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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON ACT CXII OF 2011
ON INFORMATIONAL SELF-DETERMINATION
AND
FREEDOM OF INFORMATION**

OF HUNGARY

**Adopted by the Venice Commission
at its 92nd Plenary Session
(12-13 October 2012)**

On the basis of comments by

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I. INTRODUCTION

1. On 1 February 2012, the Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested the Venice Commission to provide opinions on several recent Cardinal Acts adopted by the Hungarian Parliament, including the new Hungarian Act CXII of 2011 on Informational Self-determination and Freedom of Information, adopted in July 2011 (hereinafter referred to as the “Act”).
2. The Venice Commission appointed Ms Anne Peters as rapporteur. This Opinion is based on the comments provided by Ms Peters as well as those provided by Mr Bertil Cottier, expert. The Comments provided by the Hungarian authorities on the draft Opinion are reflected in the adopted Opinion (see CDL(2012)074).
3. The present Opinion is based on an official English translation of the Act based on the text which, as indicated by the Hungarian authorities, has legal force as of 1 June 2012 and contains the amendments adopted between the date of adoption of the Act (26 July 2011) and the 1st of June 2012. The translation may not always accurately reflect the original version on all points and, consequently, certain comments can be due to problems of translation.
4. The present Opinion was discussed at the Sub-Commission on Fundamental Rights (Venice, 13-14 October 2012) and adopted by the Commission at its 92nd Plenary Session (Venice, 12-13 October 2012).

II. PRELIMINARY AND GENERAL REMARKS

5. This Opinion should be seen in the context of the Opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011)¹.
6. On 18 April 2011 the Hungarian Parliament adopted a new Constitution of Hungary, which sets forth that

“Every person shall have the right to the protection of his or her personal data, and to access and disseminate data of public interest” (article VI(2)).

and that

“The exercise of the right to the protection of personal data and the access to data of public interest shall be supervised by an independent authority” (article VI(2)).

7. Following its adoption in July 2011, the Act under consideration has attracted strong criticism, linked in particular to the abolition of the institution of the Commissioner on Data Protection and Freedom of Information ((hereinafter the “Commissioner”) and its impact on the institutional independence of the supervisory mechanism of the enforcement of informational rights and freedoms.
8. The removal from office, before the expiry of his term, of the former Commissioner, has raised particular concern in the light of the independence principle that should govern, according to the applicable standards, the operation of the information and data protection

¹ CDL-AD(2011)016, see also document CDL(2011)058, *Position of the Government of Hungary on the opinion on the new Constitution of Hungary*, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011) transmitted by the Minister for Foreign Affairs of the Republic of Hungary on 6 July 2011.

regulatory bodies. The present Opinion will not address this specific issue, since the case is the subject of an EU infringement procedure under article 28.1 of the Directive 95/46².

III. EUROPEAN AND INTERNATIONAL STANDARDS

9. The opinion will analyse the Act with regard to the fundamental rights protected by the Hungarian Fundamental Law (hereinafter the "Constitution"), as well as by the European Convention on Human Rights (hereinafter, the "ECHR") in its articles 8 (which protects private life) and 10 (on freedom of expression)³ and article 19 of the International Covenant on Civil and Political Rights (hereinafter, the "ICCPR"), to which Hungary is a party. The General Comment No. 34 of 21 July 2011 is also of relevance for the assessment of the Act.

10. More specific standards are enshrined in the following instruments:

- The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data⁴ (hereinafter "Convention 108")
- The Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows⁵ (hereinafter "the Additional Protocol")

11. Even though not yet in force - for lack of a sufficient number of States Parties - the Council of Europe Convention on Access to Official Documents⁶, hereinafter "Convention 205", will also be taken into account, especially since Hungary has already ratified it⁷.

12. That said, both Convention 108 and Convention 205 only contain minimum standards. It is up to States Parties to provide more extensive rights and obligations⁸.

IV. ISSUES UNDER REVIEW

A. The scope of the Act

13. The Hungarian Act CXII of 2011 regulates both the protection of personal data and the right of access to information. By integrating the two informational freedoms in one single legal act, the Hungarian legislator has chosen to maintain, as an underlying approach, the philosophy of the previous act, the Act LXIII of 1992 on the Protection of Personal Data and the Access of Data of Public Interest.

14. It should be stressed that, if the countries, such as Hungary, having entrusted to a single body the supervision of both data protection and transparency of public administration are few, those which address these two issues in one single legislative text are even fewer. While certain issues - such as the regimes of exceptions to the right to access to information and of those relating to the protection of data, in many respects identical - are undoubtedly common, the task remains a challenging one.

² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23/11/1995 P. 0031 – 0050.

³ Freedom of expression includes, to some extent, the right of access to information (see the ECtHR, *Társaság a Szabadságjogokért v / Hungary*, Judgment of 14 April 2010, § 35).

