal data shall be adequate, relevant and not excessive in relation to the purposes for which they are processed [data minimization];
- personal data shall be accurate and, where necessary, kept up to date [data accuracy]; and

7 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

8 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119/89.

9 Furthermore, Montenegro has UN membership and thus, should respect the UN guidelines on privacy. However, those guidelines are non-binding and this chapter will focus on the more detailed CoE and EU rules and caselaw. In addition, according to Article 17 of the International Covenant on Civil and Political Rights (ICCPR), to which Montenegro is party, nobody should be subjected to arbitrary or unlawful interferences with their privacy.

10 See, for instance: Article 29 Data Protection Working Party, 'Opinion 03/2013 on purpose limitation', adopted on 2 April 2013.

- personal data shall be kept in a form, which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed [storage limitation].

It is important that anyone processing personal data, including public authorities, ensures that all data protection principles are complied with. In addition, anyone who processes personal data must have a valid legal basis in order to process those data.[11]

Legal bases require that processing is necessary for a specific purpose. If the purpose to be achieved by the processing may reasonably be achieved without the processing, the lawfulness of the legal basis becomes questionable. The legal basis must be established before the processing is carried out and should be documented. If the purpose of processing changes, it might be adequate to continue processing under the original legal basis, but only if the new purpose is compatible with the initial one.

Even if the publication of persons ordered self-isolation might proof effective, using such information might not comply with the necessity requirement. In addition, it should not be possible to further use the personal data for other, incompatible purposes.

Anyone processing personal data should put in place appropriate security measures to safeguard personal data against risks such as accidental or unauthorized access, destruction, loss, use, modification or disclosure. This is all the more the case for information concerning health, which forms part of so-called special categories of personal data. Health data include information concerning the past, present and future, physical or mental health of an individual, and may refer to a person who is sick or healthy.[12]

Since the misuse of special categories of personal data may entail defamatory or discriminatory consequences for data subjects, the processing of these types of personal data requires additional safeguards and higher security measures.

ECtHR has similarly stated that the right to privacy applies particularly when it comes to protecting the confidentiality of data relating to viruses, since disclosure of such information may have detrimental effects on the private and family life of the individual and his or her social and professional situations, including exposure to stigma (see *Z v. Finland*, no. 22009/93, 25 February 1997 and *Mockute v. Lithuania*, no. 66490/09, 27 May 2018).

11 While under Article 5.2 of Convention108+, 'processing can be carried out on the basis of the free, specific, informed and unambiguous consent of the data subject or of some other legitimate basis laid down by law', the GDPR provides for six legal basis under Article 6.

12 Explanatory Report to the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg 10 October 2018, Council of Europe Treaty Series - No. [223], [Explanatory Report of Convention 108 as modified by the amending Protocol] 10.

The provision of appropriate safeguards could include the possibility to collect special categories of personal data only in connection with other data on the natural person concerned, the possibility to secure the data collected adequately, stricter rules on access of staff and the prohibition of transmission of those data.

The use of location data for a tracing app to prevent the spreading of a disease may raise numerous privacy concerns. Where personal data are processed without the knowledge of individuals and allows for the identification of these persons, this raises serious doubts as to the lawfulness of the processing.

The deployment of contact tracing apps should be voluntary and personal data used for such apps should not be used for further purposes. In addition, any tracing app should incorporate the highest security and privacy measures by default. Whenever possible, personal data should be anonymized, or at least encrypted.

The right to privacy and to the protection of personal data are not absolute rights. They have to be balanced against other human rights (with the exception of the prohibition of torture and the right to human dignity, which are absolute rights) and may be subject to specific exceptions for the lawful processing of personal data undertaken for important public or private interests.

There should be no blanket or unnecessary exemptions from any privacy and data protection rights.

According to objective criteria, all exceptions have to be provided for by law, must pursue a legitimate purpose, must respect fundamental rights and freedoms and must constitute a necessary and proportionate measure in a democratic society.

The quality of law prerequisite is inextricably linked to the provided for by law requirement, which represents the first condition to allow for a restriction of the rights under both ECHR and the EU Charter.[13] ECtHR has ruled on several occasions that a legal provision needs to fulfil several criteria in order to satisfy the quality of law requirement, namely a law should be clear, foreseeable and adequately accessible (See *Del Río Prada v. Spain*, no. 42750/09, 21 October 2013; *S.W. v. the United Kingdom*, no. 20166/92, 22 November 1995 or *MM v United Kingdom*, no. 24029/07, 13 November 2012). Hence, it must be sufficiently foreseeable and formulated with sufficient precision in order to enable individuals to act in accordance with the law (see *Malone v UK*, no. 8691/79, 2 August 1984 and *Lebois v Bulgaria*, no. 67482/14, 19 October 2017). A finding by ECtHR that a measure was not in accordance with the law suffices for the Court to hold that there has been a violation of Article 8 ECHR and no subsequent assessment of whether the interference pursued a legitimate aim needs to be carried out (see *M.M. v Netherlands*, no. 39339/98, 8 April 2003 or *Solska and Rybicka v Poland*, no. 30491/17 and 31083/17, 20 December 2018). The CJEU has endorsed this line of interpretation in its case-law.[14]

13 Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375.

