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The honouring of obligations and commitments by Türkiye

Addendum to the report[1]
Co-rapporteurs: Mr John HOWELL, United Kingdom, European Conservatives Group and Democratic Alliance, and Mr Boriss CILEVIČS, Latvia, Socialists, Democrats and Greens Group

1. Introduction

1. We would like to provide updates on the latest developments relating to two main issues raised in our report of 14 September 2022.

2. Supervision of the execution of judgments of the European Court of Human Rights by the Committee of Ministers: latest decisions concerning the cases of Mr Kavala and Mr Demirtaş.

2. As mentioned in our report, the European Court of Human rights ruled on 11 July 2022 that "Türkiye has failed to fulfil its obligation under Article 46.1 [binding force and execution of judgments] to comply with the judgment delivered on 10 December 2019, which called on the Government to end the applicant's detention and secure his immediate release".

3. On 20-22 September 2022, the Ministers' Deputies, supervising the execution of the judgments of the European Court of Human Rights, "urged the competent Turkish authorities to eliminate all the negative consequences of the criminal charges brought against the applicant, in particular by ensuring that he is immediately released". The Deputies also invited the Turkish authorities to provide information "on the pending domestic procedures including indicative average timeframes, at the earliest opportunity, and in any event no later than 13 October [2022]".[2]

4. In addition, the Deputies "encouraged the Chair of the Committee of Ministers to discuss with the President of the Parliamentary Assembly of the Council of Europe on further steps that could be taken by the Committee if the applicant remains in detention".[3]

5. We welcome this decision, insofar as it is the first time that the Committee of Ministers refers to the Assembly in the supervision of the Kavala ruling. Both the Committee of Ministers and the Assembly have their own means to push for the implementation of Court judgments – and they should make full use of them.

6. In the case of Mr Kavala, where the Court found a violation of article 18 of the Convention, where it clearly and unequivocally concluded, in its Grand Chamber judgment (Article 46.4) of 11 July 2022, that the Turkish authorities did not implement the 2019 ruling, and where an infringement procedure was launched, the President of the Assembly and the Chair of the Committee of Ministers should discuss further action and envisage how and when additional steps should be undertaken. This could include the resort to the complementary joint procedure in response to a serious violation by a member State of its statutory obligations, as foreseen in the Rules of Procedure,[4] if Türkiye's failure to comply with its obligations should persist.

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1. Addendum to report Doc. 15618, approved unanimously by the committee on 10 October 2022.
2. Decision of the Deputies 1443rd meeting, 20-22 September 2022 (DH), H46-30, *Kavala v. Türkiye* (Application No. 28749/18).
3. Ibid.

7. Concerning the case of Mr Demirtaş, the Deputies await "further information on this issue (…) before the Committee can make its decisive assessment on the individual measures required to remedy the violations found by the Court". However they noted "with the utmost concern that his individual application challenging his current detention has been pending before the Constitutional Court since 7 November 2019 and underlined the urgent need that the applicant's complaint be examined rapidly, and in a manner compatible with the spirit and conclusions of the Court's judgment, including in particular its reasoning under Article 18 of the Convention" and "strongly urged the Turkish authorities, again, to assure the applicant's immediate release, underlining that Mr Demirtaş has now been held in pre-trial detention since 4 November 2016".[5]

3. Preparation of the 2023 presidential and parliamentary elections: opinion of the Venice Commission on the draft amendments to the Turkish Penal Code regarding the provision on "false or misleading information"

8. In paragraph 123 of our report, we expressed our concerns – especially in the context of the upcoming presidential and parliamentary elections in 2023 – about a bill submitted to parliament on 26 May 2022 criminalising "disinformation". Those who "publicly disseminate false information about the country's domestic and foreign security, public order and general health, with the sole aim of creating anxiety, fear or panic among the public and in a manner that is liable to disturb public peace"[6] could face prison sentences of one to three years.

