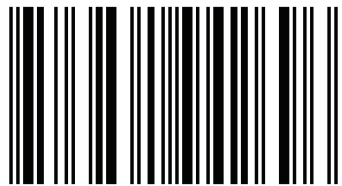


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## Comparative Study on Investigative Journalism

The third volume of the EMR/Script series deals with a specific area of press and media freedom on the European level and in the national legal frameworks of all EU Member States and candidate countries. This comparative study on investigative journalism was conducted by the EMR as institutional member of the European Centre for Press and Media Freedom (ECPMF) and is part of the Centre's work that aims at the protection of freedom of the press and media in Europe.



EMR/SCRIPT

Band 3

Jörg Ukrow, Gianna Iacino



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Stephan Ory, Mark D. Cole (Hrsg.)

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# Study on Investigative Journalism

Study on press and media freedom  
on the European level and  
in the national legal frameworks  
of all EU Member States and candidate countries

Prof. Dr. Stephan Ory  
Prof. Dr. Mark D. Cole  
(Hrsg.)



*EMR /Script* ist eine Reihe des  
Instituts für Europäisches Medienrecht e.V. (EMR)



## Preface

Freedom of the Press and Media constitutes one of the essentials of a democratic society. Especially investigative journalism furthers public debates and the forming of opinion and is therefore a most important aspect of this freedom. It can help to fight corruption and defend the rule of law. The LuxLeaks case or the Panama Papers – to name two recent examples – illustrate how journalists have fulfilled their role as public watchdogs.

However, whilst on the one hand there is often an obvious interest or even need to discover and publish information, there is often on the other hand possibly justified reason to keep that information secret. The legal framework needs to protect secrets where necessary while enabling journalists to fulfill their role as public watchdogs. In view of this evident conflict of opposing interests the study presented here analyses both the European framework for investigative journalism as well as the solutions to resolve the contradiction in the legal systems of European States. It derives from this comparative analysis areas for potential improvement.

**The Institute of European Media Law (EMR)** was founded in 1990 as an independent legal research and consultancy institute specialising in media law and policy of the European Union, the Council of Europe as well as on a comparative level the Member States of these organisations and beyond. The Institute acts as a service provider and neutral platform in a number of fields of media law and policy, including in particular press law and the conditions under which journalists work.

The present study was conducted on behalf of the **European Centre for Press and Media Freedom (ECPMF)**. The Centre was founded by 25 organizations as an independent non-profit organisation with the aim to protect press and media freedom in Europe and receives funding from the EU. The EMR is one of ECPMF's consortium partners and provides the Centre with legal analysis regarding developments in press and media freedom in Europe. It does so on the basis of regular reporting but also by in-depth studies of specific aspects for which this study is a first example.

The editors would like to thank all national experts that authored the "country reports" which give a detailed analysis of the specific national legal systems in all EU Member States and candidate states. We are especially grateful to the EMR experts Jörg Ukrow, who wrote the comprehensive analysis of the European legal framework, and Gianna Iacino, who drew up a comparative analysis of the national legal systems based on the country reports.



Comparative Study on Investigative Journalism

We hope the study will serve to support the ECPMF's work by giving a detailed analysis of the legal status of press and media freedom in Europe, by pointing out where action is needed for improvement and by presenting positive examples of robust protection of press and media freedom. We hope the study will be widely distributed and appreciate questions or comments at: [emr@emr-sb.de](mailto:emr@emr-sb.de).

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Director

Prof. Dr. Mark D. Cole  
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## **A. Introduction**

### **I. Objective of the study**

The present document is the final report for the study “Investigative Journalism”, which the Institute of European Media Law (EMR) has conducted in partnership with the Media Foundation Sparkasse Leipzig. The study is part of a larger project which aims at the protection of the freedom of press and media in Europe. The project has led to the foundation of the European Centre for Press and Media Freedom (ECPMF) in Leipzig.

The main objective of the study is to gain a reliable picture of the status quo of the protection of press and media freedom on the European level and in the national legal frameworks, and to determine any need for improvement. The study, therefore, aims to provide

- *a detailed description and analysis of the European legal framework regulating and protecting press and media freedom,*
- *a comparative analysis of the national legal frameworks regulating press and media freedom*
- *identification of any need for improvement and best practices to be implemented for a better protection of the press and media freedom in national legal systems.*

### **II. Methodology of the study and structure of the report**

The report is divided in three main parts. The first part gives a description of the European legal framework regulating Press and media Freedom. The second part is a comparative analysis of the national legal systems, which identifies differences and common traces of those legal systems governing press and media freedom on a national level. The third part of the study identifies any need for improvement and the best practices to achieve a better protection of press and media freedom in the analysed States.

The report comprises information resulting from desk research and country reports. The major share of the data used for the comparative analysis has been obtained from country experts carefully selected from the EMR’s Europe-wide network of contacts (EMR media network). To collect comparable information on the status quo of investigative journalism in the respective States, a questionnaire was created and sent to national experts in all examined States. The questionnaire can be found as annex 1 to the study.

The country reports contain both the description of the relevant legislation,

and in-depth descriptions of practical cases with regard to the press and journalistic sector. The national experts collected information from a wide range of sources including books, reports, websites of journalism and non-governmental organisations, international yearbooks, company websites, company yearbooks, news reports, websites and reports of broadcasting audience and newspaper circulation measurement organisations, websites and reports of regulatory authorities and governments, databases with relevant case-law. The country reports have been added as annex 2 to the study.

## **B. Investigative journalism and European Law**

### **I. Investigative journalism and the law of the European Union**

#### **1. General remarks**

From its origin, the European Union (EU) is not founded on a constitution but has a contractual base. Actually, the EU rests on two international treaties, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)<sup>1</sup> as the corner of the primary law of the EU.<sup>2</sup> Nevertheless, this contractual base already has a „constitutional“ character.<sup>3</sup> Actually, it is especially Title I of the TEU which outlines constitutional principles of the EU as a supranational entity.

By the TEU, the Member States established together the constitutional subject of this order. The Member States agreed to confer competences to this supranational institution in order to attain objectives they have in common. Competences not conferred upon the EU in the TEU or the TFEU remain with the Member States. These are the point of origin and the principal purpose of the European Union as is stipulated in Article 1 and 4.1 TEU.

The European Union has its own legal order which is separate from international law and forms an integral part of the legal systems of the Member States. The legal order of the Union is based on its own sources of law. These sources of law have to be based on the competences of the EU.<sup>4</sup>

According to the first sentence of Article 5.1 TEU, the limits of EU competences are governed by the principle of conferral. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States (Article 5.2 TEU).

The separation and distribution of competences between the EU and its

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<sup>1</sup> Hereinafter referred to as „the treaties“.

<sup>2</sup> Following the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the EU is a further part of this primary law of the EU.

<sup>3</sup> See ECJ, Case C-294/83, *Les Verts v. Parliament*, [1986] ECR I-1339, para. 23, and, e.g., Calliess (ed.), *Verfassungswandel im europäischen Staaten- und Verfassungsbund*, 2007.

<sup>4</sup> See ECJ, Case C-26/62 *NV Algemene Transport en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, and ECJ, Case 6/64 *Costa v. ENEL* [1964] ECR 585.



Member States follows a three-fold classification: (1) exclusive, (2) shared, (3) supportive. Each of these types of competences is defined in Art. 2 TFEU. The scope of these classes of EU competences is explicitly referred to in Articles 3, 4 and 6 of the TFEU, respectively.

If there exists an exclusive competence of the EU in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts (Article 2.1 TFEU). Media law and media policy are not subject to this exclusive competence of the EU.<sup>5</sup>

When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence (Article 2.2 TFEU).

Shared competence between the EU and the Member States applies, i.a., in the principal area of the internal market (Article 3.1 a) TFEU). The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties (Art. 26.2 TFEU). The free movement of persons comprises the free movement for workers (referred to in Article 45 TFEU) as well as the freedom of establishment (referred to in Article 49 TFEU).<sup>6</sup> Since the *Sacchi* judgement of the ECJ it is evident, that broadcasting signals as an economic activity are a “service”, according to the Treaty definitions, falling under the scope of the treaties.<sup>7</sup> The Court

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<sup>5</sup> According to Art. 3.1 TFEU, the EU shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. According to Art. 3.2 TFEU, the EU shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

<sup>6</sup> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

<sup>7</sup> “In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services. [...] It follows that the transmission of television signals, including those in the

also specified in this case that

*“[o]n the other hand, trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods“.*

Accordingly, all journalistic activities in the field of television can fall within the scope of the fundamental freedoms of the EU as an internal market. There is no argument why this relevance of the fundamental freedoms shall not apply for all other forms of journalistic activities, too. Therefore, obstacles for investigative journalism, which have a trans-border effect in the EU, can be a violation of the fundamental freedoms of the EU.

The fundamental freedoms of the internal market are of crucial importance for the so-called negative integration of the EU as one type of integration besides positive integration.<sup>8</sup> Negative integration means limitations on what the member states can do. The fundamental freedoms limit the legislative freedom of the member states in areas in which the states, in principle, retain their legislative powers as, i.a., in the field of press and media law. Yet, discrimination against out-of-state commerce with media products and services is forbidden.

The so-called positive integration of the EU encompasses the creation of secondary law of the EU dealing with, i.a. aspects of the internal market. In terms of federalism, positive integration is simply the centralization of certain legislative powers at the federal level. A hybrid results when the federal government does not preemptively regulate a certain area, but limits itself to formulate guidelines for the states (harmonization). Such a hybrid type of integration is typical for the integration by EU directives, because a directive shall only be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods (Article 288.3 TFEU).

In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas (Article 2.5 TFEU). The areas of such action shall, at European level, be, inter alia, culture (Article 6 (c) TFEU) as well as education and vocational training (Article 6 (e) TFEU). National decisions which may be influenced by these supportive, coordinating or

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nature of advertisements, comes, as such, within the rules of the Treaty relating to services.”

<sup>8</sup> See *de Witte*, 'Cultural Policy; The Complementarity of Negative and Positive Integration', in Schwarze & Schermers (eds), *Structure and Dimensions of European Community Policy*, 1988, pp 195 et seq.

supplementing actions, encompass the regulation of press activities in the field of investigative journalism.<sup>9</sup>

The use of shared or supporting, coordinating or supplementing competences of the EU is governed by the principles of subsidiarity and proportionality (Article 5.1 sentence 2 of the TEU). Under the principle of subsidiarity, in areas which do not fall within its exclusive competence (as is the case in the whole field of media law), the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (Article 5.3 of the TEU). Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties (Article 5.4 of the TEU).

## 2. The Audiovisual Media Services Directive

The most important EU directive in the field of media law is the Audiovisual Media Services Directive.<sup>10</sup> This directive governs the EU-wide coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services. The term „audiovisual media service“ covers only audiovisual media services, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.<sup>11</sup> Also press activities<sup>12</sup> as well as audio

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<sup>9</sup> See with respect to the importance of Article 167 TFEU (culture) for self-regulation in the media sector Ukrow, „Selbstkontrollen im Medienbereich und Europäisches Gemeinschaftsrecht“, in: Ukrow (ed.), *Die Selbstkontrolle im Medienbereich in Europa*, 2000, pp. 1 et seq. (at pp. 59 et seq.).

<sup>10</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJEU L 95/1 (hereinafter referred to as „AVMSD“).

<sup>11</sup> See recital (21) of the AVMSD and, e.g., Chavannes & Castendyk, Article 1 AVMSD, in: Castendyk et al. (eds.), *European Media Law*, 2008, pp. 799 et seq., para.s 24 et seq.

<sup>12</sup> Yet, in a new judgment of 21 October 2015, the ECJ (ECLI:EU:C:2015:709) stated that the concept of 'programme', within the meaning of Article 1(1)(b) of the AVMSD must be interpreted as including, under the subdomain of a website of a newspaper, the provision of videos of short duration consisting

transmission or radio services<sup>13</sup> are not covered by the scope of the AVMSD or any other specific media-related secondary law of the EU with the exception of regulations of commercial communication, namely advertisement law.

The AVMSD aims (1) to provide rules to shape technological developments, (2) to create a level playing field for emerging audiovisual media, (3) to preserve cultural diversity, (4) to protect children and consumers, (5) to safeguard media pluralism and (6) to combat racial and religious hatred. Some areas of EU coordination by the AVMSD like the regulations with respect to incitement to hatred and with respect to the protection of minors have a direct relation to journalistic work. Yet, none of the AVMSD regulations concerns investigative journalism in a direct way.

However, the new regulations guaranteeing the independence of national media regulators<sup>14</sup> may have an indirect effect of preventing chilling effects for investigative journalism.

### 3. Summary and outlook

Even if the European Treaties are not referred to as a “constitution” they exhibit all of the features of a codified corpus of primary law; an actual constitution for the EU could have the exact same provisions with the term “constitution” being a matter of symbolism. The EU is designed like a federation, though it is for all intents and purposes the “state of its states”, since its source of legitimacy is found in the principles of conferral, subsidiarity, and proportionality.<sup>15</sup>

The EU has already regulated a wide range of issues relating to mass media.<sup>16</sup> These issues affect directly essential parts of journalistic work, yet they do not cover at the present stage of European integration the field of investigative journalism. However the EU has great *potential* power for regulating even issues with respect to this type of journalism for all forms

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of local news bulletins, sports and entertainment clips. On a proper interpretation of Article 1(1)(a)(i) of the AVMSD assessment of the principal purpose of a service making videos available offered in the electronic version of a newspaper must focus on whether that service as such has content and form which is independent of that of the journalistic activity of the operator of the website at issue, and is not merely an indissociable complement to that activity, in particular as a result of the links between the audiovisual offer and the offer in text form.

<sup>13</sup> See recital (23) of the AVMSD.

<sup>14</sup> See recital (94) and Article 30 of the AVMSD.

<sup>15</sup> See *Stavrou*, “Five constitutional principles of EU law”, <http://www.protesilaos.com/five-principles-eu-law/>.

<sup>16</sup> See, e.g., *Castendyk et al.* (eds.), “European Media Law”, 2008; *Fink et al.* (eds.), “Europäisches und Internationales Medienrecht”, 2<sup>nd</sup> ed., 2012.

of mass media, even though the principle of conferral is meant to limit its authority to an exhaustive list of competences. National sovereignty understood as “absolute”, is a regulatory concept of the past with respect to media law relating to journalistic work. This sovereignty is already limited by EU directives, especially the AVMSD. In the future, this directive may have a further field of application including all forms of mass media and all other types of services which are relevant for a significant proportion of the general public. But such a further positive European integration integration is not the only potential field of dynamic integration in the field of investigative journalism. It is remarkable that the negative European integration in the field of investigative journalism is not only promoted by the fundamental freedoms but also by the protection of human rights within Europe.

## **II. Investigative journalism and the protection of human rights in Europe**

### **1. Introduction**

The freedom of expression and information, together with freedom of the mass media, contribute significantly to the formation of public opinion, thereby enabling people to make informed choices in their political decisions. Freedom of expression and media freedom are therefore essential for democracy, which is one of the fundamental values common to all Member States, on which the European Union is founded (Article 2 TEU). Moreover, in providing information on the performance of public authorities, media also play an important role as a 'watchdog' over public power, for which they need to be free from any dominant political or state influence.<sup>17</sup>

Freedom of media has a two-fold character. On one side it provides people active in journalism with an individual right to inform and to express opinions. This protected space for journalistic work without any outside intervention as a negative liberty constitutes a journalistic freedom from something or someone. On the other, media freedom gives the mass media guarantees appropriate to an institution inherent to the democratic process. This positive liberty is essential for the journalist's self governance (freedom to something).<sup>18</sup>

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<sup>17</sup> See, e.g., *Potcheva*, “Press freedom in the EU. Legal framework and challenges”, 2015, <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-554214-Press-freedom-in-the-EU-FINAL.pdf>, p. 2.

<sup>18</sup> See, e.g., *Koltay*, “The Meaning of Freedom of the Press”, [http://hunmedialaw.org/dokumentum/166/Freedom\\_of\\_the\\_Press\\_final.pdf](http://hunmedialaw.org/dokumentum/166/Freedom_of_the_Press_final.pdf), p. 2.

This essential significance of media freedom for the democratic functioning of society, making it a fundamental constitutional value, leads to very high requirements before any restrictions can be imposed on the freedom of the mass media by the public authorities. This does not mean, however, that media freedom has automatic prevalence over other conflicting interests like, e.g., the right to privacy or data protection. Rather, any conflicting interest must be balanced allowing the unfolding as far as possible of both media freedom and other conflicting rights and legitimate interests, albeit taking into account the significance of freedom of expression and media freedom for democracy.

The democratic function of media freedom does not mean however that only publications dealing with political matters are protected by the right. Rather, any journalistic products enjoy this protection, including the 'tabloid press'. However, the higher the contribution of the journalistic product to the formation of public opinion on matters of relevance for society, the bigger the weight attributed to freedom of the press against other legitimate interests.<sup>19</sup>

A debate on matters of public concern in a democratic society presupposes the existence of divergent opinions standing for the different competing political options between which citizens can freely choose. Therefore media freedom should be characterised by ideological, cultural, social and political pluralism. The more pluralist the media landscape and the more different points of view are provided in communication, the bigger is the legitimising effect media have on the political process. In this respect, while media pluralism is understood as independence of number of media companies – press freedom is related to the lack of state monopoly or state media from private control – thus avoiding media concentration under the ownership of a small intrusion.<sup>20</sup>

In addition to the 'negative' or 'defensive' liberty against state influence, media freedom also imposes a positive obligation on public authorities to promote and guarantee this freedom and to defend it from unjustified and unproportional restrictions, not only against public bodies but also in horizontal relationships between private players.

## **2. International Protection of media freedom**

Freedom of expression and of information are established as human rights in several international instruments such as the Universal Declaration of

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<sup>19</sup> See, e.g., *Potcheva*, "Press freedom in the EU. Legal framework and challenges", 2015, <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-554214-Press-freedom-in-the-EU-FINAL.pdf>, p. 2.

<sup>20</sup> See *Calderaro & Dobрева*, "European Union Competences in respect of media pluralism and media Freedom", RSCAS PP 2013/01, 2013, p. 11.

Human Rights and the UN International Covenant on Civil and Political Rights (ICCPR). Article 19 of the Universal Declaration of Human Rights states:

*„Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.“*

The international human rights treaty with the greatest relevance for the protection of journalists and other media actors is the ICCPR. Other treaties are, however, also relevant, depending on how the safety of journalists is violated. They include the Convention against *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *International Convention for the Protection of All Persons from Enforced Disappearance*. *The focus here will be on the ICCPR.*<sup>21</sup>

Under Article 2(1) of the ICCPR, each State Party must “respect and ... ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. While the “respect” according to this Article means an obligation of “non-interference”, the duty to “ensure” the rights goes beyond a pure negative obligation: It “implies an affirmative obligation by the state to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed in the Covenant, including the removal of governmental and possibly also some private obstacles to the enjoyment of these rights”.<sup>22</sup> The nature of these affirmative or positive obligations can vary, but includes prohibiting violations of human rights by private parties; developing legislative and other measures to give effect to such prohibitions, and conducting (independent and) effective investigations into certain types of violations.<sup>23</sup>

From the point of view of the right to freedom of expression, it is very important that all of the substantive rights safeguarded by the ICCPR imply

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<sup>21</sup> See also, e.g. *McGonagle*, How to address current threats to journalism? The role of the Council of Europe in protecting journalists and other media actors, MCM(2013)009, pp. 5 et seq.

<sup>22</sup> *Buergenthal*, “To Respect and Ensure: State Obligations and Permissible Derogations”, in Louis Henkin, Ed., *The International Bill of Rights (1981)*, pp. 72 et seq., at 77; cit. by *McGonagle*, How to address current threats to journalism? The role of the Council of Europe in protecting journalists and other media actors, MCM(2013)009, pp. 6.

<sup>23</sup> See *McGonagle*, How to address current threats to journalism? The role of the Council of Europe in protecting journalists and other media actors, MCM(2013)009, pp. 7.

negative and positive State obligations in this manner. To promote the safety of journalists, e.g., requires affirmative State action in order to ensure various human rights of the journalists, namely their right to life (Article 6); the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7); the right to liberty and security of person (including the right not to be subjected to arbitrary arrest or detention) (Article 9), and the right to liberty of movement (including the right to leave a country) (Article 12).<sup>24</sup>

Article 19 of the ICCPR as the key regulation for the protection of media freedom in the framework of UN human rights law states:

*„1. Everyone shall have the right to hold opinions without interference.*

*2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

*3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

*(a) For respect of the rights or reputations of others;*  
*(b) For the protection of national security or of public order (ordre public), or of public health or morals.“*

According to the UN Human Rights Committee, freedom of opinion and freedom of expression are for the full development of the person. They are essential for any society.<sup>25</sup> They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.<sup>26</sup>

The obligation to respect freedoms of opinion and expression is binding on

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<sup>24</sup> See *McGonagle*, How to address current threats to journalism? The role of the Council of Europe in protecting journalists and other media actors, MCM(2013)009, pp. 7.

