



Statement
on the
Draft Slovak Act on Periodic Press and
News Agencies

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**Commissioned by the Representative on Freedom of the Media of the
Organization for Security and Co-operation in Europe**



**Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media**

ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · <http://www.article19.org>

KEY RECOMMENDATIONS

On Content Restrictions

- Section 6(1) should be removed in its entirety from the Act. It is unnecessary, as well as vague and overbroad, and members of the executive should never have the power to impose sanctions on media outlets.

On the Rights of Correction, Reply and Supplementary Information

- We recommend that, to avoid the risk of abuse, the three remedies be reduced to a single remedy which is engaged only where the claimant demonstrates that he or she has a justified interest in correcting an incorrect or misleading fact published by a periodical. The conditions for refusing a correction/reply should be extended to include cases where the reply is longer than what is necessary to correct the original mistake; where the reply is disproportionate or illegal or introduces new issues; where a correction has already been provided which redresses the harm done; and where the original statement was justified by an overriding legitimate public interest.

Introduction

A draft Act on Periodic Press and Agency News Service and the Amendment and Supplementing of Certain Acts (the Press Act) (hereinafter the draft Act) is currently being considered by the Slovak authorities. The draft Act was recently approved by Cabinet and is currently before Parliament. ARTICLE 19 has been asked to comment on the draft Act, in particular to assess it against international standards on freedom of expression.¹

The draft Act includes a small number of positive protections for freedom of expression, including protection of sources, a right to access information and protection against liability for the publication of certain statements made by others. At the same time, it is mostly concerned with regulating periodicals,² including by imposing a number of restrictions on the content of what may be published, by requiring certain information to be carried in each edition, by granting rights to correction, reply and supplementary information, by providing for the registration of periodicals and by establishing a system of sanctions for breaches.

For the most part, the provisions in the draft Act are uncontroversial. In certain key respects, however, they fail to conform to accepted international or European standards. In some cases, apparently subtle differences – such as the use of the term ‘promoting’ or ‘trivializing’ – have proven in practice to be highly problematical in some countries. In other cases – such as granting the Ministry the power to impose sanctions – the problems are more blatant. The proper scope of the right to correction and/or reply is a particularly complex issue. In many European countries, long-standing rules on this formally fail to conform to European standards and yet have not been tested constitutionally or at the European Court for various reasons. The analysis of these issues in this Statement is based on authoritative statements, in particular by the Council of Europe, as well as a principled analysis of the right to freedom of expression, which requires any restrictions on this right to be carefully tailored and proportionate.

Analysis of the Draft Act

Protection of Sources

Section 4 of the draft Act provides that publishers of periodicals and news agencies and their employees are obliged to respect the confidentiality of sources of information as requested by those sources. Under international law, it is well-established that the media have a right to protect the confidentiality of their sources of information.³ As the European Court of Human Rights has stated:

Protection of journalistic sources is one of the basic conditions for press freedom Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be

¹ This Statement is based on an English translation provided to ARTICLE 19 by the OSCE, produced by the Ministry of Culture of the Slovak Republic. ARTICLE 19 takes no responsibility for errors based on mistaken or confusing translation.

² In this Statement, references to periodicals should be understood as including news agencies.

³ See, for example, *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights) and Recommendation No. R (2000) 7 of the Committee of Ministers of the Council of Europe to member states on the right of journalists not to disclose their sources of information, adopted 8 March 2000.

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undermined and the ability of the press to provide accurate and reliable information may be adversely affected.⁴

In most European countries, however, this is cast as a right or privilege, not as an obligation.⁵ Although the matter has never been dealt with by an international court, there are potentially serious problems with imposing source confidentiality as an obligation on the media and it would be preferable for Slovakia to follow the dominant European practice in this area.

Furthermore, the rule should not be restricted to publishers and employees, but extend to “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication”.⁶ This is of particular importance in Slovakia, due to the large number of consultants and freelancers working for the media.

Recommendation:

- The rule on protection of sources should be cast as a right of the media, not an obligation, and it should apply to everyone regularly engaged in the professional dissemination of information.

