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Russia

**WRITTEN COMMENTS OF MLDI AND MMDC SUBMITTED IN
ACCORDANCE WITH RULE 44 (3) OF THE RULES OF COURT**

Introduction

1. These Written Comments are provided to the Court by Media Legal Defence Initiative (“MLDI”) and Mass Media Defence Centre (“MMDC”) (“the Intervenors”) pursuant to Rule 44 (3) of the Rules of the Court, and with the permission of the President of the Third Section.¹ In accordance with the grant of permission, the written comments are addressed solely to questions of principle raised by the case and do not seek to offer submissions or analysis in respect of its particular facts.
2. An independent, diverse press is one of the cornerstones of a democratic society.² The proper functioning of a democratic society requires that the press be free, active, and inquiring. The Court has long recognised the fundamental importance of press freedom. In *Castells v. Spain*, in the context of political discussion, it emphasised that the “pre-eminent role of the press in a State governed by the rule of law must not be forgotten. (...) Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of a democratic society.”³ The Court has often recognised the particular importance of the free press in reporting on extremist or controversial views or behaviour. Reportage in respect of such views is to be distinguished from the promotion or validation of such views.⁴ Although Article 10 of the Convention provides for restrictions on the right to freedom of expression, any such restriction must be proportionate and no more than necessary to promote the legitimate object of the restriction. Media regulation⁵ is a form of restriction on the exercise by the press of its right to free expression. Whether it is a legitimate restriction will depend on the nature of such regulation.

¹ Communicated to the Intervenors by letter dated 10 February 2017.

² *Goodwin v. the United Kingdom*, 22 E.H.R.R. 123 (1996), par. 29; *Jersild v. Denmark*, Application No. 15890/89 (23 September 1994), par. 31.

³ *Castells v. Spain*, Application No. 11798/85 (23 April 1992), par. 43.

⁴ *Jersild v. Denmark*, par. 31.

⁵ For the purposes of this intervention, “media regulation” refers to the process by which a range of specific, often legally binding, tools are applied to media systems and institutions to achieve established policy goals such as pluralism, diversity, competition, and freedom. This type of regulation consists of the deployment of

3. These Written Comments are made against the backdrop of disquiet about the increase in attacks on press freedom within the territory of the Council of Europe. The Council of Europe has expressed its deep concerns about the state of freedom of expression and media freedom in Turkey,⁶ Russia⁷ and Azerbaijan.⁸ A common factor in these countries is the existence of a regulatory body that is effectively controlled by the government.
 4. Threats to the democratic function of an independent and diverse press can take many forms, including through government controlled regulation. These Written Comments focus on media regulation and its implications for the right to freedom of expression. The Intervenors make three principled observations:
 - I. That media regulators that are not independent of government may facilitate arbitrary abuse of the right to freedom of expression, and that self-regulation is the most appropriate, and least restrictive, means of regulating the press under Article 10 of the Convention.
 - II. That warnings issued by media regulators can have a chilling effect on both journalists and media organisations. This chilling effect should be treated as a weighty factor in the assessment of proportionality of any restriction of Article 10 of the Convention.
 - III. That *Roskomnadzor* is a state-controlled media regulator which has enabled arbitrary abuse. Its use of warnings has a severe chilling effect on the Russian press.
- I. Media regulators that are not independent of government may facilitate arbitrary abuse of the right to freedom of expression.**
- (a) The functions of media regulators interfere with the right to freedom of expression*
5. The functions of a media regulator may include control over the licensing regime for the media, oversight of media registration or accreditation, and monitoring compliance with an ethical code of conduct for the media. Measures adopted pursuant to these functions all amount to interventions in the activity of media outlets, and therefore interfere with their right to freedom of expression under Article 10 of the Convention.
- (b) Agencies responsible for media regulation must be independent*
6. Given the impact media regulation can have on media freedom under Article 10 of the Convention, it is imperative that the agencies responsible for such regulation be independent.

formal statutory rules laid down by public authorities (for example, quotas, content requirements, or ownership restrictions) as well as more informal codes of conduct developed and implemented by media organisations in conjunction with the state.