14 *Opinion* 1/15 (EU-Canada PNR Agreement), 26 July 2017, EU:C:2017:592, para 146.

Article 8(2) ECHR lists the legitimate aims that may justify a limitation upon the rights protected under Article 8 ECHR. These are interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health, or the protection of the rights and freedoms of others (see *MM v United Kingdom*, no. 24029/07, 13 November 2012; *Handyside v United Kingdom*, no. 5493/72, 7 December 1976; *S & Marper v United Kingdom*, nos. 30562/04 and 30566/04, 4 December 2008) or *Khelili v Switzerland*, no. 16188/07, 18 October 2011).

In order to test the necessity and proportionality of an interference enshrined in a legal act, one needs to look at whether the interference is appropriate for achieving a legitimate objective and whether it is the least intrusive measure to attaining such objective.[15]

A data controller must be able to justify any limitation of the right to data protection and demonstrate both necessity and proportionality in accordance with the jurisprudence of ECtHR and the CJEU. Necessity, as interpreted by both ECHR and the CJEU, implies that any measures must be the least intrusive compared to other options for achieving the same goal.[16] Proportionality means that the advantages resulting from the exception should outweigh the disadvantages that the latter causes on the exercise of the fundamental rights at stake.[17] To reduce disadvantages and risks to the enjoyment of the rights to privacy and data protection, it is important that exceptions contain appropriate safeguards.[18]

The use of personal data by the police and other law enforcement authorities should be guided by the recommendations under the CoE Police Guidelines and the provisions under the LED, as they may proof useful for a structured work of law enforcement authorities as well as to respect key data protection standards. Whenever police and other law enforcement authorities process personal data, it should be ensured that the data are accurate, securely stored and that there be a time limit for erasure.

In order to ensure the accuracy of personal data in the law enforcement context, personal data based on facts should be separated from personal data that are relat-

15 EDPS, 'EDPS Guidelines on Assessing the Proportionality of Measures That Limit the Fundamental Rights to Privacy and to the Protection of Personal Data' (2019) <https://edps.europa.eu/sites/edp/files/publication/19-12-19_edps_proportionality_guidelines2_en.pdf> accessed 8 May 2020.

16 Judgments of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia,* C 73/07, EU:C:2008:727, para 56; of 9 November 2010, *Volker und Markus Schecke and Eifert*, C 92/09 and C 93/09, EU:C:2010:662, para 77; the Digital Rights Ireland judgment, para 52, and of 6 October 2015, Schrems, C 362/14, EU:C:2015:650, para 92, Joined Cases C 203/15 and C 698/15 of 21 December 2016, *Tele2 Sverige AB* (C 203/15) v *Post- och telestyrelsen and Secretary of State for the Home Department* (C 698/15) v *Tom Watson*, para 96, Opinion 1/15 of 26 July 2017, para 140 and 141.

17 European Data Protection Supervisor (EDPS), 'Necessity toolkit on assessing the necessity of measures that limit the fundamental right to the protection of personal data' 11 April 2017, available at https://edps.europa.eu/data-protection/our-work/publications/papers/necessity-toolkit_en.

18 European Union Agency for Fundamental Rights (FRA), 'Handbook on European data protection law', 2018 edition, 46.

ing to personal assessments. Moreover, categories of individuals liable to become subject to an interference should be defined (see *Roman Zakharov v Russia*, no. 47143/06, 4 December 2015). There should be a clear deletion procedure determined (see *S. and Marper v United Kingdom*, no. 30562/04 and 30566/04, 4 December 2008 or *Gaughran v United Kingdom*, no. 45245/15, 13 June 2020). In addition, data controllers should maintain records of processing activities that should be made available to the data protection supervisory authority on request.

This would allow better structured files, enhanced trust in law enforcement authorities and an effective supervision of processing operations. Every data subject should have the possibility to request the data protection supervisory authority to investigate a claim concerning his or her rights in respect of the processing of his or her personal data.

The GDPR, the LED and Convention 108+ put more emphasis on the role of competent supervisory authorities than their predecessors did. All three acknowledge that more than one authority might be needed to meet the particular circumstances of a different legal system. In addition, specific data protection supervisory authorities whose activities are limited to a specific area may also be put in place (for instance, in the electronic communications sector, health sector, public sector, etc.).