Content Restrictions

Section 6(1) of the draft Act imposes a number of restrictions on what content may be published in a periodical. Section 6(1)(a) prohibits the dissemination of statements that “promote war or describe cruel and other inhuman actions in a manner that trivialises them, justifies them or indicates approval of them”, while section 6(1)(b) contains a similar prohibition on statements that “promote the use of narcotic or psychotropic substances or describe the use of narcotic or psychotropic substances in a manner that trivialises such use, justifies it or indicates approval of it”. Section 6(1)(c), for its part, prohibits the promotion of violence or incitement to hatred based on a list of some 18 grounds (depending on how you count them), including ‘social origin’, ‘genetic characteristics’, ‘language’, ‘religion or faith’, ‘class’, ‘property’ and ‘political or other thinking’. Finally, section 6(1)(d) prohibits the publication of information which is forbidden by various special regulations.

Pursuant to section 12 of the draft Act, the Ministry has the power to impose fines of up to 200 000 SKK (approximately USD9,000) for breach of these rules.

ARTICLE 19 is of the view that laws governing the print media should not contain any content restrictions whatsoever. If the publication of a certain category of statement carries a sufficient risk of harm to justify a restriction on freedom of expression, this should apply regardless of the manner in which the statement is disseminated – in a newspaper, in a book, orally and so on – and, as a result, the restriction should be placed in a law of general application, such as the criminal or civil code. Slovakian law already protects many of the interests set out in section 6(1). Articles 423 and 424 of the Criminal Code, for example, prohibit hate speech. To reiterate these general prohibitions in a specific law governing the print media sends a double warning to periodicals, and subjects them to two sets of potentially

⁴ Goodwin, *ibid.*, para. 39.

⁵ Sweden is a well-known exception to this.

⁶ Recommendation No. R (2000) 7, note 3, Appendix, Definitions.

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conflicting rules on the same matter. It cannot be necessary to prohibit these statements in two different legal rules, and so the specific restriction for the print media cannot be justified as a restriction on freedom of expression.

It may be noted that the codes of conduct that are imposed in many countries on the broadcast media are fundamentally different from the rules in the draft Act. Regulation of broadcasters is, under international law, treated very differently from regulation of the print media, among other things because broadcasters are given special access to a limited public resource, the airwaves.

This problem is very significantly exacerbated due to the fact that a Minister is responsible for imposing penalties for breach of these provisions, unlike under the civil or criminal laws, where such decisions are made by the courts. This breaches the well-established international standard that only independent bodies may regulate the media. The reasons for this are obvious; if politicians are given the power to impose sanctions on media outlets, they will naturally be tempted to abuse those powers for political ends. As the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – stated in a Joint Declaration in 2003:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.⁷

Ministers clearly do not meet these criteria. Furthermore, the fact that a periodical may appeal any decision by the Minister to impose a sanction to the courts in no way resolves the problem, which is that the Minister has the power to impose a sanction in the first place.

The substance of the restrictions is also highly problematical. International law, for example as set out in the *International Covenant on Civil and Political Rights* (ICCPR),⁸ accepts, indeed requires, that States prohibit incitement to racial and religious hatred, as well as to war, but such restrictions are required to be cast in clear and narrow terms to avoid being subject to potential abuse. There is nothing wrong with writing about war and/or drugs in an approving way – and many renowned books do just that – as long as one does not incite others to illegal acts. Furthermore, it is simply not legitimate to prohibit the promotion of hatred based on ‘political or other thinking’; formally, this could even be interpreted to prohibit the condemnation of racist ideas. It may be noted that the right to freedom of expression protects statements that “offend, shock or disturb the State or any sector of the population” and that this is one of the demands of “pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”⁹ It is only where a statement poses an actual risk of harm to a legitimate interest that a restriction may be justified.

A related problem with the restrictions in sections 6(1)(a) and (b) is that the standards they set out are cast in unacceptably vague terms. The notions of ‘promotion’ and what constitutes a

⁷ Adopted 18 December 2003. Available at: <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2003.pdf>.

⁸ UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976. Slovakia became an independent party to this treaty in May 1993.