⁶ *Resolution of the Parliamentary Assembly of the Council of Europe on the functioning of democratic institutions in Turkey*, Resolution 2121 (2016) (22 June 2016), par. 20-29. See also Commissioner for Human Rights, *Memorandum on freedom of expression and media freedom in Turkey* (15 February 2017), <https://goo.gl/tYdCct>. Both the European Commission and the UN Special Rapporteur on the right to freedom of opinion and expression have expressed similar concerns and alarm, in particular regarding measures taken under the state of emergency, see European Commission, *Commission staff working document, Turkey 2016 Report* (9 November 2016), <https://goo.gl/4PPAhE>; and Preliminary conclusions and observations by the UN Special Rapporteur on the right to freedom of opinion and expression to his visit to Turkey (14-18 November 2016), <https://goo.gl/j9FNca>

⁷ *Resolution of the Parliamentary Assembly of the Council of Europe on attacks against journalists and media freedom in Europe*, Resolution 2141 (2017), <https://goo.gl/7dokNd>; see also Commissioner for Human Rights, *Russia: Commissioner cancels visit to the country because of unacceptable restrictions imposed to his programme* (11 October 2016), <http://www.coe.int/hy/web/commissioner/-/vy>.

⁸ See Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, *Information note by the co-rapporteurs on their fact-finding visit to Baku and Sheki (19-21 May 2014)* (25 August 2014), <https://goo.gl/DDIQfJ>.

This is reflected in the international consensus among human rights bodies that states should secure the independence of media regulators in order to safeguard the right to freedom of expression. This is irrespective of whether these regulators are responsible for the broadcast, audio-visual, or print media.

7. The importance of independence of media regulators for safeguarding the right to freedom of expression has been explicitly recognised by the Committee of Ministers of the Council of Europe, which observed that:⁹

“States have a positive obligation to guarantee pluralism in the media sector, which entails ensuring that a diversity of voices, including critical ones, can be heard. Independent media regulatory authorities can play an important role in upholding media freedom and pluralism and States should therefore safeguard their independence.”

8. The crucial importance of ensuring that the appointment of members to these bodies is free from interference by a particular group was also addressed by the Committee of Ministers of the Council of Europe, which suggested the following rules to ensure independence: (i) members of the authorities should be appointed in a democratic and transparent manner; (ii) appointees may not receive any mandate or take any instructions from any person or body; and (iii) appointees should not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.¹⁰
9. In regard to regulators responsible for broadcast media more specifically, the Committee of Ministers of the Council of Europe has remarked that “it is important that member States should guarantee the regulatory authorities for the broadcasting sector genuine independence”.¹¹ In *Gaweda v. Poland*, a case concerning requirements under Polish law that a periodical register with the judiciary prior to publication, this Court noted that entrusting the task of registering periodicals with an “independent tribunal” was a “valuable safeguard of freedom of the press.”¹²
10. Consistent with the approach of the Council of Europe, the Council of the European Union’s Human Rights Guidelines on Freedom of Expression Online and Offline state that media pluralism and the right to freedom of expression require that media regulators be free from government or political influence. In its guidelines, the Council of the European Union notes that:¹³

“Regulatory activity should not be used to shape the media landscape to the taste of specific interest groups or the incumbents in power, excluding other groups or positions from the public debate. (...) The independence of regulatory bodies from governmental influence is a vital condition for free and independent media to flourish. (...) National regulatory bodies should be free from direct political interference and should have a positive obligation to protect human rights, including freedom of expression.”

⁹ Committee of Ministers of the Council of European, *Recommendation on the Protection of Journalists and the Safety of Journalists and Other Media Actors*, CM/Rec (2016)4, <https://goo.gl/Lv7zom>, par. 15.