⁴ Entered into force for Hungary on 1 February 1998. Hungary made no reservation to the text; on the contrary, it has expanded its scope to the data processed without the aid of electronic or automatic processing (note verbale dated 10 July 1997).

⁵ <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=181&CM=1&CL=ENG>

Entered into force for Hungary (without any reservation) on 1 September 2005.

⁶ Adopted 18 June 2009 (CETS No. 205), not yet in force (needs 10 ratifications, currently 6 ratifications). Besides Hungary also Bosnia and Herzegovina, Lithuania, Montenegro, Norway, Sweden have ratified the Convention. Eight states have signed but not yet ratified: Belgium, Estonia, Finland, Georgia, Moldova, Serbia, Slovenia, Macedonia.

⁷ Hungary ratified the Convention 205 on 5 January 2010 (without any reservation.)

⁸ See in particular article 11 of the Convention 108.

15. First, two different and even opposite aims are covered by the provisions of the same act: while data protection aims to ensure individual self-determination in relation to personal data, the right to information promotes public debate and citizens' control on public activities. Moreover, addressing informational rights in one single Act is difficult due to these rights' different scope of application (data protection extends to the private sector, which is generally not the case for transparency) and basic concepts (data protection only applies to personal data, while transparency covers any information; moreover, the concept of sensitive data is totally foreign to transparency). This may in some cases give rise to interpretation and application problems.

B. The National Authority for Data Protection and Freedom of Information

1. Standards

16. Pursuant to article 1 of the Additional Protocol, the Parties shall establish one or more authorities to ensure compliance with the principles laid down in Convention 108. As stated by paragraph 3 of Article 1, these authorities must exercise their functions "in complete independence". In doing so, the Protocol fills a gap in Convention 108, which does not require Parties to explicitly create such a supervisory body.

17. The Additional Protocol does not define specific criteria for independence. Its Explanatory report underlines that "[a] number of elements contribute to safeguarding the independence of the supervisory authority in the exercise of its functions. These could include the composition of the authority, the method for appointing its members, the duration of exercise and conditions of cessation of their functions, the allocation of sufficient resources to the authority or the adoption of decisions without being subject to external orders or injunctions". The present assessment of the independence of the Hungarian supervisory authority is based on these elements

18. Convention 205, on the other hand, does not oblige Parties to establish a supervisory body. It merely guarantees the existence of a remedy in the event of denied access to data. This may be regular (courts) or special (*ad hoc*) body established by the law and must be, in both cases, "independent and impartial" (art. 8). The Explanatory report to Convention 205 provides no details about the content of these two notions.

19. The establishment of an independent regulatory body is also an obligation under the EU Data Protection Directive⁹ (art. 28 .1).

20. The Court of Justice of the European Union has interpreted the notion of independence broadly. Supervisors "must enjoy the independence allowing them to perform their tasks without outside influence. This independence precludes not only *any influence exercised by the supervised bodies, but also any injunction or any other external influence, be it direct or indirect*¹⁰, which could jeopardize the fulfilment, by those authorities, of their task of establish a proper balance between protecting the right to privacy and free movement of personal data"¹¹.

⁹ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data

¹⁰ Italics added.

¹¹ Case C-518/07 Commission v Germany ECR I-1885, Judgment of 9 March 2010 (§ 30). See also the conclusions of the Advocate General of 3 July 2012 (Case Commission v/ Austria C-614/10), in which he denounced the lack of independence of the Austrian Data Protection Commission due to the quality of federal civil servant of the Commission's members, the inclusion its secretariat within the Federal Chancellery and the Chancellor's right to be informed of the cases handled by the Commission.

21. It should also be noted that the draft General Regulation on the protection of data submitted earlier this year by the European Commission¹² contains a special provision (article 47) devoted to the requirement of independence of national supervisory authorities. While refraining from defining organizational criteria (composition, appointment and dismissal of members), this provision establishes the functional aspects of independence: budgetary autonomy, availability of appropriate human, technical and financial resources¹³ and the prohibition, on such authorities' members, to carry out ancillary paid or unpaid activities.

22. Since no model of supervision authorities has emerged in Europe, there is a great diversity in Europe in this area in terms of competences, composition and designation modalities' of such bodies.

23. As far as the competencies are concerned, while in countries such as Germany, United Kingdom, Slovenia, Switzerland and Hungary, supervision of the legislation on both data protection and access to information lies with the same authority, the majority of countries have set up specialized bodies. It may be indeed seen as surprising to entrust the same authority with the task of overseeing two laws whose spirit and objectives are diametrically opposed.

24. As regards the composition, there are either supervision committees (a collegial model), or "single person" supervisory authorities (directive model). It is commonly understood that the collegial model provides increased independence guarantees, since possible links with the State or with supervised stakeholders are diluted within the college.

