



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

LEGAL ANALYSIS OF THE DRAFT INFORMATION SECURITY CONCEPT OF UKRAINE

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I. Summary

The aim of the Information Security Concept (the Concept) is to create preconditions for developing Ukraine's information potential to ensure growth and avoid negative external influences. For this purpose measures are suggested that involve different stakeholders. The Concept is unsurprisingly influenced by what is recognized in the national law as the war and the external aggression and it appears as if the main aim is to prevent propaganda targeted at the country from abroad. Although the desire to take action against propaganda is well understood and legitimate, the adoption and implementation of new rules is nevertheless problematic. This is due to the difficulty in defining propaganda and the risk with setting out limitations on content in law or regulation, rather than assessing it ad hoc based on general rules (like prohibition of incitement). Consequently the report highlights a number of problems with the Concept, where its content could lead to undue limitations on freedom of expression. Furthermore, the legal nature of the Concept and its relationship with law and regulation is unclear.

The Concept is evaluated based on international standards and OSCE commitments. Freedom of expression is not an absolute right, but limitations must be carefully made given the importance of the right – not just as a basic right but also as a prerequisite for exercising other human rights and fundamental freedoms. Proportionality and necessity of any limitations to free speech are essential.

In the article by article analysis concerns are pointed out and explained in detail. Several terms are potentially ambiguous and not suitable in a normative document. The fact that the nature of the document is not clear adds to the possible complications. In some definitions, the aim of the Concept to protect Ukrainian interests has led to definitions that are not neutral (like information sovereignty or information aggression). In the list of fundamental principles, rule of law and protection of human rights and freedoms are prominent. This is important, as these principles should play an important role for interpretation of the Concept. Having this in mind means that the possible restrictions set out elsewhere must be seen through the prism of freedom of expression and thus not be disproportional. Even so, it is not good to build in complicated interpretation issues in the legal text and potentially ambiguous terms should be avoided. This includes how the following is set out: protection of information sovereignty, national sovereignty, constitutional order and territorial integrity of Ukraine; construction of Ukrainian identity in the information space, such identity being an integral part of politico-social discourse; and promoting development of the content in the information space to safeguard and protect universal human values, as well as intellectual, spiritual and cultural potential of Ukrainian people. The content of the principles is legitimate but their strong emphasis on national identity indicate that they may be interpreted to limit foreign content or foreign or minority subjects in Ukrainian media as well as to prescribe a certain interpretation of what is Ukrainian identity. Provisions banning discrediting authorities are worrying as this could have a chilling effect and restrict the possibility of media to exercise its watchdog role.

The only way to maintain real freedom of expression is to stay on the moral high-ground of not doing the same as those one wants to oppose. By setting out to defend Ukrainian interests there is a danger that legitimate discussions in media (for example about what Ukrainian identity is), pluralistic Ukrainian voices (including those of national minorities) and relevant

international content are blocked. Creating media content should not be a state task. A pluralistic and free media market shall cater for content, with public service media complementing private media and in addition access to international media. Even in times of crisis, proportionality and necessity of restrictions to freedom of expression are essential. There is an impression that the legislator wants to provide the courts and other implementing authorities with a tool to defend limitations. To avoid such a perception it is recommended not to introduce new provisions. Existing human rights and freedoms allow for some limitations and it is better to emphasize the proper and proportional application of these.

The National Security and Defence Council has a major role and wide mandate, including drafting law and exercising control over other organs. It is not clear how this relates to the role of other existing authorities. The provisions on non-governmental monitoring and public-private partnership for implementation, including special expert councils, are unclear on how the real independence of the bodies is to be ensured.