¹⁰ Committee of Ministers of the Council of Europe, *Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Section*, CM/Rec (2000)23, Appendix, par. 5.

¹¹ *Id.*, Preamble.

¹² *Gaweda v. Poland*, Application No. 26229/95 (14 March 2002), par. 47.

¹³ Council of the European Union, *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, Brussels (12 May 2014), <https://goo.gl/ydaLp3>, Annex 1, p. 17.

11. In the European Union’s Audiovisual Media Services Directive, it is also envisaged that agencies with regulatory oversight over the audio-visual media will be “competent independent regulatory bodies”.¹⁴
12. This principle has also been recognised by international and regional human rights mechanisms outside of Europe. The Inter-American Commission has stated that it is “fundamental that bodies with oversight or regulatory authority over the communications media be independent of the executive branch, be fully subject to due process and have strict judicial oversight.”¹⁵ The African Commission has stated, in its Declaration of Principles on Freedom of Expression in Africa, that “[a]ny public authority that exercises powers in the area of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.”¹⁶
13. The UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression, and the OSCE Special Representative on Freedom of the media have jointly declared that:

“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.”¹⁷
14. In light of the above, there is considerable agreement among international human rights mechanisms that bodies responsible for media regulation must be independent in order to comply with the obligations under Article 10 of the Convention. Media regulators that are not genuinely independent of government inhibit the right to freedom of expression, and may not provide adequate safeguards against arbitrary abuse of regulatory powers.

(c) Self-regulation is a less restrictive means of regulation under Article 10 of the Convention

15. It is evident that not all media are the same, and there may be different considerations that need to be taken into account when adopting a system of regulation over different types of media. The UN Human Rights Committee has gone so far as to state that “[r]egulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge.”¹⁸
16. Alternative systems of regulation have been developed to meet the responses required for different types of media. These systems range from self-regulation, to compulsory statutory regulation.
17. It is settled jurisprudence of this Court that interferences with the right to freedom of expression must meet a test of proportionality in order to be considered a justified interference under

¹⁴ European Parliament and Council of the European Union, *Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services* (10 March 2010), Article 4(7).

¹⁵ IACHR, *Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008* (25 February 2009), OEA/Ser.L/V/II.134. Doc. 5, Chapter III, par. 82.

¹⁶ African Commission on Human and Peoples’ Rights, *Declaration of Principles on Freedom of Expression in Africa*, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia, Principle 7(1).

¹⁷ UN Special Rapporteur on Freedom of Expression, OAS Special Rapporteur on Freedom of Expression, and OSCE Special Representative on Freedom of the Media, *Joint Declaration on regulation of the media, restrictions on journalists and investigating corruption* (19 December 2003).

¹⁸ UN Human Rights Committee, *General Comment 34, Article 19: Freedoms of Opinion and Expression* (12 September 2011), UN Doc. CCPR/C/GC/34, par. 39.

Article 10(2) of the Convention.¹⁹ The UN Human Rights Committee, in applying its proportionality test, has observed that restrictive measures “must be the least intrusive instrument amongst those which might achieve their protective function”.²⁰ The Interveners draw the Court’s attention to the pronouncements of European and UN human rights mandates supporting the position that self-regulation is one of the least intrusive means of regulating the media, particularly when compared to government regulation.

18. In 2001, the Committee of Ministers of the Council of Europe noted that;

“self-regulation has become an important and recognised mechanism for the media in avoiding restrictive State legislation on the dissemination of information through the media, especially on matters of decency and moral values which differ widely among individuals and States, while ensuring respect of certain standards, some actors of the new communications and information services have taken initiatives for the creation of their own self-regulatory mechanisms”.²¹

19. In November 2013, the Council of Europe Conference of Ministers invited the Council of Europe to “promote truly independent media in Europe based on effective self-regulation”.²² In doing so, the Conference of Ministers highlighted that self-regulation can promote media freedom.²³

“We agree that the independence of the media and media freedom – whether print, broadcast or online – require effective self-regulation. Undue State regulation, control and supervision of the media have negative effects in this respect, including individuals’ perception of media freedom.”

