Legal analysis of the Presidential Decree on websites ban

Legal analysis of the Presidential Decree #126/2018 on enacting the Decision of the National Security and Defense Council (NSDC) of Ukraine as of 2 May 2018 on personal special economic and other sanctions that entail "prohibiting Internet providers to let Internet users access certain resources/services, including subdomains."

Prepared by the FreeNet Ukraine Coalition.

Compliance with the domestic law

According to Article 34 of the Constitution of Ukraine, every person has a right to freely gather, store, use and impart information in oral, written or any other form. In addition, the Constitution of Ukraine provides an array of other rights and freedoms that are subject to limitations if the sanctions with regard to the Internet[1] are introduced. These human rights and freedoms can only be **limited by law** in certain cases **based on the court's decision** (for example, right to peaceful assembly). Moreover, Article 19 of the Constitution of Ukraine binds the public and local authorities and their officials **only** act within the framework and the remit established by the Constitution and laws of Ukraine.

Considering that the Law of Ukraine On Sanctions does not entail a sanction such as "prohibiting Internet providers to let Internet users access certain resources/services, including subdomains[2]," that the constitutional rights and freedoms are guaranteed and cannot be abolished, that the content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws or in the amendment of laws that are in force[3], and that other laws of Ukraine do not stipulate mechanisms to prohibit Internet providers to provide services as specified in the NSDC Decision[4], we believe that a sanction such as limiting human rights and freedoms **is not in line with constitutional standards and manifests unlimited discretion of the Government.**

The NSDC Decision sets forth that it was adopted in line with Article 5 of the Law of Ukraine On Sanctions. This Article stipulates two types of sanctions – sectoral and personal. The former sanctions listed by the NSDC Decision shall be enacted by the Presidential Decree and endorsed by the Resolution of the Verkhovna Rada of Ukraine within 48 hours after the Presidential Decree was adopted. The latter sanctions do not require Parliament's endorsement. A sanction such as "prohibiting Internet providers to let Internet users access certain resources/services" entails limitations not only for owners of the websites – that are directly responsible for the content – but also for the providers – there are up to 7,000 providers

[1] Freedom of belief and religion (Article 35), right to peaceful assembly and freedom of association (Articles 36, 37, 39), right to property, including intellectual property (Article 41), right to entrepreneurship (Article 42), to work (Article 43), to education (Article 53, freedom of literary, artistic, scientific and technical creativity, protection of intellectual property, their copyrights, moral and material interests that arise with regard to various types of intellectual activity (Article 54), etc.

[2] List of the types of sanctions is provided in Article 4 of the Law of Ukraine On Sanctions

[3] Article 22 of the Constitution of Ukraine

[4] The Law of Ukraine On Telecommunications stipulate disconnection of end user equipment pursuant to the court's decision "if the subscriber uses this equipment for illegal actions or actions against the national security" (item 9 of part 1 of Article 38). Article 39 binds the operators and providers of telecommunications to limit access of their subscribers to the resources that impart child pornography, based on the court's decision (part 18 of part 1 of Article 39).

in Ukraine[5] – and directly for the Internet users – over 20 million[6]. **Therefore, this sanction is sectoral and can only be enacted after the endorsement by the Parliament's plenary[7].**

It is also worth mentioning that subjecting Ukrainian nationals and resident legal entities not controlled by a foreign legal entity or a non-resident natural person to restrictive measures **directly contradicts** to the provisions of part 2 of Article 1 of Ukraine On Sanctions (Ukraine may impose sanctions on foreign states, foreign legal entities, legal entities controlled by a foreign legal entity or a non-resident natural person, foreign nationals, stateless persons and persons engaged into terrorist activities).

Therefore, Presidential Decree # 126/2018 on enacting the Decision of the National Security and Defense Council (NSDC) of Ukraine as of 2 May 2018 on personal special economic and other sanctions in a part of the websites ban **is not in line with the domestic law and violates fundamental constitutional human rights.**

Compliance with international law

In the international law, the freedom of expression is guaranteed by the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights ratified by Ukraine in 1973[8], and the Convention for the Protection of Human Rights and Fundamental Freedoms ratified by Ukraine in 1997[9]. Article 19 of the ICCPR and Article 10 of the Convention specify that the **freedom of expression includes the right to seek, receive and impart information and ideas by any means and irrespective of the borders**.

Restriction of the freedom of expression is possible if: i) it is prescribed by the law, ii) it serves legitimate interests, iii) is necessary in a democratic society[10]. If such restrictions introduced by the state do not meet at least one of these criteria, it entails violation of the rights and freedoms guaranteed by the international instruments.

According to the European Court of Human Rights (ECtHR) case-law, "**prescribed by the law**" means that a law of certain legal force is adopted that:

a) is publicly available (is published and available to everyone concerned by this law);
b) is predictable (formulated with sufficient precision for the citizens to act respectively);

"A norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[11]

A quality law shall provide adequate protection from uncontrolled restrictions of the freedom of expression by those engaged into enforcement of such restrictions. The law shall specify the mandate of the public authorities on imposing restrictions and the means of imposing restrictions with adequate clarity.