II. Recommendations

- It is not to be recommended to try to combat propaganda with new legal rules. This risks to be ineffective, possibly counterproductive and to threaten freedom of expression and freedom of the media.
- There are many unclear provisions that potentially could cause restrictions for freedom of expression in the Concept. Thus it is advised not to adopt it in its current form, but to extract any necessary elements that are not sufficiently covered by existing law and set these out in policies and/or amendments to existing laws.
- Effective application of existing rules on freedom of expression and its legitimate – proportional and necessary – limitations is to be preferred. Instead of new binding rules, interpretative comments and similar could be issued.
- The legal nature of the Concept must be made clear, so its status vis-à-vis laws, instruments from the regulators and policy documents is clear. If it has a lower status than laws it cannot change the content of laws and there should be no ambiguity about this.
- Several provisions that are especially open to misinterpretation in a way which would threaten freedom of expression should be stricken or otherwise stated in a different form in a non-normative policy document. If properly interpreted and applied, the provisions do not have to pose a danger, but the current tense situation is not one in which it is recommendable to give authorities ambiguous tools for limiting freedom of the media.
- The term *Information Sovereignty* is difficult to define in any normatively adequate manner and would better be deleted. Instead individual provisions can specify what exactly is to be defended, so as to avoid an effect of excessive limits to freedom of expression.
- Principles that give raise to concern include: *protection of information sovereignty, national sovereignty, constitutional order and territorial integrity of Ukraine; construction of Ukrainian identity in the information space, such identity being an integral part of politico-social discourse; and promoting development of the content in the information space to safeguard and protect universal human values, as well as intellectual, spiritual and cultural potential of Ukrainian people.* Also *information aggression* is a difficult term to interpret unambiguously. There is a danger that legitimate discussions in media (for example about what Ukrainian identity is), pluralistic Ukrainian voices (including those of national minorities) and relevant international content are blocked.
- There should be nothing in the Concept to indicate that the state will be involved in creating media content or through regulation excessively influencing it. This is a task for a pluralistic media market, including public service broadcasting.
- There should be nothing in the Concept to indicate that in balancing freedom of expression against possible reasons for restricting this freedom there should be a presumption of allowing restrictions.
- Prohibitions on criticizing authorities or similar should be deleted from the Concept, as these risk having a chilling effect on the watchdog role of media.
- It is important that the Concept cannot be interpreted as depriving foreigners of any rights.
- The mandate and tasks of the National Security and Defence Council appear to be too wide, which could interfere with the tasks of other organs in the media sphere like the independent regulator.

III. Analysis

III.1 Introduction

The aim of the Information Security Concept (the Concept) is stipulated as creating preconditions for developing Ukraine's information potential to ensure rapid growth and avoiding negative external influences. The approach is to involve different parties with efficient cooperation between Government, civil society, private sector and individuals. The external threats are mentioned twice in the stipulation of the aim and it is clear from this as well as from the Concept itself that it is - unsurprisingly - influenced by the war going on in Ukraine and the external aggression targeted at the country.

In fact, the main aim of the Concept appears to be to prevent propaganda targeted at the country from abroad. It is no secret that there is a massive Russian propaganda offensive against Ukraine and many other countries, aiming at presenting a Russian view on the annexation of Crimea and the war in Eastern Ukraine. This is causing problems not least in countries that were previously in the Soviet Union and many different initiatives have been taken in e.g. Latvia or Moldova to counteract such propaganda through new or amended legislation. Although the reasons for such acts is well understood and fully legitimate, the actual adoption and implementation of new rules is nevertheless problematic. This is due to the difficulty in defining propaganda and the risk involved with any limitations on freedom of expression where the content of prohibited expression is set out in law or regulation, rather than being assessed ad hoc based on general rules (like prohibition of incitement).

The nature of the Concept is not easy to understand. In many ways it is written as a normative document, a regulation or similar. At the same time, the content is programmatic and political to a large extent and thus not suitable for a normative document. A normative document must be amenable to be applied in a neutral fashion by an independent court, based on concrete evidence in each case. Emotional and political terms are not suitable in such documents.