20. This has been echoed by UNESCO, which has noted the efficiency and cost-effectiveness of such a model.²⁴

Self regulation preserves independence of the media and protects it from partisan government interference. It could be more efficient as a system of regulation as the

¹⁹ *Sunday Times v. UK*, Application No. 6538/74 (26 April 1979), par. 62.

²⁰ UN Human Rights Committee, *General Comment 34, Article 19: Freedoms of Opinion and Expression* (12 September 2011), UN Doc. CCPR/C/GC/34, par. 34.

²¹ Committee of Ministers of the Council of Europe, *Recommendation on self-regulation concerning cyber content*, CM Rec (2001)8, <http://goo.gl/yKRhxl>, Explanatory Memorandum.

²² Council of Europe Conference of Ministers, *Political Declaration of The Ministers of States participating in the Council of Europe Conference of Ministers responsible for media and information society, held in Belgrade, Serbia, on 7 and 8 November 2013 : Freedom of Expression and Democracy in the Digital Age Opportunities, rights, responsibilities*, <http://goo.gl/b4xyld>, p. 12. The Council of Europe has been particularly active in promoting media self-regulation during the last twenty years. It adopted several documents designed to foster the development of such systems. In the *Resolution 2 of the 4th Ministerial Conference on Mass Media Policy* (Prague, 7 and 8 December 1994), the Ministers of member states agreed that a democracy requires the existence and strengthening of free, independent, pluralistic and responsible journalism and that all those engaged in the practice of journalism have the right to elaborate self-regulatory standards, see European University Institute, *Statutory media self-regulation: beneficial or detrimental for media freedom?* (December 2014), http://cadmus.eui.eu/bitstream/handle/1814/34047/RSCAS_WP_2014_127.pdf;sequence=1.

²³ *Id.*, p. 1.

²⁴ UNESCO, *The Importance of Self Regulation of the Media in Upholding Freedom of Expression* (Series CI Debates, N. 9 – February 2011, ISSN 2176-3224), <http://goo.gl/B6sjMs>, p. 12. See also the Council of Europe Commissioner for Human Rights who has stated that “[s]elfregulatory mechanisms within the media are of great importance as they can formulate their own criteria, monitoring and procedures aiming to promote and develop professional standards. Peer-agreed codes of ethics have proven themselves to be an effective benchmark and guideline of principles and standards of practice in achieving the highest standard of professional and credible journalism in many countries.” See Council of Europe Commissioner for Human Rights, *Positions on Freedom of the Media* (3 May 2010), CommDH/PositionPaper(2010)2, <http://goo.gl/wCyPD0>, p. 5.

media understand their own environment better than government (though they may use that knowledge to further their own commercial interests rather than the public interest). As the media environment becomes global (through the development of the internet and digital platforms) and questions of jurisdiction become more complex then self regulation can fill the resulting gap. It is less costly to government because industry bears the cost and can be more flexible than government regulation. Self regulation may also encourage greater compliance because of peer pressure (although there is also evidence that regulation or the threat of regulation is more likely to secure compliance). Self regulation can also drive up professional standards by requiring organisations to think about and even develop their own standards of behaviour.

21. Similarly, the former OSCE Representative on Freedom of the Media has indicated that media self-regulation is favoured as it preserves editorial freedom, helps to minimize state interference, promotes media equality, improves media accountability, and helps readers access the media.²⁵
22. Taking into consideration the Court's jurisprudence and the observations of the above-mentioned bodies, the Interveners respectfully submit that lighter regulation should be imposed on the press compared to other types of media. To this end, the Interveners highlight the fact that the press is not affected by a scarcity of frequencies or channels as with traditional broadcasting,²⁶ nor does it have as immediate and powerful an effect as audio-visual media.²⁷ With this in mind, the Interveners suggest that self-regulation is the most appropriate means of regulating the press as it is one of the least restrictive means of doing so.