⁹ *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72 (European Court of Human Rights), para. 49.

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“trivialising, justifying and approving way” of referring to war, inhuman acts or drugs are inherently subjective, whereas the idea of incitement to war is susceptible of more objective interpretation. We understand that the criminal law also uses the terms “trivialising, justifying and approving way” and, to this extent, it should also be amended.

The broadness and vagueness of the restrictions means that they could be arbitrarily abused to prohibit legitimate reporting on the subjects covered, thereby undermining the ability of the print media to fulfil its function in a democratic society, as well as the public’s right to know.

The purpose of section 6(1)(d) is unclear. Inasmuch as it simply reinforces rules set out in other legal provisions, it would appear to have no independent legal effect and, as a result, cannot be justified. To the extent that the rules regarding print media coverage of elections need to be revised, this should be done directly in the legal provisions referred to.

Recommendations:

- Section 6(1) should be removed in its entirety from the draft Act.
- Members of the executive should never have the power to impose sanctions on media outlets.
- There should be no content restrictions which are not set out clearly and narrowly, or which go beyond prohibiting incitement to crime or hatred.

Rights of Correction, Reply and Supplementary Information

Sections 7-10 of the draft Act provide for the rights of correction, reply and supplementary information. A correction may be claimed where a statement by a periodical contains untrue facts which identify someone. That person may, within 30 days, provide a written correction which the periodical must carry within eight days, or in the next edition, unless they are able to prove that the original statement was true or that a correction has already been provided. A right of reply may be claimed whenever a periodical publishes factual statements impinging on the honour, dignity or privacy of a legal or natural person, whether or not a correction has already been provided. The application for a reply must be in writing and not exceed the length of the original article. It must be published within three days, or in the next edition, unless the original article was published with the consent of the applicant or a reply has already been provided. A claim of a right to ‘supplementary information’ arises when a periodical publishes facts relating to a procedure before a public authority against any person which identify that person, once the matter has been finalised. The periodical must publish the supplementary information, which does not appear to be subject to any length constraints, within eight days or in the next edition, unless the periodical itself published an announcement on the final ruling.

Corrections, replies and supplementary information must be published in the “equivalent position and the same format” as the original article and without further comment by the periodical. Where a periodical refuses to publish a correction, reply or supplementary information, an application may be made to the court to force publication and for ‘proportional’ financial compensation.

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We note that the right of reply and related rights are a highly contentious area of media law. It is not disputed that the right represents an interference with freedom of expression.¹⁰ Some see it as a low-cost, low-threshold alternative to expensive lawsuits for individuals whose personality rights (for example to reputation or to privacy) have been harmed by the publication of incorrect or misleading statements about them; others regard it as an impermissible interference with editorial independence.

In the United States, a mandatory right of reply for the print media has been struck down on the grounds that it is an unconstitutional interference with the First Amendment. In *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court held:

[A mandatory right of reply] fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.¹¹

On the other hand, within Europe, the right of reply is seen as an appropriate means of addressing harmful reporting and also as a means of contributing towards pluralism. In a 1989 case, the European Commission of Human Rights stated that “in a democratic society, the right of reply constitutes a guarantee of the pluralism of information which must be respected.”¹² The Committee of Ministers of the Council of Europe has adopted a Resolution on the right of reply which recommends that the right be recognised, but suggests that exceptions be made in the following cases:

- i. if the request for publication of the reply is not addressed to the medium within a reasonably short time;
- ii. if the length of the reply exceeds what is necessary to correct the information containing the facts claimed to be inaccurate;
- iii. if the reply is not limited to a correction of the facts challenged;
- iv. if it constitutes a punishable offence;
- v. if it is considered contrary to the legally protected interests of a third party;
- vi. if the individual concerned cannot show the existence of a legitimate interest.¹³

Other commentators, including ARTICLE 19, have suggested that the right of reply should ideally be voluntary. The UN Special Rapporteur on Freedom of Opinion and Expression, for example, has stated:

¹⁰ See, for example, *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights) and *Enforceability of the Right to Reply or Correction*, 29 August 1986, OC-7/86, Inter-American Court of Human Rights, Ser. A, No.7, Advisory Opinion.