<sup>25</sup> See UN Human Rights Committee, communication No. 1173/2003, *Benhadj v. Algeria*, Views adopted on 20 July 2007; No. 628/1995, *Park v. Republic of Korea*, Views adopted on 5 July 1996.

<sup>26</sup> See UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para.s 2 and 3.



every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party.<sup>27</sup> The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.<sup>28</sup>

Paragraph 1 of article 19 UNCCPR requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion.<sup>29</sup> The harassment, intimidation or stigmatization of a person like, e.g., a journalist, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.<sup>30</sup> Any form of effort to coerce the holding or not holding of any opinion is prohibited.<sup>31</sup>

Paragraph 2 of article 19 UNCCPR requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20.<sup>32</sup> It includes

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<sup>27</sup> See the UN Human Rights Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 4, Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40, vol. I (A/59/40 (Vol. I)), annex III.

<sup>28</sup> See *ibidem*, para. 8; see also UN Human Rights Committee, communication No. 633/1995, *Gauthier v. Canada*, Views adopted on 7 April 1999.

<sup>29</sup> See UN Human Rights Committee, communication No. 550/93, *Faurisson v. France*, Views adopted on 8 November 1996.

<sup>30</sup> See UN Human Rights Committee, communication No. 157/1983, *Mpaka-Nsusu v. Zaire*, Views adopted on 26 March 1986; No. 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994.

<sup>31</sup> See UN Human Rights Committee, communication No. 878/1999, *Kang v. Republic of Korea*, Views adopted on 15 July 2003.

<sup>32</sup> See UN Human Rights Committee, communications Nos. 359/1989 and 385/1989, *Ballantyne, Davidson and McIntyre v. Canada*, Views adopted on 18 October 1990. Article 20 UNCCPR states that any propaganda for war as well as any advocacy of national, racial or religious hatred that constitutes

journalism<sup>33</sup> as well as political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, cultural and artistic expression, teaching and religious discourse.<sup>34</sup> The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.<sup>35</sup> Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression.<sup>36</sup>

Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the

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incitement to discrimination, hostility or violence shall be prohibited by law. E.g., in the case *Faurisson v. France*, the UN Human Rights Committee ruled that the restriction of Mr. Faurisson's freedom of expression, who stated that there were no homicidal gas chambers for the extermination of Jews in Nazi concentration camps, was necessary within the meaning of Article 19, Paragraph 3, and Article 20 Paragraph 2 of the ICCPR (Human Rights Committee, Views on Communication No. 550/1993, *Faurisson v. France*, 8 November 1996, (CCPR/C/58/D/550/1993)).

<sup>33</sup> See UN Human Rights Committee, communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*, Views adopted on 19 March 2009.

<sup>34</sup> See UN Human Rights Committee, communication No. 414/1990, *Mika Miha v. Equatorial Guinea*; communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005; communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006; communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005; Communication No. 926/2000, *Shin v. Republic of Korea*, Views adopted on 16 March 2004; communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000 and UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 11.

<sup>35</sup> See UN Human Rights Committee, communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000 and UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 11.

<sup>36</sup> See UN Human Rights Committee, communication No. 926/2000, *Shin v. Republic of Korea*; communication No. 1341/2005, *Zundel v. Canada*, Views adopted on 20 March 2007; communication No. 1009/2001, *Shchetoko et al. v. Belarus*, Views adopted on 11 July 2006; communication No. 412/1990, *Kivenmaa v. Finland*, Views adopted on 31 March 1994; communication No. 1189/2003, *Fernando v. Sri Lanka*; communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005 and UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 12.

date of production.<sup>37</sup> To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.<sup>38</sup>

According to the UN Human Rights Committee, a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.<sup>39</sup> The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function.<sup>40</sup> The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.<sup>41</sup> The abovementioned right of access to information includes a right whereby the media has access to information on public affairs<sup>42</sup> and the right of the general public to receive media output.<sup>43</sup>

States parties should take account of the extent to which developments in

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<sup>37</sup> See UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 18.

<sup>38</sup> See UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 19.

<sup>39</sup> See UN Human Rights Committee, communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005.

<sup>40</sup> See UN Human Rights Committee, communication No. 633/95, *Gauthier v. Canada*.

<sup>41</sup> See the UN Human Rights Committee's general comment No. 25 (1996) on article 25 (Participation in public affairs and the right to vote), para. 25, Official Records of the General Assembly, Fifty-first Session, Supplement No. 40, vol. I (A/51/40 (Vol. I)), annex V.

<sup>42</sup> See UN Human Rights Committee, communication No. 633/95, *Gauthier v. Canada*.

<sup>43</sup> See UN Human Rights Committee, communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*.

information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.<sup>44</sup>

Paragraph 3 of article 19 UNCCPR expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The relation between right and restriction and between norm and exception must not be reversed.<sup>45</sup>

Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.<sup>46</sup>

States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 of article 19 UNCCPR may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.<sup>47</sup> Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19.<sup>48</sup> Journalists

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<sup>44</sup> See UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 15.

<sup>45</sup> See UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 21.

<sup>46</sup> See UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 22.

<sup>47</sup> See UN Human Rights Committee, communication No. 458/91, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

<sup>48</sup> See UN Human Rights Committee, communication No. 1353/2005, *Njaru v.*

are frequently subjected to such threats, intimidation and attacks because of their activities. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress.<sup>49</sup>

Restrictions to the freedoms guaranteed by Article 19 UNCCPR must be provided by law. For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.<sup>50</sup>

Extreme care must be taken by States parties to ensure that treason law and similar provisions relating to national security are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress.<sup>51</sup>

Restrictions must not be overbroad. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law”. The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a

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Cameroon, Views adopted on 19 March 2007.

<sup>49</sup> See UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 23.

<sup>50</sup> See UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para.s 24 and 25.

<sup>51</sup> See UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 30.

democratic society concerning figures in the public and political domain.<sup>52</sup>

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>53</sup>

Journalism is a function shared by a wide range of players, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of players.<sup>54</sup>

It is normally incompatible with paragraph 3 to restrict the freedom of journalists and others who seek to exercise their freedom of expression (such as persons who wish to travel to human rights-related meetings) to travel outside the State party, to restrict the entry into the State party of foreign journalists to those from specified States or to restrict freedom of movement of journalists and human rights investigators within the State party (including to conflict-affected locations, the sites of natural disasters and locations where there are allegations of human rights abuses). States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.<sup>55</sup>

Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of

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<sup>52</sup> See UN Human Rights Committee, communications No. 1128/2002, *Marques v. Angola*; communication No. 1157/2003, *Coleman v. Australia*.; communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005 and UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 34.

<sup>53</sup> See UN Human Rights Committee, communication No. 926/2000, *Shin v. Republic of Korea* and UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 35.

<sup>54</sup> See UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 44.

<sup>55</sup> See UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 45.

expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.<sup>56</sup>

Article 4A.4 of the Third Geneva Convention relative to the Treatment of Prisoners of War and Article 79 of the First Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts are specifically important for the protection of journalistic work in armed conflicts. The last mentioned Article is titled “Measures of protection for journalists” and states that “journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians .... They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 A (4) of the Third Convention.”

Besides, several international organisations provide regular reports on media freedom, for instance the OSCE Representative on Freedom of the Media.

Non-governmental organisations are vital sources of information for the Council of Europe, the OSCE and the United Nations, and for national governmental authorities. Their work provides much of the evidence and analysis on which informed assessments can be made on policies for freedom of expression and safeguarding the lives and work of media workers. The input of NGOs can also ensure that policy-makers are alive to the realities and concerns of their societies.<sup>57</sup>

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<sup>56</sup> See UN Human Rights Committee, communication No. 909/2000, *Kankanange v. Sri Lanka*, Views adopted on 27 July 2004 and UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression. 2011, para. 47.

<sup>57</sup> See, e.g., *Horsley*, The activities of organisations in Europe working for the

### 3. The protection of media freedom in the framework of the Council of Europe

#### a) Introduction

At the European level, the task of defining legal standards for media freedom is carried out mainly by the European Convention on Human Rights (ECHR), through the activity of the Council of Europe and through the case law of the European Court for Human Rights (ECtHR) which involves the interpretation of Article 10 of the ECHR. This set of acts which the Committee of Ministers, the Parliamentary Assembly and the Committees of Experts have produced on this topic, plus the important case law of the Court of Human rights and the European Convention for Transfrontier Television form a sort of corpus that covers most of the issues relating to media freedom, and is a point of reference for any national, supranational or international order that deals with this topic.

#### b) The Convention for the Protection of Human Rights and Fundamental Freedoms

##### aa) Introduction

The European Convention on Human Rights (ECHR) is, besides the common constitutional traditions of EU Member States, a source of EU fundamental rights which constitute general principles of EU law (Article 6.3 TEU) to be observed in all EU action. Although the Convention establishes only a minimum standard of human rights protection, which can be exceeded by the contracting parties, the European Court of Human Rights (ECtHR) has set a high standard of protection for freedom of expression and of the media.

##### bb) Article 10 of the Convention

Article 10 of the ECHR as the key regulation for the protection of media freedom in the framework of human rights law of the Council of Europe states:

*“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and*

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protection and safety of journalists and to combat impunity, MCM(2013)011, pp. 12 et seq.



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

It follows that the freedom of expression and media freedom are not established in the ECHR as absolute rights, meaning that they may be restricted if the restrictive measure pursues a legitimate objective and is necessary in a democratic society, i.e. does not interfere with freedom of expression or media freedom more than is necessary in order to achieve the objective pursued (proportionality test). Furthermore, for media freedom, the Convention establishes a specific possible restriction: a licensing regime for broadcasting, television and cinema enterprises (Article 10(1) ECHR, third sentence).

Freedom of expression applies both to the traditional printed press and electronic media (radio and television), as well as the new media (e.g. publishing on Internet).<sup>58</sup>

The ECtHR has held that although the essential object of many provisions of the Convention including its Article 10 ECHR is to protect the individual against arbitrary interference by public authorities, there may in addition be *positive* obligations inherent in an effect respect of the rights concerned. Genuine, effective exercise of certain freedoms does not depend merely on the State's duty *not* to interfere, but may require positive measures of protection even in the sphere of relations between individuals. Therefore, Article 10 ECHR can be invoked before the ECtHR as well as national courts not only in vertical relations but also in horizontal ones (*Drittwirkung*). In deciding whether a positive obligation under Article 10 exists, regard must be had to the kind of expression rights at stake; their capability to contribute to public debates; the nature and scope of restrictions on expression rights; the ability of alternative venues for expression; and the weight of countervailing rights of others or the public.<sup>59</sup>

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<sup>58</sup> See EU Network of Independent Experts of Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p. 117.

<sup>59</sup> See ECtHR, *Appleby and Others v. the United Kingdom*, no. 44306/98, ECHR 2003-VI, §§ 42-43 and 47-49, and ECtHR, *Positive obligations on member States under Article 10 to protect journalists and prevent impunity*, December 2011, pp. 4 et seq.

The ECtHR has arguably conceded that a positive obligation arises for the State to protect the right to freedom of expression by ensuring a reasonable opportunity to exercise a right of reply and an opportunity to contest a newspaper's refusal suing for a right to reply in courts.<sup>60</sup> Moreover, the Court has stressed that States are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear.<sup>61</sup> The pattern of positive obligation assumes greater importance in relation to any violence or threats of violence directed by private persons against other private persons, such as the press, exercising free speech.<sup>62</sup>

The European Court of Human Rights has stressed that the values set forth in Paragraph 2 are to be viewed as exceptions, which must be strictly interpreted and not as principles to be balanced against the freedom of expression. The respondent State must establish that any restriction: (1) is 'prescribed by law', (2) has a legitimate aim (namely, one of those enumerated in Paragraph 2), and (3) is 'necessary in a democratic society' to promote that aim.<sup>63</sup>

To be 'prescribed by law' a restriction must be 'adequately accessible' and foreseeable, that is, 'formulated with sufficient precision to enable the citizen to regulate his conduct'.<sup>64</sup> In order to have a 'legitimate aim', a restriction must be in furtherance of, and genuinely aimed at protecting, one of the permissible grounds set forth in Article 10.2.<sup>65</sup> To be 'necessary' a restriction does not have to be 'indispensable' but it must be more than merely 'reasonable' or 'desirable'. A 'pressing social need' must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.<sup>66</sup> The Contracting States have a certain margin of

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<sup>60</sup> See ECtHR, *Melnychuk v. Ukraine* (dec.), no. 28743/03, ECHR 2005-IX

<sup>61</sup> See ECtHR, *Dink v. Turkey*, nos. 2668/07 and others, 14 September 2010, § 137.

<sup>62</sup> See ECtHR, *Özgür Gündem v. Turkey*, no. 23144/93, ECHR 2000-III, §§ 42-43. See for these aspects of positive obligations under Article 10 ECHR also ECtHR, *Positive obligations on member States under Article 10 to protect journalists and prevent impunity*, December 2011, pp. 5.

<sup>63</sup> See ECtHR, *Observer and Guardian v. United Kingdom* (Appl. No. 13585/88), judgment of 26 November 1991, Ser. A, No. 216.

<sup>64</sup> See ECtHR, *Sunday Times v. United Kingdom* (Appl. No. 6538/74), judgment of 26 April 1979, Ser. A, No. 30, para. 49.

<sup>65</sup> See EU Network of Independent Experts of Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, 2006, p. 118.

<sup>66</sup> See ECtHR, *Handyside v. United Kingdom* (Appl. No. 5493/72), judgment of 7 December 1976, Ser. A, No. 24, paras. 48-50; Eur. Ct. H.R., *Sunday Times v. United Kingdom* (Appl. No. 6538/74), judgment of 26 April 1979, Ser. A,

appreciation in determining whether such a need exists, but this margin 'goes hand in hand with a European supervision'.<sup>67</sup> This supervision must be strict and is not limited to ascertaining whether the state has exercised its discretion reasonably, carefully and in good faith; rather, the necessity of any restriction 'must be convincingly established'<sup>68</sup> The scope of the margin of appreciation varies according to the aim at issue.<sup>69</sup> For example, protection of morals is accorded a wide margin because national authorities are considered to be in a better position than the Convention organs to assess the need of interference.<sup>70</sup>

cc) Some remarks to the case-law of the European Court for Human Rights specifically relevant for investigative journalism

(1) Introduction

In its landmark decisions in the Handyside case of 1976 and the Sunday Times case of 1979, the ECtHR has stated unequivocally, that 'freedom of expression constitutes one of the essential foundations of ... a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society''.<sup>71</sup>

Since these landmark rulings, the ECtHR has delivered a comprehensive jurisprudence on violations of Article 10 ECHR, protecting investigative journalism in a comprehensive way, confirming the protection of journalistic sources and of whistle-blowers and stressing the 'chilling effect' of criminal sanctions on journalistic activities reporting on misconducts of public

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No. 30, para. 62.

<sup>67</sup> See EU Network of Independent Experts of Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p. 118.

<sup>68</sup> See ECtHR, *Observer and Guardian v. United Kingdom* (Appl. No. 13585/88), judgment of 26 November 1991, Ser. A, No. 216, para. 59(c).

<sup>69</sup> See EU Network of Independent Experts of Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p. 118.

<sup>70</sup> See, e.g., ECtHR, *Müller and others v. Switzerland* (Appl. No. 10737/84), judgment of 24 May 1988, Ser. A, No. 133, paras. 33-35.

<sup>71</sup> ECtHR, *Handyside v. United Kingdom* (Appl. No. 5493/72), judgment of 7 December 1976, Ser. A, No. 24, para. 49 and ECtHR, *Sunday Times v. the United Kingdom* (Appl. No. 6538/74), judgment of 26 April 1979, Ser. A, No. 30, para. 64.

authorities. The ECtHR has, however, also strengthened the right to privacy and to family life against journalistic reporting aimed at satisfying the mere curiosity of the audience.

(2) The special role of freedom of information and expression for journalists and the media.<sup>72</sup>

The instrumental importance of journalists and the media for promoting public debates in a democratic society has been stressed repeatedly by the ECtHR. The media can make important contributions to public debate by (widely) disseminating information and ideas and thereby contributing to opinion-forming processes within society.<sup>73</sup> The media can also strengthen public debate by serving as fora for discussions. This function is further fostered by new media technologies which have considerable potential for high levels of individual and group participation in society.<sup>74</sup> Insofar as non-journalistic actors fulfil similar functions to those of journalists or media professionals, it can be argued that they should also benefit, *mutatis mutandis*, from the freedoms enjoyed by their professional counterparts.<sup>75</sup>

The role of “public watchdog” in a democratic society which is ascribed to media and media players like journalists is specifically important with respect to investigative journalism. It is an essential part of the protection established by Article 10 ECHR that journalists can monitor the activities of governmental authorities as well as other players in the democratic process vigilantly and can freely publicise any wrongdoing on their part.<sup>76</sup>

In light of the important democratic functions which mass media can fulfil, the case-law of the Court tends to acknowledge an enhanced level of freedom of expression for journalists and other media actors (as opposed to ordinary individuals).<sup>77</sup>

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<sup>72</sup> See for the following aspects also McGonagle, How to address current threats to journalism? The role of the Council of Europe in protecting journalists and other media actors, MCM(2013)009, pp. 22 et seq.

<sup>73</sup> See *McGonagle*, How to address current threats to journalism? The role of the Council of Europe in protecting journalists and other media actors, MCM(2013)009, p. 22.

<sup>74</sup> See ECtHR, *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 27, 14 April 2009; ECtHR, *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 49, ECHR 2012.

<sup>75</sup> See *McGonagle*, How to address current threats to journalism? The role of the Council of Europe in protecting journalists and other media actors, MCM(2013)009, p. 24.

<sup>76</sup> See *McGonagle*, How to address current threats to journalism? The role of the Council of Europe in protecting journalists and other media actors, MCM(2013)009, p. 22.

<sup>77</sup> See for the parallel approach of the institutions of the CoE *Nikolchev &*

The enhanced freedom comprises legal recognition and protection of specific journalistic practices and realities involved in both pre-publication and publication activities. Concerning the former, protection of confidential sources is obviously of crucial importance for all types of journalism, not least investigative journalism. The same is true for pre-publication procedures and processes of gathering and selection of material, such as research and enquiry as well as for the protection against searches of professional workplaces and private domiciles and against seizure of materials. Indeed, interferences with those processes can pose such a serious threat to the right to freedom of expression of journalists that they demand the highest levels of scrutiny by the ECtHR.<sup>78</sup>

Concerning activities relating to publication and dissemination, journalists and the media have a wide freedom to report and comment on matters of public interest. Article 10 ECHR, protects “not only the substance of ideas and information, but also the form in which they are conveyed”, which means that the right to freedom of expression also includes editorial and presentational autonomy for media professionals.<sup>79</sup> This autonomy may even include recourse to “a degree of exaggeration, or even provocation”.<sup>80</sup>

### (3) The protection of journalistic sources

In its judgment of 27 March 1996<sup>81</sup> the Grand Chamber of the European Court of Human Rights with an 11 to 7 majority came to the conclusion that a disclosure order requiring a British journalist to reveal the identity of his source and the fine imposed upon him for having refused to do so, constitutes a violation of the freedom of expression and information as protected by Article 10 of the European Convention for the protection of human rights and fundamental freedoms. In 1990 William Goodwin, a trainee-journalist working for "The Engineer", was found guilty by the House of Lords of Contempt of Court because he refused to disclose the identity of a person who previously supplied him with financial information derived from a confidential corporate plan of a private company. According to the House of Lords, the necessity of obtaining disclosure lay in the threat

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McGonagle, Eds., *Freedom of Expression and the Media: Standard-setting by the Council of Europe*, (I) Committee of Ministers, (II) Parliamentary Assembly - IRIS Themes (Strasbourg, European Audiovisual Observatory, 2011).

<sup>78</sup> See ECtHR, *Dammann v. Switzerland*, no. 77551/01, § 52, 25 April 2006.

<sup>79</sup> See ECtHR, *Oberschlick v. Austria* (no. 1), 23 May 1991, § 57, Series A no. 204. See also ECtHR, *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298.

<sup>80</sup> See ECtHR, *Prager and Oberschlick v. Austria*, 26 April 1995, § 38, Series A no. 313.

<sup>81</sup> See ECtHR, *Goodwin v. the United Kingdom*, 27 March 1996, Reports of Judgments and Decisions 1996-II.

of severe damage to the private company which would arise if the information contained in their corporate plan was disseminated while their refinancing negotiations were still continuing. The disclosure order was estimated to be in conformity with Section 10 of the Contempt of Court Act of 1981, as the disclosure was held to be necessary in the interest of justice. The European Court of Human Rights, however, was of the opinion that the impugned disclosure order is in breach of Article 10 of the European Convention on Human Rights. Although the disclosure order and the fine imposed upon Goodwin for having refused to reveal his source were "prescribed by law" and pursued a legitimate aim ("the protection of the rights of others"), the interference by the English courts in Goodwin's freedom of expression and information was not considered as necessary in a democratic society. The majority of the Court, and even the joint dissenters, firmly underlined the principle that "protection of journalistic sources is one of the basic conditions for press freedom" and that "without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest". In its judgment the Court emphasized that without protection of a journalist's sources "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". The Court considered that a disclosure order cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest. As the Court pointed out: "In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court".