II. The Impact of Press and Media “Warnings” on Journalistic Free Expression

23. State interference may include the use of a broad range of sanctions by state regulators, including the power to issue a warning. The Interveners submit that, as a matter of principle, the chilling effect of issuing warnings - even where no immediate consequences flow from such warning - can be particularly severe, and that this effect should therefore be treated as a weighty factor in the assessment of the proportionality of an interference.
24. The Court frequently exercises the most careful scrutiny where “measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern”.²⁸
25. Warnings are capable of doing exactly this: they are designed to put pressure on media outlets to refrain from reporting on certain sensitive issues as they expect that this might trigger another warning or lead to other consequences. This effect of warnings has been recognised by the Court in *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turquie*,²⁹ where an Istanbul radio station was given three warnings before its licence was twice suspended by the Turkish broadcasting regulatory authority. In this case, the radio station was accused of, among other things, broadcasting programmes liable to incite people to engage in violence, terrorism or ethnic discrimination or to stir up hatred. The Court held that the warnings

²⁵ OSCE Representative on Freedom of the Media Miklós Haraszti, *The Media Self-Regulation Guidebook* (2008), <http://goo.gl/YRLjKt>, p. 12.

²⁶ *Informationsverein Lentia and Others v. Austria*, Application No. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90 (24 November 1993), par. 39.

²⁷ *Jersild v. Denmark*, par. 31; *Pedersen and Baadsgaard v. Denmark* [GC], Application No. 49017/99 (17 December 2004), par. 79; *Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)* (10 March 2010), Recital 58.

²⁸ See e.g. *Novaya Gazeta V Voronezhe v. Russia*, Application No. 27570/03 (21 December 2010), par. 42.

²⁹ *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. c. Turquie (no 1)*, Application Nos. 64178/00 64179/00 64181/00 (30 March 2006).

constituted an interference, as well as the suspension. The Court considered it relevant that a warning had the effect of putting pressure on the radio station to refrain from broadcasting anything likely to be considered contrary to the interests of the state.³⁰

26. In light of the above, warnings in and of themselves are sufficient to have a chilling effect on a journalist or media organisation. Warnings that carry sanctions of the most severe nature will inevitably increase the chilling effect. Non-compliance with a warning may for instance result in suspension or annulment of a media outlet's licence, which amount to prior restraint. In relation to suspension orders, the Court found that the preventative effect of such orders "entailed implicit sanctions on the applicants to dissuade them from publishing similar articles or news reports in the future, and hinder their professional activities."³¹ The Interveners submit that even the threat of a sanction that may lead to closure will have a chilling effect. This has been recognised by the Court as well in *Timpul Info-Magazin and Anghel v. Moldova*, in which it held that a fine that led to the closure of a newspaper had a "chilling effect on the applicant newspaper, and that its imposition was capable of discouraging open discussion of matters of public concern".³²

III. *Roskomnadzor* is a state-controlled media regulator, which has enabled arbitrary abuse

27. The implications of a lack of independence of state controlled media regulators that can issue warnings, and the chilling effect of such warnings, can be starkly demonstrated by the practice adopted in Russia.

28. As with the majority of Council of Europe states, Russia has an alternative system of regulation: the Public Collegium for Press Complaints. It is headed by former Russian Human Rights Commissioner Vladimir Lukin and the co-author of the Law on Mass Media and Head of the Presidential Human Rights Council, Mikhail Fedotov.³³ The Public Collegium for Press Complaints consists of two chambers: the House of the media community (representatives of associations, the media, journalists, publishers, broadcasters, distributors, advertising agencies, etc.) and the House of the media audience (representatives of the Judicial Council, the Public Chamber the Russian Federation, various trade unions, political parties, religious and other non-governmental organizations), each of which is headed by the Chairman of the Chamber and his two deputies.³⁴ One of the main functions of the Collegium is dispute resolution. The Collegium has a good reputation in this respect and therefore presents the most proportionate manner of content regulation for Russian print media.