9. At its meeting of 14 September 2022, the Monitoring Committee decided to request an opinion from the Venice Commission on the draft amendments to the Turkish Penal Code regarding the provision on "misleading information". The Venice Commission published an urgent opinion on 7 October 2022.[7] We thank the Venice Commission for having prepared it in due time for our debate in the Assembly.

10. The Venice Commission notes that the concepts used are very confused, and that the draft amendment contains several terms, notably "misleading information", "false information to mislead," "publicly disseminating" (or "overtly disseminating"), "disturbance of the public peace", "general well-being" (or "public health" or "general health"), "in a way conducive", which are "very broad and vague, and open to different interpretations". In addition, the confusion surrounding the meaning of the terms in the original version and in the different translations confirms that these terms are not 'sufficiently clear'".[8] There is no definition of "false or misleading information" in Turkish law. The authorities indicated that "the decision as to whether a content entails misleading, false information will be taken by the courts, which will avail themselves of expert witnesses". However, the Commission notes in this respect that there are "no criteria in the law against which the expert witnesses could make this assessment objectively and consistently". The Venice Commission therefore recommends that the criteria to assess the authenticity of information be included in the law.

11. The Venice Commission has made a comparative study about legislation in place in several countries.[9] The European countries cited (by the Turkish authorities) as inspiration for criminalising "false or misleading information" "have not actually done this, but rather introduced obligations on internet platforms regarding illegal contents".

12. The Venice Commission acknowledges that the draft amendment pursues a legitimate aim: "information disorder (misinformation, disinformation and malinformation) is indeed one of the important issues of these days" and that "there is globally a need to tackle the serious problems of disinformation campaigns, with presumed impact on election results and subsequently on governments and the constitutional order of states".

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4. See the Assembly Rules of Procedures and Resolution 2319 (2020) "Complementary joint procedure between the Committee of Ministers and the Parliamentary Assembly in response to a serious violation by a member State of its statutory obligations".
5. Decision of the Deputies, 1443rd meeting, 20-22 September 2022 (DH), H46-29, *Selahattin Demirtaş (No. 2) group v. Turkey* (Application No. 14305/17).
6. Translation based on the official text registered in parliament as of 7 October 2022. CDL-PI(2022)032, para.10.
7. Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Penal Code regarding the provision on "false or misleading information", CDL-PI(2022)032. This urgent opinion will be presented to the Venice Commission for endorsement at its 132nd plenary session (Venice, 21-22 October 2022).
8. The urgent opinion makes reference to two different versions of translations being provided by the authorities (on 26 September and 7 October), and another version of the text published on the parliament's website.
9. The Venice Commission has examined the legislation in place in Germany, France, Sweden, Greece, Russian Federation as well as Tunisia and at EU level, and the legislation in preparation in the United Kingdom.

13. For the Venice Commission, "in light of the existence in the Turkish legal system of legislation targeting the most dangerous aspects of 'false or misleading information', so serious as to qualify as offence to national security, public order and safety", there is "no pressing social need to introduce the criminal provision at stake, and further open the door to possible threats and arbitrary restrictions of freedom of expression."

14. The question of liability of the journalist quoting someone else's statement and whether intermediaries (internet service providers, ISPs) and social media platforms might "disseminate" "false or misleading information" in the meaning of the draft provision (and if so, under what circumstances) are important, and "should be answered directly in the law. Moreover, it would prevent excessively broad application of the law that would violate Art. 10 of the Convention". The Venice Commission also stresses the need "to affirm and protect the right to anonymity on the internet, regulate and strictly limit the creation and use of profiles. It is also essential to ensure easy access by users to their personal data in hands of the ISPs, including personal data for the information they reveal relating to political opinions in particular".

15. As to the severe penalties envisaged (from 1 to 3 years of prison), even if, under Turkish law convictions of less than three years do not normally result in imprisonment, as indicated by the authorities,[10] the Venice Commission stresses nevertheless that, "irrespective of actually being imprisoned, a criminal conviction is a serious matter which also affects the criminal record of a person with ensuing limitations and adverse effects".