In two judgments of 2007, the European Court of Human Rights further underlined the importance of journalists' right of non-disclosure of their sources under Article 10 of the Convention. The case of *Voskuil v. the Netherlands*<sup>82</sup> concerned Mr Voskuil's allegations that he was denied the right not to disclose his source for two articles he had written for the newspaper *Splits* and that he was detained for more than two weeks in an attempt to compel him to do so. Voskuil had been summoned to appear as a witness for the defence in the appeal proceedings concerning three individuals accused of arms trafficking. The court ordered the journalist to reveal the identity of a source, in the interests of those accused and the integrity of the police and judicial authorities. Voskuil invoked his right to remain silent (*zwijgrecht*) and, subsequently, the court ordered his immediate detention. In Strasbourg, Voskuil complained of a violation of his right to freedom of expression and press freedom, under Article 10 of the Convention. The European Court recalled that the protection of a journalist's sources is one of the basic conditions for freedom of the press,

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<sup>82</sup> See ECtHR, *Voskuil v. the Netherlands*, no. 64752/01, November 2007.

as reflected in various international instruments, including the Council of Europe's Committee of Ministers Recommendation No. R (2000) 7. Without such protection, sources might be deterred from assisting the press in informing the public on matters of public interest and, as a result, the vital public-watchdog role of the press might be undermined. The order to disclose a source can only be justified by an overriding requirement in the public interest. In essence, the Court was struck by the lengths to which the Netherlands authorities had been prepared to go to learn the source's identity. Such far-reaching measures cannot but discourage those who have true and accurate information relating to an instance of wrongdoing from coming forward in the future and sharing their knowledge with the press. The Court found that the Government's interest in knowing the identity of the journalist's source had not been sufficient to override the journalist's interest in concealing it. There had, therefore, been a violation of Article 10.

The case of *Tillack vs. Belgium*<sup>83</sup> concerned the journalist H.M. Tillack, who complained of a violation, by the Belgian authorities, of his right to protection of sources. Tillack, a journalist working in Brussels for the weekly magazine *Stern*, was suspected of having bribed a civil servant, by paying him EUR 8,000, in exchange for confidential information concerning investigations in progress in the European institutions. The European Anti-Fraud Office OLAF opened an investigation in order to identify Tillack's informant. After the investigation by OLAF failed to unmask the official at the source of the leaks, the Belgian judicial authorities where requested to open an investigation into an alleged breach of professional confidence and bribery involving a civil servant. On 19 March 2004, Tillack's home and workplace were searched and almost all his working papers and tools were seized and placed under seal. The ECtHR emphasised that a journalist's right not to reveal her or his sources could not be considered a mere privilege, to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information and should be treated with the utmost caution (even more so in the applicant's case, since he had been under suspicion because of vague, uncorroborated rumours, as subsequently confirmed by the fact that no charges were placed. The Court also took into account the amount of property seized and considered that although the reasons given by the Belgian courts were "relevant", they could not be considered "sufficient" to justify the impugned searches. The European Court accordingly found that there had been a violation of Article 10 of the Convention.

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<sup>83</sup> See ECtHR, *Tillack v. Belgium*, no. 20477/05, 27 November 2007.

A further procedural strengthening of the protection of confidential sources has been reached in the case of *Sanoma v. the Netherlands*.<sup>84</sup> In this decision of 14 September 2010, the 17 judges of the Grand Chamber unanimously reached the conclusion that the order to hand over the CD-ROM with photographs in the possession of the editor-in-chief of a weekly magazine to the public prosecutor of the Netherlands was a violation of the journalists' rights to protect their sources. It noted that orders to disclose sources potentially had a detrimental impact, not only on the source, whose identity might be revealed, but also on the newspaper or publication against which the order was directed, whose reputation might be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who had an interest in receiving information imparted through anonymous sources. Protection of journalists' sources was considered "a cornerstone of freedom of the press, without which 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 to the public may be adversely affected". In essence, the Grand Chamber was of the opinion that the right to protect journalistic sources should be safeguarded by sufficient procedural guarantees, including the guarantee of prior review by a judge or an independent and impartial decision-making body, before the police or the public prosecutor have access to information capable of revealing such sources. Since in the case of *Sanoma Uitgevers B.V. v. the Netherlands* an *ex ante* guarantee of a review by a judge or independent and impartial body was not in existence, the Grand Chamber was of the opinion that "the quality of the law was deficient in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources". Emphasizing the importance of the protection of journalistic sources for press freedom in a democratic society, the Grand Chamber of the European Court found a violation of Article 10 of the Convention.

#### (4) The protection of pre-publication procedures and processes

In a judgment of 25 April 2006, the ECtHR<sup>85</sup> unanimously held that the Swiss authorities violated Article 10 ECHR by convicting Mr. Dammann, a journalist, for inciting an administrative assistant of the public prosecutor's office to disclose confidential material. The assistant had forwarded data relating to criminal records of suspects in a spectacular criminal case. By

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<sup>84</sup> See ECtHR, *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, 14 September 2010.

<sup>85</sup> See ECtHR, *Dammann v. Switzerland*, no. 77551/01, 25 April 2006.



punishing the journalist, a step had been taken prior to publication and such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. It was thus likely to hamper the press in its role as provider of information and public watchdog. Furthermore, no damage had been done to the rights of the persons concerned, as the journalist had himself decided not to publish the data in question. In these circumstances, the Court considered that Dammann's conviction had not been reasonably proportionate to the pursuit of the legitimate aim in question, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press.

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(5) The right of journalists to receive and publish confidential documents

In a judgment of 1999,<sup>87</sup> the Grand Chamber of the ECtHR decided in favour of the protection of journalists and emphasised the importance of the freedom of the press and its vital role in a democratic society. The case concerns important aspects regarding the limits of journalistic freedom in reporting on matters of general interest. The applicants were both convicted in France for the publication of an article in the satirical newspaper *Le Canard enchaîné*. The article and the documents it contained showed that the managing director of Peugeot had received large pay increases while at the same time the management refused the demands of the workers at Peugeot for a pay rise. Mr. Fressoz, the publication director of the magazine at that time, and Mr. Roire, the journalist who wrote the article, were convicted for receiving and publishing photocopies that had been obtained through a breach of professional confidence by an unidentified tax official. They both claimed that these convictions violate their freedom of expression as protected by Article 10 of the European Convention. The Court emphasised that in principle journalists cannot be released from their duty to obey ordinary criminal law on the grounds that Article 10 affords them protection of freedom of expression. However, in particular circumstances the interest of the public to be informed and the vital role of the press may justify the publication of documents that fall under an obligation of professional secrecy.

Taking into consideration the fact that the article contributed to a public debate on a matter of general interest, that the information on the salary of Mr. Calvet as head of a major industrial company did not concern his private life, and that the information was already known to a large number

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<sup>86</sup> See *Voorhoof*, in: Voorhoof D. et al and McGonagle T. (Ed. Sup.), *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, IRIS Themes, European Audiovisual Observatory, Strasbourg, 2015, p. 141.

<sup>87</sup> See ECtHR, *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I.

of people, the Court was of the opinion that there was no overriding requirement for the information to be protected as confidential. It was true that the conviction was based on the publication of documents of which the divulgation was prohibited, but the information they contained was not confidential. The Court emphasised that in essence Article 10 of the Convention "leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists' rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism" (par. 54). In the Court's view the publication of the tax assessments was relevant not only to the subject matter but also to the credibility of the information supplied, while at the same time the journalist had acted in accordance with the standards governing his profession as a journalist.

The final and unanimous conclusion of the Court, sitting in Grand Chamber, as that there was no reasonable relationship of proportionality between the legitimate aim pursued by the journalist's conviction and the means deployed to achieve that aim, given the interest a democratic society had in ensuring and preserving freedom of the press.<sup>88</sup>

(6) The protection against searches of workplaces and private domiciles of journalists and against seizure of material

In 1995 searches were performed in connection with the prosecution of members of the police and the judiciary for breach of professional confidence following leaks in some highly sensitive criminal cases (the murder of the leader of the socialist party; investigations regarding industrial, financial and political corruption). Four Belgian journalists applied to the ECtHR, alleging (among other complaints) that searches and seizures by the judicial authorities at their newspaper's offices, their homes and the head office of the French speaking public broadcasting organisation RTBF constituted a breach of their freedom of expression under Article 10 and a violation of their right to privacy under Article 8 of the European Convention on Human Rights.

The European Court, in its judgment of 15 July 2003,<sup>89</sup> came to the conclusion that the searches and seizures violated the protection of journalistic sources guaranteed by the right to freedom of expression and

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<sup>88</sup> See *Voorhoof*, European Court of Human Rights: First Judgments on Freedom of Expression and Information after Reorganisation of the Court, in: Voorhoof D. et al and McGonagle T. (Ed. Sup.), *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, IRIS Themes, European Audiovisual Observatory, Strasbourg, 2015, p. 53.

<sup>89</sup> See ECtHR, *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003.

the right to privacy. The Court agreed that the interferences by the Belgian judicial authorities were prescribed by law and were intended to prevent the disclosure of information received in confidence and to maintain the authority and impartiality of the judiciary. The Court considered that the searches and seizures, which were intended to gather information that could lead to the identification of police officers or members of the judiciary who were leaking confidential information, came within the sphere of the protection of journalistic sources. The Court emphasized the wide scale of the searches that had been performed, while at no stage had it been alleged that the applicants had written articles containing secret information about the cases. The Court also questioned whether other means could not have been employed to identify those responsible for the breaches of confidence, and in particular took into consideration the fact that the police officers involved in the operation of the searches had very wide investigative powers. The Court found that the Belgian authorities had not shown that searches and seizures on such a wide scale had been reasonably proportionate to the legitimate aims pursued and therefore came to the conclusion that there had been a violation of Article 10 of the Convention. The Court, for analogous reasons, also found a violation of the right to privacy protected by Article 8 of the Convention.<sup>90</sup>

(7) The freedom of critical political journalism

In its judgement of 1 July 1997<sup>91</sup> the European Court of Human Rights once more<sup>92</sup> confirmed the high level of freedom of political speech guaranteed by Article 10 of the European Convention for the protection of human rights and fundamental freedoms. In October 1990 Jörg Haider, the leader of the Austrian Liberal Party (FPÖ), held a speech in which he glorified the role of the generation of soldiers in World War II, whatever side they had been on. Some time later this speech was published in *Forum*, a political magazine printed in Vienna. The speech was commented critically by Gerhard Oberschlick, editor of the magazine. In his commentary, Oberschlick called Haider an 'Idiot' (Trottel). On application by Haider, Oberschlick was found guilty for insult (Beleidigung) by the Austrian courts (Art. 115 Austrian Penal Code). Oberschlick appealed to the European Commission of Human Rights, arguing that the

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<sup>90</sup> See *Voorhoof*, European Court of Human Rights: First Judgments on Freedom of Expression and Information after Reorganisation of the Court, in: Voorhoof D. et al and McGonagle T. (Ed. Sup.), *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, IRIS Themes, European Audiovisual Observatory, Strasbourg, 2015, p. 114.

<sup>91</sup> ECtHR, *Oberschlick v. Austria*, 1 July 1997, Reports of Judgments and Decisions 1997-IV.

<sup>92</sup> See also ECtHR, *Lingens*, 8 July 1986, Series A, Vol. 103; ECtHR, *Oberschlick*, 23 May 1991, Series A, Vol. 204; ECtHR, *Schwabe*, 28 August 1992, Series A, Vol. 242-B

decisions in which he was convicted for having insulted Mr Haider, had infringed his right to freedom of expression as secured by Article 10 of the European Convention on Human Rights. The Court came to the conclusion that the conviction of Oberschlick by the Austrian Courts represented a disproportionate interference with the exercise of his freedom of (political) expression, an interference which is "not necessary in a democratic society". The Court reiterated that freedom of expression is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also the "those that offend, shock or disturb". The limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual. The Court takes into account that Mr Haider clearly intended to be provocative and consequently could expect strong reactions on his speech. In the Court's view, the applicant's article may certainly be considered polemical, but it didn't constitute a gratuitous personal attack, as the author provided an objectively understandable explanation why he considered Haider as an "Idiot". The Court came to the conclusion that "it is true that calling a politician a Trottel in public may offend him. In the instant case, however, the word does not seem disproportionate to the indignation knowingly aroused by Mr. Haider".

(8) The duty for research of journalists and its limits

The background of the judgment of the ECtHR III<sup>93</sup> was as follows: In 1992, the newspaper company Bladet Tromsø and its editor, Pal Stensaas, were convicted by a Norway District Court for defamation. The newspaper had published several articles on seal hunting as well as an official - but secret - report that referred to a series of violations of the seal-hunting regulations (the Lindberg report). The article and the report more specifically made allegations against five crew members of the seal-hunting vessel M/S Harmoni who were held responsible for using illegal methods of killing seals. Although the names of the persons concerned were deleted, the crew members of the M/S Harmoni brought defamation proceedings against the newspaper and its editor. The District Court was of the opinion that some of the contested statements in the article and the report as a matter of fact were "null and void", and the newspaper and its editor were ordered to pay damages to the plaintiffs.

The European Court of Human Rights, however, reached the conclusion that the conviction by the Norwegian district court was in breach of Article 10 of the European Convention. The Court took account of the overall background against which the statements in question had been made, notably the controversy that seal hunting represented at the time in Norway

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<sup>93</sup> See ECtHR, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III.

and the public interest in these matters. The Court also underlined that the manner of reporting in question should not be considered solely by reference to the disputed articles but in the wider context of the newspaper's coverage of the seal hunting issue. According to the Court "the impugned articles were part of an ongoing debate of evident concern to the local, national and international public, in which the views of a wide selection of interested actors were reported". The Court emphasized that Article 10 of the Convention does not guarantee an unrestricted freedom of expression even with respect to media coverage of matters of public concern, as the crew members can rely on their right to protection of their honour and reputation or their right to be presumed innocent of any criminal offence until proven guilty. According to the Court some allegations in the newspaper's articles were relatively serious, but the potential adverse effect of the impugned statements on each individual seal hunter's reputation or rights was significantly attenuated by several factors. In particular, the Court was of the opinion that "the criticism was not an attack against all the crew members or any specific crew member". On the other hand, the Court underlined that the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research, because otherwise, the "vital public-watchdog role" of the press might be undermined. The Court reached the following conclusion: "Having regard to the various factors limiting the likely harm to the individual seal hunter's reputation and to the situation as it presented itself to *Bladet Tromsø* at the relevant time, the Court considers that the paper could reasonably rely on the official Lindberg report, without being required to carry out its own research into the accuracy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect".<sup>94</sup>

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<sup>94</sup> See *Voorhof*, European Court of Human Rights: Two Recent Judgements on the Freedom of Expression and Information, in: Voorhof D. et al and McGonagle T. (Ed. Sup.), *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, IRIS Themes, European Audiovisual Observatory, Strasbourg, 2015, p. 55 et seq. It should be mentioned that 4 of the 17 judges dissented manifestly with the majority. In the dissenting opinions, annexed to the judgement, it is argued why the articles are to be considered as defamatory towards private individuals. According to the minority, the Court had not given sufficient weight to the reputation of the seal hunters. The minority opinion also disagrees with the publication of the secret report and the fact that the newspapers took the allegations formulated in the report for granted: "How could it have been "reasonable" to rely on this report when the newspaper was fully aware that the Ministry had ordered that the report not be made public immediately

c) Further instruments for the protection of media freedom

The judgments of the European Court of Human Rights give important and additional support in favour of the protection of journalistic freedoms as reflected in international policy instruments on journalistic freedoms within the framework of the CoE, for example

- Recommendations such as
  - Recommendation No. R (96) 4 of the Committee of Ministers to member states on the protection of journalists in situations of conflict and tension
  - Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information
  - Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media
  - Recommendation 1215 (1993) of the Parliamentary Assembly of the CoE „Ethics of journalism“
  - Recommendation 1506 (2001) of the Parliamentary Assembly of the CoE “Freedom of expression and information in the media in Europe”
  - Recommendation 1702 (2005) of the Parliamentary Assembly of the CoE „Freedom of the press and the working conditions of journalists in conflict zones“
  - Recommendation 1706 (2005) of the Parliamentary Assembly of the CoE “Media and terrorism”
  - Recommendation 1783 (2007) of the Parliamentary Assembly of the CoE “Threats to the lives and freedom of expression of journalists”
  - Recommendation 1848 (2008) of the Parliamentary Assembly of the CoE “Indicators for media in a democracy”
  - Recommendation 1916 (2010) of the Parliamentary Assembly of the CoE „Protection of “whistle-blowers”“
  - Recommendation 1950 (2011) of the Parliamentary Assembly of the CoE “The protection of journalists’ sources”

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because it had contained possibly libellous comments concerning private individuals?”. In an unusually sharp conclusion, the minority held that the Court sends the wrong signal to the press in Europe and that the judgement undermines respect for the ethical principles which the media voluntarily adhere to. Their final conclusion was: "Article 10 may protect the right for the press to exaggerate and provoke but not to trample over the reputation of private individuals".

- Recommendation 2024 (2013) of the Parliamentary Assembly of the CoE „National security and access to information“
- Recommendation 2062 (2015) of the Parliamentary Assembly of the CoE „Protection of the safety of journalists and of media freedom in Europe“
- Recommendation 2073 (2015) of the Parliamentary Assembly of the CoE „Improving the protection of whistle-blowers“
- Recommendation 2075 (2015) of the Parliamentary Assembly of the CoE „ Media responsibility and ethics in a changing media environment“
- Resolutions such as
  - the Resolution No. 2 on Journalistic Freedoms and Human Rights, adopted in the framework of the Council of Europe's Conference of ministers responsible for media policies, held in Prague, 7-8 December 1994
  - the Resolution No 3 “Safety of journalists” adopted in the framework of Ministers of States participating in the Council of Europe’s Conference of Ministers responsible for media and information society, held in Belgrade, Serbia, on 7 and 8 November 2013,
  - the Resolution 1003 (1993) of the Parliamentary Assembly of the CoE „Ethics of journalism“
  - the Resolution 1438 (2005) of the Parliamentary Assembly of the CoE „Freedom of the press and the working conditions of journalists in conflict zones“
  - the Resolution 1535 (2007) of the Parliamentary Assembly of the CoE “Threats to the lives and freedom of expression of journalists”
  - the Resolution 1636 (2008) of the Parliamentary Assembly of the CoE “Indicators for media in a democracy”
  - the Resolution 1954 (2013) of the Parliamentary Assembly of the CoE „National security and access to information“
  - the Resolution 1729 (2010) of the Parliamentary Assembly of the CoE „Protection of “whistle-blowers”“
  - the Resolution 2035 (2015) of the Parliamentary Assembly of the CoE „Protection of the safety of journalists and of media freedom in Europe“
  - the Resolution 2060 (2015) of the Parliamentary Assembly of the CoE „Improving the protection of whistle-blowers“
  - Resolution 2066 (2015) of the Parliamentary Assembly of the CoE „Media responsibility and ethics in a changing media environment“

d) The declaration on the protection and promotion of investigative journalism

The Council of Europe has hitherto stressed the importance of investigative journalism in a clear way in the “Declaration by the Committee of Ministers on the protection and promotion of investigative journalism”, adopted by the Committee of Ministers on 26 September 2007. This declaration reads as follows:

*“The Committee of Ministers of the Council of Europe,*

*1. Recalling Article 10 of the European Convention on Human Rights which guarantees the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers;*

*2. Recalling also its declarations on the freedom of expression and information of 29 April 1982 and on freedom of political debate in the media of 12 February 2004 and reiterating the importance of free and independent media for guaranteeing the right of the people to be fully informed on matters of public concern and to exercise scrutiny over public authorities and political affairs, as repeatedly confirmed by the European Court of Human Rights;*

*3. Convinced that the essential function of the media as public watchdog and as part of the system of checks and balances in a democracy would be severely crippled without promoting such investigative journalism, which helps to expose legal or ethical wrongs that might have been deliberately concealed, and thus contributes to the formation of enlightened and active citizenry, as well as to the improvement of society at large;*

*4. Acknowledging, in this context, the important work of investigative journalists who engage in accurate, in-depth and critical reporting on matters of special public concern, work which often requires long and difficult research, assembling and analysing information, uncovering unknown facts, verifying assumptions and obtaining corroborative evidence;*

*5. Emphasising, however, that investigative journalism needs to be distinguished from journalistic practices which involve probing into and exposing people’s private and family lives in a way that would be incompatible with Articles 8 and 10 of the European Convention on Human Rights and the related case law of the European Court of Human Rights;*

*6. Bearing in mind also that investigative journalism could benefit from the adherence of media professionals to voluntarily adopted self-regulatory instruments such as professional codes of conduct and of ethics which take full account of the rights of other people and*



*the role and responsibility of the media in a democratic society;*

7. *Considering that, because of its very nature, investigative journalism is of particular significance in times of crisis, a notion that includes, but is not limited to, wars, terrorist attacks and natural and man-made disasters, when there may be a temptation to limit the free flow of information for security or public safety reasons;*

8. *Conscious that in emerging democracies the encouragement and development of investigative journalism is especially important for the stimulation of free public opinion and the entrenchment of a democratic political culture while, at the same time, it is at a greater danger of potential abuse;*

9. *Bearing in mind the Parliamentary Assembly of the Council of Europe's Recommendation 1506 (2001) on freedom of expression and information in the media in Europe, and in particular its concern about the continuing use of violence as a way of intimidating investigative journalists;*

10. *Recalling its Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information;*

11. *Welcoming developments in certain member states' domestic case law tending to confirm and uphold the right of journalists to investigate matters of public interest and disclose facts and express opinions in respect of such matters without interference by public authorities,*

*I. Declares its support for investigative journalism in service of democracy.*

*II. Calls on member states to protect and promote investigative journalism, having regard to Article 10 of the European Convention on Human Rights, the relevant case law of the European Court of Human Rights and other Council of Europe standards, and in this context:*

*i. to take, where necessary, suitable measures designed to ensure the personal safety of media professionals, especially those involved in investigative journalism, and promptly investigate all cases of violence against or intimidation of journalists;*

*ii. to ensure the freedom of movement of media professionals and their access to information in line with Council of Europe standards and facilitate critical and in-depth reporting in service of democracy;*

*iii. to ensure the right of journalists to protect their sources of information in accordance with Council of Europe standards;*

*iv. to ensure that deprivation of liberty, disproportionate pecuniary*

*sanctions, prohibition to exercise the journalistic profession, seizure of professional material or search of premises are not misused to intimidate media professionals and, in particular, investigative journalists;*

v. to take into consideration and to incorporate into domestic legislation where appropriate the recent case law of the European Court of Human Rights which has interpreted Article 10 of the European Convention of Human Rights as extending its protection not only to the freedom to publish, but also to journalistic research, the important preceding stage which is essential for investigative journalism.