¹¹ 418 U.S. 241 (1974), p. 258.

¹² *Ediciones Tiempo S.A. v. Spain*, note 10. See also European Union Directive 89/552/EEC of 3 October 1989, OJ L 298, 17 October 1989, pp. 23-30, Article 23, prescribing a right of reply in the broadcast sector for all EU Member States, and Article 14 of the *American Convention on Human Rights*, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978, which requires State Parties to provide for either a right of reply or a right of correction.

¹³ Resolution (74)26 on the right of reply – position of the individual in relation to the press, 2 July 1974. Available at:

[http://www.coe.int/t/e/human_rights/media/4_documentary_resources/CM/Res\(1974\)026_en.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/4_documentary_resources/CM/Res(1974)026_en.asp#TopOfPage).

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The Special Rapporteur is of the view that if a right of reply system is to exist, it should ideally be part of the industry's self-regulated system, and in any case can only feasibly apply to facts and not to opinions.¹⁴

It may be noted that the objections to overbroad rights of correction/reply are not academic. Requiring the correction of false statements of fact is one thing, going beyond this to allow a reply in response to critical reporting, or reporting which is not deemed to be sufficiently in-depth on an issue is quite another. This will create a chilling effect inasmuch as editors will not wish to publish material which might lead to them being required to publish a correction/reply and thus undermine the free flow of information, contrary to commitments in this area by the Council of Europe and the OSCE.

The right to freedom of expression requires that the least intrusive remedy which will address a problem be applied. It may be noted that requiring a periodical to carry a statement by someone else is a far more intrusive remedy than simply requiring a periodical to insert its own statement. ARTICLE 19 thus notes that where the provision by a periodical of its own correction to a false statement of fact will effectively undo the harm, this should be the preferred solution. As a result, where a periodical has published a correction which has undone the harm, this should be a grounds for rejecting a claim for a reply.

We note the following problems, relative to the standards discussed above, with the draft Act's provisions on the rights of correction and reply:

- The draft Act provides for a right of correction whenever a false statement of fact published by a periodical identifies someone. There is no requirement that the statement harm the person's reputation or any other personality right. Resolution (74)26 of the Council of Europe on the right of reply calls for corrections only where the applicant has a 'justified interest' in having the information corrected. Even the current Press Act (Law 81/1966), in Article 19 on the right to correction, only requires a correction in cases of false or misleading facts which impinge on the claimant's honour.
- A periodical may refuse to publish a correction if they can prove the truth of the statement. This places the onus on the periodical, not the claimant. However, since falsity is inherent to the claim, the onus should be on the claimant. Otherwise, anyone could make a claim for a correction, thereby forcing the periodical to prove, potentially in a court of law, the truth of their statements. This may be difficult, for example where the periodical has relied on confidential sources of information. The claimant should, for the same reason, be required to show that he or she has a justified interest in the correction.
- Under the draft Act, a reply may be demanded only where a statement of fact impinges on the honour, dignity or privacy of a person. However, there is no requirement that the statement be false. This could lead to situations where periodicals were required to provide replies to individuals simply for having published true, if uncomplimentary, statements about them. It is quite clear from Resolution (74)26 of the Council of Europe that the right should arise only in the context of inaccurate, or at least misleading, statements of fact. As with a correction, the onus should be on the person claiming a reply to prove that the original statement was false and that it breached his or her rights.

¹⁴ Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Report of the mission to Hungary, 29 January 1999, E/CN.4/1999/64/Add.2, para. 35.