25. The designation mechanism of supervisory bodies is an important and even decisive marker of independence. It is obvious that the designation made by the executive exclusively, which still prevails in some countries (including Estonia, Ireland, Latvia, Luxembourg, Netherlands and Sweden), offers fewer guarantees of independence than the designation by Parliament. Some countries have addressed this problem by subjecting the appointment by the Government to ratification by Parliament (e.g. Switzerland), which also adds to the concerned bodies' legitimacy or by a constitutional guarantee that ministers may not influence decision-making in individual cases (e.g. Sweden).

2. The Hungarian Act

26. Under Act LXIII of 1992 previously in force, oversight was exercised by the independent Data Protection and Freedom of Information Commissioner, elected by Parliament for five years. In Hungarian administrative law, the Commissioner had the position of an ombudsman.

27. New Act CXII of 2011 replaced the Commissioner by the National Authority for Data Protection and Freedom of Information (hereinafter the Authority). It is a directive oversight body, headed by a President (assisted by a vice-President) appointed by the President of the Republic for a term of nine years, at the proposal of the Prime Minister (art. 40 (1) of the Act). The Authority's legal status as "autonomous state administration body" is enshrined in article 38.1 and detailed by articles 38-71 of the Act.

28. The transformation from an ombudsman into an administration authority has attracted criticism, as the oversight body becomes in principle more dependent on those it controls. The Government argued that the transformation was necessary as new information technology required more efficient action, and that an administrative body could work more efficiently than an ombudsman.

¹² Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 25.1.2012, COM(2012) 11 final.

¹³ It is understood that no legal provision, no matter how well it is formulated, can guarantee, in practice, sufficient funding or sufficiently qualified personnel.

29. The Commission does not find that argument fully convincing. The efficiency of an authority depends on its competencies and above all on its human and financial resources. Whether an authority is equipped with sufficient resources in the end depends on the will of the deciding political actors. Nothing prevents them from endowing an ombudsman with the resources which are required to accomplish its tasks.

30. Following infringement proceedings launched by the European Commission in January 2012, Hungary amended the Act and the amendments have restored the independence of the Authority to a considerable extent. The current version of the Act includes particularly detailed provisions aiming at guaranteeing - directly and, in most cases, indirectly – the Authority's independence. It is worth saying that some of these guarantees may not always be found in corresponding legislation of other European countries.

31. A formal guarantee of independence is provided in article 38.5 of the Act:

“(5) The Authority shall be independent, subordinated only to law; it may not be given instructions as to the performance of its tasks, and shall perform its tasks separately from other bodies, free of any influence. Tasks for the Authority may only be established by law.”

32. In more concrete terms, the Venice Commission notes that, under art. 52 of the Act, the Authority is entrusted with extensive supervision and intervention powers: on the one hand it is provided with the investigative powers necessary to carry out its tasks (the right of access to contentious data, the right to conduct interrogations), and on the other hand it is entitled to initiate legal proceedings (pursuant to art. 1 al. 1 and 2 of the Additional Protocol).

33. Additional independence guarantees are linked to the function of president of the Authority. These include: its stability (art. 40. 3 which provides for a term of nine years, and art. 45, which defines clearly and exhaustively the grounds for dismissal by the appointing authority and allows the President to defend himself in court); its importance amongst other high level public functions (art. 40, providing for a salary equal to that of a minister); the President's impartiality (articles 40.2 and 40.1 setting out strict conditions and incompatibilities associated to the function)¹⁴.

34. Article 39 guarantees the budgetary autonomy of the Authority (through a specific financial appropriation distinct from that of the public administration and specifically allocated by the Parliament without Government intervention), which is very rare at international level. By the same provision, the Authority is exempted from the annual budgeting principle, thereby enjoying a remarkable financial flexibility.

35. This being so, the Venice Commission wishes to point out also a number of remaining shortcomings and issues of concern.

36. First, due to the designation mechanism set out by the Act, which is the prerogative of the President of Hungary, the new Authority seems less independent than the old Ombudsman. In particular, this is due to the fact that, as stipulated by article 40.1 of the Act, the President designates the Head of the Authority upon a proposal of the Prime Minister; thus, there is a strong involvement of the executive in the designation process. More precisely, there is criticism that the Parliament is now entirely excluded from the procedure. That said, it should be recalled that Hungary is by far not the only country to favour the appointment by the executive alone and that, according to the above-mentioned case-law of the Court of Justice of the European Union, "the management of the supervisory authorities may be appointed by the parliament or the

¹⁴ It is regrettable, however, that the prohibition only applies to ancillary activities remunerated; it would have been preferable to extend this prohibition to unpaid activities, which are equally likely to create unwanted links (cf. art. 47 of the proposed EU regulation on data protection mentioned above).

government”¹⁵. More generally, a comparison with other European countries shows a variety of ways to elect or appoint the head of a freedom of information oversight authority. In Switzerland, the commissioner is proposed by the Government and appointed by the Parliament; in Germany it is the Parliament at the proposal of the Government, while in the UK the commissioner is appointed by the Crown.