16. The Venice Commission concludes that "the chilling effect of this draft provision with the heavy sanctions is likely to lead to widespread self-censorship in a country that is already struggling in an environment hostile to an open, robust public debate. In addition, the liability of online platforms and other intermediaries as major means of dissemination of information will inevitably amplify the impact of the (self-)censorship".

17. Another aspect rightly pointed out by the Venice Commission is that "although it may be possible, in principle, to seize the Constitutional Court of Türkiye to assess the constitutionality of the Penal Code amendment, if enacted, its judgment cannot be expected earlier than the elections take place. The harm to the exercise of freedom of speech before elections would be then irreparable even if the Constitutional Court of Türkiye later ruled on its unconstitutionality."

18. Noting that "there exist alternative, less intrusive measures than criminalisation designed to counter the information disorder which are considered by several other states to be effective", the Venice Commission has therefore "serious doubts regarding the necessity in a democratic society of the criminal response to 'false or misleading information' envisaged with the draft amendment in question".

19. The Venice Commission therefore concludes that "the interference with the freedom of expression which the draft provision under consideration would produce in Türkiye if enacted would neither be 'necessary in a democratic society' nor proportionate to the legitimate aims of prevention of disorder and protection of national security, of health and of rights of others". In addition, the Venice Commission is particularly concerned with potential consequences of such provision, namely "the chilling effect and increased self-censorship, not least in view of the upcoming elections in June 2023". It subsequently recommends the Turkish authorities "not to enact the draft amendment of Art. 217/A to the Turkish Penal Code".

20. On 4 October 2022, the parliament started to debate this draft "disinformation bill", including the amendment to the Penal Code on "false or misleading information". This triggered renewed protests by the opposition and by journalists. In light of the urgent opinion of the Venice Commission, we reiterate our deep concerns about the possible impact such legislation could have on pluralistic and free debates, especially ahead of the 2023 presidential and parliamentary elections, and therefore urge the parliament not to enact this draft amendment.

4. Proposed amendments to the draft resolution

21. As a result of the above-mentioned developments, we would like to propose the following amendments to the draft resolution on the honouring of obligations and commitments by Türkiye (Doc 15618):

10. Comments submitted by the Turkish authorities on 6 October 2022 regarding the draft urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Penal Code regarding the provision on "false or misleading information", CDL-REF(2022)043.

Amendment A

After paragraph 8.2, add the following paragraph:

> *"In this respect, the Assembly welcomes the decision of the Ministers' Deputies of 22 September 2022 related to the implementation of the Kavala judgment and its reference to the Assembly. It invites the President of the Assembly and the Chair of the Committee of Ministers to maintain close contacts and make full use of the means at their respective disposal, if Türkiye's failure to comply with its obligations should persist."*

Amendment B

At the end of paragraph 8.4, add the following sentence:

> *"The Assembly also urges the authorities to ensure that Mr Demirtaş' individual application challenging his current detention, which has been pending before the Constitutional Court since 7 November 2019, be examined rapidly, and in a manner compatible with the spirit and conclusions of the Court's judgment, including in particular its reasoning under Article 18 of the Convention, as recalled by the Committee of Ministers on 22 September 2022."*

Amendment C

In paragraph 10.7, replace the last two sentences with the following text:

> *"The Assembly is concerned by the draft amendment of Article 217/A to the Turkish Criminal Code that would criminalise the dissemination of "false or misleading information" and lead to prison sentences. For the Venice Commission, such amendment would amount to an interference with the freedom of expression which would 'neither be "necessary in a democratic society' nor proportionate to the legitimate aims of prevention of disorder and protection of national security, of health and of rights of others". Beside its potential detrimental impact, namely, the chilling effect and increased self-censorship, this amendment could cause irreparable harm to the exercise of freedom of speech before elections. The Assembly is therefore very concerned about the possible consequences of this legislation in view of the presidential and parliamentary elections planned in 2023 and urges the Turkish authorities, in light of the Venice Commission's urgent opinion of October 2022, not to enact this draft amendment to the Criminal Code."*