III.2 International standards and OSCE commitments

This report is based on the mandate of the OSCE in relation to freedom of expression as set out in international instruments such as the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights, to which OSCE Participating States have declared their commitment.¹

Article 19 of the Universal Declaration states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." This right is further specified and made legally binding in Article 19 of the International Covenant on Civil and Political Rights.

Freedom of expression is also stipulated by Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR)²:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and

¹ Helsinki Final Act (1975), Part VII; reiterated e.g. in the Concluding Document of the Copenhagen Meeting of the CSCE on the Human Dimension (1990) and later statements.

² Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4.XI.1950. www.echr.coe.int/NR/...DC13.../Convention_ENG.pdf

regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The Republic of Ukraine is a party to the instruments mentioned here and bound by these provisions, something reinforced by its role as a participating State of the OSCE. This report underlines how Ukraine can best ensure that its legislation respects free expression and free media even in a difficult time of crisis and aggression. The mentioned provisions on freedom of expression allow for exceptions to this freedom, but such exceptions must be proportional and necessary in a democratic society.

In the 1999 OSCE Charter for European Security the role of free and independent media as an essential component of any democratic, free and open society is stressed.³ The Mandate of the OSCE Representative on Freedom of the Media is, based on OSCE principles and commitments, to observe relevant media developments in all participating States and on this basis advocate and promote full compliance with OSCE principles and commitments regarding free expression and free media.⁴

Although each country has the right to determine the details of its media landscape and the content of its media legislation as well as any special legislation for exceptional situations, such legislation must respect the principles included in international commitments on freedom of expression and ensure that this freedom can be implemented in practice. International best practices have developed on how to achieve this. One main issue for legislators as well as regulators to deal with is how to ensure respect for the principles established by the European Court of Human Rights (ECtHR) that any restrictions to human rights, including freedom of expression, should be proportional, necessary in a democratic society and set out in law. The document analysed here needs to be carefully scrutinised to ensure that proposed measures are indeed proportional and necessary.

Freedom of expression is not an absolute right, but its limitations must be very carefully made given the importance of the right – not just as a basic right but also as a prerequisite for exercising many other human rights and fundamental freedoms. A principle of protection of freedom of expression is that also unpleasant speech is protected, unless it violates any legitimate rules such as prohibition on incitement to hatred or violence. The threshold for what is seen as incitement should be high in a democratic society with freedom of expression and the rule of law. There are no international accepted legal norms on what is propaganda but also speech which is of a propagandistic nature is protected unless it transgresses limits of accepted speech due to incitement. The OSCE Representative on Freedom of the Media has in the past few years several times highlighted the uncontrolled proliferation of propaganda, which she has called the ugly scar on the face of modern journalism.⁵ This proliferation should however not lead to state involvement in media content or restrictions on freedom of expression.

³ See point 26 of the Charter for European Security, adopted at the Istanbul Summit of the OSCE, 1999. http://www.osce.org/documents/mcs/1999/11/17497_en.pdf

⁴ Mandate of the OSCE Representative on Freedom of the Media 1997, Point 2. <http://www.osce.org/pc/40131>

⁵ Like in the *Regular Report to the Permanent Council* 27 November 2014 (p. 3).

III.3 Article by article analysis

Article 1

The purpose of the Concept is stipulated in Article 1 as “to ensure information sovereignty and identify approaches to protecting the national information space in order to provide a comprehensive information support for Ukrainian people.”

Article 2

In the definition of terms – Article 2 - a wide definition is made of information security. This is good, as this notion can include many different things, some of which are difficult to define in a narrow way given the rapid technological developments that may add new issues as well as new threats. In some other definitions, the aim of the Concept to protect Ukrainian interests has led to definitions that are not neutral. Mainly this applies to the definition of Ukraine’s Information Sovereignty. This is a programmatic definition and it is unclear what it actually adds as far as normative content is concerned. It is a very important term as the Concept has as a key role to protect this same Information Sovereignty. This concept of information sovereignty is not a notion that is well known or used in international legal contexts. Just like the real extent of sovereignty in a modern, interconnected world is a matter of much discussions among academics as well as practitioners, the concept related to information is even more complex. An unclear definition could potentially be misleading. Although each country has the right to define its media policy, in societies with freedom of expression, in today’s interconnected world this should not mean limiting media content from other countries. The definition looks like it could be interpreted to have such effect and this could be exacerbated by the different places in which the Concept protects the wide-reaching Information Sovereignty.