37. The legal options available to the President of the Republic to terminate the mandate of the President of the Authority before it expires also attracted criticism¹⁶. In its original version of 2011, the Act provided that the President of the Republic could “discharge” or “disqualify”¹⁷ the President of the Authority in case the latter “fails to perform his duties arising from his assignment for over 90 days” (art. 45 (4) and (5) Act CXII, as of 11 July 2011, entered into force 1 January 2012).

38. Nevertheless, according to the current version of the Act, which was amended, as mentioned, in the context the European Commission infringement proceedings, the President of the Republic can only remove the President of the Authority under art. 45.1 (d) and (e) of the Act, if: the conditions necessary for appointment¹⁸ are absent; if the President has violated the provisions on the declaration of assets (as laid down in art. 42), or if he is in a conflict of interest in the meaning of art. 41 of the Act. As a safeguard against arbitrary removal, the President of the Authority can now challenge a motion to remove him from office at the Budapest Labour Court (art. 45.6 (b) of the Act).

39. One will also note that art. 38.4 gives the Authority the right to submit proposals for amendments to the legislation on data protection and the right to information. It is not clear however whether the Authority may send its proposals to Parliament directly, which would be an additional guarantee of independence, or must go through the Government or any other channel. According to the Hungarian authorities, article 38.4 should be read in conjunction with article 45/A of the Act (allowing the Authority’s President to participate and speak in parliamentary committees’ meetings) and article 57 (requiring the Authority to make recommendations to the legislator when it establishes that threats or violation of rights are due to shortcomings in the applicable legal regulations). It should also be taken into account that, according to article 38.4, the Authority is required to submit its annual report to the Parliament, which is also an opportunity for addressing its legislative proposals directly to the legislator.

40. Further concern might be raised when it comes to the Authority’s staff and their recruitment (regulated by Art. 50 and 51). The Venice Commission finds regrettable that the Act does not explicitly indicate - although this may be inferred from its status of autonomous authority within the meaning of art. 38 - whether the Authority’s President, who exercises the “employer’s rights over the civil servants and employees of the Authority” may freely recruit the Authority’s staff.. It recommends that the Act be amended in order to make it clear that staff recruitment - without any outside interference - is part of the President’s prerogatives.

C. The protection of personal data

¹⁵ See Case C 518/07 *Commission v Germany*, ECR I 1885, Judgment of 9 March 2010, §44. The Court made this statement in response to the objection of the German government that the absence of parliamentary oversight would lead to an infringement of the democratic principle. The judgment concerned the independence of the German authority which supervises the compliance on data protection provisions with regard to the “processing of personal data outside the public sector” in the different German Länder (see *ibid.*, para. 46). In that judgment, the Court stressed that the supervisory authorities “must remain free [...] of the influence [...] of the supervised bodies.” (*ibid.*, para. 25, see also para. 30). It also asked for a “broad interpretation of the requirement of independence of the supervisory authorities” (*ibid.*, para. 51).

¹⁶ See also *Opinion on Hungary’s New Constitutional Order: Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws* (Miklós Bánkuti, Tamás Dombos, Zoltán Fleck, Gábor Halmai, Krisztina Rozgonyi, Balázs Majtényi, László Majtényi, Eszter Polgári, Kim Lane Scheppele, Bernadette Somody, Renáta Uitz), p. 50.

¹⁷ The difference between “discharge” and “disqualification” seems to lie in whether the failure to perform his duties is the fault of the President of the Authority or not.

¹⁸ See art. 40(1) and (2) of the Act

41. Substantive rules for data protection are set out in articles 4 to 25 of the Act. Overall, the provisions of the Act dealing with data protection are in line with the Council of Europe standards, and in particular with the Convention 108:

- Although improvements can be made (see comments under Section D below), key concepts of personal data, sensitive data, processing and master file have been formulated in comparable terms (art. 2 and 6 of the Convention 108/ art. 3 of the Act);
- The principles of fairness, lawfulness, finality, proportionality and accuracy, which are supposed to govern all data processing have been correctly implemented (art. 5 Convention 108 / art. 4 of the Act);
- The obligation to secure the data has been fully implemented (art. 7 Convention 108/ art. 7 of the Act);
- The Act provides increased protection for sensitive data¹⁹ (art. 6 Convention 108/ art. 5 al. 2 of the Act);
- The data subject enjoys legal remedies to stop unlawful processing of personal data (art. 10 Convention 108/ art. 22 of the Act). In particular, articles 60 and 61 invest the Authority with the power to launch a data protection procedure and take administrative decisions in order to enforce the right to the protection of personal data and redress illicit process of such data;
- Finally, the regime of transborder flows (i.e. the principle of “no data export” to countries without adequate protection and its exceptions) as enshrined in art. 7 of the Act is consistent with art. 12 of the Convention 108 and art. 2 of the Additional Protocol.