All data protection supervisory authorities should have the necessary infrastructure and financial, technical and human resources to take prompt and effective action. The suitability of these resources should be kept under review. A data protection supervisory authority cannot effectively safeguard individual rights and freedoms unless it exercises its functions in complete independence.[19] A number of elements contribute to safeguarding the independence of the supervisory authority in the exercise of its functions.[20] In addition, it is essential that the supervisory authority proactively ensures the visibility of its activities, functions and powers. This also ensures transparency towards the public and increases trust in its work.

Apart from exercising their rights with the data controller, data subjects also have at their disposal several administrative and judicial remedies against the wrongdoings of data controllers. The most common are the administrative remedy – complaint to the data protection supervisory authority. and the judicial remedy – claim for damages against the controller. Other judicial remedies include complaints against the decision of the data protection supervisory authority and administrative proceedings against the controller.

19 Also see: CJEU, Judgment of the Court (Grand Chamber) of 9 March 2010 in case C -518/07, *Commission v Federal Republic of Germany,* ECLI:EU:C:2010:125.

20 1) the composition of the authority; 2) the method for appointing its members; 3) the duration of exercise and conditions of cessation of their functions; 4)the possibility for them to participate in relevant meetings without undue restrictions; 5) the option to consult technical or other experts or to hold external consultations; 6) the availability of sufficient resources to the authority; 7) the possibility to hire its own staff; or the adoption of decisions without being subject to external interference, whether direct or indirect. Also see: Articles 52 to 54 GDPR on the independence, general conditions for the members of the supervisory authority and rules on the establishment of the supervisory authority.

The data protection supervisory authority should inform the public, for instance via annual reports of its activities in order to raise awareness and to build trust within the population.

The performance of the duties of a data protection supervisory authority includes a general prohibition on seeking or accepting external instructions, for instance, by the Government. This does not prevent supervisory authorities from seeking advice by experts where deemed necessary. However, this is only permitted for as long as the data protection supervisory authority may exercise its own independent judgment.[21]

Notwithstanding its independence, it should be possible to appeal against the decisions of the data protection supervisory authority through the courts in accordance with the principle of the rule of law.

Recommendations

There is a need to raise awareness within the Montenegrin population about their rights. This applies, for instance, concerning the right not to have one's personal data publicly accessible on a website.

Any processing of personal data carried out to condemn a pandemic such as the COVID-19 outbreak must be proportionate in its effect and, in the case of those taken pursuant to a derogation, should no longer apply than strictly required by the situation concerned. In all cases it is essential that there be a legal basis for any limitation on privacy and data protection rights. Furthermore, adequate safeguards should be put in place to avoid any arbitrariness in the application of measures that interfere with the rights to privacy and data protection.

The processing of special categories of personal data requires additional safeguards and higher security measures in order to protect individuals against the risk of defamatory or discriminatory consequences.

As regards the suitable and specific measures to safeguard data subject rights, it is recommendable to keep any personal data in a pseudonymized and encrypted manner. Access keys should be given in a fragmented manner only to those in charge of monitoring the respect of a measure. In order to verify access to information concerning the health of persons, access logs should document any processing of the personal data in question. Anyone without access authorization rights should not be able to access the data.

The systematic and large-scale monitoring of location and/or contacts by means of a

21 Please refer to: Explanatory Report to the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg 10 October 2018, Council of Europe Treaty Series - No. [223], [Explanatory Report of Convention 108 as modified by the amending Protocol], 20-22.

tracing app is a grave intrusion into individuals' privacy. It can only be justified if the users voluntarily agree to such monitoring.[22]

- *A Data Protection Impact Assessment (DPIA) should be carried out prior to the employment of a tracing app that involves the processing of large numbers of personal data;*[23]
- *The data controller of any contact tracing app should be clearly defined;*
- *The purpose of the app must be specific enough to exclude any further processing for unrelated purposes;*
- *Careful consideration should be given to the data minimization, the data accuracy and the storage limitation principles;*
- *Any tracing app should implement high security measures and adequate safeguards;*
- *There needs to be a clear legal basis for the processing/storage/access to personal data.*[24] *For any processing operation that is not strictly necessary, the controller should seek additional consent from the user.*[25]

Compliance of tracing apps and their algorithms should be auditable and be reviewed on a regular basis by experts. Personal data should be encrypted, pseudonomized or anonymized, if possible. The concept of anonymisation is prone to being misunderstood and is often mistaken for pseudonymisation.[26]

Furthermore, the use of an app to fight a pandemic may lead to the collection of health data. Processing of health data should only be allowed when such processing is necessary for reasons of public interest in the area of public health and when fulfilling the

22 European Data Protection Board, 'Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak', adopted on 21 April 2020, 7.