29. However, Russian print media is also subject to regulation by the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications or *Roskomnadzor*, Russia's federal executive body responsible for regulating the media. Since it was established by Presidential Decree No. 1715 on 3 December 2008,³⁵ it oversees *all* types of media, including audio-visual, print and online media, and their compliance with *inter alia* Law No. 2124-1 of December 27, 1991, *On Mass Media* (the "Law on Mass Media").³⁶

³⁰ *Id.*, par. 73.

³¹ *Ürper and Others v Turkey*, Application No. 14526/07 (20 October 2009), par. 43.

³² See e.g. *Timpul Info-Magazin and Anghel v Moldova*, Application No. 42864/05 (27 November 2007), par. 39.

³³ See <http://www.presscouncil.ru/index.php/kollegiya/prezidium>.

³⁴ See <http://www.presscouncil.ru/index.php/kollegiya/palata-media-soobshchestva> and <http://www.presscouncil.ru/index.php/kollegiya/palata-media-auditorii>.

³⁵ See <https://rkn.gov.ru/eng/>.

³⁶ Law No. 2124-1 of 27 December 1991, *On Mass Media*, http://www.democracy.ru/english/library/laws/eng_1991-1/ (the "Law on Mass Media"). For a full list of the laws, regulations and orders applicable to regulated entities, see http://eng.rkn.gov.ru/requirements_for_regulated_entities/.

30. Under the jurisdiction of the Ministry of Telecom and Mass Communications of the Russian Federation³⁷ and in cooperation with other governmental authorities,³⁸ *Roskomnadzor* performs a wide range of functions, including (i) “state control and supervision of mass media over the compliance with the legislation of the Russian Federation related to mass media and mass communications, television and radio broadcasting”, information technology and telecommunications; (ii) “supervision and statutory compliance control of personal data processing”; and (iii) “managing the radio frequency service activities”.³⁹ The Interveners understand that this includes the registration of media outlets, issuing of broadcasting licences, assigning radio frequencies, blocking websites and maintenance of a wide range of registers including registers for media outlets, bloggers, news aggregators, personal data processors and blocked websites.
31. *Roskomnadzor*’s links with the government could not be clearer. It is headed by Alexander Zharov, the former Deputy Minister of Communications and Mass Communications. *Roskomnadzor*’s head is appointed and dismissed by the Russian government at the recommendation of the Minister of Communications and Mass Media.⁴⁰ Oleg Ivanov is *Roskomnadzor*’s deputy head, alongside Vadim Subbotin, Antonina Arkadijevna Priezzheva and Alexander Pankov. The deputies are appointed and dismissed by the Minister of Communications and Mass Media.⁴¹ Each of the deputy heads have previously worked in government, with the exception of Mr Ivanov who served in the Russian armed forces.⁴² In addition, *Roskomnadzor* has 71 regional offices.⁴³
32. Any “editorial production and release of mass media” requires registration in the manner prescribed by the Law on Mass Media.⁴⁴ Under the Law on Mass Media, a mass media product shall be understood as a periodical printed publication; a radio, television or video programme; a newsreel programme; or any other form of periodical dissemination of mass information.⁴⁵ A periodical printed publication shall be understood as a newspaper, magazine or journal, almanac, bulletin, or any other publication which has a constant name and publishes an issue at least once a year.⁴⁶ A “mass media registration certificate” is granted once the registration of the relevant media outlet is approved. Without this certificate, print media with a circulation over 1000 copies are not allowed to publish.⁴⁷
33. Where media outlets are registered as “mass media”, *Roskomnadzor* has the ability to issue warning documents to the editorial board in the event of “abuse of freedom of mass media.” Article 4 of the Law on Mass Media states that such abuse can include incitement to terrorism, extremism, propaganda of violence and cruelty, information about illegal drugs, and obscene

³⁷ See <https://rkn.gov.ru/eng/>.