42. At first glance, the individuals’ right of access to personal data concerning them, as provided in article 8 of Convention 108, seems to be fully guaranteed. Under articles 14 to 17 of the Act, the data subject enjoys the right to freely obtain from the master file an extract from their personal data (as well as the right of rectification and erasure of inaccurate or irrelevant data). Furthermore, the regime of exceptions to these rights seems to be in line with the applicable standards (art. 9 Convention 108/ article 19 of the Act).

43. In the Commission’s view, several aspects should nonetheless be reconsidered and improved.

44. First, knowing that Convention 108, in its art. 8.b, guarantees access by data subjects to personal data “without excessive delay”, the 30 days’ deadline set out in art. 15.4 for meeting an access request is excessive. This is even more regrettable as, in terms of general right of access to data of public interest, the processing time of a request is only 15 days (art. 29 al. 1²⁰);

45. Also, according to article 15.5 of the Act, access fees²¹ will be charged for a second request in the same year. Since the Convention 108 guarantees a right of access to “reasonable intervals”²², the Commission considers that only those who unnecessarily multiply access requests should be penalized in this way. The Commission notes that, according to the Act, the amount paid must be reimbursed if the data were controlled unlawfully or if the request for information has led to the correction of the data. It nevertheless considers that, since the mere requirement to pay the costs has, for the person concerned, a undisputable chilling effect, the reimbursement is not sufficient to effectively guarantee the right of the data subject to access his/her personal data, a key principle in the field of data protection.

¹⁹ It should be noted that the Convention 108 merely requires that appropriate safeguards be established, without specifying their nature.

²⁰ It is nonetheless true that, based on article 29.2, the 15 days deadline may be exceptionally extended once.

²¹ The Hungarian authorities have informed the Commission that the Hungarian text of the Act provides for the possibility to require “reimbursement of costs” and not “fees”.

²² “Any person shall be enabled [...]: b. to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form” (article 8.b).

46. The right to correct inaccurate data is granted by the Act in its article 17 to the extent that "the data controller has access to the authentic personal data". The purpose of this restriction, which is not provided for by Convention 108, is not clear.

47. The Venice Commission further notes that, unlike most legislation governing data protection, the Act does not provide any exception for journalists and the sources they use in their investigation activities. In the absence of a general exception for the press (which is rare in international comparison), it would be wise, at least, to limit data subjects' access so that they will not be allowed to know the source of the information made public by the journalists²³. The ECtHR has indeed stressed that "[p]rotection of journalistic sources is one of the basic conditions for press freedom [...]. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected"²⁴. The Commission has been informed by the Hungarian authorities that the protection of journalists' sources is guaranteed by Art. 6 of Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content, which provisions shall be applied as *lex specialis* compared with Act CXII of 2011. The Commission however notes that the above-mentioned art. 6 of the Freedom of the Press Act only refers to court or administrative procedures and wishes to stress, in this connection, that the right of access according to the data protection legislation does not qualify as a court or administrative procedure-related right as its implementation does not involve any judicial or administrative authority. It also recalls that most European countries explicitly protect journalistic sources in their respective data protection legislation or even generally exclude personal data processed by the media from the scope of the law on data protection. The Commission therefore recommends that an explicit guarantee for the protection of journalists' sources be also included in Act CXII of 2011.

D. The access to data of public interest

1. Scope of the right

a. Standards

48. The Council of Europe Convention on Access to Official Documents (Convention 205)²⁵ obliges state parties to guarantee a right to access to official documents, as defined by its Art. 1 (2) (b):

*"„official documents" means all information recorded in any form, drawn up or received and held by public authorities, recorded in any form" and relates to the official duties of the authority*²⁶.

49. It is important to note that, as indicated by its Explanatory report, the Convention's scope includes documents containing personal data²⁷.

b. The Hungarian Act

50. In general, the Act CXII addresses the main issues pertaining to classical legislation on the right to access to information in a satisfactory manner. The matter is regulated by articles 26 to 37 of the Act (Chapter III, entitled "Access to Data of Public Interest", subtitle 21: "General Rules concerning Access to Data of Public Interest"), while the various categories of data are

²³ The Convention 108 is silent on the issue; its explanatory report (§ 58) emphasizes, however, that the exception to right of access, in favour of "the protection of the rights and freedoms of others", laid down in art. 9, concerns in particular the requirements stemming from the freedom of the press. Directive 95/46 explicitly states the need for exceptions intended for journalistic (and artistic) activities, although it leaves Member States a wide margin of appreciation on the matter.