*III. Draws the attention of member states to recent worrying developments which might have an adverse effect on journalistic activity and on investigative journalism in particular and calls on member states, if appropriate, to take remedial action, in line with Council of Europe standards, when faced with the following situations:*

*i. an apparent trend towards increasing limitations on freedom of expression and information in the name of protecting public safety and fighting terrorism;*

*ii. lawsuits brought against media professionals for acquiring or publishing information of public interest which the authorities sought without good reason to keep undisclosed;*

*iii. cases of unjustified surveillance of journalists, including the monitoring of their communications;*

*iv. legislative measures being taken or sought to limit the protection granted to "whistle blowers".*

*IV. Invites the media, journalists and their associations to encourage and support investigative journalism while respecting human rights and applying high ethical standards.*

*V. Calls on member states to disseminate widely this declaration, where appropriate accompanied by a translation, and to bring it, in particular, to the attention of relevant governmental bodies, legislators and the judiciary as well as to make it available to journalists, the media and their professional organisations."*

#### **4. The protection of media freedom in the EU**

##### **a) Introduction**

The Court of Justice of the EU (CJEU) interprets EU legal provisions in the

light of EU fundamental rights being general principles of EU law long before the entry into force of the EU Charter of Fundamental Rights,<sup>95</sup> which has Treaty status and thus binding effect since December 2009 (Article 6.1 TEU).

When it comes to fundamental rights in the EU, there are three main instruments which have to be taken into consideration: the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Charter of Fundamental Rights of the European Union; and the common constitutional traditions of the Member States.

With respect to the EU Charter of Fundamental Rights, the Union recognises the rights, freedoms and principles set out in this Charter, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions (Article 6.1 TEU). Therewith, the EU Charter of Fundamental Rights is part of the European primary law and is enforceable by the EU and by the national courts. With regard to its application, the Charter is “addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law [...] The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”.<sup>96</sup>

Furthermore, “(f)undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law” (Article 6.3 TEU).

Article 2 TEU of the Treaty of the European Union emphasizes the fundamental values upon which the EU is based. “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice,

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<sup>95</sup> See, e.g., *Ress & Ukrow*, „Neue Aspekte des Grundrechtsschutzes in der Europäischen Gemeinschaft“, in: *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)*, Vol. 1 1990, pp. 499 et seq.

<sup>96</sup> Article 51 of the EU Charter of Fundamental Rights.

solidarity and equality between women and men prevail”.

According to Article 7.1 TEU the Council may determine there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it. According to Article 7.2 TEU, the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations. Where such a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council (Article 7.3 TEU). The Council, acting by a qualified majority, may decide subsequently to vary or revoke the aforementioned measures in response to changes in the situation which led to their being imposed (Article 7.4 TEU). Although the threat of such an action could be considered as having general deterrent effect on Member States, Article 7 TEU is to be accounted just as a specific ultima ratio instrument for the protection of media freedom in the EU.<sup>97</sup>

b) The protection of media freedom and the EU Charter of Fundamental rights

The freedom of expression and of information and the press freedom are established as fundamental rights in Article 11 of the Charter:

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

*2. The freedom and pluralism of the media shall be respected."*

Article 11 of the Charter has been drafted on the basis of Article 10 of the European Convention on Human Rights,<sup>98</sup> and this clearly emerges also from Article 52.3 of the Charter, which states that “[i]n so far as this Charter

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<sup>97</sup> See Brodi & Gori, „Legal Analysis of the EU Instruments to Foster Media Pluralism and Media Freedom”, in: Robert Schuman Centre for Advanced Studies (ed.), European Union Competencies in Respect of Media Pluralism and Media Freedom, RSCAS Policy Paper 2013/01, pp. 43 et seq., at p. 52.

<sup>98</sup> See EU Network of Independent Experts of Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p. 115.

contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

In Article 11.2 of the Charter, the freedom and pluralism of the media was made independent from other parts of freedom of expression. “Media as an overall category includes here both printed and electronic press (radio and television), as well as Internet, as a new medium. This emancipation of the freedom of the media is reflected in the fact that in the Praesidium’s explanation reference was not made to the jurisprudence of the European Court of Human Rights, but to the ECJ’s practice”.<sup>99</sup>

According to its explanations, Article 11.2 of the Charter is based in particular on Court of Justice case-law regarding television, especially in case *Stichting Collectieve Antennevoorziening Gouda*<sup>100</sup> and the Protocol on the System of Public Broadcasting in the Member States annexed to the EC Treaty, and on Council Directive 89/552/EC.<sup>101</sup>

Its Preamble also emphasises that the Charter reaffirms the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States. As regards the former, Article 11 also corresponds to the constitutional provisions of the Member States, all guaranteeing freedom of expression as one of the key fundamental human rights and some guaranteeing also explicitly, the others indirectly the freedom of information and the media freedom.<sup>102</sup>

Article 11 has also to be combined with Article 53, according to which

*“[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the*

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<sup>99</sup> EU Network of Independent Experts of Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p. 122.

<sup>100</sup> ECJ, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda* and others, [1996] ECR I-4007.

<sup>101</sup> See EU Network of Independent Experts of Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p. 116.

<sup>102</sup> See for details the country reports of this paper.

*Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”.*

Thus there is a strong cooperation between the EU institutions and the Council of Europe, which is at the basis of the media freedom issue in Europe. The CJEU repeatedly refers to the constitutional traditions of the different Member States, to the ECHR and to the case-law of the ECtHR and a general strong cooperation between the two Courts emerges particularly in the media pluralism and freedom field.<sup>103</sup>

c) Further instruments to protect media freedom

On 12 May 2014, the Council of the European Union adopted the EU human rights guidelines on freedom of expression online and offline.<sup>104</sup> Their aim is to clarify the international human rights standards on freedom of opinion and expression and to provide political and operational guidance to officials and staff of the EU institutions and EU Member States for their work in third States, in international organisations and civil society.<sup>105</sup>

The European Parliament has adopted a series of resolutions which aim at strengthening of journalistic freedoms.<sup>106</sup> These are, inter alia,

- the Resolution of the European Parliament on the Confidentiality of Journalists' Sources,<sup>107</sup>
- the resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights),<sup>108</sup>
- resolution of 10 March 2011 on media law in Hungary.<sup>109</sup>

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<sup>103</sup> See *Brodi & Gori*, „Legal Analysis of the EU Instruments to Foster Media Pluralism and Media Freedom”, in: Robert Schuman Centre for Advanced Studies (ed.), *European Union Competencies in Respect of Media Pluralism and Media Freedom*, RSCAS Policy Paper 2013/01, pp. 43 et seq., at p. 54.

<sup>104</sup> See [http://eeas.europa.eu/delegations/documents/eu\\_human\\_rights\\_guidelines\\_on\\_freedom\\_of\\_expression\\_online\\_and\\_offline\\_en.pdf](http://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf)

<sup>105</sup> See European Commission, 2014 report on the application of the EU Charter of Fundamental Rights, p. 57

<sup>106</sup> See *Kosta*, “Fundamental Rights in EU Internal Market Legislation”, 2015, pp. 143 et seq.

<sup>107</sup> OJEC 1994, Nr. C 44/34.

<sup>108</sup> 2003/2237(INI).

<sup>109</sup> P7\_TA(2011)0094.

## **5. The Scope of the media freedom**

### a) The scope *ratione personae*

Freedom of the media does protect printed publications as well as products and emissions of audiovisual communication media, such as television. Even after two decades of internet, it is less obvious whether online content enjoys protection under media freedom. While this is the case for the online editions of traditional media, and also for internet journalistic publications, the classification as „press“ or „media“ of blogs, and – more generally – non-professional journalistic activities, which nevertheless aim to contribute to the formation of public opinion, is problematic. Yet, such activities are in any case protected by freedom of expression and information.

### b) The scope *ratione materiae*

The case law of the European Court of Human Rights (ECtHR), the Court of Justice of the EU (CJEU) and the national constitutional courts of Member States has set the standard for protection of freedom of expression and information, as well as of media freedom in the EU.

Freedom of the media seeks on one hand to protect the content delivered by the mass media and on the other to ensure that structural questions do not render the exercise of the functions of the mass media impossible or too difficult. Such structural issues may be in the form of legal requirements or other circumstances, such as administrative obstacles to the media, including excessive registration, licensing and accreditation requirements; unjustified denial of access to information held by government agencies; harassment, intimidation, incarceration and physical attacks, including murder, of journalists; restrictions on media pluralism, especially in broadcasting, through undue governmental control and pressure over broadcasters or favouritism toward state-owned media.

## **6. Freedom of expression vs freedom of information**

Article 11 of the Charter – just like Article 10 of the ECHR – specifies freedom of expression generally without specifying particular forms or categories of expression, and as more or less deserving of protection. The case-law of the European Court of Human Rights shows that there is a kind of categorization of expression according to the importance of its content for the purpose of determining the extent of protection afforded.<sup>110</sup>

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<sup>110</sup> See EU Network of Independent Experts of Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p. 116.

Forms of expression, which are entitled to particular protection include *'information and ideas on political issues'<sup>111</sup> as well as other 'information and ideas concerning (other) ... of public interest'<sup>112</sup>.*

Obviously, the freedom to seek information is specifically important for investigative journalism. Indeed, Article 11 of the Charter does not contain an explicit right to seek information like Article 19 ICCPR. Yet, this right is implicit in the right to receive information, which is part of Article 11.<sup>113</sup>

While freedom of information refers to the allegation of facts that can be right or wrong, freedom of expression covers value judgments and other opinions that are not susceptible to be proved true. As a consequence, whilst allegations of facts enjoy protection only if they are the truth, or due diligence has at least been undertaken to establish their truthfulness before they were divulged, value judgments are covered by the freedom of expression. The sole limits to the latter are those against defamation, hate speech or incitement to violence – limits to the freedom of expression necessary to protect human dignity, pluralism and tolerance in a democratic society.

The other aspect of media freedom and freedom of expression is the right of the audience to be informed, with states having to guarantee media pluralism, so that citizens have access to 'impartial and accurate information and a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country.

## **7. The protection of media freedom and the EU Agency of Human Rights**

As the European Union can rely on common constitutional principles regarding human rights, as mentioned above, so another potential European level of intervention on media freedom and pluralism could be through the European Union Agency for Fundamental Rights (FRA). The latter provides the EU institutions and Member States with independent, evidence-based advice on fundamental rights. The Agency cooperates with EU Institutions and Member States to provide them with independent

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<sup>111</sup> ECtHR, *Lingens v. Austria* (Appl. No. 9815/82), judgment of 8 July 1986, Ser. A, No. 103; ECtHRm *Oberschlick v. Austria* (Appl. No. 11662/85), judgment of 23 May 1991, Ser. A, No. 204, paras. 57-61.

<sup>112</sup> ECtHR, *Sunday Times v. United Kingdom* (Appl. No. 6538/74), judgment of 26 April 1979, Ser. A, No. 30, para. 65; ECtHR, *Barfod v. Denmark* (Appl. No. 11508/85), judgment of 22 February 1989. Ser. A, No. 149.

<sup>113</sup> See EU Network of Independent Experts of Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, 2006, p. 117.



expert advice and fundamental rights analysis, and it also has close relations with the Council of Europe.<sup>114</sup>

The thematic areas of activity of the FRA are determined through a five-years multiannual framework, adopted by the Justice and Home Affairs Council of the European Union, on proposal of the European Commission and after consulting the European Parliament. According to the 2013-2017 Multi-Annual Framework, the FRA will inter alia have to deal with information society issues. With regard to its general competences on human rights, and to the more specific ones on the information society aspects and having in mind Article 11 of the Charter, the FRA could be mandated to monitor the protection of media pluralism and freedom in the different Member States. It could monitor and propose common standards, basing its work on the ample case law of the European Court of Human Rights and of the CJEU and work in close relation with the Council of Europe. This could allow the EU to play its part in ensuring that its own laws and actions, as well as those of Member States, are in line with the Convention. In particular, EU institutions can specifically request the FRA to deliver an expert opinion on a specific topic (as with the case on PNR) and therefore the FRA could be mandated to deliver a report on media freedom and pluralism in the different Member States.<sup>115</sup>

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<sup>114</sup> See European Union Agency for Fundamental Rights (FRA), "Bringing rights to life: The fundamental rights landscape of the European Union", 2012, pp. 27 et seq.

<sup>115</sup> See *Brodi & Gori*, „Legal Analysis of the EU Instruments to Foster Media Pluralism and Media Freedom”, in: Robert Schuman Centre for Advanced Studies (ed.), *European Union Competencies in Respect of Media Pluralism and Media Freedom*, RSCAS Policy Paper 2013/01, pp. 43 et seq., at p. 77 et seq.

## C. Comparative Analysis of the national legal systems

*“Investigative Journalism constitutes the highest and most noble expression of the freedom of information”*

states the Italian Supreme Court of Cassation.<sup>116</sup> And in fact, investigative journalism plays a major role in defending democratic values against various forms of private and public corruption, violations of the rule of law and many other kinds of abuse of power or wrongful behavior by private parties. It is deemed most important for nurturing public debates and, hence, for the individual and collective forming of opinions which in turn are essential in the democratic process. Therefore, the work of journalists is highly valued and protected in most of the States examined in this study.

However, all legal systems of the European States also feature restrictions to journalistic work and the freedom of expression. Journalists are bound by the law, which protects other rights and interests as well. Whenever freedom of expression collides with interests of the State or the rights of private businesses and individuals, it can be and is in practice restricted. In this context, legal questions arise, e.g. regarding the duty of care of journalists and the liability within the editorial chain of a journalistic product. Furthermore, for their research, investigative journalists often rely on sources of information, which are not publically accessible. Therefore, the way in which acquisition and use of information is regulated, as well as the boundaries of law enforcement when investigating potential breaches of law by journalists, have a significant impact on the work of investigative journalists.

### I. Legal framework of the analysed States

In addition to the European legal framework<sup>117</sup>, all examined States have a national legal framework regarding the freedom of expression and journalistic work. While the legal systems differ widely from each other, similarities can be identified. For example, in most States journalistic freedoms are protected on three levels: in the Constitution, on the statutory level and through a self-regulatory journalistic code. An overview of the main provisions at all levels regulating the work of journalists will be given in the present chapter, before a closer look will be taken on specific regulations regarding, e.g. illegally obtained information and the

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<sup>116</sup> Court of Cassation, 3rd Chamber, Judgment of 9 July 2010, no. 16236.

<sup>117</sup> Cf. extensively above under B. Investigative journalism and European Law, p. 6 et seqq.

boundaries of law enforcement in the next chapter. The overview will be limited to the most important provisions and to those which can be found in several States. The full range of all laws and provisions as well as the rights and duties of journalists can be found in the country reports.<sup>118</sup>

## 1. The level of the Constitution

In all examined States, press and media freedom is protected by the respective Constitution. The only exception being the United Kingdom but this is due to the fact that it does not have a formal constitutional document. However, in the UK the freedom of expression is protected nonetheless. The UK Human Rights Act, a law on statutory level, incorporates the European Convention on Human Rights (ECHR) into the national legal framework and therefore, the freedom of expression as protected in Art. 10 ECHR is at the same time part of the UK legal system. The case is similar in the Czech Republic. The Czech Republic does not have a national provision in its constitution which protects the freedom of expression, but the United Nations General Assembly Declaration of Human Rights and Fundamental Freedoms (UDHR) is an integral part of the Czech Constitution and therefore the freedom of expression as covered by Art. 19 UDHR is also within the scope of protection by the Czech Constitution.

However, the expressions “journalism” and “investigative journalism” are not explicitly mentioned in any Constitution, instead press and media freedom fall within the scope of the protection of the more general freedom of expression.<sup>119</sup> Such a provision protecting the freedom of expression expressly in the constitution or by interpretation in jurisprudence is foreseen in the Constitutions of most examined States.<sup>120</sup>

In many States press and media freedom is not only protected by the scope of the freedom of expression, but also by other constitutional provisions. Some constitutions explicitly include the right to the freedom of press and media,<sup>121</sup> into the scope of freedom of expression or as a separate right

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<sup>118</sup> Cf. under E. Annexe, II. Annex 2 : Country Reports, p. 85 et seqq.

<sup>119</sup> In some States also called the Freedom of speech.

<sup>120</sup> The numbers refer to the pages within this document: Austria (86), Bulgaria (110), Cyprus (122), Germany (158), Denmark (198), Estonia (208), Spain (220), Finland (232), France (268), Greece (278), Croatia (290), Hungary (Art. IX para. 1 Hungarian Constitution), Ireland (Art. 40.6.1 Irish Constitution), Italy (334), Lithuania (348), Luxembourg (363), Latvia (390), Macedonia (404), Netherlands (417), Poland (Art. 54 Polish Constitution), Portugal (442), Romania (466), Sweden (474), Slovenia (Art. 39 para. 1 Constitution of Slovenia), Slovakia (Art. 26 para. 1 Constitution of Slovakia), Turkey (535).

<sup>121</sup> Germany (158), Bulgaria (110), Greece (278), Hungary (Art. IX para. 3

and some also explicitly mention the prohibition of censorship.<sup>122</sup> Furthermore, some constitutions explicitly guarantee the freedom of information<sup>123</sup>, which usually protects the seeking, obtaining and disseminating of information. The freedom of information should not be confused with the right of access to public information which usually only grants access to public documents. The right of access to public information is protected by the Constitutions of Spain, Finland, Romania, Sweden, and Slovenia.

Few Constitutions foresee special provisions regulating the confiscation of printed material. While the Greek Constitution prohibits the confiscation of material before and after the publication, the provisions from Bulgaria, Cyprus, and Italy allow the confiscation of printed material only under specific circumstances. The only provision explicitly concerning the protection of sources is to be found by the Spanish Constitution.

All these constitutional rights contributing to the protection of investigative journalism are not granted in an unlimited manner. As mentioned above, it is rather the case that they are restricted by other constitutional provisions, protecting expressly or through corresponding case-law, third-party rights or rights of the State. These provisions concern, inter alia, the right to privacy<sup>124</sup>, the right to honour and personal reputation<sup>125</sup>, the protection of children and youth,<sup>126</sup> the right to reply,<sup>127</sup> and the right to a fair trial<sup>128</sup>.

## 2. Statutory Law

On the statutory level, journalism is regulated in various sections of several

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Hungarian Constitution), Italy (334), Luxembourg (363), Netherlands (Art. 7 Dutch Constitution), Poland (Art. 14 Polish Constitution), Portugal (442), Sweden (474), Slovenia (Art. 39 Constitution of Slovenia), Slovakia (Art. 26 para. 2 Constitution of Slovakia), Turkey (535).

<sup>122</sup> Austria (86), Germany (158), Estonia (208), Spain (220), Finland (232), Greece (278), Italy (337), Latvia (390), Macedonia (398), Portugal (442), Romania (466), Slovakia (Art. 26 para. 3 Constitution of Slovakia).