---

[5] http://nkrzi.gov.ua/index.php?r=site/index&pg=55&language=uk
[6] http://detector.media/rinok/article/133767/2018-01-16-v-ukraini-zmenshilas-kilkist-regulyarnikh-koristuvachiv-internet-inau/
[7] Part 2 of Article 5 of the Law of Ukraine On Sanctions
[8] http://zakon5.rada.gov.ua/laws/show/995_043
[9] http://zakon2.rada.gov.ua/laws/show/995_004
[10] Para 2 of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms
[11] Para. 55 of the Judgment of the European Court of Human Rights in Case of VGT VEREIN GEGEN TIERFABRIKEN v. SWITZERLAND

As noted above, a sanction such as "prohibiting Internet providers to let Internet users access certain resources/services, including subdomains" is directly specified **neither in the Law of Ukraine On Sanctions nor in any other legal acts of Ukraine**. Absence of legally determined procedures, reasons and mechanisms to list the websites for blocking through the enforcement of the provision of the Law of Ukraine On Sanctions in terms of "other sanctions which comply with the terms of imposing the sanctions as set forth by this Law" manifests unlimited discretion of the government in the field of human rights. No person can anticipate which of his/her actions or decisions may be the reason for including him/her in the sanction list, and thus, no person can foresee the consequences of his/her actions. Unclear wording and reasons for including certain persons in the sanction lists makes the actions of the government look like arbitrary.

With this being said, we believe that **the practice of banning hundreds of websites in a way used by the government is not in line with the criterion "prescribed by the law"** in the meaning of international legal instruments and the ECtHR case-law.

As far as compliance with the criterion "necessary in a democratic society" in the websites ban is concerned, we would like to emphasize the following.

In a number of its judgments, the ECtHR highlighted the fundamental importance of the freedom of Internet and crucial role of the Internet in the enjoyment of the right to freedom of expression[12].

In addition, in Urper and Others v. Turkey, the ECtHR stated: "the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."

Identifying whether a prior constraint is "necessary in a democratic society," the ECtHR further states: "the **legal framework is necessary** both to ensure strict scrutiny of the bans and efficient judicial scrutiny to prevent any abuse of authority." Having analyzed previous bans introduced by the Government of Turkey based on its anti-terrorist legislation, the ECtHR makes the following conclusion in this case: "The practice of banning the future publication of entire periodicals on the basis of [anti-terrorist legislation] **went beyond any notion of "necessary" restraint in a democratic society and, instead, amounted to censorship."**

In other case against Turkey[13] on prior constraints, the ECtHR stated: "59. … In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, **for a legal discretion granted to the executive to be expressed in terms of an unfettered power**. 68. … Furthermore, the judicial review procedures concerning the blocking of Internet sites are insufficient to meet the criteria for avoiding abuse, as domestic law does not provide for any safeguards to ensure that a blocking order in respect of a specific site is not used as a means of blocking access in general."

The Council of Europe Committee of Ministers Declaration on freedom of communication on the Internet as of 28 May 2003 specifies: "Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers. This does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries" (Principle 3).

Internet users' right to receive and impart information should not be restricted by means of blocking, slowing down, degrading or discriminating Internet traffic associated with particular

---

[12] Judgment of the European Court of Human Rights in Case of TIMES NEWSPAPERS v. UNITED KINGDOM; Judgment of the European Court of Human Rights in Case of DELFI v. Estonia
[13] Judgment of the European Court of Human Rights in Case of OF AHMET YILDIRIM v. TURKEY (cases of YILDIRIM v. TURKEY, CENGIZ AND OTHERS v. TURKEY)

content, services, applications or devices, or traffic associated with services provided on the basis of exclusive arrangements or tariffs[14].

Conditions for restriction of the Internet freedom are legality, legitimacy and proportionality[15].

Considering the above-mentioned international standards on the websites blocking in Ukraine, including in a way it was performed, unclear mechanism and reasons for including certain persons in the sanction lists, general (prior) nature of such restrictions and the fact the sanction list is mostly composed of information resources, we believe that **the ban does not comply with the criterion "necessary in a democratic society" and is not proportional to a legitimate case.**

Therefore, Presidential Decree # 126/2018 on enacting the Decision of the National Security and Defense Council (NSDC) of Ukraine as of 2 May 2018 on personal special economic and other sanctions in a part of the websites ban **is not in line with the international law and contradicts to the international instruments ratified by Ukraine.**

With this being said, we request:

1. Abolish the Presidential Decree # 126/2018 on enacting the Decision of the National Security and Defense Council (NSDC) of Ukraine as of 2 May 2018 on personal special economic and other sanctions as the one that does not comply with domestic and international law, at least in a part of the websites ban.

2. Start dialogue with experts and human rights activists on legal and other initiatives on regulating the Internet by setting up a working group or conducting working meetings to prevent human rights violations in planning and implementation of such initiatives.

3. Be guided by the principles of rule of law and legality, bar from the restrictions of human rights without compliance with the requirements of domestic and international law in implementing cyber protection and information policies.

Participants of the FreeNet Ukraine Coalition:

Human Rights Platform
Digital Security Lab Ukraine
Human Rights Information Centre
Crimean Human Rights Group
Office of Freedom House in Ukraine
The Influencer Platform
Nadia Babynska
Mykola Kostynian

[14] Guidelines on the network neutrality, Annex to the Recommendation CM/Rec(2016)1 of the Committee of Ministers to Member States on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality as of 13 January 2016
[15] Recommendation CM/Rec(2016)5 of the Committee of Ministers to Member States on Internet freedom as of 13 April 2016.