²⁴ See *Goodwin v. The United Kingdom*, (Application no. 17488/90), Judgment of 26 mars 1996, § 39.

²⁵ Council of Europe Convention on Access to Official Documents, CETS 205, 18.VI.2009

²⁶ Council of Europe Convention on Access to Official Documents, Explanatory Report, § 13.

²⁷ Explanatory Report, § 16.

defined by its art. 3. The three relevant ones are: “personal data”; “data of public interest”; and “data public on grounds of public interest”.

51. The Venice Commission particularly welcomes the inclusion, in its scope, of private stakeholders carrying out public duties, as well as the obligation to provide circumstantiated access to a document containing only some secret information and the establishment of a procedure for rapid access to data associated with effective remedies (see comments below).

52. Increased clarity should be provided as to the inclusion of personal data in the scope of the right to information. According to the Act, transparency only covers “data of public interest” and “public data on ground of public interest”. It is not clear whether personal data are included in the scope of the right since neither of these two categories explicitly covers such data (see art. 3 points (5) and (6), as well as art. 26. 3). According to the Hungarian authorities, “the term ‘public data on ground of public interest’ was developed originally by the case-law of the Constitutional Court for the very reason to cover personal data and is usually applied in this context.” Moreover, “The definition of ‘public data on ground of public interest’ and the provisions of the Act²⁸ are meant to make it clear that once an act qualifies personal data as public data on ground of public interest they shall be made accessible the same way as data of public interest [...] Thus the balance of the right to protection of personal data and the right to access public information is made in the Hungarian legal system by the Parliament on a case-by-case basis and enshrined always in an act explicitly.”

53. The Venice Commission takes note of the explanation provided by the Hungarian authorities. It fully shares the view that data protection and access to official documents are *a priori* equally legitimate interests, which implies that specific conflicts shall be dealt with by weighing these interests on a case by case basis and that the scope of protection should depend on the specific circumstances surrounding the request for access²⁹. It nevertheless believes that increased clarity on this particularly sensitive matter would be beneficial to an appropriate interpretation and application of the Act. In this connection, considers important to include the right to privacy and/or private interests in art. 27 (2) of the Act, as exceptions to the right to access to data of public interest.

54. Improvements and clarifications could also be made to the definitions given by Act to the key categories of data. “Personal data” is defined in a somewhat circular way as data relating to a data subject (art. 3 point (2) of the Act), while a “data subject” is a natural person identified or identifiable on the basis of personal data (art. 3 point (1) of the Act). Under the Act, data that falls under the definition of “personal data” is never data of public interest, since art. 3 point (5) defines “data of public interest” as “other than personal data”.

55. The definition of “data public on grounds of public interest” may also be improved, as its scope and purpose are unclear. Article 3 of the Act defines “Data public on grounds of public interest” as a separate category. Nevertheless, according to the system established by Art. 26, “data public on grounds of public interests” may be seen as a sub-category of or equated to “data of public interest”, “which is defined in art. 3 point (5) as : information or data, registered in any form, controlled by a body performing government responsibilities; concerning public activities or generated in the course of performing public tasks. It is difficult to understand the reason to create a special regime for these data, especially since the procedure is identical access (art. 28.1 in fine). The Venice Commission considers it important that the exact relationship between the two categories be made clear in art. 3 of the Act.

56. More generally, the Venice Commission notes that Act CXII regrettably uses different and less clear criteria to define the scope of the right to access to data of public interest than those established under the Convention 205. Even though the Act can be read and interpreted in the light of the Convention and taking into account the declaration made by Hungary with regard to

²⁸ Art. 28 (1) of the Act.

²⁹ See also Convention 205, Explanatory Report.

the Article 1(2) of the Convention 205³⁰, it would be preferable to use the definitions “public authorities” and especially “official documents”) provided by the Convention, which reflect the scope of most European freedom of information laws.

³⁰“In accordance with Article 1, paragraph 2, subparagraph a.ii, of the Convention, the Republic of Hungary informs the Secretary General of the Council of Europe that, for the Republic of Hungary, the definition of “public authorities” includes the following:

- legislative bodies as regards their other activities;
- judicial authorities as regards their other activities;
- natural or legal persons insofar as they perform public functions or operate with public funds, according to national law.”