It would be better not to define this term and later say that this is what is to be protected, but rather to say explicitly in the normative provisions what it is that should be protected. In this way it is possible to avoid that information sovereignty is too widely interpreted.

In the definition of cybercrime the words “socially dangerous” appear superfluous. If the action is a crime under Ukrainian law, the legislator has made an assessment that it should be punishable and presumably it is socially dangerous so there is no need to repeat this here. It can be misleading to do so, as it may look like it is up to the application of this law to determine if something is socially dangerous or not.

Article 3

Article 3 on the legal basis and on the role that the Concept will fulfil adds to the unclarity about the nature of the Concept. The second paragraph states: *This Concept serves as the basis for designing and approving strategies, programmes and plans that set out objectives, principles and lines of action of Ukraine’s information security practitioners.* As such programmes and plans, provided these are binding documents, must be based on law and it is not clear if the Concept has the nature of a law, the respective influence of law and of the Concept is unclear. It would be best to explicitly explain the nature of the Concept, preferably in the very beginning of the document or otherwise in this Article.

Article 4

The two dimensions of Article 4 on how to ensure information security are fine, with perhaps some difficulty to differentiate what actions may fall under one or the other. Also the points 1 and 2 of the Article appear a bit overlapping, which may be the intention (activities of authorities and general principles) but the formulation makes it not fully clear.

Article 5

Article 5 includes a long list of fundamental principles of Ukraine's information security. After this Article, Chapter II of the Concept is also entitled Fundamental Principles and sets out more detail about some of these issues. The principles start with rule of law and protection of human rights and freedoms. This is important, as these principles – including international provisions on freedom of expression – are thus clearly to play an important role for interpretation of the Concept. Having this in mind means that the possible restrictions set out elsewhere must be seen through the prism of freedom of expression and not be disproportional. Even so, it is not good to build in complicated interpretation issues in the legal text so potentially ambiguous terms in the Concept should be amended.

The principles include timely and adequate protection of vital national interests against real and potential information security threats and protection of Ukraine's information sovereignty. This is acceptable even if protection against potential threats is not a very good formulation as such protection can risk becoming disproportionate. Trying to protect against potential threats is very difficult in practice.

After this, freedom of thought, freedom of speech and free expression of opinions and convictions is specifically mentioned – in addition to the general provision of human rights mentioned above. Although there is a certain overlap here and it is not clear why it is necessary to mention these rights in slightly different words in separate points, it further emphasises the importance of freedom of expression so it is nevertheless positive as it underlines what is said above about how freedom of expression and related freedoms will be essential for interpretation. The freedom of expression is clarified by the point on freedom to collect, store, use and disseminate information. It is followed by privacy, namely protection against interference with the private and family life of an individual. The possible conflict between these different rights is well known and something that has to be solved in each individual case. Access to information only by operation of law is mentioned, which is a somewhat confusing expression as it sounds as if access to information is limited. As previous points have stressed freedom of information it sounds a bit contradictory but this could be an unfortunate expression or even due to translation – it is presumed all that the point refers to is that there shall be a law setting out details of access to information: procedures and similar.

Further points include harmonisation of personal, public and national interests with responsibility of the entire Ukrainian nation for ensuring information security; delineation of authority, interaction and responsibility of the state and non-state information security practitioners; priority of development and expansion of information technologies, products and services, ongoing improvement of information transmission channels in terms of quantity and technical quality. These points express multi-stakeholderism and how the issues covered affect many different interests, which is in line with modern thinking on the issue.