³⁸ *Id.*, Article 5.

³⁹ Statute of the Russian Federation No. 228 of 16 March 2009, *On the Federal Service for Supervision of Communications, Information Technology, and Mass Media, Regulation of the Government*, <http://eng.rkn.gov.ru/about/>, Article 1. For a full overview of the extensive functions of *Roskomnadzor*, see Article 5 and http://eng.rkn.gov.ru/about/powers_of_roskomnadzor/.

⁴⁰ *Id.*, see Article 8.

⁴¹ *Id.*

⁴² Mr Subbotin previously worked for Ministry of Communications and Mass Media. Ms Arkadijevna Priezzheva worked in various government bodies. Mr Pankov worked in the Ministry of Communication and Information Technology and Communication and Telecommunication State Regulation Division of the Industry and Infrastructure Department of the Government of the Russian Federation, see <http://eng.rkn.gov.ru/about/Management/>.

⁴³ See <http://eng.rkn.gov.ru/about/structure/> and http://eng.rkn.gov.ru/about/regional_offices/.

⁴⁴ See http://eng.rkn.gov.ru/mass-communications/mass_media_registration/.

⁴⁵ Article 2 of the Law on Mass Media.

⁴⁶ *Id.*

⁴⁷ This is different for online media, which can publish without being registered.

language.⁴⁸ Following a warning, the relevant media outlet must delete or edit the relevant publication.⁴⁹ While *Roskomnadzor*'s decisions can be challenged before Russian courts by the relevant media outlet, the Interveners understand that such a challenge is rarely successful.⁵⁰

34. Warnings can put media outlets at risk of closure. Under Article 16 of the Law on Mass Media, *Roskomnadzor* is able to apply to court to annul a mass media operator's certificate of media registration if two warnings are issued against an operator within a 12-month period.⁵¹ *Roskomnadzor* does not always proceed to request annulment of the certificate of registration immediately after a second warning has been issued, but as the Law on Mass Media does not provide a set timeframe for proceedings to be initiated, the continuous threat of closure of the media outlet often results in self-censorship.
35. The broadness of *Roskomnadzor*'s mandate and its lack of independence from the executive have been widely criticised. For example, according to PEN America:⁵²

Roskomnadzor has taken on an increasingly powerful and important role in the Russian media landscape, with enormous implications for freedom of expression. *Roskomnadzor* effectively exercises control over public media and discussion and has the power to restrict the activity or content conveyed over any form of media, including websites, social media, and print publications including books. With the passage of other laws restricting freedom of expression and in particular specific content (...), *Roskomnadzor*'s role has continued to expand. (...)

Roskomnadzor has the power to impose crippling fines or remove from publication works deemed inconsistent with Russian law. Since *Roskomnadzor* does not have the resources to read and analyze every publication within the scope of the law, enforcement is necessarily selective and open to political influence. The result is an arbitrary and unpredictable approach that leaves content producers guessing what may get them fined or jailed. In practice, *Roskomnadzor* has broad latitude to take action against media, including social media, for purely political reasons. The selectivity and, at times, arbitrariness of *Roskomnadzor*'s enforcement protocols create significant uncertainty for writers, publishers, broadcasters, websites and other media producers, often resulting in self-censorship as a way to avoid uncertain rules and arbitrary enforcement. (...)

In practice, *Roskomnadzor* has become a convenient and powerful tool for the Kremlin to temporarily or permanently disable content across a range of platforms, from social media to traditional publishing. (...) [M]any acknowledge that *Roskomnadzor* is used specifically as a selective enforcement tool by the Russian government."