2. Exceptions to the right to access to data

a. Standards

57. In the more recent case-law, Art. 10 ECHR has been interpreted more broadly, not only as a right to receive information which is already in the public realm, but also in the direction of a right of access to administrative data and documents.³¹

58. Art. 3 of the Convention 205 enumerates the admissible exceptions - subject to the usual requirements for limitations to fundamental rights under the ECHR³² - in an exhaustive manner, and sets out concrete mechanisms for the proportionality test, which are typical for freedom of information laws: the harm test and the public interest override. The Explanatory report makes it clear that states have a large margin of appreciation as to how to implement these tests: for each individual case or, by the legislature, through the way in which the limitations are formulated. Legislation may for example set down varying requirements for carrying out harm tests, such as a presumption for or against the release of the requested document or an unconditional exemption for extremely sensitive information. When such requirements are set down in legislation, the public authority should verify, when they receive a request for access to such an official document, whether the requirements in the statutory exceptions are fulfilled. Absolute statutory exceptions should be kept to a minimum³³.

Art. 10 (2) ECHR does not impose stricter standards than Convention 205.

b. The Hungarian Act

Legal basis

59. Act CXII allows for exemptions to access to information, which are regulated in art. 27, and whose regime varies according to the interest they protect.

60. Information classified under the law on the protection of classified information is excluded from the scope of the Act CXII (Art. 27.1). Similarly, as stated in Article 27.3, business secrets are protected by relevant provisions the Civil Code.

61. Moreover, art. 27 (2) of the Act provides a list of public interests for the protection of which access to documents can "be restricted by law". It is unclear whether the list of grounds is exhaustive, since art. 27 does not use the word "only", e.g. "right to access may *only* be restricted" It is not clear either whether "*by law*" means that Act CXII is in itself the law which allows for restriction, or such restrictions require an additional law or may be introduced by other laws. Assuming that the list is exhaustive, it may be concluded that art. 27 satisfies the requirement of a legal basis. It is nevertheless recommended that the word "only" be added to the text.

Protected values

62. In the Commission's view, all grounds for restriction of access to information in Act CXII are covered by the grounds enumerated in art. 3.1 of Convention 205. The Commission nonetheless finds that improvements could be made to some of the exemptions listed in article 27 and their specific regime.

³¹ See notably ECtHR, no. 37374/05, *Tarsasag v Hungary*, Judgment of 14 April 2009, § 35, 'towards the recognition of a right of access to information'.

³² Exceptions must be "set down precisely in the law", be 'necessary in a democratic society, have the aim of protecting specific objectives enumerated in Art. 3 (1) of the Convention, and they must be "proportionate to the aim of protecting" those objectives (Art. 3 (1) Convention 205).

³³ Explanatory Report to Convention 205, § 38.

63. First, the submission of highly sensitive documents to a general derogatory system defined by a special law is problematic. The Act should regulate the publicity of all official documents and all the more so that the secrecy clause protecting the interests of national defence and domestic security (art. 27. 2) is sufficient to ensure confidentiality. That said, one can imagine, following the example of other countries' laws, a special procedure for accessing highly sensitive information, which would, in particular, require the approval of the authority that created the document and not only that of the authority that holds it

64. Furthermore, it would be important to make sure that the exception concerning legal or administrative proceedings should be limited to the ongoing proceedings (art. 27.2.g).

65. Similarly, the intellectual property exception (art. 27.2.h) should be clarified in the sense that copyright impedes exploitation of the document requested, but shall in no case oppose his simple consultation.

66. More generally, the Commission notes that free access to information is allocated implicitly (cf. art. 29.3, which provides for the payment of a fee in case of costs) and would consider it wise to explicitly state, in the Act, the principle of free access to official documents (as in art. 7.1 of Convention 205).

Proportionality and balancing of interests

67. Act CXII does not explicitly provide for a harm-test nor for a balancing of interests. According to art. 27.2, "the right to access data of public interest and data public on grounds of public interest may [...] be restricted by law". While it belongs to the legislator to identify the grounds for restriction, the data-controlling body has a margin of discretion in applying such restrictions to specific requests. It is important to recall that discretion must be exercised under due consideration of the conflicting interests.

68. Additionally, Art. 30.5 prescribes how discretion of the controlling body must be exercised and allows for denial of access only when then public interests in non-disclosure "prevails."

69. A different, somewhat confusing, regime is established for the protection of internal deliberations (concerning data generated or registered in the course of decision-making). The internal deliberation exception provides both for a balancing of interests (art. 27;5 and for a harm test in Art. 27.6.). The Commission considers that, in order to fully meet the requirements of Convention 205, the Act should clarify the relation between art. 27.5 and art. 27.6, either by explicitly mentioning in art. 27 the need for a balancing of interests *or* for a harm-test, or by making a clear reference to art. 30.

Precision of the law

70. Convention 205 requires that "limitations shall be set down precisely in law". The Act lists the exceptions precisely. Nevertheless, the regime of protection of internal deliberations is confusing (see above). In addition, since the Act itself does not regulate the exemptions comprehensively, applicants will have to consult other laws in order to find out whether specific information is exempted from disclosure.