Next the employment of international and collective security systems and arrangements to ensure Ukraine's information security is mentioned as well as harmonisation of information legislation with the rules of international law and EU regulations. The exact content of this will depend on each situation. The international legal situation is not very well established but is being defined constantly. It is positive to indicate that Ukraine will form part of the efforts of the international community in this context. More specific points are also mentioned, like building a dual system of public service and commercial broadcasting, which is positive.

Some principles however give raise to some concern as they may be interpreted in a manner that is restrictive to freedom of expression. This does not have to be the case and as all principles should be seen as a totality, the strong emphasis of freedom of expression above should guarantee against this. However, it is important to point to possible risks. Such principles that may be worrisome include protection of information sovereignty, national sovereignty, constitutional order and territorial

integrity of Ukraine; construction of Ukrainian identity in the information space, such identity being an integral part of politico-social discourse; and promoting development of the content in the information space to safeguard and protect universal human values, as well as intellectual, spiritual and cultural potential of Ukrainian people. The content of the principles is legitimate but their strong emphasis on national identity indicate that they may be interpreted to limit foreign content or foreign subjects in Ukrainian media as well as to prescribe a certain interpretation of what is Ukrainian identity.

This reviewer is well aware of the threats posed by propaganda. It is undisputable that to counter bad speech with good speech, i.e. to not limit media content through law or regulatory action but instead to combat it with facts and a free discussion, is a slow and frustrating method. At the same time, it is the only way to maintain real freedom of expression and to stay on the moral high-ground of not doing the same as those one wants to oppose. By setting out to defend Ukrainian interests – which is a legitimate and understandable aim - there is a danger that equally legitimate discussions in media (for example about what Ukrainian identity is), pluralistic Ukrainian voices (including those of national minorities) and relevant international content are blocked. If properly interpreted and applied, the provisions do not have to pose a danger, but the current tense situation is not one in which it is recommendable to give authorities ambiguous tools for limiting freedom of the media. The unclear nature of the Concept underlines this risk.

To spell out directly what the concern is: There is nothing wrong with protecting national interest but although the provisions are acceptable as such, they open the door to be used to restrict media content that is not in line with official views. National interests should not be seen as the same as official, government interests. The provisions do not have to be used in this way, if those who interpret them do it in light of freedom of expression, but if the Concept is seen as a tool in a propaganda war, there is a real danger that the interpretation will not be neutral and objective.

Article 6

Part II of the Concept is entitled Fundamental Principles of the National Information Security Policy. It states as a focus (Article 6) to meet vital information interests and needs which includes production, consumption, dissemination and development of national strategic content as well as the functioning of the infrastructure. As far as a secure and functioning infrastructure is concerned, it is clear that this is of importance for the state. The first point on strategic content raises a question what exactly work towards this on behalf of the state shall entail. Creating media content should not be a state task. A pluralistic and free media market shall cater for content, with public service media complementing private media and in addition access to international media. The legislation should enable this. Depending on the content of the rest of the Concept as well as other laws, the provision in point 1 of Article 6 may just be seen as a legitimate restatement of the importance of the mentioned issues, a programmatic statement. It may however also amount to a statement of intent that restricts a free media market through excessive state involvement.

Article 7

Article 7 similarly gives raise to certain concern. The first point speaks of the importance of balance between constitutional rights and freedoms and state policy related to prevention of threats. This balance is important and something each state has to deal with. Evidently in times of crisis this is more difficult and it is inevitable that the security aspects may have prevalence. This does however not reduce the importance of proportionality and necessity of any restrictive measures. The formulation in the Article appears to indicate that the need for restrictions may be given special prominence. Even just the fact of spelling out this balance - which already follows from the European Convention on Human Rights (ECHR) and other international instruments - underlines the impression

that the legislator wants to provide the courts and other implementing authorities with a tool to defend limitations.