23 On the carrying out of DPIAs, see for instance, Article 29 Data Protection Working Party, 'Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679, adopted on 4 April 2017, as last Revised and Adopted on 4 October 2017. Also see: EDPB, 'Recommendation 01/2019 on the draft list of the European Data Protection Supervisor regarding the processing operations subject to the requirement of a data protection impact assessment (Article 39.4 of Regulation (EU) 2018/1725)', adopted on 10 July 2019. Please note that the scope of regulation (EU) 2018/1725 only applies to EU institutions, bodies and agencies. Nevertheless, similarities may be drawn to processing carries out under the GDPR and consequently, the list of processing operations subject to the requirement of a DPIA. On the list issued by the EDPS, please see: Decision of the European Data Protection Supervisor of 16 July 2019 on DPIA lists issued under Articles 39(4) and (5) of Regulation (EU) 2018/1725, 16 July 2019.

24 The legal basis or legislative measure that provides the lawful basis for the use of contact tracing applications should incorporate meaningful safeguards.

25 The mere fact that the use of contact-tracing applications takes place on a voluntary basis does not mean that the processing of personal data will necessarily be based on consent. When public authorities provide a service based on a mandate assigned by and in line with requirements laid down by law, it appears that the most relevant legal basis for the processing is the necessity for the performance of a task in the public interest.

26 Indeed, a large body of research has shown that location data thought to be anonymised may in fact not be completely anonymized. This is because mobility traces of individuals are inherently correlated and unique. Therefore, they can be vulnerable to re-identification attempts under certain circumstances. See: de Montjoye et al. (2013) 'Unique in the Crowd: The privacy bounds of human mobility' and Pyrgelis et al., 2017) 'Knock Knock, Who's There? Membership Inference on Aggregate Location Data'.

abovementioned requirements concerning the processing of special categories of personal data.

Generally, personal data breaches should be notified at least to the data protection supervisory authority. Depending on the circumstances of the breach, it should also be notified to the data subject(s) concerned. Where the data protection supervisory authority is notified, such notification should include a minimum description of the nature of the breach and the measures taken to mitigate the risks for individuals.

The data protection supervisory authority plays a crucial role in the communication of data breaches to data subjects and the general public. However, regardless of whether or not a breach shall be notified to the supervisory authority, the controller should document all breaches.[27]

Data protection supervisory authorities serve a role of independent administrative authorities and unique organizations that perform a pivotal function in defending the fundamental rights of individuals.[28] *Supervisory authorities should be consulted prior to certain types of processing, when controllers or processors perform DPIAs and when adequate security measures are to be implemented.*

In addition, the data protection supervisory authority should guide controllers, for instance, by establishing a list of high-risk processing operations that require DPIAs.

Finally, the data protection supervisory authority should assist individuals to exercise their rights. For those tasks, the supervisory authority needs to be provided with sufficient investigative, corrective and advisory powers, as otherwise, its role will remain a dead letter. Most importantly, however, is that the data protection supervisory authority acts in complete independence.

For any future tracing app, it might be useful to take into consideration other apps that were developed. For instance, the 'Corona app' that was developed on behalf of the German Government is supposed to be data protection friendly, as it does not allow for any geolocation, refrains from storing any data centrally and is based on Bluetooth. In addition, the app was developed in an open-source manner and benefitted from recommendations of data protection experts.[29] *Furthermore, the European Commission, issued Guidance on Apps supporting the fight against the COVID-19 pandemic in relation to data protection.*[30]

27 See, for instance, Article 33(5) of Regulation (EU) 2016/679. Article 29 Data Protection Working Party, 'Guidelines on Personal data breach notification under Regulation 2016/679', adopted on 3 October 2017, as last Revised and Adopted on 6 February 2018. Also see: EDPA, 'Guidelines on personal data breach notification For the European Union Institutions and Bodies', 07 December 2018.

28 Paul de Hert and Juraj Sajfert, 'The Role of the Data Protection Authorities in Supervising Police', Chloé Brière and Anne Weyembergh (2017) The Needed Balances in EU Criminal Law: Past, Present and Future, 246.

29 https://www.bundesregierung.de/breg-de/themen/corona-warn-app.

30 Communication from the Commission Guidance on Apps supporting the fight against COVID-19 pandemic in relation to data protection (2020/C 124 I/01) [2020] OJ C 124/1, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0417(08).