71. To ensure conformity with the European and international legal standards set out above, the balancing of interest mentioned in art. 30.5 should be inserted in art. 27. Moreover, for clarity reasons, it is recommended that the regime of exceptions as a whole be regulated in the Act, including access to highly sensitive documents and to business secrets.

3. Complaint Procedure and Procedure on Declassification

a. Standards

72. Convention 205 sets two standards. First, applicants shall have access to a *review procedure* before a court or another independent or impartial authority established by the law (art. 8.1). The Explanatory Report states: “This review body must be able, either itself to overturn decisions (...) or to request the public authority in question to reconsider its position”³⁴. Second, applicants shall have access to an *expeditious and inexpensive review or reconsideration procedure*, be it before court or another independent body, or within the administrative system (Convention 205, Art. 8.2).

73. Further standards are enshrined in Art. 13 ECHR and Art. 2 (3) ICCPR.

b. The Hungarian Act

Investigation by the Authority

74. Besides turning to court, an applicant may request the Authority to conduct an investigation. According to Article 52 (1), “*Anyone is entitled to request an investigation from the Authority, on the grounds of violation of rights relating to the control of personal data, access to data of public interest or data public on grounds of public interest, or in the event of immediate threat of the above*”. It is important to note that the Act does not state that a person may only claim a violation of his own rights. According to art. 52.2, the investigation by the Authority is a *sui generis* proceeding, and not an administrative proceeding falling under the general rules. Moreover, turning to the Authority is neither a precondition nor an impediment for judicial review. Art. 31 (1) states that, “should” the applicant request an investigation by the Authority, litigation can be initiated within 30 days of the Authority’s refusal to assess his request in substance. The proceedings before the Authority are free of charge (art. 52.4) and the deadline for dealing with a notice is two months.

75. Should the Authority find these rights violated or immediately threatened, it “shall call on” the data controller to remedy the violation or eliminate the immediate threat and/or make specific recommendations that would help effectively address the situation. In case the data controlling authority fails to comply with the Authority’s request or recommendations, “further measures”, can be taken by the latter, including initiating judicial review, in accordance with Article 64 of the Act. Specific recommendations may also be made to the legislator when the Authority establishes that “*the violation of rights or its immediate threat ensues from an unnecessary, ambiguous or inappropriate provision of legislation or regulatory instrument of public law, or the lack or deficient nature of the legal regulation of data control issues*” (see Articles 56 to 58) .

Judicial proceedings

76. Based on art. 31.1 of the Act, applicants may turn to the court to challenge a refusal to grant access to information³⁵, in case the deadline to answer an access request has expired without result or in order to challenge the determination of fees for making a copy.

77. In the Venice Commission’s view, the remedial mechanism provided by the Act is in line with both requirements stated by Convention 205 in its art. 8.1 and art. 8.2. For reasons of clarity, it might however be preferable to list all the options of an applicant to challenge a refusal

³⁴ Explanatory Report to Convention 205, § 64.

³⁵ According to the Hungarian authorities, this was omitted in the English version of the Act, although it is clearly stated in the original Hungarian text.

to grant him or her access to information in one single provision of the Act. Also, increased clarity should be provided concerning the relationship between the two types of proceedings.

78. Further consideration is also required as to the procedure for the supervision of classified data, which clearly excludes the possibility for an applicant to request declassification. Art. 62 (3) of the Act expressly states that administrative procedures on declassification of classified information can only be initiated by the Authority, which seems not to be in conformity with the standard set by Article 8 of Convention 205, which requires a review procedure for any type of access' denial.

V. CONCLUSIONS

79. The Hungarian law on self-determination and freedom of information (Act CXII/2011, as of 1 June 2012) may be considered, as a whole, as complying with the applicable European and international standards.

80. Despite this overall positive assessment, several points would need consideration and improvements:

- The mode of designation of the President of the National Authority for Data Protection and Freedom of Information, which entirely excludes the Parliament, does not offer sufficient guarantees of independence;
- The inclusion of personal data in the scope of the general right to information should be more clearly stipulated by the Act;
- The protection of media sources should be explicitly guaranteed by the Act as an exception to the right of data subjects to access their personal data;
- The scope and purpose of key concepts for the right to access to data of public interest and their inter-relations are insufficiently clear and may be source of difficulties in the interpretation and application of the Act.
- The provisions on the remedial mechanism should be clarified: the two options might be mentioned in one provision and the relationship between the two options should be made clear;
- More generally, it is recommended to make sure that the legislation dealing with data protection and access to information, since it directly involves citizens, is clear, precise and to the extent possible self-sufficient; any reference to provisions of related laws should be made through explicit cross-references

81. The Venice Commission invites the Hungarian authorities to revise the Act in the light of the recommendations contained in this Opinion. It remains at the disposal of the Hungarian authorities for any further assistance.