<sup>123</sup> Bulgaria (110), Germany (158), Spain (220), Italy (334), Lithuania (348), Luxembourg (365), Latvia (390), Portugal (442), Romania (466), Sweden (474), Slovenia (Art. 39 para. 2 Constitution of Slovenia), Slovakia (Art. 26 para. 1 Constitution of Slovakia).

<sup>124</sup> For example: Cyprus (123), Germany (170), Spain (226), Greece (278), Ireland (325), Italy (334), Lithuania (348), Luxembourg (365), Netherlands (Art. 10 Dutch Constitution), Poland (431), Romania (466), United Kingdom (549).

<sup>125</sup> For example: Germany (187), Spain (226), Greece (275), Italy (334), Lithuania (348), Luxembourg (364), Romania (466).

<sup>126</sup> For example: Germany (165), Spain (220), France (274).

<sup>127</sup> For example: Greece (278), Portugal (442), Romania (470).

<sup>128</sup> For example: Cyprus (123), Finland (232), Turkey (535).

statutory laws in all examined States. Some of these Laws have the scope to regulate journalism and the media. For example most States have a specific Media Law regulating broadcasting in specific laws or more broadly encompassing audiovisual media in those laws,<sup>129</sup> as well as Press Law.<sup>130</sup>

However, many provisions regarding investigative journalism directly or indirectly can also be found in more general laws, e.g. the Criminal Law and the Criminal Procedure Law,<sup>131</sup> the Civil Law<sup>132</sup>, and the Copyright Law.<sup>133</sup> While some States have a Law on Access to Public Information<sup>134</sup> which grants private individuals a right to access to public documents, Cyprus for example has a specific law which prohibits public servants to give out secret information.<sup>135</sup> In addition to the States which have included such a right in their constitution, and those States having a specific Law on the right to access public information, such a right also exists in Cyprus, Latvia and Portugal.

And on the statutory level, too, many laws exist to protect the rights and interests of the government or private businesses and individuals, also against the interest of journalists. For example, a specific Law on State Secrets exists in Hungary, Ireland, Italy, Malta, Slovakia and the United Kingdom. Due to the transposition of the Data Protection Directive 95/46/EC, all analysed States have a law concerning data protection which can also impact the work of journalists. In addition, for Denmark the Marketing Consolidation Act gives protection to trade and business secrets.

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<sup>129</sup> Austria (86), Bulgaria (111), Cyprus (122), Germany (159), Denmark (199), Finland (232), Greece (279), Croatia (2), Hungary (303), Ireland (323), Lithuania (348), Luxembourg (365), Latvia (390), Macedonia (398), Portugal (444), Romania (467), Slovenia (496), Slovakia (512), Turkey (542), United Kingdom (550).

<sup>130</sup> Cyprus (122), Germany (158), France (273), Hungary (307), Italy (338), Latvia (390), Malta (130), Poland (430), Portugal (444), Sweden (474), Slovakia (512), Turkey (538).

<sup>131</sup> Austria (86), Bulgaria (112), Cyprus (122), Germany (159), Denmark (198), Finland (233), Greece (278), Croatia (290), Hungary (300), Ireland (324), Italy (337), Lithuania (351), Luxembourg (362), Latvia (392), Macedonia (398), Netherlands (416), Poland (430), Romania (466), Slovenia (496), Turkey (532).

<sup>132</sup> Austria (86), Germany (159), Hungary (300), Lithuania (350), Luxembourg (362), Netherlands (416), Poland (430), Romania (467), Slovakia (512), Turkey (542), United Kingdom (562).

<sup>133</sup> Austria (86), Germany (159), Macedonia (398), Poland (430).

<sup>134</sup> Bulgaria (112), Germany (Informationsfreiheitsgesetz), Finland (232), Hungary (296), Ireland (320), Luxembourg (385), Malta (411), Romania (466), Slovakia (512), United Kingdom (550).

<sup>135</sup> The Law on Public Service.

Many different rights and duties of journalists are foreseen by all of these laws. While freedom of expression is part of most constitutions, in some States it has been expressly recognised in statutory law as well.<sup>136</sup>

One of the most important rights for journalists is the right to protect his sources of information. However, such a right exists only in some of the examined States.<sup>137</sup> The right to protect sources exists additionally in Spain, where it is, as shown above, even granted on the constitutional level. In Finland amendments to the Judicial Procedure Act were adopted, which entered into force on 1 January 2016, and which have introduced the protection of sources into Finnish Law. In addition, in Ireland a right for the protection of whistleblowers exists.

Besides the four States which have a special provision for the confiscation of journalistic material and the searches of editorial offices in their constitution, such a provision can be found on statutory level in France, Italy, Turkey and the United Kingdom.

On the other hand, the most important rights of individuals and businesses laid down in statutory law limiting the scope of journalistic work are the right to privacy,<sup>138</sup> the right of a person to their own image,<sup>139</sup> the right to honour, reputation and dignity,<sup>140</sup> the right to reply,<sup>141</sup> and the right to the protection of industrial, business and trade secrets.<sup>142</sup>

### 3. Self-regulation

In many examined States, journalists and/or publishers are organised in unions and associations which have adopted self-regulatory Codes of Ethics.<sup>143144</sup> In some States, more than one Code of Ethics of relevance

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<sup>136</sup> Bulgaria (111), Luxembourg (386) Portugal (445), Slovenia (496).

<sup>137</sup> Austria (100), Belgium (99), Cyprus(123), Czech Republic (146), Germany (163), Denmark (201), Estonia (208 – regulation applies to audiovisual media), Spain (223), France (270), Greece (280 – regulation applies to TV and radio), Croatia (291), Hungary (316), Ireland (321), Lithuania (348), Luxembourg (364), Latvia (390), Malta (411), Poland (433), Portugal (447), Sweden (492 et sqq.), Slovenia (497), Turkey (542), United Kingdom (555).

<sup>138</sup> Greece (278), Hungary (302), Ireland (334), Italy (5), Lithuania (348), Luxembourg (365), Latvia (391), Netherlands (419), Portugal (445), Slovakia (512), Turkey (538), United Kingdom (549).

<sup>139</sup> Austria (86), Germany (169), Hungary (302), Luxembourg (377), Poland (431 et sqq.), Portugal (445).

<sup>140</sup> Italy (334), Lithuania (350), Luxembourg (364), Latvia (2), Portugal (445).

<sup>141</sup> Bulgaria (111), Cyprus (123), Germany (182), Denmark (204), Portugal (442), Slovakia (523), Turkey (540).

<sup>142</sup> Lithuania (3), Latvia (391), Poland (431), Slovakia (512), Turkey (532).

<sup>143</sup> Also called Code for Journalistic Ethics, or Code for Media Ethics.

<sup>144</sup> Austria (86), Bulgaria (112 et sqq.), Cyprus (125), Germany (172), Denmark (201), Estonia (209), Spain (229), Finland (234), France (268 et sqq.),

for the journalistic sector exists.<sup>145</sup> Safeguarding freedom of expression is a public aim, but it can also be achieved through self-regulation systems.<sup>146</sup> Considering globalization and the increasing speed of digital evolution, self-regulation offers an even higher flexibility to cope with new problems and develop corresponding solutions. For example, strict national rules may cause legal and political conflicts in an international context, if they apply to content from abroad. With the Internet, national boundaries in the context of information flows are increasingly losing significance and the capability of national law to regulate situations linked to the respective country is becoming more limited in this regard.<sup>147</sup>

The ways of achieving self-regulation differ across the analyzed States, which also reflects the democratic, regional and cultural diversity in Europe. Nevertheless, each system has its own merits so that it is neither possible nor necessary to prefer one compared to the others. The two main types for self-regulation are voluntary self-regulation as well as co-regulation. Voluntary self-regulation means that providers in a given sector – in this case: those involved in the production and publication of media content – agree on rules amongst themselves. Co-regulation, on the other hand, is executed within a specific legal framework or on a statutory level. The latter concept usually means that public authorities set the legal framework and define the objectives to be achieved, but leave the detailed means for achieving those objectives to the operators of the given sector and to other interested parties.<sup>148</sup>

In Greece several Codes of Ethics exist in parallel due to the fact that according to the law all owners of TV channels, whether the channel is public, private, free-to-air or encrypted, must adopt rules and ethical principles governing the programmes broadcast. Greece has, for example, a Code of Ethics for Greek Journalists, a Code of Conduct for news and other political programs, as well as an advertising and communication

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Greece (282), Croatia (290), Italy (341), Lithuania (350), Luxembourg (378), Latvia (394 et seq.), Macedonia (398), Malta (412), Netherlands (416), Poland (430), Portugal (448), Romania (468 et seq.), Sweden (475), Slovenia (496), Slovakia (513), United Kingdom (550).

<sup>145</sup> Austria (86), Spain (229), Greece (282), Romania (468), Slovenia (496).

<sup>146</sup> Ukrow, „Selbstkontrollen im Medienbereich und Europäisches Gemeinschaftsrecht“, in: Ukrow (ed.), *Die Selbstkontrolle im Medienbereich in Europa*, 2000, pp. 1 et seq. (at p. 15).

<sup>147</sup> Ukrow, „Selbstkontrollen im Medienbereich und Europäisches Gemeinschaftsrecht“, in: Ukrow (ed.), *Die Selbstkontrolle im Medienbereich in Europa*, 2000, pp. 1 et seq. (at p. 13).

<sup>148</sup> Ukrow, „Selbstkontrollen im Medienbereich und Europäisches Gemeinschaftsrecht“, in: Ukrow (ed.), *Die Selbstkontrolle im Medienbereich in Europa*, 2000, pp. 1 et seq. (at p. 16).

Code.

The Code of Ethics of Cyprus became statutory law when it was attached as an appendix to the Law on Radio and Television Stations. However, the Law stipulates that the regulator cannot examine a case of possible breach of the Code, unless seized by the Media Complaints Commission. This commission was also established by media professionals in 1997 with a view to enforcing the Code and denies any powers to the Regulator on matters of ethics.

All of the mentioned self-regulating Codes of Ethics set professional and ethical standards for journalists, including rights as well as duties of journalists. While the Codes differ from each other in terms of their contents, certain rights and duties appear in most Codes: the duty to respect the dignity of personal life<sup>149</sup>, the right to privacy<sup>150</sup>, the duty to respect the presumption of innocence.<sup>151</sup> Furthermore, many Codes of Ethics encourage journalists to publish only accurate data and distinguish between fact and comment,<sup>152</sup> and to protect their sources.<sup>153</sup> Some Codes of Ethics have rules regarding the methods of acquisition of information, especially the use of hidden cameras and other recording devices,<sup>154</sup> just to name a few.

In some States, an Ethics Commission monitors the correct application of the Code of Ethics by the profession.<sup>155</sup> In Portugal, the Commission for the Journalists' Professional Charter is presided not only by representatives of journalists and the media industry, but also by a judge. Therefore, it is perceived as a self-regulatory tool, as well as an example of regulated self-regulation.

Some Ethics Commissions have the power to process complaints regarding supposed violations of the Code of Ethics.<sup>156</sup> However, the Commissions usually dispose of no remedy other than to publicly criticise the media or journalists in violation of the Code of Ethics,<sup>157</sup> although some have further reaching powers including a possible exclusion from the

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<sup>149</sup> Bulgaria (112), Denmark (202), France (269).

<sup>150</sup> Denmark (202), Netherlands (425), Luxembourg (365).

<sup>151</sup> Cyprus (126), Denmark (202), Spain (229), France (269), Luxembourg (364), Slovakia (521).

<sup>152</sup> Macedonia (404), Malta (412), Portugal (448), Slovakia (524).

<sup>153</sup> Cyprus (126), Spain (229), Malta (412), Portugal (448).

<sup>154</sup> Spain (229), Malta (412), Poland (431), Slovakia (513), United Kingdom (552).

<sup>155</sup> Bulgaria (112), Cyprus (125), Denmark (201), Finland (234), Latvia (394), Malta (412), Portugal (448), Sweden (475), Slovenia (496).

<sup>156</sup> Bulgaria (113), Germany (173), Denmark (201), Luxembourg (378), Latvia (394), Malta (412), Slovenia (496).

<sup>157</sup> Germany (174), Denmark (202), Luxembourg (379), Malta (412).



association.

## **II. Most relevant aspects of press and media freedom**

This part of the study concentrates on the most important aspects of the legal frameworks for a functioning free press. Namely, these are the rules regarding the freedom to obtain and to publish information and the legal limits to those freedoms. Equally important are the powers of the States to initiate criminal investigations into offenses committed by journalists in the exercise of their profession and special safeguard mechanisms provided by the law limiting such criminal proceedings, e.g. the protection of sources of the journalist. In this context, a closer look shall be taken into the allocation of liability within the editorial chain as well.

### **1. Investigative Journalism and the obtaining and publication of information**

#### **a) Applicability of criminal rules to journalists**

All journalistic work starts with the obtaining of information. The freedom to obtain information is an integral part of the freedom of press and media and consequently this part of the work of the journalist is typically included in the scope of protection. However, all legal frameworks also include limits to the freedom of obtaining information. As a principle, journalists have to observe the law while trying to obtain information. There is no general rule, which exempts journalists from the duty to observe the law. Only in Hungary media content providers and journalists generally cannot be held responsible for any infringements committed while obtaining information in the public interest if such information could not have been obtained in any other ways. However, this exception does not apply to any subsequent claims made under civil law for damages caused by the infringement.<sup>158</sup>

In all other States, any violation of law can be prosecuted and have serious consequences for the journalists in breach of that law. Of course, some specific provisions exist, which exempt as one group journalists from the otherwise generally applicable legal obligations. The EU Data Protection Directive, for example, provides that Member States in the implementation foresee an exemption from many obligations foreseen by the law for the processing of data when these data are processed (which can include the collecting and putting together of data) for purely journalistic purposes. But even with those exceptions, not all information, which might be in the public interest, can be obtained by means that can be regarded to be legal with legal methods. Therefore, most Courts take the importance of the freedom

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<sup>158</sup> Hungary (316).

of press and media into consideration when deciding on whether a criminal violation was committed by a journalist during the exercise of his profession. In Denmark, to give a concrete example, a journalist was acquitted of trespassing, even though he had entered a private building site, because he did so in following protesters for a news report.<sup>159</sup> But journalists cannot rely on being acquitted by courts of criminal actions. Courts usually have to balance the freedom of the press and media with the protection of other rights on a case to case basis. In Poland, to give another example, a journalist was found guilty of false testimony and forgery of documents. He wanted to gather information about a Polish refugee centre. Therefore, he pretended to be a refugee that lost his ID, assumed another identity and signed several documents using this false identity. The Court found him guilty, stating that the journalist's report was of no significance to the Polish public, that it did not add any new information to the public debate on refugee camps and that the report did not change the situation of any refugee in the camp.<sup>160</sup>

As these examples show, there is a variety of actions otherwise considered to be crimes which journalists might be allowed to commit to obtain information, but it is not at all clear to which extent exemptions will apply nor are these set out in a broad manner. The most common methods of obtaining information illegally, are the use of hidden cameras and/or recording devices. For other types of information that are obtained it is not the method but the content that make it illegal: obtaining secret information such as State secrets and business secrets obtained through informants typically constitutes an illegal act. Therefore, a closer look will be taken on the regulations regarding the use of such methods.

b) Obtaining and publication information through the secret use of recording devices

The rules regarding the use of secret recording devices vary widely in the different States, but it can be noted that the use of such methods is regarded as illegal in most States.<sup>161</sup> In some States, only the use of hidden audio recording devices is illegal, while the use of hidden cameras is legal.<sup>162</sup> While in Italy the use of hidden cameras by journalists is legal so

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<sup>159</sup> Denmark (200).

<sup>160</sup> Poland (432 et sqq.).

<sup>161</sup> Belgium (113), Bulgaria (112 – self regulation), Cyprus (125), Czech Republic (154), Germany (169 et sqq.), Denmark (199), Spain (227), Croatia (290), Hungary (304 et sqq.), Lithuania (351 et sqq.), Macedonia (400), Malta (411), Netherlands (418), Portugal (452), Romania (469), Slovenia (501), Turkey (534 et sqq.).

<sup>162</sup> Sweden (479 et sqq.), United Kingdom (552).

far, the Judicial Affairs Committee of the Italian Chamber of Deputies recently introduced an amendment criminalizing the use of hidden cameras for non-judicial purposes.<sup>163</sup>

aa) Secret filming

Irrespective of the way the material was obtained, the publication of illegally recorded material can still be legal, as long as its publication is in the public interest. For such cases, the publication of secretly filmed material is regarded legal in 18 of the analysed States,<sup>164</sup> while the law in five of these States additionally requires that the information obtained in this way could not have been obtained in any other way.<sup>165</sup> In some States, like Bulgaria, the Czech Republic, and Romania, the viewer has to be informed about the fact that the broadcast material has been recorded secretly.<sup>166</sup> In Latvia the use of hidden cameras is not forbidden by law at all and the publication of secretly filmed material can be described as common.<sup>167</sup>

bb) Secret audio recordings

The publication of secret audio recordings is only legal in nine States and again under the condition that the publication of those recordings is in the public interest.<sup>168</sup> The law in five of those States requires that the information could not have been obtained in any other way.<sup>169</sup> It is noteworthy to mention that the question, whether the publication is in the public interest, is not always easy to determine, as the following case from Macedonia proves. In 2015, the political opposition revealed wiretapped phone conversations of politicians, which proved the involvement of those politicians in corruption and other criminal activities.<sup>170</sup> While the making of those recordings was undoubtedly illegal, their publication would have had

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<sup>163</sup> Italy (341).

<sup>164</sup> Belgium (102), Bulgaria (113), Cyprus (125), Czech Republic (154), Germany (169 et sqq.), Denmark (200 et sqq.), Estonia (210, self-regulation), Spain (227), Finland (237 et sqq.), Ireland (323 et sqq.), Macedonia (399 et sqq.), Malta (411), Netherlands (418), Portugal (452), Romania (469), Sweden (479), Slovenia (501), Slovakia (517).

<sup>165</sup> Bulgaria (113), Czech Republic (154), Estonia (210), Netherlands (418), Romania (469).

<sup>166</sup> Bulgaria (113), Czech Republic (154), Romania (469).

<sup>167</sup> Latvia (392).

<sup>168</sup> Bulgaria (113), Czech Republic (154), Germany (168), Estonia (210, self-regulation), Macedonia (399 et sqq.), Malta (168), Netherlands (418), Romania (469), Slovenia (501, self-regulation).

<sup>169</sup> Bulgaria (112), Czech Republic (154), Estonia (210), Netherlands (418).

<sup>170</sup> *Borce Manevski*, IRIS-2015-10:1/22.

to be considered legal, if it was in the public interest. It seems that revealing politicians as corrupt would undeniably be in the public interest. Nevertheless, the Public Prosecutor of the Republic of Macedonia reminded the media not to publish any audio materials which could be used as evidence in future court cases.<sup>171</sup> Regardless of this statement, no media company was actually charged for the publication of those audio recordings so far.<sup>172</sup>

In Denmark and Finland, secret audio recordings are legal, if one person of a conversation agrees to the recording.<sup>173</sup> In Finland and Turkey, on the other hand, not only the secret recording constitutes a crime, but in Finland, eavesdropping is a crime,<sup>174</sup> and in Turkey it constitutes a crime to listen to a non-general conversation without consent.<sup>175</sup> Turkey has the strictest rules regarding the publication of illegally obtained information. There, the publication of secretly recorded material constitutes a crime.<sup>176</sup> And not only is there no public interest exception, but the punishment for the publication of illegally obtained information is increased if the disclosure happens through press and broadcast.<sup>177</sup> A possible consequence for journalists using secret recording devices in Portugal is a suspension from work for up to 12 months.<sup>178</sup> While in Bulgaria, the breach of confidence in connection with the professional occupation constitutes a crime, and the use of secret recording devices is illegal in Malta<sup>179</sup> and in Poland,<sup>180</sup> the self-regulating Codes of Conduct of the journalists' association in these respective States allow the use of such devices nevertheless.

### c) Obtaining and publication of secret information

An equally important source of information for investigative journalism is the receiving of information through informants. They leak information to journalists which would otherwise be difficult to obtain, usually because it is under legal protection. Most commonly leaked information is protected as State or Trade secret.

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<sup>171</sup> Macedonia (399).

<sup>172</sup> Macedonia (401).

<sup>173</sup> Denmark (199), Finland (238).

<sup>174</sup> Finland (237).

<sup>175</sup> Turkey (534).

<sup>176</sup> Turkey (535).

<sup>177</sup> Turkey (534).

<sup>178</sup> Portugal (452).

<sup>179</sup> Malta (411 et sqq.).