To avoid such a perception it is recommended not to introduce new provisions. Existing human rights and freedoms allow for some limitations and it is better to emphasize the proper and proportional application of these.

Article 7 point 2 stipulates the establishment of a regulatory framework in line with European norms. The provisions in point 3 on harmonising the national information space should be seen in this light: there will be regulation in line with best European practice, under a policy developed by the government and/or parliament but with regulation being independent and non-political. The statement on cooperation between different stakeholders is positive.

As with many other Articles in the Concept, Article 7 also contains both good and bad provisions – both such which strengthen introduction of European norms and practices and such which may create obstacles to a free media market.

The statement that comprehensive assistance, government support and priority shall be given to designing and distributing the national information product, including beyond the boundaries of Ukraine raises questions of suitability of such support in a market economy. In the EU such provisions would risk falling foul of state aid law. Even if Ukrainian state aid law is not necessarily (fully) in line with EU law, also in Ukraine any state assistance needs to be in line with law. This is very important from an anti-corruption viewpoint as any state support to the private sector needs to be transparent, non-discriminatory and based on law. As direct state involvement in creating media content is not to be recommended the given Article presumably mainly aims at supporting private companies. In any event it looks like excessive interference in media by state resources.

The final point of Article 7 is entirely political: “using Ukraine’s national information product for the promotion of universal human values in the international information environment and information development of humankind, in particular exchanging visions, approaches and mechanisms with Ukraine’s foreign partners to address contemporary challenges instigated by destructive policies of other countries and targeted at undermining democratic values and freedom of expression in the information space.” It is not easy to see how such a statement can be normative without excessive intervention in media by the state. If the state itself is to ensure this content of its media, this points to excessive interference but also if the intention is to ensure that private media provides certain content, this is also interference. A pluralistic media environment with editorial freedom will provide different types of content and such pluralistic content should be allowed, provided it does not bypass the limits of incitement or other legal provisions on content (like defamation, prohibited pornography and so on).

Article 8

Article 8 explains what the information security threats are and what to do about them. A mixture of technical and content related threats are mentioned. The description of content related threats is an attempt to describe propaganda. There is no generally accepted description of propaganda in international law and the reasons for this are understandable. It is very difficult to express in clear and normative language what propaganda is, not least as we are all likely to be more inclined to find that a message we disagree with is propaganda whereas a message we agree with is seen as legitimate. Freedom of expression protects also disagreeable expressions. It is very important for the freedom of expression that there is no quality or opinion requirement to see what is allowed and what not. Any attempt to classify messages in order to be able to prohibit them leads very close to the dangerously thin line between censorship and legitimate regulation. The wording of Article 8 shows clear examples of such dangers. Apart from the fact that it takes profound expertise and objective studies of psychology to determine how various messages affect different groups, a statement like “influencing

freedom of choice by cultivating a culture of violence and cruelty, insolence and contempt for human and national dignity, inciting religious, racial or ethnic hatred and discrimination based on any ground such as ethnic origin, language, religion, etc.” is full of potentially subjective messages. Incitement to hatred and violence is already prohibited by national and international law and what additional legitimate content this point holds is not easy to see.

Point b on impairing defence readiness may be seen as corresponding to existing provisions in humanitarian law.

The most objectionable point is however c):”dissemination of corrupted, unreliable and prejudicial information by subjects of information activity to discredit public authorities and destabilize social and political situation, significantly complicating political decision making, inflicting harm on national interests or creating a negative image of Ukraine”. This would have the effect of seriously undermining the watchdog role of media by having a chilling effect on the free criticism of public authorities. It directly contravenes freedom of expression as in any free society, media is allowed to project whatever image it wants of a country, authorities etc. Such negative images shall be countered by different messages in a climate of free discussion and debate.