Finally, the CoE's Secretary General on Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis may proof a useful tool to provide guidance in times of pandemic.[31] *As the European Data Protection Board put it, 'personal data and technology used to help fight COVID-19 should be used to empower, rather than to control, stigmatize, or repress individuals'.*[32]

31 CoE's Secretary General on Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis - A toolkit for member states, SG/Inf(2020)11, 7 April 2020, available at: https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40.

32 European Data Protection Board, 'Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak', adopted on 21 April 2020, 3.

CHAPTER III
FREEDOM OF EXPRESSION

General consideration

"Free and quality journalism is an asset of democracy. The pandemic has reminded us of the essential role that journalists and media professionals play by providing reliable information, countering disinformation that may cause panic and keeping decision-makers accountable to the public".[33]

Ensuring the right to information is a necessary response to the COVID-19 pandemic. Governments across the world are making difficult decisions about how to respond to the COVID-19 outbreak. Being open helps ensure public trust and accountability in the government's actions. It also makes the public more aware of the situation and act accordingly to protect themselves and their communities.

Furthermore, it enables people to understand the decisions; scientists and other experts to scrutinise and propose improvements to these decisions; journalists and elected representatives to examine official statements and actions from a more informed perspective; and countries to share and learn from each other's experiences. The right to information is critical for building trust between governments and the public. When the public knows what the government is doing to address the pandemic, it builds trust, brings more awareness, and opens a dialogue with the institutions that will result in better behaviours from society. This is extraordinarily important because intrusive measures to limit free movement and association and prevent social gatherings will not be accepted unless clearly and quickly explained to the public.

The UN Special Rapporteur on the Right to Health has found that states have an obligation to inform the public in public health emergencies that "an effective emergency response system requires the public to be provided with useful, timely, truthful, consistent and appropriate information promptly throughout".[34]

33 Statement of Ms Dunja Mijatović, Council of Europe Commissioner for Human Rights, ahead of World Press Freedom Day

34 UN Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover. Addendum: Mission to Japan, A/HRC/23/41/Add.3, 31 July 2013, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-41-Add3_en.pdf

As has been proven across Europe, access to reliable information played a significant role in counteracting the pandemic. At the same time, freedom of expression became one of the most vulnerable rights in the last months.

Governments should ensure a free, non-restricted access to information, as well as, restrain themselves from introducing restrictions to the free flow of information. Public access to information facilitates the public's ability to evaluate and debate decision-making processes that affect their lives by encouraging informed participation and debate.

Tackling disinformation

False claims have become so widespread during the pandemic that the World Health Organization has been referring to an "infodemic". Tackling disinformation during the pandemic seems crucial for the well-being of the citizens. As has been highlighted by the European Commission in its communication from March 2020, governments should increase efforts to tackle false information[35]. However, measures undertaken, should also take into consideration freedom of expression standards.

First, it is important to distinguish between illegal content and content that is harmful but not illegal. Then, there are blurred boundaries between the various forms of false or misleading content: from disinformation, which is defined as intentional, to misinformation, which can be unintentional. The motivation can range from targeted influence operations by foreign actors to purely economic motives. A calibrated response is needed to each of these challenges. Furthermore, there is a need to provide more data for public scrutiny and improve analytical capacities.

As has been highlighted by the European Commission[36], tackling disinformation should consist of a coordinated action between various governmental bodies. It should also involve internet platforms. Furthermore, there is a need for additional efforts, increased transparency and greater accountability of online platforms. Ensuring freedom of expression and pluralistic democratic debate should be central to the disinformation response. Response to disinformation should also mean empowering citizens, raising citizens awareness and increasing societal resilience implies enabling citizens to participate in the democratic debate by preserving access to information and freedom of expression, promoting citizens' media and information literacy, including critical thinking and digital skills. This can be done through media literacy projects and support to civil society organisations.

35 Communication available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1006

36 Joint communication to the European Parliament, the European Council, the Council, The European Economic and Social Committee of the Regions Tackling COVID-19 disinformation - Getting the facts right JOIN/2020/8.

Media freedom and the pandemic

Freedom of expression is one of the essential foundations of any free and democratic society[37], and that it is one of the basic conditions for each individual's self-fulfilment[38]. The right is necessary for the realisation of transparency and accountability, and it is essential for the promotion and protection of human rights[39]. As most of the cases resulting from article 398 of the Criminal Code, concerned online content, it should be noted that ECHR acknowledged for the first time that article 10 of the Convention had to be interpreted as imposing on states a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists' freedom of expression on the internet[40]. Since then, the Court has applied the general principles resulting from the case law on article 10 to online content[41].

The Government should create a regulatory framework to ensure protection of freedom of expression, including online freedom of expression.