<sup>180</sup> Poland (431).

aa) State secrets

All examined States have legal provisions regarding the protection of State secrets, and the publication of State secrets – also by journalists – is a criminal offence in most States.<sup>181</sup> In some States the mere possession of State secrets is a criminal offence, for example in Ireland and Turkey.<sup>182</sup> In 2015, in Germany, the Federal Attorney General launched investigations for treason against two journalists. They had published two articles on their blog regarding the Federal Office for the Protection of the Constitution. The one article contained an excerpt of the agency's plan for the "Bulk Data Analysis of Internet Content". The other article contained a classified personnel plan for the implementation of a new department. Before the investigations could go any further, the Ministry of Justice intervened due to public protests against the investigation. The Federal Attorney General was sent into retirement and the investigations were dropped.<sup>183</sup>

Only in few of these States, exceptions apply. In Slovenia the publication of State secrets is not punishable if the published information reveals a violation of rights (human rights, fundamental freedoms, and other constitutional or statutory rights) or a serious abuse of power or authority.<sup>184</sup> While Sweden does not have an explicit exception in the law for cases in which the publication is in the public interest, it can be derived from a High Court judgment that it is nevertheless unlikely that someone will be held liable for publishing secret public documents. In the given case, a newspaper published two articles based on military information of secret nature. One article indicated that a Polish travel agent was a spy and the other article was about a threat to Sweden by another country. The High Court held that no one could be held liable for the publication of the secret information in these cases, because the published information was not "really important" and therefore, the publication did not have potential to damage the State.<sup>185</sup> The situation is similar in the UK where no public interest defence exists either. But in a specific case, several journalists had been accused of payments to public officials to receive secret information. The journalists were charged with aiding and abetting the public officials'

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<sup>181</sup> Austria (§ 252 Austrian Criminal Code), Bulgaria (114), Germany (166), Denmark (198), Spain (224 et sqq. – in case the information is given to another country), Finland (247), Ireland (320), Italy (335), Lithuania (352), Luxembourg (366 et sqq.), Malta (411), Netherlands (Art. 98 – 98c Dutch Penal Code), Poland (430), Romania (468 et sqq.), Sweden (476), Slovenia (498), Slovakia (512), Turkey (532), United Kingdom (557).

<sup>182</sup> Ireland (320), Turkey (532).

<sup>183</sup> *Iacino*, The Netzpolitik Case, <https://ecpmf.eu/news/legal/archive/germany-the-netzpolitik-case-what-it-means-for-media-freedom-law>.

<sup>184</sup> Slovenia (502).

<sup>185</sup> Sweden (477).

misconduct in public office. 13 journalists were found not guilty and only one journalist was convicted. But the Court of Appeal set that conviction aside, too.<sup>186</sup> In Finland, on the other hand, the Supreme Court considered a journalist to be an instigator to a secrecy offence committed by a person giving the journalist an interview and revealing secret information in that interview.<sup>187</sup>

Only in Latvia, the publication of State secrets is not an illegal action for journalists. In Latvia, the publication is only illegal for people who have a duty to secrecy, which does not apply to journalists.<sup>188</sup> And in Germany, since a change of the relevant law in 2012 – following a judgment of the Federal Constitutional Court – acts of aiding to the breach of official secrets and special duties of confidentiality shall not be deemed unlawful if they are restricted to receiving, processing or publishing of the secret.<sup>189</sup> This exception, however, does not apply to State Secrets.

#### bb) Trade secrets

The publication of trade secrets is illegal in 16 States.<sup>190</sup> In seven of those States exceptions apply. In Bulgaria, Germany and Macedonia such secrets can be published if the publication is in the public interest. A public interest exception can be derived from a court decision in Italy as well. Journalists had sent a tea sample instead of a urine sample to a medical laboratory to review the validity of the test results. The laboratory even failed to recognize that the sample was a beverage and not a bodily fluid. The court held, that the journalists had a right to publish an article about this procedure with the possibility of identifying the laboratory.<sup>191</sup> In Slovakia, the publication of trade and business secrets is possible if they contain information with regard to a significant impact on the health of the population or on world cultural and natural heritage or the environment, information related to public funds and state aids or the disposal of state or municipality property.<sup>192</sup> Enterprises in Hungary, which use public funds may not invoke the business secret in the range of their activities

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<sup>186</sup> United Kingdom (558).

<sup>187</sup> Finland (247).

<sup>188</sup> Latvia (392).

<sup>189</sup> Germany (167 et sqq.).

<sup>190</sup> Austria (§ 123 Austrian Criminal Code), Bulgaria (113 et sqq.), Czech Republic (150), Germany (§§ 203, 204 Criminal Code), Denmark (200), Spain (225), Finland (236 et sqq.), Hungary (305), Italy (Law no. 675 of 1996), Lithuania (350), Latvia (391), Poland (431), Slovenia (504), Slovakia (512), Turkey (533), United Kingdom (562).

<sup>191</sup> Italy (336 et sqq.).

<sup>192</sup> Slovakia (512 et sqq.).

connected to public funds or public assets.<sup>193</sup> In the UK, journalists can invoke the iniquity defence: If the breach of confidence was necessary to prevent the commission of a crime or to enable a crime to be punished, the publication of trade and business secrets is justified.<sup>194</sup>

The publication of trade and business secrets is legal in two States. Sweden has no provision regarding trade secrets, therefore trade secrets can legally be published without any consequences.<sup>195</sup> In Luxemburg, it can be derived from one specific case that not the publication of business secrets in itself is contrary to the law. A journalist who published secret information of a company was rather charged for his active role in the illegal removal of the documents from the company than for the publication of the content of these documents.<sup>196</sup>

In the Netherlands, the Courts have to decide on a case by case basis, using, *inter alia* the principle of proportionality whether the publication of business secrets is legal. In the most important case in this regard a publisher uploaded internal documents of the Scientology church on a website. Scientology wanted the documents to be taken down. The Court of Appeals of The Hague decided in favour of the publisher, taking into consideration that he had no commercial interest in the publication and that the documents had already been public for a short time period before they had been published by him.<sup>197</sup>

d) Publication of information obtained by legal methods

As seen above, even the publication of illegally obtained information can be legal in some cases. On the other hand, the publication of legally obtained information can under certain circumstance be prohibited or have legal consequences because of a violation of third party rights through the publication. In all examined States certain duties of care for journalists exist to prevent such violation of third party rights. Those duties stem from statutory law as well as self-regulation. The most common reporting duties are presented in the following.

In most States, rules and regulations exist regarding the truthfulness of reporting. Generally, journalists have the duty to report the truth, and in case there is not enough proof to determine the veracity of the information they should refrain from reporting.<sup>198</sup> Journalists should not present

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<sup>193</sup> Hungary (301).

<sup>194</sup> United Kingdom (563).

<sup>195</sup> Sweden (478).

<sup>196</sup> Luxembourg (365).

<sup>197</sup> Netherlands (417 et sqq.).

<sup>198</sup> Austria (89 et sqq.), Bulgaria (115), Cyprus (126), Czech Republic (151),

suspicious as certainties, they should distinguish facts from comments,<sup>199</sup> and report objectively, fair and balanced.<sup>200</sup>

In many States detailed rules exist regarding the right to privacy. Journalists have to respect the right to privacy,<sup>201</sup> and more specifically refrain from unlawfully disclosing the identity of persons.<sup>202</sup> In Slovenia, for example, journalists shall confer with their editor in chief before publishing information which concerns the private sphere of an individual.<sup>203</sup> Furthermore, journalists have to respect the dignity and honour of persons.<sup>204</sup>

In most States provisions exist regarding the reporting about criminal investigations and trials. Journalists need to avoid violating the presumption of innocence.<sup>205</sup> Many States have provisions regarding reporting which can identify the accused e.g. in criminal investigations or procedures.<sup>206</sup> In Finland, on the other hand, no such special provisions apply. Whether the name and picture of an accused can be published there, depends on more general rules such as the right to privacy of the accused.<sup>207</sup> In some States, the accused can request the publication of a counterstatement if something was published about him.<sup>208</sup> For the reporting about victims of crimes, special provisions apply in several

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Germany (186), Denmark (203), Spain (220), Finland (252), France (269), Greece (283), Lithuania (356), Luxembourg (381), Latvia (394), Macedonia (404), Malta (412), Netherlands (423), Poland (435), Portugal (448), Slovakia (523), Slovenia (505).

<sup>199</sup> Belgium (104), Bulgaria (115), Czech Republic (151), Estonia (216), Lithuania (356), Macedonia (404), Malta (412), Sweden (486), Slovakia (524), Slovenia (506), United Kingdom (562)

<sup>200</sup> Denmark (203), Luxembourg (372), Slovenia (506), United Kingdom (562).

<sup>201</sup> Austria (88), Bulgaria (114), Cyprus (123), Estonia (211), Spain (226), Finland (252), Greece (278), Croatia (290), Hungary (302), Lithuania (348), Luxembourg (373), Latvia (391), Netherlands (419), Poland (431), Romania (466), Sweden (479), Slovenia (505), Turkey (534).

<sup>202</sup> Austria (93), Bulgaria (116), Czech Republic (153), Italy (334).

<sup>203</sup> Slovenia (500).

<sup>204</sup> Austria (94), Cyprus (123), Czech Republic (142), Germany (187), Finland (250 et sqq.), Croatia (291), Lithuania (348), Luxembourg (370), Latvia (391), Portugal (445), Romania (466), Slovakia (514), Slovenia (499), Turkey (540).

<sup>205</sup> Belgium (104), Bulgaria (114), Czech Republic (152), Germany (181), Denmark (212), Spain (229), Finland (256), France (269), Hungary (313), Lithuania (354), Latvia (391), Macedonia (404), Portugal (457), Romania (471), Sweden (484 et sqq.), Slovakia (521), Slovenia (506), Turkey (538).

<sup>206</sup> Germany (188), France (274), Denmark (203), Italy (339), Lithuania (355), Luxembourg (374), Poland (436), Sweden (486), Slovakia (521), Slovenia (506).

<sup>207</sup> Finland (256).

<sup>208</sup> Czech Republic (153), Germany (182), Luxembourg (372), Netherlands (423 et sqq.), Sweden (487), Slovenia (506).



States, too.<sup>209</sup> Also, when reporting, journalists should refrain from the incitement of hatred<sup>210</sup> and in some States additionally they are urged not to put any emphasis on a person's nationality when reporting about them.<sup>211</sup>

In all examined States legal consequences are foreseen for the breach of reporting duties and thus, for the violation of individuals' rights. Most common is the right to compensation of material damages as well as non-material damages.<sup>212</sup> It is noteworthy that in Macedonia fines are possible, but that journalists cannot be fined more than 2000 €, editors in chief not more than 10.000 € and media publishers not more than 15.000 €. <sup>213</sup> In Malta, in civil proceedings not more than 11.600 € can be awarded.<sup>214</sup> Next to the right of compensation for damages persons affected by the reporting can invoke in many States further rights such as the right of reply <sup>215</sup> In some States a right to revocation exists.<sup>216</sup>

In a few States, for example in Germany, Denmark, and the UK, prohibitive injunctions preventing publications are possible.<sup>217</sup> Additionally, in the UK, it is possible to even prevent the reporting on the fact that an injunction has been issued with a so-called super injunction.<sup>218</sup>

Special media related defences against claims of infringements of personality rights exist in all examined States. Most common is the public interest defence.<sup>219</sup> According to this defence, the publication of information is legal if the public interest in the publication outweighs the interest to protect the right which will be infringed by the publication.

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<sup>209</sup> France (273 et sqq.), Croatia (291), Poland (436), Sweden (484), Slovenia (506), Turkey (542), United Kingdom (560).

<sup>210</sup> Germany (187), Finland (263), Greece (280), Luxembourg (375), Romania (466), Slovenia (499).

<sup>211</sup> Estonia (216), Sweden (484),

<sup>212</sup> For example: Austria (88), Cyprus (133), Czech Republic (147), Germany (185), Finland (250 et sqq.), Greece (282), Croatia (292), Hungary (303 et sqq.), Ireland (i.e. 331), Italy (344), Lithuania (350), Malta (413), Romania (470), Slovakia (528), United Kingdom (563).

<sup>213</sup> Macedonia (405).

<sup>214</sup> Malta (413).

<sup>215</sup> Bulgaria (215), Germany (185), Finland (254), Croatia (292), Sweden (487), Slovakia (523), Slovenia (506), Turkey (540).

<sup>216</sup> Austria (92), Germany (183), Latvia (395).

<sup>217</sup> Germany (184), Denmark (200), United Kingdom (563).

<sup>218</sup> United Kingdom (563).

<sup>219</sup> Austria (i.e. 88, 89, 93), Cyprus (134), Denmark (199), Estonia (211), Finland (238), Greece (290), Croatia (2), Ireland (329), Italy (342), Lithuania (351), Poland (431), Sweden (479), Slovenia (499), United Kingdom (550),

Another common defence is the defence of truth.<sup>220</sup>

## 2. Criminal investigations of journalists

Since journalists might commit a variety of crimes while trying to obtain information or when publishing it, they might be subject to criminal investigations. Such criminal investigations can have a chilling effect on the freedom of the press and media. Journalists who fear prosecution, might refrain from publishing information even if there is a public interest in the disclosure of such information. Furthermore, informants might refrain from leaking information to journalists if they fear to be revealed in the course of such criminal investigations. Therefore, a closer look is taken at the (limited) possibilities of law enforcement agencies to investigate alleged criminal offences of journalists, especially the regulations regarding the search of editorial offices and the seizure of journalistic material as well as the regulations regarding the surveillance of journalistic communication. In this context, a closer look needs to be taken at the regulation of the protection of sources and the limit it sets for law enforcement agencies when investigating journalists' actions.

### a) Search and seizure

The search of editorial offices and the seizure of journalistic material are possible in all examined States.<sup>221</sup> Search warrants can only be issued and search and seizure respectively only take place if the requirements of the respective laws are fulfilled. Beside common prerequisites for search and seizure foreseen by the law in all States (e.g. the suspicion that a crime has been committed), special provisions apply in most States for the search of editorial offices and the seizure of journalistic material.<sup>222</sup> In most cases these special provisions exist in relation to the protection of sources. Only in six States no such special provisions apply.<sup>223</sup>

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<sup>220</sup> Cyprus (127), France (269), Greece (278), Croatia (291), Ireland (329), Italy (342), Malta (410), United Kingdom (565 et sqq.).

<sup>221</sup> Austria (87), Belgium (100), Bulgaria (110), Cyprus (127), Germany (167 et sqq.), Denmark (201), Estonia (213), Finland (271), France (3), Croatia (291), Hungary (305), Ireland (324), Italy (338), Lithuania (352), Latvia (392), Luxembourg (369 et sqq.), Macedonia (401), Malta (411), Netherlands (419 et sqq.), Poland (433), Portugal (453), Romania (469 et sqq.), Sweden (480 et sqq.), Slovakia (518), Slovenia (501), United Kingdom (555).

<sup>222</sup> Austria (87 et sqq.), Belgium (101), Bulgaria (110), Cyprus (123, 127 et sqq.), Germany (167 et sqq.), Denmark (201), Estonia (213), Finland (241), France (271), Hungary (305), Italy (338), Lithuania (352 et sqq.), Luxembourg (369 et sqq.), Malta (410), Poland (433), Portugal (453), Romania (469), Sweden (480 et sqq.), United Kingdom (555).

<sup>223</sup> Croatia (290), Latvia (392 et sqq.), Macedonia (401), Netherlands (416),

In 18 States, a court order is necessary to conduct a search of editorial offices.<sup>224</sup> According to Estonian Law, an order from the prosecutor is sufficient, however, the Supreme Court ruled that the police requires a court order to conduct a search at the premises of a person processing information for journalistic purposes.<sup>225</sup> The situation is similar in the Netherlands. The law requires only an order from a public prosecutor for searches of editorial offices, since the Law does not differentiate between journalists and regular citizens. However, in a case against the Netherlands, the European Court of Human Rights decided that an *ex ante* review by a judge (as an independent and impartial decision-making body) was most important for the protection of the freedom of the press, and therefore the Dutch practice requires a court order for the searches of editorial offices.<sup>226</sup> In Sweden, where the Law also only requires a search order by the prosecutor, the Chancellor of Justice stated that the decision to search an editorial office of a newspaper should only be ordered by a court.<sup>227</sup> In France, a court order by a magistrate is sufficient. Judges and prosecutors can be magistrates.<sup>228</sup> In Malta, search warrants can only be issued under the Official Secret Act, whereas following the Press Act police cannot conduct searches or arrests for the purpose of criminal proceedings.<sup>229</sup>

In Ireland and in Italy it is – under certain circumstances – possible that a police officer issues the search warrant. In Ireland the police officer has to be of ‘chief superintendent’ rank,<sup>230</sup> and in Italy the law allows this only in urgency cases when a Court order cannot be issued in time. The Court then has to confirm the seizure within 24 hours, otherwise it becomes ineffective.<sup>231</sup> In Cyprus, the court has to confirm the lawfulness of the search and seizure only within a period of 72 hours.<sup>232</sup>

Rules regarding censorship prior to publication exist in Finland, Italy and Sweden. In Finland and Sweden the content of an article can only be target

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Slovakia (518), Slovenia (501).

<sup>224</sup> Austria (87), Bulgaria (110), Germany (177), Denmark (201), Estonia (213), Finland (240 et sqq.), Croatia (291), Lithuania (353), Luxembourg (7), Latvia (392), Macedonia (401), Netherlands (419 et sqq.), Poland (433), Portugal (453), Sweden (481), Slovenia (504), United Kingdom (555).

<sup>225</sup> Estonia (213).

<sup>226</sup> Netherlands (419 et sqq.).

<sup>227</sup> Sweden (481).

<sup>228</sup> France (271).

<sup>229</sup> Malta(410).

<sup>230</sup> Ireland (324).

<sup>231</sup> Italy (338).

<sup>232</sup> Cyprus (123).

of a criminal investigation after the article has been published.<sup>233</sup> Furthermore, Swedish authorities cannot prohibit the printing of journalistic material,<sup>234</sup> and in Italy the seizure of press material is only possible after it has been published.<sup>235</sup> In Bulgaria, printed matter can only be confiscated if it infringes public decency or contains incitement to violations of the constitutional order.<sup>236</sup>

b) Telecommunication surveillance

The surveillance of electronic communication of journalists is – with very few exceptions – permitted in all examined States, if the general prerequisites foreseen by law are fulfilled. Special provisions protecting journalists from surveillance of their telecommunication only exist in five States.<sup>237</sup> In Turkey and Sweden, however, only the use of bugging devices is inadmissible, and only in case one person of the conversation is allowed to refuse to testify in court proceedings, which is the case for journalists in Turkey and Sweden. Other provisions protecting journalists from other forms of telecommunication surveillance do not exist.<sup>238</sup> In Finland, surveillance of the communication between a journalist and an accused is only permitted by law if the investigated crime is punishable with at least six years of imprisonment.<sup>239</sup> In Denmark, surveillance is generally not possible due to the data protection law.

c) Protection of sources

It is important for the credibility of journalists that they reference the source of their information. And indeed, in some States certain obligations exist in this regard. Czech Television for example, has to inform its viewers about the source of the information broadcast.<sup>240</sup> The Spanish Constitutional Court stated that another proof must be provided for the truthfulness of the published information when the source of the information does not need to be identified due to privilege.<sup>241</sup> According to Finnish law, the editorial office should inform on how the information obtained by an anonymous source was verified, in case the published information leads to a highly

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<sup>233</sup> Finland (240), Sweden (475).

<sup>234</sup> Sweden (475).

<sup>235</sup> Italy (338).

<sup>236</sup> Bulgaria (110).

<sup>237</sup> Finland (242 et sqq.), Luxembourg (369 et sqq.), Sweden (481), Slovenia (504), Turkey (536).

<sup>238</sup> Turkey (536), Sweden (484).

<sup>239</sup> Finland (242 et sqq.).

<sup>240</sup> Czech Republic (151).

<sup>241</sup> Spain (222).

negative publicity for a third party.<sup>242</sup>

Nevertheless, the protection of sources by guaranteeing their anonymity is highly important for investigative journalism and a functioning free press and media. Only when informants do not fear exposure they are encouraged to leak information to journalists. And indeed, journalists have the right to protect their sources in most of the analysed States.<sup>243</sup> In Bulgaria the right to protect sources is only foreseen by the Law on radio and television. Therefore, a right to protect sources for the printed press can only be derived from Art. 10 ECHR. In the Netherlands, too, the right to protection of sources derives from a judgment of the European Court of Human Rights, but has not yet been introduced into Dutch legislation.<sup>244</sup> Neither does the Slovakian law foresee the right of protection of sources.<sup>245</sup>

In some States the protection of sources is not only a journalist's privilege but also his duty.<sup>246</sup> Revealing the source is an administrative violation in Latvia,<sup>247</sup> and punishable in Sweden.<sup>248</sup> In other States, exceptions exist to the journalist's duty to protect sources. In Finland, a journalist can reveal his source if serious crimes are concerned, but defamation and secrecy offences are excluded from that exception.<sup>249</sup> In Estonia, a journalist is allowed to reveal his source if he has been knowingly provided false information.<sup>250</sup> In Portugal, no such general rule exists, however, the journalists union's Ethics Council allowed two journalists to reveal their sources, when it came to light that the sources had used the journalists to distribute false information.<sup>251</sup> These incidents led to a change of the Ethics Code, the possibility to reveal a source was included.<sup>252</sup>

As mentioned above, the right to protection of sources usually limits the possibility of law enforcement agencies to search editorial offices and seize

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<sup>242</sup> Finland (243).