It is evident that what has called for this Concept to be drafted is the massive onslaught of state-sponsored Russian propaganda on Ukraine (as well as many other countries). Without denying this situation or being complacent about it, Ukraine must still be strongly advised not to fall for the temptation of answering with the same kind, which regrettably is what this Concept appears to provide for. Article 8 bans a free airing of views by Ukrainian media and gives the state a mandate to use resources to project its vision of things. It would lead to Ukraine losing the moral high-ground that freedom of expression gives. Battling propaganda against propaganda is never successful but leads to a downward spiral in which people stop trusting media and just presume that whatever they hear and see is adjusted to cater for one message only. This is not saying that the Ukrainian authorities intend to create such a negative situation for free media, but by providing tools that allow for such a situation to arise, they have already started on a dangerous slippery slope.

Provisions later in Article 8 appear to suggest that the Concept should indeed be interpreted in a manner that respects best European and international practice by setting out tools for implementing the policy such as ownership rules and the need for regulation. However, the mixing in of demagogic language clouds the picture. “Manipulating public opinion” is not a normatively clear phrase as it is almost impossible to satisfactorily explain how this differs from any political speech? There are many more important tools of a good media regulation like for example the importance of making a clear distinction between fact and opinion and requiring news to be objective.

As for the technical threats the situation here is a bit different as it allows for a more objective interpretation, At the same time, also here some matters are not easy to define (like exerting destructive information influence).

The content of Article 8 highlights yet again the unclear nature of the Concept. It lists a number of matters of concern, some that are dealt with in law and some in regulation – others that are more of a policy nature or that may not have been explicitly addressed before. It is very difficult what if anything this Concept actually adds to deal with the mentioned issues.

Article 9

Part III of the Concept is entitled Ukraine Information Security Practitioners and Mechanisms and deals with institutional issues. Article 9 defines all the “practitioners” that include also citizens and civil society institutions together with officials, mass media and different institutions. The Article appears to exclude foreigners, which is not in line with best international practice. Even if some rights apply differently to citizens than to foreigners, basic rights such as freedom of expression shall be

guaranteed also for non-citizens. It is not clear why Article 9 is needed at all, as it would be sufficient to ensure that everyone is guaranteed the rights relevant under the Concept given their different roles and positions. Duties and powers of institutions that have special roles under the Concept can be set out (like in Article 10) but the very basic participation of everyone in the communications sphere can be implied.

Article 10

Article 10 paragraph 2 lists the main practitioners of the information security policy. The term “practitioners” may be a bit misleading (which could also be a translation issue) as it would be presumed that the bodies mentioned have the responsibility for implementing the policy and monitoring its implementation, so a term or phrase that clearly reflects this would be better.

Article 10 sets out the tasks of the National Security and Defence Council of Ukraine in relation to information security. It has a wide mandate, including drafting law and exercising control over other authorities. There are some provisions in Article 10 that give raise to concern, primarily the last point of paragraph 1: “specifies the state of information aggression and proposes to the Verkhovna Rada of Ukraine to introduce a special legal framework for the protection of the national information space.” The term “information aggression” is difficult to define as there are no accepted international legal definitions of such a term. In any event, additional special legislation should be avoided as a proper implementation of existing laws is to be preferred.

The other paragraphs in Article 10 set out the different organs responsible for information security (see above) and the role of central executive authorities related to drafting as well as various educational and empowering activities. Paragraph 5 lists different authorities in the communications sphere with which the central executive authorities shall communicate including the broadcasting council, the telecommunications regulatory authority and the self-regulatory authority. It is good to clearly stipulate the need for such cooperation. The actual need for a concept such as this is not very clear, as mentioned, but if special tasks related to communications with a big role for executive and security authorities is set out, it is important to ensure that the legitimate role of regulatory and self-regulatory organs is not diminished by such a policy.