36. Both the Committee to Protect Journalists ("CPJ") and Human Rights Watch have criticised *Roskomnadzor* in relation to its website blocking activities. CPJ noted that since *Roskomnadzor* was given power in February 2014 to block online content without a court order, warnings have been issued to several critical online news sites that were later blocked. Human Rights Watch

⁴⁸ Article 4 of the Law on Mass Media.

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⁵⁰ Russia's judiciary has been criticised for its lack of independence from political pressure, *see e.g.* Committee to Protect Journalists ("CPJ"), *Russia intensifies restrictions on blogs, social media* (3 July 2014), <https://cpj.org/blog/2014/07/russia-intensifies-restrictions-on-blogs-social-me.php>. CPJ was for instance informed by Russian media that "Roskomnadzor has never lost a case in court because all courts do is look at the presence of an official warning; they don't look at whether the warning is fair or not."

⁵¹ Article 16 of the Law on Mass Media.

⁵² PEN America, *Discourse in Danger: Attacks on Free Expression in Putin's Russia* (25 January 2016), https://www.pen.org/sites/default/files/PEN_Discourse_In_Danger_Russia_web.pdf, p.9.

has noted that *Roskomnadzor*'s efforts to block websites were in some cases "clearly aimed at stifling dissenting opinions".⁵³

37. According to CPJ, *Roskomnadzor* plays an active role in censoring media for alleged violations of laws, including legislation on combating extremism.⁵⁴ It considers the system of warnings used by *Roskomnadzor* as "part of a trend of media repression".⁵⁵

Conclusion

38. While the Intervenors make no specific comment on the proportionality or otherwise of the sanctions at issue in the present proceedings (this being a matter for the parties and the Court), the intervenors note that, in principle, warnings issued by a state regulator such as *Roskomnadzor* could have a substantial chilling effect on the media. In particular, the Intervenors note the severity of the potential consequences of a warning by the state regulator, *Roskomnadzor* in the present case:
- a. As a state body, warnings and sanctions imposed by *Roskomnadzor* carry the imprimatur of the Russian state, which is of particular significance since, in a democratic society, it is one of the roles of the free press to subject state officials and public authorities to scrutiny and, where appropriate, criticism.
 - b. It is furthermore important to note that in most European countries, similar oversight of print media would have been exercised by a self-regulatory body or other proportionate alternative. Even if not criminal in character, a warning issued by a state body carries with it a degree of stigma insofar as it indicated a state-sanctioned finding of impermissible conduct. The fact of a warning may also carry with it commercial risks for a newspaper, insofar as it made advertisers, whether public bodies or private enterprises, reluctant to advertise through the newspaper in question.
 - c. In addition, where warnings put media outlets at risk of closure, the chilling effect is particularly serious. As set out above, the threat of closure can exist for a lengthy period of time, which often results in self-censorship.
 - d. The suspension or termination of a licence would have catastrophic consequences for a newspaper or media outlet. The closure of a media outlet for non-compliance with warnings is one of the most severe sanctions that can be imposed on the media, resulting in prior restraint. This would have severe commercial consequences as well. The very risk of such serious consequences is capable of having an effect on a newsgathering organisation's behaviour and editorial decisions.

Padraig Hughes, *Legal Director*
Alinda Vermeer, *Senior Legal Officer*
Jonathan McCully, *Legal Officer*
Media Legal Defence Initiative

Galina Arapova, *Director*
Mass Media Defence Centre

⁵³ Human Rights Watch, *Briefing on Shrinking Space for Civil Society in Russia* (24 February 2017), <https://www.hrw.org/news/2017/02/24/briefing-shrinking-space-civil-society-russia>

⁵⁴ CPJ, *In Russia, media regulator uses warnings to restrict the press* (19 February 2015), <https://cpj.org/blog/2015/02/in-russia-media-regulator-uses-warnings-to-restrict.php>

⁵⁵ *Id.*