<sup>243</sup> Austria (87), Belgium (100), Bulgaria (111), Cyprus (123), Czech Republic (146), Germany (163), Denmark (201), Estonia (208 – regulation applies to audiovisual media), Spain (222 et sqq.), France (270), Greece (280 – regulation applies to TV and radio), Croatia (291), Ireland (321), Lithuania (348), Luxembourg (369), Latvia (390), Malta(141), Netherlands (420), Poland (433), Portugal (447), Sweden (492 et sqq.), Slovenia (497), Turkey (542), United Kingdom (555).

<sup>244</sup> Netherlands (420).

<sup>245</sup> Slovakia (519).

<sup>246</sup> Czech Republic (154), Estonia (212 – regulation applies to audiovisual media), Finland (243), Latvia (395), Portugal (447), Sweden (480).

<sup>247</sup> Latvia (395).

<sup>248</sup> Sweden (480).

<sup>249</sup> Finland (244).

<sup>250</sup> Estonia (212 – applies to audiovisual media).

<sup>251</sup> Portugal (451).

<sup>252</sup> Portugal (451).

journalistic material. In Austria, for example, journalists can refuse to submit any materials which they have obtained from informants.<sup>253</sup> In Belgium, the law prohibits law enforcement agencies to try to obtain information regarding protected sources of journalists,<sup>254</sup> and in Germany searches and seizure are unconstitutional if aimed at establishing a source's identity.<sup>255</sup> In Luxembourg, law enforcement agencies are not allowed to aim at obtaining information, which can reveal a source. But even if they obtain such information while not aiming at it, such information must not be used as evidence in court proceedings.<sup>256</sup>

In some cases, special procedural rules apply to the seizure of journalistic material to avoid the disclosure of sources. In Finland, an ombudsman has to be present during the search to control which information is targeted by the search.<sup>257</sup> In Lithuania and Portugal, a representative of the journalists' organization has to be present during the search.<sup>258</sup> In France, a magistrate and the journalist must be present. Only they are allowed to consult the documents or the objects discovered at the time of the search prior to a seizure of those documents. The journalist can oppose the seizure of documents. The document must then be placed under seal. The journalist's objection to the seizure must be noted in the search report and both the report and the document under seal have to be sent to a judge who then decides whether the document can be confiscated.<sup>259</sup> A similar procedure exists in Poland. Documents which might reveal a source have to be put under seal and sent to the court. The court will decide whether the document can reveal the source.<sup>260</sup> Likewise, in Denmark, a journalist can demand that a court examines the documents in question to decide whether their seizure is justified.<sup>261</sup> The Hungarian Media Council, on the other hand, can seize and even make copies of all written documents and electronic data without exception.<sup>262</sup>

In most States, the right to protection of sources includes the right of the journalists to refrain from testimony in court proceedings as well.<sup>263</sup>

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<sup>253</sup> Austria (88).

<sup>254</sup> Belgium (100).

<sup>255</sup> Germany (167).

<sup>256</sup> Luxembourg (371).

<sup>257</sup> Finland (242).

<sup>258</sup> Lithuania (353), Portugal (453).

<sup>259</sup> France (271 et sqq.).

<sup>260</sup> Poland (433 et sqq.).

<sup>261</sup> Denmark (201).

<sup>262</sup> Hungary (305).

<sup>263</sup> Austria (§ 31 Mediengesetz), Belgium (100), Germany (179), Estonia (212), Finland (244 et sqq.), France (271), Croatia (291), Lithuania (353), Latvia (395), Poland (433), Portugal (449), Sweden (493), Turkey (536),

Additionally, in Poland, the editor and the publisher are not allowed to disclose any personal data of the author of the publication.<sup>264</sup>

Despite the importance of the right to protection of sources, the laws in 18 of the examined States show a variety of rather broad exceptions to that right.<sup>265</sup> Informants providing information about crimes or criminals are protected under the right of protection of sources in Turkey, unless the information constitutes a crime by the informant.<sup>266</sup> In Finland the right to refrain from testimony does not apply to information that has been obtained or used illegally if the charges of the criminal investigation concern that illegal obtaining and utilization of information.<sup>267</sup> In Ireland, the protection of sources does not apply to information leaked by public officials. Such information has to be turned over by the journalist.<sup>268</sup> In Cyprus a judge can order a journalist to reveal his source, but only if the information leaked by that source is directly linked to a crime, the necessary information cannot be obtained in any other way, and a public interest exists in the disclosure of the source.<sup>269</sup> In Belgium a judge can order a journalist to reveal his sources, e.g. in case of a clear physical threat to a person.<sup>270</sup> In Italy, a judge can as well order a journalist to reveal his source during criminal proceedings, if the information the journalist can provide is a crucial for the investigated crime.<sup>271</sup> In some States, general exceptions exist for the purpose of investigating<sup>272</sup> or for the prevention a (serious) crime.<sup>273</sup> In Austria and Germany, an exception is only provided for if the journalist himself is suspected of having committed a crime.<sup>274</sup>

While in Malta exceptions to the protection of sources apply in the interest of national security and public safety,<sup>275</sup> in other States an exception exists in case of public interest in the disclosure of the source.<sup>276</sup> In Denmark, the

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United Kingdom (555).

<sup>264</sup> Poland (433).

<sup>265</sup> Austria (88), Belgium (100), Cyprus (123), Denmark (201), Spain (223), Finland (243 et sqq.), Croatia (291), Ireland (321), Italy (according to the Criminal Procedure Code), Lithuania (348), Luxembourg (369 et sqq.), Latvia (392 et sqq.), Malta (411), Poland (434), Portugal (449), Turkey (538), United Kingdom (555).

<sup>266</sup> Turkey (538).

<sup>267</sup> Finland (245).

<sup>268</sup> Ireland (321).

<sup>269</sup> Cyprus (123).

<sup>270</sup> Belgium (100).

<sup>271</sup> Italy (according to Criminal Procedure Act).

<sup>272</sup> Spain (223), Finland (242), Luxembourg (371), Poland (433), Portugal (449).

<sup>273</sup> Croatia 291), Luxembourg (371), Malta (411).

<sup>274</sup> Austria (88), Germany (178).

<sup>275</sup> Malta (411).

<sup>276</sup> Lithuania (348), Latvia (393).

Supreme Court decided that the protection might not be guaranteed under certain circumstances.<sup>277</sup> Neither in the UK nor in Portugal is the protection of sources an absolute right.<sup>278</sup> In Portugal and Hungary, a judge can order a journalist to disclose his source of information.

In Portugal a journalist can be charged with contempt of court in case of his refusal to reveal his source despite an order by a judge,<sup>279</sup> whereas in Belgium the refusal to reveal the source cannot lead to any criminal charges.<sup>280</sup>

### 3. Allocation of liability within the editorial chain

Furthermore, legislation regarding the allocation of liability within the editorial chain can have an influence on a journalist's ability and willingness to publish certain information and, therefore, affects the freedom of press and media in total. The regulations regarding the allocation of liability differ widely in the States observed. Even when trying to achieve the same goal, namely the protection of the freedom of the press, the law in different States sometimes foresees opposing regulations. For example in Belgium and Luxembourg, the person primarily responsible for a publication is the author.<sup>281</sup> In Belgium, the author is held responsible for his publications, and if he is known and lives in Belgium, the publisher, printer and distributor cannot legally be prosecuted for that publication. Therefore, this group of persons do not need to fear prosecution for the publication of the author's article and therefore, do not have such a not to publish it.<sup>282</sup> For a similar reason, the legislator in Luxembourg decided to put the primary liability on the journalist instead of the publisher. The lower the responsibility is that a publisher has for the content of the publication, the lower his incentive to control the content.<sup>283</sup> In other States, however, the author has a right to stay anonymous and in case he exercises that right, he cannot be held responsible for his publications with the consequence that the editor or publisher is liable for the publication.<sup>284</sup>

Overall, only in a few States, the editor or media owner is responsible for publications instead of the author.<sup>285</sup> According to the Law in Slovenia,

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<sup>277</sup> Denmark (201).

<sup>278</sup> Portugal (449 et sq. ), United Kingdom (555).

<sup>279</sup> Portugal (449 et sq.).

<sup>280</sup> Belgium (100).

<sup>281</sup> Belgium (106), Luxembourg (387).

<sup>282</sup> Belgium (106).

<sup>283</sup> Luxembourg (386 et sq.).

<sup>284</sup> Poland (433), Sweden (490).

<sup>285</sup> Cyprus (124), Estonia (217), Lithuania (357), Latvia (395), Slovakia (525 et sq.).



editors are responsible for any published information, but nonetheless, Slovenian jurisprudence holds journalists personally liable for criminal and civil law infringements. Only if the author is unknown or cannot be prosecuted due to other reasons, the editor, publisher and printer bear the responsibility for all crimes against honour and reputation.<sup>286</sup> In some States with such external liability, the media owner or editor can claim compensation from the author after having been held liable.<sup>287</sup>

But, in more than half of the examined States the author as well as the editor and the media owner can be held responsible for the content of a publication.<sup>288</sup> In Italy there is no uniform case law regarding the question whether just the authors of a publication or the editors as well should have to pay damages for libel.<sup>289</sup>

While in some States even the person printing and distributing the publication can be held liable for its content,<sup>290</sup> the Irish Defamation Act states explicitly that the printer, distributor and seller of a publication cannot be considered the author or editor of a publication.<sup>291</sup>

Nine States have a successive order of liability.<sup>292</sup> That means that the primary responsibility lies with one person and only if that person cannot legally be held accountable – usually because the person is unknown – the next person in that order becomes responsible. In five of these States the first person responsible is the author.<sup>293</sup> In Denmark this only applies to TV and radio publications and in Sweden it only applies to non-periodical publications. For written publications in Denmark and for periodical publication in Sweden the editor is the first responsible person. In the same manner in France, the first responsible person is the director and publisher, however, the author has to be prosecuted as an accomplice.<sup>294</sup>

In Estonia, Finland, Italy, and Macedonia the law obliges media service providers to appoint a responsible editor for a publication.<sup>295</sup> And in

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<sup>286</sup> Slovenia (507).

<sup>287</sup> Austria (95), Bulgaria (116), Luxembourg (387).

<sup>288</sup> Austria (95), Belgium (106), Germany (193 et sqq.), Denmark (204), Spain (228), Finland (264), France (275), Croatia (294), Italy (344 et sqq), Macedonia (405), Malta (410), Netherlands (426), Poland (437), Portugal (462 et sqq.), Romania (471), Turkey (543), United Kingdom (565).

<sup>289</sup> Italy (344).

<sup>290</sup> Belgium (106), France (275), Sweden (489), Slovenia (507 et sqq.).

<sup>291</sup> Ireland (329).

<sup>292</sup> Belgium (106), Denmark (204), Spain (228), Finland (264), France (275), Luxembourg (386), Malta (410), Sweden (488), Turkey (543).

<sup>293</sup> Belgium (106), Denmark (264), Spain (228), Sweden (489 – non-periodical publications), Turkey(543).

<sup>294</sup> France (275).

<sup>295</sup> Estonia (217), Finland (263), Italy (345), Macedonia (405).

Cyprus, a media owner has to register the title of his publication with the Ministry of Interior and pay a small deposit, which can be used in case of his conviction to pay damages.<sup>296</sup> While the registration is only considered a formality to secure the media owners name, it is an unusual requirement which might be an obstacle for the exercise of the freedom of the press.

### III. Conclusions

All States protect the freedom of expression on the constitutional, the statutory and the self-regulatory level. However, not only protective rules, but also restrictive rules for the freedom of the press and media can be found in all States. The range of those protective and restrictive regulations is very wide and many differences can be found in the various legal systems with consequences for the extent of the protection of the freedom of the press and media. And indeed, according to the World Press Freedom Index 2015 the examined States are ranked from no. 1 (out of 180) – Finland – to no. 149 (out of 180) – Turkey.<sup>297</sup>

However, the analysis of the existing legal systems alone is not sufficient to determine the status of the freedom of the press and media. To the contrary, the practical application of the protective and restrictive rules foreseen by the law have to be taken into consideration. In practice, the protection of the freedoms also varies widely in the examined States. In the Netherlands, the right to protection of sources is applied in practice due to a judgement of the ECtHR, while it has not been introduced into Dutch law.<sup>298</sup> In Poland, on the other hand, the right to protect sources is foreseen by the law, but the journalists's privilege is often infringed by law enforcement officers.<sup>299</sup> The legal system in Portugal foresees a high protection of the freedom of the press and media. Nevertheless, Portugal has been convicted three times more often than the European average for violating the principle of the freedom of the press by the ECtHR.<sup>300</sup> An extensive use of libel suits has become a problem for journalists in some States, too.<sup>301</sup> The defence against libel suits is time consuming and expensive and can create an obstacle for the exercise of a journalist's profession.

In addition to journalists rights' that are foreseen by the law and the application of those rights in practice, a negative attitude of politicians and

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<sup>296</sup> Cyprus (124).

<sup>297</sup> The world Press Freedom Index 2015: <https://index.rsf.org/#/>

<sup>298</sup> Netherlands (420).

<sup>299</sup> Poland (438).

<sup>300</sup> Portugal (459).

<sup>301</sup> Cyprus (137), Greece (282), Ireland (332), Malta (3).

society towards journalists can undermines their credibility and make it more difficult for the Press and Media overall, to fulfil their task as public watchdog. Such negative attitudes can even lead to violence against journalists and endanger their health. For example, in Ireland several harassments of journalists have been reported,<sup>302</sup> in Croatia and Macedonia, physical attacks on journalists have occurred. The Vice Prime Minister of Macedonia himself physically attacked a journalist, because he did not like the question he had been asked by him.<sup>303</sup>

However, a first step for a better protection of the freedom of the press and media is a better protection within the written law. An overview of best practices for the protection of these freedoms will be shown in the following.

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<sup>302</sup> Ireland (330).

<sup>303</sup> Macedonia (403).

## **D. Best practices for the protection of the freedom of the press and media**

The legal systems of all examined States leave room for improvement for a better protection of the freedom of the press and media. An extreme example is a rule in the Macedonian legal system, according to which journalists need a licence to attend press conferences of the government.<sup>304</sup> Such a rule should be abolished because it can be used to exclude critical journalists from such press conferences and to avoid their questions.

As seen above, journalists might infringe the law while trying to obtain information. While in many States, courts take the importance of the Freedom of the press into consideration when deciding on criminal charges against journalists, but a risk of conviction always exists. Therefore, a decriminalization of journalists for acts committed while trying to obtain information, would significantly improve the situation. A general rule, which exempts journalists from any criminal liability for infringements of the law during the exercise of their profession can be found in Hungary, and should be introduced in all legal systems.

With regard to the publication of information journalists might commit an infringement of the law, too. The publication of information can infringe third party rights. Private individuals, companies and States can have legitimate interests in the privacy and secrecy of certain information. Thus, there are no general objections against rules, which prohibit the publication of certain information and thereby, restrict the freedom of press and media. The publication of secretly filmed material, as well as the publication of secret audio recordings, and the publication of trade secrets is illegal in many States. But in most of these States exceptions for the prohibition of publication apply in case of a public interest in the publication. The publication of State secrets is illegal in almost all countries and only in few of those countries exceptions exist. Such a public interest (or other) exception concerning the publication of information under privacy or secrecy cannot be found in all States, and should be introduced where missing to allow a balance of interest.

Most States that have a public interest exception have not defined the term 'public interest'. Therefore, courts are responsible for the interpretation of the indeterminate legal concept, which can lead to legal uncertainty for journalists and other parties involved in the proceedings. Some States describe expressly the situations when exceptions apply, instead of using

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<sup>304</sup> Macedonia (407).

the more general term 'public interest'. In Slovenia, for example, the publication of State secrets is not punishable if the publication reveals a violation of rights or a serious abuse of power or authority. The publication of trade and business secrets is possible in Slovakia if the publication contains information with regard to public funds, state aid or the disposal of state or municipality property. Furthermore, the publication is possible if it contains information which has implications on the health of the population or could have an effect on world cultural and natural heritage or the environment. Such a description can function as a guideline for journalists and it can prevent legal uncertainties. In Macedonia, there would no longer be a need to debate, whether the publication of secret audio recordings revealing the involvement of politicians in corruption, would be in the public interest and journalists would no longer need to fear prosecution for the publication of such recordings if these points would be clarified explicitly. Detailed exceptions describing the cases in which a publication is possible, instead of the use of an indeterminate legal concept such as 'public interest', should apply in all States and to all information covered by privacy or secrecy constraints. A list of reasons defining the scope of the public interest should always be non-exhaustive to not exclude any cases and circumstances, which might be in the public interest as well, and should rather give guidance for the balancing of interests.

The search of editorial offices and the seizure of journalistic material is possible in all States. In most States an *ex ante* review by a judge is necessary for the search of editorial offices. Rules allowing the search of editorial offices without prior review by an independent and impartial decision-making body should be abolished.

Most States have rules concerning the protection of sources, which allows journalists to refrain from testimony in court proceedings and prohibit the search of editorial offices and the seizure of journalistic material. Where such rules are missing, they should be introduced. Exceptions should be prescribed by law and only apply if they are necessary for the protection of an equally important right. Preferably, only adequate grounds of suspicion against the journalist himself should constitute an exception. In any case, also in this context no exceptions should apply which use indeterminate legal concepts, such as the 'public interest'. Rather, only clearly defined exceptions should be foreseen. Additionally, special procedural provisions for the seizure of journalistic material exist in France, Poland, and Denmark. According to those procedural provisions, any document, which law enforcement officers want to seize, needs to be put under seal and sent to court awaiting a decision by a judge before it can be seized. Such special procedural provisions are good safeguards for the protection of sources. In some States the right to protection of sources is not just a privilege, but a duty for journalists as well. In those States journalists are not allowed to reveal their source. Exceptions should apply to a journalist's

duty to keep his source of information confidential in case a journalist has been provided false information and has been used to distribute that information.

With the changing and more digitalized media landscape, the rules for the protection of the freedom of press and media need to be adapted accordingly. Today, many journalists are not employees of a media company or do not exercise journalism as a profession, e.g. many bloggers. The protection of bloggers varies in the examined States. In many of them, the legal systems have not yet been adapted accordingly and often do not foresee any regulation with regard to online journalism. In Austria and Portugal, for example, protective rights such as the right to protect sources do not apply to bloggers and website operators.<sup>305</sup> The Court of Cassation in Italy decided that messages posted in an online forum cannot be considered to be press.<sup>306</sup> In other States, online journalism enjoys the same protection as other forms of journalism. In Germany, equal rights for all journalists apply, independently of the means through which their content is being published.<sup>307</sup> In Belgium, the courts acknowledge bloggers' rights to protection of sources.<sup>308</sup> Everybody exercising journalistic work should benefit from all regulations regarding the protection of the freedom of press and media. But, all journalistic duties and obligations, such as the obligation to report the truth, distinguish facts from comments, respect people's privacy and so on, should apply to that group of persons, too, because many rights can be infringed if all information is available to everyone at all times. Therefore, everybody exercising journalistic work should be subject to restrictive rules protecting third party rights, too.

Overall, possibilities for improvement exist in all examined States. But, how important further improvements for a better protection of the freedom of press and media are varies in the examined States due to the current level of protection. Therefore, it is to be hoped that further harmonization of the standards can be achieved, e.g. by case law of the ECtHR, which impacts indirectly all States and by internationally coordinated self-regulatory measures and with a view to practices in other States, which this comparative study is aiming to contribute to.

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<sup>305</sup> Austria (96), Portugal (464).

<sup>306</sup> Italy (338).

<sup>307</sup> Germany (196).

<sup>308</sup> Belgium (100).



## **E. Annexes**



## **I. Annex 1: Questionnaire**

### **1. Relevant legislation and case law**

The core part of this section shall be devoted to describing (also by naming) the main provisions regulating the journalistic field, be it legislative/regulatory or self-regulatory [acts, legislation, regulation, codes], which have a bearing on the pursuit of the relevant freedoms.

Please elaborate on these issues including the **relevant jurisprudence** of the courts – whose interpretation might in some cases go beyond the explicit text of the norms!

### **2. Please outline in detail the regulation regarding:**

a) The utilisation of illegally/improperly obtained information (such as secret state papers, business/trade secrets, using hidden camera or through breach of confidence);

b) The boundaries of law enforcement: search of editorial offices, seizure of documents or (press) material (including the printed press), and surveillance of journalistic communication;

### **3. Please describe the journalistic duty of care by reporting about on-going investigations, for instance criminal or political;**

### **4. Which are the existing criteria, as for example guidelines for journalists in order to present the “objective truth”?**

For example, minimum level of facts of evidence, content requirements – expressly indication of “suspicion” without prejudice, requirements to apply for the legitimacy of text- or/and pictorial reporting (anonymization or elimination of identification characteristics – blurred or pixelated photographs) etc.?

### **5. Are there any legal/practical differences in how liability is asserted to different persons within the “editorial chain” of a journalistic product – journalist, editor, and publisher (as the legal person/company)?**

Please explain it.