It should be underlined, that freedom of expression protection standards are applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population"[42]. Furthermore, false statements benefit from protection under art. 10 of the European Convention of Human Rights. In Salov v. Ukraine, ECtHR 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. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention".[43]

Freedom of expression embraces information that are not favourably received or may even be false. Governments should restrain themselves on limiting such information.

Freedom of expression, including when it is exercised online, is of crucial importance during an international health emergency like the global COVID-19 pandemic. The UN Special Rapporteur on the promotion and protection of the right

37 The Sunday Times (No 2) v. United Kingdom, Application no. 13166/87 (26 November 1991), par. 71; UN Human Rights Committee, General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, UN Doc. CCPR/C/GC/34, par. 2.

38 Karácsony and Others v. Hungary, Application nos. 42461/13 and 44357/13 (17 May 2016), par. 132; UN Human Rights Committee, General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, UN Doc. CCPR/C/GC/34, par 2.

39 UN Human Rights Committee, General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, UN Doc. CCPR/C/GC/34, par. 3.

40 Editorial Board of Pravoye Delo and Shtekel v. Ukraine, Application no. 33014/05 (5 May 2011), paragraphs 61-64.

41 E.g. Magyar Jeti ZRT, Application no. 11257/16 (4 December 2018).

42 The Sunday Times (No 2) v. United Kingdom, Application no. 13166/87 (26 November 1991), par. 50.

43 Salov v. Ukraine, Application no. 65518/01 (6 September 2005), par. 113.

to freedom of opinion and expression (UNSR), David Kaye, highlighted recently that freedom of expression goes "hand-in-glove" with public health[44]. In his recent report to the UN Human Rights Council, he observed that "in the face of a global pandemic, the free flow of information, unhindered by threats and intimidation and penalties, protects life and health and enables and promotes critical social, economic, political and other policy discussions and decision-making".[45]

Therefore, interferences with the right to freedom of expression, such as proceedings for causing panic and disorder, will only be justified if they are "provided by law," pursue a "legitimate aim," and are "necessary" and "proportionate." As was highlighted by the UNSR these principles "apply across the board; they are not simply discarded in the context of efforts to address the public health threat of COVID-19"[46]. Therefore, an analysis of the cases from Montenegro will be effectuated in line with the 3-step test, that is applied by ECtHR. At first, it should be underlined that the aim of art. 398 of the Montenegrin Criminal Code seems clear and is related to the protection against misinformation and false news. Therefore, in the following sections the clarity of the law and the proportionality would be further discussed.

Any interference with freedom of expression by the government would only by justified if provided by the law, pursue a legitimate aim and would be necessary and proportionate.

Provided by law - Although criminal cases were opened based on art. 398 of the Montenegrin Criminal Code, this legal basis may raise doubts from the perspective of international standards. ECHR has consistently stated that, aside from having a legal basis in domestic law, a measure restricting freedom of expression must be made pursuant to a law that is accessible to the person concerned and foreseeable as to its effects[47]. The Court has elaborated on the concept of "foreseeability" by stating that "a norm cannot be regarded as a 'law' within the meaning of [Article 10(2) ECHR] unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail"[48]. Furthermore, the Court has stated that a law must also be compatible with the "rule of law," meaning that "there must be adequate safeguards in domestic law against arbitrary interferences by public authorities"[49].

44 UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (UNSR), Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Disease pandemics and the freedom of opinion and expression, UN Doc. A/HRC/44/49, 23 April 2020, par. 10.

45 Ibidem, par. 6.

46 Ibidem, par. 16. See also, Id., par. 10. ("These principles do not simply evaporate in the face of a contagion.")

47 E.g. Gawęda v. Poland, Application no. 26229/95 (14 March 2002), par. 39; and ECtHR, Maestri v. Italy, Application no. 39748/98 (17 February 2004), par. 30.

48 Centro Europa 7 S.r.l. and Di Stefano v. Italy, Application no. 38433/09 (7 June 2012), par. 141.

49 E.g. Magyar Kétfarkú Kutya Párt v. Hungary, Application no. 201/17 (20 January 2020), par. 93.

The law on which any restrictions to freedom of expression are based need to be accessible, foreseeable and formulated with sufficient precision.

It should be noted that the cases held in Montenegro during the COVID-19 pandemic, have demonstrated, that art. 398 of the Criminal Code of Montenegro raises doubts as to the "lawfulness" standard. The scope of the law is vague and the meaning of some of its terms are nebulous, preventing individuals from regulating their actions so as to avoid violating the law. E.g. terms such as "panic" and "false news" do not have clear definitions and could give way to abuses by those responsible for enforcing the provision. As has been highlighted in NGOs reports the lack of clarity results in controversial application of the law[50]. E.g. in the case of Mr. R., two state prosecutors came to diametrically opposed views as to whether a crime may have been committed under art. 398 of the Criminal Code on the basis of the same set of facts. Such vagueness confers undue margin of expression on authorities, enabling interference with individual rights while disingenuously claiming adherence to the law.[51]

Terms such as "panic" or "false news" should be render more precise to become sufficiently clear to citizens.