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- Replies have to be published within three days, which does not leave editors sufficient time to consider whether or not they are justified. Resolution (74)26 of the Council of Europe calls for the publication of replies “without undue delay”; the period of eight days the draft Act allocates for corrections and supplementary information clearly satisfies this standard and should be considered for replies as well.
- The draft Act sets out only very limited circumstances in which a reply may be refused. The Council of Europe Resolution additionally allows a reply to be refused where its length exceeds what is necessary to correct the inaccurate statements, where it goes beyond addressing the contested statements, for example by introducing new issues or by commenting on other statements, and where it contains illegal material or breaches the legitimate interests of third parties. It may be noted that the draft Act not only fails to include the Council of Europe limitation on length to what is required to correct the challenged statements, but it specifically provides that replies may be as long as the original text. This is clearly open to abuse, for example where a long article contains only one factual statement concerning the claimant.
- It should also be possible to refuse a claim for a correction/reply where a periodical itself publishes a correction which effectively redresses the harm done.
- Under the draft Act, there are no apparent restrictions on the ‘entities’ which may claim a correction or reply. The Council of Europe Resolution prohibits “state and other public authorities” from claiming this right, due to the obvious possibilities of abuse that this may entail, and the fact that taxpayer supported public authorities do not have personality rights, since their ‘good fame and reputation’ belongs to the public.
- In the draft Act, the overriding importance of open debate on matters of public interest is not taken into account. The Council of Europe Resolution specifically recognises that certain legitimate public interests may override both the right to privacy and the right to reputation. A reply should not be available where the publication of the statement was justified by an overriding legitimate public interest.
- The draft Act specifically allows claimants to demand both a right of correction and a right of reply, as well as any other legal remedies they may have, whether or not a correction or reply has been granted. This is clearly illegitimate and allows two remedies for the same wrong. Indeed, given that criminal penalties for defamation, contrary to international standards, still exist in Slovakia, claimants could potentially claim four remedies for the same wrong: a correction, a reply, a civil remedy and a criminal remedy.
- The draft Act allows claimants to ask for financial compensation where a correction or reply has improperly been refused. This is illegitimate and constitutes double dipping – potentially being compensated twice for the same harm – since claimants still have the right to take advantage of any civil remedies which may be available. Instead, when assessing damages in a civil case, the court should take into account in mitigation any correction or reply which has been provided.
- Both corrections and replies are required to be published in the “equivalent position and the same format” as the original article. That goes beyond the requirements of the Council of Europe Resolution, which simply call for replies to be given, “as far as possible, the same prominence”. This recognises the practical challenges facing publishers, which a requirement of identical position does not.
- The draft Act prohibits periodicals from publishing any accompanying material to either a correction or a reply. That is not justifiable; accompanying material might, for example, be required to avoid confusing readers and to provide them with background information.

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There should be no right to supplementary information, over and above cases in which a right of reply is engaged. This is simply not necessary, as reflected in the fact that this rule is rarely found in other democracies. While it is not very professional for periodicals to cover high-profile trials and yet not announce the final results, giving those who have been accused a right to make a statement in the periodical is not the solution. It not only represents a serious interference with editorial freedom, but it is also only a solution to one particular failure of unprofessional reporting. Ultimately, a lack of professionalism cannot be resolved by giving individuals who feel their issues have not been covered appropriately access to the media. This means that the media no longer have the power to decide when they have provided sufficient attention to an issue. Working towards a more professional media, along with developing public service media, represent better solutions to this problem.

Recommendations:

- We recommend that, to avoid abuse, the rights of correction and reply be reduced to a single remedy which is engaged only where the claimant demonstrates that he or she has a justified interest in correcting an incorrect or misleading fact published by a periodical.
- The length of time for providing a reply should be extended, for example to eight days.
- The conditions for refusing a correction/reply should be extended to include cases where the reply is longer than what is necessary to correct the original mistake; where the reply is disproportionate or illegal, breaches the rights of third parties or introduces new issues; where a correction has already been provided which redresses the harm done; and where the original statement was justified by an overriding legitimate public interest.
- The length of a reply should explicitly be restricted to what is necessary to correct the original statement.
- It should be explicitly stated that the State and public authorities are not eligible to claim a right of correction/reply.
- The right to claim financial compensation for an improper failure to provide a correction/reply should be removed.
- The rule that corrections/replies must be given “an equivalent position and the same format” as the original statement should be replaced by a rule requiring only that they be given similar prominence.
- The prohibition on a periodical publishing accompanying material to a correction/reply should be removed.
- There should be no right to supplementary information.