Article 11

Article 11 outlines the implementation mechanisms of the Concept. The implementation is to be done through regulations. The Article lists in details different organs responsible for different tasks in this respect. It would appear that this Article sufficiently explains the role of different actors in order to implement the Concept and could be the only Article under section III that is required. Point 9 of Article 11 lists a number of programmes that are to make up the regulations that implement the Concept. It is not known if these are (partly) existing programmes or all to be created (in accordance with point 10). The programmes are on valid issues and provided these programmes are elaborated taking into account freedom of expression, the right to privacy, proportionality and necessity of any limits to rights and freedoms and other best international principles, the spirit of the Concept could be positive. It is presumed that all the mentioned programmes will be in line with Ukrainian law that guarantees the rights and freedoms. The style of drafting, without mentioning applicable law, is a bit strange and contributes to the actual nature of the Concept remaining somewhat vague. Most likely in practice it is not necessary to start from scratch with all the mentioned issues, but there is a framework of not just laws but also regulations and other acts to consider.

The work on this report has not permitted to study all relevant Ukrainian legislation but it needs to be stressed again that it is essential to clarify the status of the Concept as well as the role that it gives different organs, so that this does not contradict existing law and tasks of existing organs. Changes introduced through this Concept need to be properly evaluated against existing legislation, which can

be difficult given that several principles set out in the Concept are not clear. Point 11 of the Article mentions the need for coordination but the picture is nevertheless not clear,

Article 12

The following section, Section IV is on “Non-Governmental Monitoring of and Public-Private Partnership for Implementation of the National Information Policy and Information Security”. Article 12 on non-governmental monitoring refers to other rules in regulations on community councils and according to paragraph 2 of Article 12 it must be “in the forms prescribed by the National Security and Defence Council of Ukraine, such forms being not at variance with applicable laws of Ukraine concerning non-governmental monitoring”. This analysis does not allow for an in-depth analysis of the rules for community councils or generally for non-governmental monitoring but nevertheless the provision gives raise to some concern. There should not be any restrictions on activities of non-governmental organisations apart from what follows from general (criminal or other) law. When it comes to monitoring state activities, it is difficult to see what restrictions there could be in law. The watch-dog function of not just independent media but also of non-governmental organisations is very important in democratic states. No special form should be prescribed for how non-governmental organisations carry out their tasks, whether this includes keeping an eye on how public bodies carry out their functions or anything else. The provision looks a bit like it suffers from a common ill in transition societies, namely forgetting that everything which is not prohibited is allowed and thus does not need to be set out in law.

Article 13

Article 13 is of a different nature as this provision sets up special Expert Councils as a method to involve civil society in the monitoring of the Concept. This is positive although the absence of any guarantees that the Councils will really be independent deflects from the positive impression. There is a mention of who the members shall be but nothing on their appointment that would ensure that they are independent representatives of civil society. It is also not clear what the nature of the proposals and reports is, if these are binding and in that case for whom and how are they to be taken into account?

The Article is a positive attempt to ensure oversight of the activities set out in the Concept but it does not solve issues of confusion of the nature of the Concept and the role of various organs in the communications sphere following from the Concept or from legislation, nor is the oversight sufficient to reduce risks of excessive public control over media content or other risk with the Concept, as set out above.

Final Provisions

In the final provision it is mentioned that several laws are to be amended to be brought into line with the Concept. This adds to the unclarity about the nature of the Concept, how it can alter laws. It also appears as if the above-mentioned programmes are to be introduced through law so it is not clear if the actual programmes will have the nature of law.

This criticism and emphasis on the nature of the Concept is not just a comment on terminology used or formalities for formalities sake. In any parliamentary democracy, the division of competence is essential and thus Government actions cannot change laws without a proper parliamentary procedure (apart from possibly in special cases set out in law – but such special procedures should not be excessively used). The importance of the status of the Concept and its relationship to existing legislation is extra important as it contains several provisions that could be used to limit freedom of expression and freedom of the media. The authority given under the Concept to the National Security and Defence Council could interfere with independent organs responsible for media regulation, which should not happen in a rule of law state with respect for freedom of expression.