Necessity and proportionality - A measure that interferes with the right to freedom of expression will only be justified if it is "necessary" in a democratic society and "proportionate" to the aim being pursued. These principles require that, where a State (national prosecution, courts) invokes a "legitimate aim" such as protecting public order or health, they must demonstrate in a "specific and individualized fashion the precise nature of the threat"[52]. Furthermore, they must establish a "direct and immediate connection between the expression and the threat"[53].

The decision on proportionality is based on the principles governing a democratic society. In order to prove that interference was "necessary in a democratic society", the domestic courts, as well as the Strasbourg Court, must be satisfied that a "pressing social need" existed, requiring that particular limitation on the exercise of freedom of expression. In Observer and Guardian v. the United Kingdom, the Court stated that "[t]he adjective 'necessary', within the meaning of Article 10 paragraph 2, implies the existence of a 'pressing social need'"[54].

Introducing restrictions on the authors of comments, based on art. 398 of the Criminal Code, courts need to assess, whether a pressing social need existed and was it necessary.

Although the aim of art. 398 of the Criminal Code is to protect the society against

50 Johnathan McCully, Stefan Sljukic, op. cit., p. 28.
51 UNSR, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Disease pandemics and the freedom of opinion and expression, UN Doc. A/HRC/44/49, 23 April 2020, par. 14.
52 UN Human Rights Committee, General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, UN Doc. CCPR/C/GC/34, par. 35.
53 Ibidem.
54 Observer and Guardian v. the United Kingdom, Application no. 13585/88 (26 November 1991), par. 59(c).

panic, in the discussed cases, there were no proof of serious threats to public health or danger to public order in relation to the incriminated publications. Posts that are made on social media websites, such as Facebook and Instagram, particularly those made by private individuals, should not be treated with the same authority and level of seriousness by users as official announcements or journalistic output. ECtHR stated that "regard must be had to the specificities of the style of communication on certain Internet portals. For the Court, the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet portals – a consideration that reduces the impact that can be attributed to those expressions"[55]. In light of those arguments, the existence of pressing social need raises doubts in the discussed cases.

Posts made on social media by private individuals should not be treated by officials with the same authority and seriousness, as official announcement of journalistic output.

Furthermore, the criminal measures adopted in these cases cannot be deemed to be "proportionate" to any legitimate aim being pursued. It is an established principle of international law that a restriction on the right to freedom of expression must be the "least intrusive instrument among those which might achieve the desired result"[56]. Moreover, the sole threat of criminal responsibility may discourage others to take part in the public debate around COVID-19 and therefore have a chilling effect. The chilling effect of the criminal sanction is particularly dangerous in cases of political speech and public interest debate[57].

Criminal responsibility should be the last resort whenever freedom of expression is involved. Other less severe measures should be considered first.

Questions relating to health care during a pandemic seems to be crucial for the public debate. Therefore, statements around the topic and particularly medical care, should benefit from a wider protection, as they are part of an enhanced public debate[58].

Statements made within public debate should benefit from a wilder protection. Health related topic seems of vital importance during authorities fight with pandemic.

Additionally, depriving an individual of their liberty and pursuing criminal charges against them are particularly disproportionate restrictions on the right to freedom of expression in these cases. In almost all the cases based on art. 398 of the Criminal Code arrest of the suspects were ordered. ECtHR has stated that the imposition of a penalty of imprisonment against an individual for expressing themselves will only be compatible with Article 10 of the Convention in "exceptional circumstances," where other fundamental rights have been seriously impaired, as, for example, in

55 Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, Application no. 22947/13 (2 February 2016), par. 77.
56 Goodwin v. United Kingdom, Application no. 17488/90 (27 March 1996), par.
57 Lewandowska-Malec v. Poland, Application no. 39660/07 (18 September 2012), par. 70.
58 Ibidem.

the case of hate speech or incitement to violence[59]. The UNSR has stated that "[i]n the case of offences such as... publishing or broadcasting "false" or "alarmist" information, prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights"[60].

Moreover, as has been highlighted by the Secretary General of the Council of Europe, criminalising information relating to the pandemic may have the opposite effect of promoting reliable and truthful information. Instead it can create distrust in institutional information, delay access to reliable information and have a chilling effect on freedom of expression[61]. Malicious spreading of disinformation may be tackled with ex post sanctions, and with governmental information campaigns. States should work together with online platforms and the media to prevent the manipulation of public opinion, as well as to give greater prominence to generally trusted sources of news and information, notably those communicated by public health authorities[62].

In light of the harsh criminal responsibility, as well as orders for arrest, the proportionality of art. 398 of the Criminal Code and its application in particular cases during the COVID-19 pandemic, should raise doubts.

Pre-trial detention and freedom of expression - Deprivation of liberty must only be applied when less severe mechanisms are insufficient to exercise control over the suspect and to guarantee his or her presence at trial (as ultima ratio). Generally, the principle of subsidiarity must be applied in a way that the suspect or accused may await the trial process in conditions of unrestricted liberty or, where justified, under specified restrictions. Detention may be a measure necessary because of a high risk that a suspect carries out (further) offences of a severe nature. It is difficult to justify detention in a situation when speech is involved and the suspect did not use hate speech expressions or incitement to violence, which poses a direct threat[63]. Decision on detention should be justified by a real threat that the suspects have pose to public order[64]. It should be underlined that unproportioned reaction of the authorities toward speech, could have a chilling effect on commentators and prevent them from expressing concerns in the future[65].

A suspect, especially one not posing danger, should await trial in conditions of unrestricted liberty. Whenever speech is involved, criminal means, including pre-trial detention, should be only applied in exceptional circumstances.

59 Cumpana and Mazare v. Romania, Application No. 33348/96 92004 (17 December 2004), para 115.
60 UNSR, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, par. 205.
61 Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit for member states, 7 April 2020, Information documents, SG/Inf(2020)11, p. 7.
62 Ibidem.
63 E.g. Ahmet Şık v. Turkey, Application no. 53413/11 (8 July 2014) and Nedim Şener v. Turkey, Application no. 38270/11 (8 July 2014).
64 Appeal against arrest for fake news on social media, Human Rights Action Montenegro, 13 March 2020.
65 E.g. Maciejewski v. Poland, Application no. 34447/05 (13 Januray 2015).

Recommendations

Information sharing is an innately human response to crisis events. Social media platforms enable people to come together and share information at unprecedented scales—and in new ways. State and online platform censorship of certain content could dampen the collective sense making process that is vital both for information transfer and for coping psychologically with impacts of the pandemic. During an event like this one, populations need to be able criticize government responses and challenge government claims that conflict with other evidence. The Government should create a regulatory framework to ensure protection of freedom of expression, including online freedom of expression and should abstain itself from interference with legitimate speech.

In accordance with the Secretary General of the Council of Europe and the UNSR tackling misinformation could be made on the basis of civil law and should primarily consist of a closer cooperation with online platforms and the media;

It is important to distinguish between illegal content and content that is harmful but not illegal. There are blurred boundaries between the various forms of false or misleading content: from disinformation, which is defined as intentional, to misinformation, which can be unintentional. The motivation can range from targeted influence operations by foreign actors to purely economic motives. A calibrated response is needed to each of these challenges. Furthermore, there is a need to provide more data for public scrutiny and improve analytical capacities to tackle the disinformation problem;

Governments should ensure a free, non-restricted access to information, as well as, restrain themselves from introducing restrictions to the free flow of information. Public access to information facilitates the public's ability to evaluate and debate decision-making processes that affect their lives by encouraging informed participation and debate;

National authorities should take into account standards resulting from ECtHR case law around art. 10 of the Convention. In light of the standards described above, a number of recommendations should be put forward:

Standards of freedom of expression protection, which are bounding off line, should also be used to online communication, including social media. Moreover, posts made on social media by private individuals should not be treated by officials with the same authority and seriousness, as official announcement of journalistic output;

Freedom of expression embraces information that are not favourably received or may even be false. Such statements should be tolerated by officials and should not trigger responsibility;

Any interference with freedom of expression by authorities would only by justified if provided by the law, pursue a legitimate aim and would be necessary and proportion-

ate. Therefore, introducing restrictions on the authors of comments, based on art. 398 of the Criminal Code, courts need to assess, whether a pressing social need existed and was it necessary;

The law on which any restrictions to freedom of expression are based need to be accessible, foreseeable and formulated with sufficient precision. Therefore, terms such as "panic" or "false news" should be render in national law more precise to become sufficiently clear to citizens in order to ensure legal certainty;

Instead of reaction based on criminal law, authorities should reply to false comments and rectify them, as the outreach of officials is much wider, than those of individuals; Montenegrin authorities should refrain themselves from using detention or deprivation of liberty in cases concerning freedom of expression unless hate speech or incitement to violence is involved, pre-trial detention should be an ultima ratio;

Debate around pandemic and medical care should be largely tolerated, particularly in the times of enhanced fight with pandemic. States should refrain themselves of punishing dissident voices or those who question the government's actions.

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