### **6. Conclusion and perspectives**

## **II. Annex 2: Country Reports**

The country reports are presented in alphabetical order according to country codes by ISO 3166

### **1. Austria**

Dr. Michael Kalteis

## 1. Relevant Legislation and Case-law

Regulations related to the journalistic duty of diligence in investigative workings can be found in the Constitutional Law (in particular Article 13 Staatsgrundgesetz 1867 [freedom of speech, prohibition of censorship], Nr. 1 and 2 of the decision of the Provisional National Assembly for German-Austria 1918 [prohibition of censorship and comparable measures], Article 10 ECHR, and potentially also in Article 11 CFREU<sup>309</sup>), in provisions of sub-constitutional status (especially in the – cross-media designed – MedienG, in the broad field of criminal law [Articles 111 et seqq. StGB, the StPO and special penal provisions like Article 23 MedienG], in civil law [Articles 16, 1328a and 1330 ABGB, Article 78 in conjunction with Articles 81 et seqq. Urh-G, the latter concerning the right of a person to its own likeness] and – in the form of a general remit to the „generally recognized principles of journalistic work” – in provisions of the media law [Article 16 para. 5 PrR-G, Article 41 para. 5 AMD-G, Articles 4 para. 8, 10 para. 5 ORF-G]) and, finally, in non-legislative standards (especially in the „Code of Ethics for the Austrian Press“ and in the „Austrian Journalists Code“).<sup>310</sup>

## 2. Obtaining of information and boundaries of law enforcement

Information is regarded as illegally obtained if the journalist – at this stage: while doing his research work – commits a violation of criminal law, especially concerning Articles 118 et seqq. StGB (violation of the secrecy of correspondence or telecommunication, unlawful access to information systems, unlawful interception of data, abusive use of bugging devices, etc.; concerning media content offences in terms of Article 1 para. 1 Nr. 12 MedienG<sup>311</sup> – Articles 111 et seqq. StGB [defamation, allegation of an

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<sup>309</sup> As to the constitutional status of the ECHR in Austria see Öhlinger/Eberhard, Verfassungsrecht<sup>10</sup> (2014), Rz. 129 et seqq. The constitutional status of (parts of) the CFREU has been basically confirmed by the VfGH whereby the legal implications vary between the several fundamental rights, cf. VfGH 14.3.2012, U 466/11 ua. and St. Mayr, Verfassungsgerichtlicher Prüfungsgegenstand und Prüfungsmaßstab im Spannungsfeld nationaler, konventions- und unionsrechtlicher Grundrechtsgewährleistungen, ZfV 2012, 401 et seqq.

<sup>310</sup> In relation to the provisions of the MedienG those of the DSG 2000 are applicable subsidiarily (cf. Article 48 DSG 2000: „media privilege“); therefore, a detailed account does not seem mandatory, for further information cf. Berka, Welchen Beitrag leistet das Datenschutzrecht zum Persönlichkeitsschutz?, in: Berka/Grabenwarter/Holoubek (Hrsg), Persönlichkeitsschutz in den elektronischen Massenmedien (2012), 79.

<sup>311</sup> Cf. OGH 17.2.2005, 12 Os 105x and Zöchbauer, Grundfragen des Medienstrafrechts (1992), 84: no real difference to „conventional“ offences in the field of criminal except Article 23 MedienG.

already dismissed criminal offence, insult], Article 297 StGB [traducement] and Article 23 MedienG [prohibited influence on criminal proceedings] – only punishable attempts are conceivable at this stage<sup>312, 313</sup>) or of civil law-provisions (e.g. nuisance, right of a person to its own likeness according to Article 78 UrhG, etc.).

Especially the provisions of criminal (procedural) law are relevant: In case that offences have already been committed the media worker/journalist in terms of Article 1 para. 1 Nr. 11<sup>314</sup> is criminally liable; according to Article 3 VbVG this also applies to the media owner in terms of Article 1 para. 1 Nr. 8<sup>315</sup> if there has been a culpability regarding selection or monitoring. Besides that, the competent court can confiscate objects which are used for committing future criminal offences (cf. Articles 19a, 26 StGB in conjunction with Article 15 StPO<sup>316</sup>; of course also legally obtained information can be affected). This for example applies to image or voice recordings, etc. which the journalist wants to use for his reportings, if that use can fulfill media content offences in terms of Article 12 para. 1 Z 12 MedienG (according to Article 5 StGB conditional intent would suffice).

However, due to the legal privilege of the protection of journalistic sources pursuant to Article 31 MedienG (violation of this privilege → appeal for nullity according to Article 281 para. 1 Nr. 4 StPO) a confiscation is often

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<sup>312</sup> Controversial, see OGH 8.5.2001, 11 Os 53/01 and *Zöchbauer*, in: Röggl et al. (Hrsg), *Medienrecht – Praxiskommentar* (2012), § 29 MedienG Rz. 3.

<sup>313</sup> The same applies for Article 310 in conjunction with Article 12 StGB (contribution to the betrayal of an official secret). To the current plans to abolish the duty of protecting official secrets in terms of Article 20 para. 3 B-VG see p.91 of the current government programme, [www.bka.gv.at/DocView.axd?CobId=53264](http://www.bka.gv.at/DocView.axd?CobId=53264).

<sup>314</sup> This also includes editors, correspondents, journalistically active editorial secretaries, reporters, designers, photographers or layout artists (but not for example cameramen or broadcasting announcers), cf. *Noll*, in: Berka et al. (Hrsg), *Mediengesetz*<sup>3</sup> (2012), § 1 MedienG Rz. 40 et seqq. and *Wittmann/Zöchbauer*, in: Röggl et al. (FN 5), § 1 MedienG Rz. 21 et seqq.

<sup>315</sup> The media owner is responsible for the final wording (denominations in the imprint only cause disprovable legal presumptions, cf. OGH 15.12.1992, 4 Ob 111/92; 25.11.1993, 12 Os 141/93; 2.10.1996, 13 Os 91/96); host- or access-providers are not regarded as media owners, a website media owner is the person deciding on the content development of the website respectively having final responsibility concerning the journalistic subunits that are accessible from the website, cf. OGH 26.5.2010, 15 Os 8/10f; 30.6.2010, 15 Os 34/10d.

<sup>316</sup> A confiscation according to Article 33 in conjunction with Articles 36 et seqq. MedienG (to prevent the further spread of already distributed information due to their potentially given relevance with regard to the criminal law) is probably unlikely at this stage, cf. *Röggl*, in: Röggl et al. (FN 5), § 36 MedienG Rz. 1 et seqq. and *Heindl*, in: Berka et al. (FN 7), § 33 MedienG Rz. 5 et seqq. with further references to the (varying) case-law.

impossible: According to that certain persons – including the media worker/journalist and the media owner – can refuse the notification or surrender of material or information if it was obtained by an informer (irrespective of whether the informer himself wants to remain unknown); in case the journalist himself is suspected of having committed an offence, the refusal is only possible in the lack of urgent suspicion (Article 144 para. 2 StPO).<sup>317</sup> Apart from that, Article 31 para. 3 MedienG refers to the legal possibilities of electronic eavesdropping according to Articles 135 et seqq. StPO.

In case that information is illegally obtained because of an infringement of the civil law, actions of trespass (Articles 339, 364, 523 ABGB and 454 ZPO), injunctive reliefs (e.g. according to Article 81 UrhG<sup>318</sup>; regardless of a cause of guilt) and fault-based compensation claims (Articles 1295 et seqq. ABGB; successful claims for damages presuppose a fault by the concrete defendant) are possible.

An information is improperly obtained if its attainment is in breach of „soft law“-regulations, e.g. the „Code of Ethics for the Austrian Press“ of the Austrian Press Council<sup>319</sup> (addressed only to print media, including their web presence) or the „Austrian Journalists Code“ of the Austrian Journalists Club<sup>320</sup> (both are rather comparable in content).

Concerning the proper way of obtaining information the mentioned codices state e.g. the principles of accuracy, of the prohibition of unlawful interferences (especially the prohibition of the acceptance of gifts), of the protection of privacy (balancing of interests if children or young people are affected) and the proper procurement of materials/information (prohibition of deception, intimidation, exploiting stress-situations or – except there is a predominant public interest – the use of hidden cameras or comparable technical devices). A journalist cannot be forced to a violation of those principles, on the other side there is no legal remedy of the journalist to effectuate a publication (Articles 2, 4 MedienG).

As far as – at this stage – a violation of these principles also constitutes a criminally relevant conduct, the above mentioned concerning illegally obtained information are relevant (criminal liability and confiscation). Apart from that, violations do not lead to effective sanctions in the proper

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<sup>317</sup> Cf. OGH 18.3.2003, 11 Os 5/03, 25.9.2003, 15 Os 69/03; 16.12.2010, 13 Os 130/10g; 18.3.2003, 11 Os 5/03; see Mersch, *Der Schutz des Redaktionsgeheimnisses in Deutschland und Österreich*, MMR-Aktuell 2011, 314346.

<sup>318</sup> To this topic see *Handler*, *Der Schutz von Persönlichkeitsrechten* (2008), 414 et seqq.

<sup>319</sup> [www.presserat.at/show\\_content.php?hid=2](http://www.presserat.at/show_content.php?hid=2).

<sup>320</sup> [www.oejc.at/index.php?id=156](http://www.oejc.at/index.php?id=156).

meaning of the word as the Austrian Press Council or the Austrian Media Council can only declare the violation (see Pt. A.3.a. below).

### 3. Reporting about on-going investigations

The publication of information without the (effectual) consent of the person concerned may lead to consequences in the fields of hard and soft law:

#### Hard law

As to criminal law: If the publication of an information fulfills a media content offence in terms of Article 12 para. 1 Nr. 12 MedienG – see pt. A.2. above – the media worker/journalist and – via Article 3 VbVG – the media owner can be held criminally liable (at this stage a confiscation pursuant to Articles 33 in conjunction with Articles 36 et seqq. can be possible; cf. footnote 10 above). However, this liability is dispensed according to Article 29 MedienG<sup>321</sup> (provided that it is not yet dispensed due to lapse of time according to Article 32 MedienG) if

- an untrue or at least not verifiably true information was/is published (true information cannot lead to a criminal liability with regard to media content offences [but cf. footnote 7 above] but potentially to injunctive reliefs and claims for damages),
- there were sufficient indications to hold them to be true (from an objective point of view it depends on the average carefulness to be expected from a journalist, from a subjective point of view it must be ensured that the journalist did not act mala fide),
- the principle of due diligence was complied with at the moment of loss of control over the content of the publication (in most cases this means the moment of issuing printing approval or – at the latest – the moment of publication but not the period of drafting<sup>322</sup>; the proof of due diligence is not permissible in the case of a mere value judgement; the procedural objection of due diligence has to be raised until the end of the court proceeding at first instance [otherwise interdiction of novation<sup>323</sup>]; the individual aspects of complying with due diligence will be outlined under pt. b. below),
- there was/is a public interest in the publication (with regard to the circumstances of the case, the people involved, the presumption of

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<sup>321</sup> Its legal nature of Article 29 MedienG is controversial (elimination of illegality or liability), cf. *Zöchbauer*, in: Röggl et al. (FN 5), § 29 MedienG Rz. 3.

<sup>322</sup> *Mersch*, Die journalistische Sorgfalt: on- und offline (2013), 66 et seqq.

<sup>323</sup> Cf. OGH 15.10.1987, 13 Os 120/87.

innocence according to Article 8 StPO respectively Article 6 para. 2 ECHR, etc. [controversial: added social value]<sup>324</sup>)

- and the information does not relate to the highly personal sphere of life (otherwise the information has to be verifiably true and associated to the public life of the concerned person; the highly personal sphere of life is characterized e.g. by family life, medical/therapeutical/etc. relations or circumstances, personal identity and sexuality, etc. [cf. also Article 4 Nr. 2 DSG 2000 defining the term „sensitive data“]; the case-law also takes into account 1.) that it is often only after several years that certain aspects become relevant and that 2.) also a persons public behavior/life can hold aspects related to the highly personal sphere of life<sup>325</sup>).

It has to be outlined that the proof of due diligence according to Article 29 MedienG only constitutes a personal ground for the exemption of punishment<sup>326</sup>, so that the simple fact that the media worker/journalist provides evidence does not mean that also the media owner is exempt from criminal punishment (whereby the criminal liability of the media owner requires his culpability regarding selection or monitoring, cf. Article 3 VbVG).

As to civil law: In the circumstances mentioned in Articles 6 et seqq. MedienG (committing media content offences, violation of the highly personal sphere of life, unlawful disclosure of identity, violation of the presumption of injustice with regard to a certain criminal case, etc.) physical persons concerned by the publication<sup>327</sup> can claim for compensation (only) for non-material damages<sup>328 329</sup> against the media owner (who for his part can claim for compensation against the

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<sup>324</sup> See *Heindl*, in: Berka et al. (FN 7), § 29 MedienG Rz. 15 with further references on the relevant case-law; VfSlg.11.062/ 1986.

<sup>325</sup> Cf. *Zöchbauer*, in: Röggl et al. (FN 5), § 7 MedienG Rz. 2 et seqq. and Berka, in: Berka et al. (FN 7), § 7 MedienG Rz. 8 et seqq., both with further references on the relevant case-law.

<sup>326</sup> *Heindl*, in: Berka et al. (FN 7), § 29 MedienG Rz. 4.

<sup>327</sup> But cf. OGH 29.6.2011, 15 Os 151/10k regarding – admissible – claims of various organs of a legal entity (the published reporting especially referred to their acting as official representatives).

<sup>328</sup> Claims with regard to material damage can be asserted according to Articles 1330 ABGB, Article 7 UWG or Article 78 in conjunction with Articles 81 et seqq. UrhG, cf. *Zöchbauer*, in: Röggl et al. (FN 5), Vorbemerkungen zu §§ 6 ff. MedienG Rz. 2 with further references. The estimation of the admissibility of the publication of a photograph also requires to take into account the criteria stated in the Articles 7a and 7b MedienG, cf. OGH 23.9.1994, 4 Ob 184/97f.

<sup>329</sup> Despite the characterisation of claims under Articles 6 et seqq. MedienG as civil-law claims the criminal courts are competent, cf. Articles 8, 8a MedienG.

responsible media worker/journalist according to the DHG<sup>330</sup>). The proof of due diligence can in some cases eliminate the liability of the media owner and is subject to the same limitations as in Article 29 MedienG (see pt. b. below).<sup>331</sup> The media owner can also refer to the due diligence of the media worker/journalist.

With reference to Article 1330 para. 2 ABGB the person concerned by a certain publication can also raise a claim for material compensation (in that case also the media worker/journalist can be theoretically liable); against the backdrop of the case-law of the VfGH the defendant can – against the clear wording of Article 1330 para. 2 ABGB – invoke the reasons for an exclusion of liability as mentioned in Article 6 para. 2 MedienG.<sup>332</sup>

Considerations regarding both criminal and civil law: In addition to the (alleged) infringements caused by a certain publication several aspects that either depend on the result of the court proceedings (verdict of guilt/discharge respectively judgement granting/dismissal of a complaint) or not, have to be taken into account:

- In case of criminal proceedings the defendant has to pay the costs of litigation in any case, irrespective of the result of the proceeding (Article 29 para. 3 MedienG; with regard to proceedings concerning the publication of a counterstatement or a subsequent notification – see below – Article 19 MedienG statutes a special regulation); the regulatory structure of the MedienG leads to the – often and justifiably criticised – result that in case of a verdict of guilt the media worker/journalist and the media owner are both liable while in case of a verdict of discharge the media worker/journalist has to pay the costs of litigation all by himself.<sup>333</sup> With regard to proceedings concerning compensation claims pursuant to Articles 6 et seqq. MedienG the situation is substantially comparable due to the legal practice of the Austrian courts (who interpret the relevant provisions against their wording). However, if a certain claim is based on Article 1330 para. 2 ABGB and there is no proof of due diligence the claimant has to pay the costs of litigation;<sup>334</sup>

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<sup>330</sup> Controversion, cf. *Berka*, in: *Berka et al.* (FN 7), Vorbemerkungen zu §§ 6 ff. MedienG Rz. 36.

<sup>331</sup> OGH 14.12.2000, 6 Ob 291/00p.

<sup>332</sup> To that fact as well as to the inapplicability of Article 1328a ABGB see *Mersch* (FN 15), 13 et seqq.

<sup>333</sup> See *Mersch* (FN 15), 42 et seqq.

<sup>334</sup> See *Mersch* (FN 15), 41 et seqq.



- regardless of whether the proof of due diligence is successful or not, the people who are concerned by a publication can demand a counterstatement/subsequent notification according to Articles 9-21 MedienG if the (true or untrue) factual information occurred in a periodic medium in terms of Article 1 para. 1 Nr. 5 or 5a MedienG (which means that these legal remedies cannot be brought into account if the publication occurred via placards, in a one-time circular letter<sup>335</sup> or in cases of pure value judgements<sup>336</sup> [whereas headlines always have to be interpreted in the concrete context with the text below<sup>337</sup>]; duty of publication of the media owner in a comparable presentation and to an appropriate extent);
- also the measures of confiscation and sequestration according to Article 33 in conjunction with Articles 36 et seqq. MedienG as well as the publication of a judgement pursuant to Article 34 MedienG (a counterstatement does not exclude this possibility<sup>338</sup>) are possible if a journalist was not able to disprove the untruthfulness of a distributed information and the verdict of discharge was merely based on Article 29 MedienG;
- a claim for revocation according to Article 1330 para. 2 ABGB requires at least slight negligence (as a consequence the proof of due diligence eliminates that claim); this is a significant difference compared to the publication duty stated by Article 29 para. 3 MedienG regarding the fact that the proof of untruthfulness was not possible (= „softened right of revocation“);
- According to the case-law<sup>339</sup> injunctive reliefs concerning the further spread of already published untrue information can be raised if a risk of first or recurrent infringement is given (Article 1330 para. 2 ABGB; independent of negligence).

#### Soft law

In addition to research-related principles (see pt. A.2. above) the „Code of Ethics for the Austrian Press“ and the „Austrian Journalists Code“ also contain principles – primarily – concerning the publication of information, especially the principles of distinctiveness (recognizable separation

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<sup>335</sup> Cf. *Röggla*, in: *Röggla et al.* (FN 5), § 9 MedienG Rz. 2.

<sup>336</sup> Cf. OGH 4.7.1995, 14 Os 92/95; OLG Wien 8.11.2011, Bs 312/11y (= MR 2013, 67 et seqq.).

<sup>337</sup> OGH 23.8.2007, 12 Os 36/07x.

<sup>338</sup> See OLG Wien 14.3.2012, 17 Bs 24/12x (= MR 2012, 62); 16.1.2008, 17 Bs 253/07s.

<sup>339</sup> *Mersch* (FN 15), 45 with further references.

between factual reports, third-party opinions and commentaries, labeling of composite photographs, etc.), protection of personality and privacy (especially no disclosure of a person's identity in the case of possible disadvantages for this person), protection against 'blanket' disparagements and discriminations), affirmation of a public interest (consideration e.g. of the need to inform about serious crimes, protection of public security) and avoidance of explicit reportings on suicides (consideration of special guidelines elaborated by the crises intervention center<sup>340</sup>, avoidance of imitations, no publication of suicide notes).

In case of a violation against the principles laid down in the „Code of Ethics for the Austrian Press“, the Austrian Press Council can initiate an „independent procedure“ (on the request of any person) or a „complaints procedure“ (on the request of the person concerned by the publication).<sup>341</sup> The decisions of the Austrian Press Council (whose number has been increasing over the last years)<sup>342</sup> are not binding unless the accused print medium voluntarily declares its submission (the most circulated news papers in Austria do not do so although they statistically cause by far most of the infringements<sup>343</sup>) and – in the case of a “complaints procedure” – the claimant refrains from appealing to the civil courts.

In case of a violation of the „Austrian Journalists Code“, the Austrian Media Council<sup>344</sup> can give recommendations on grounds of a complaint or on its own initiative; on this occasion the Media Council sometimes also refers to the „Code of Ethics for the Austrian Press“ or to foreign or international codes of conduct.<sup>345</sup>

#### 4. Due diligence guidelines for journalists

The main fields of the journalistic due diligence are – not least with regard to the „Code of Ethics for the Austrian Press“

- the duty to act with caution and honest efforts to converge to the truth<sup>346</sup> (omitting further research doesn't automatically mean a violation of the statutory journalistic due diligence unless the further research is possible without considerable difficulties and does not

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<sup>340</sup> [www.kriseninterventionszentrum.at/dokumente/pdf3\\_Leitfaden\\_Medien.pdf](http://www.kriseninterventionszentrum.at/dokumente/pdf3_Leitfaden_Medien.pdf).

<sup>341</sup> For more information about the self-appointed „media ombudsman board“ - which also insists on the compliance with the „Code of Ethics for the Austrian Press“ - see [www.leseranwalt.at](http://www.leseranwalt.at).

<sup>342</sup> [www.presserat.at/show\\_content.php?hid=14](http://www.presserat.at/show_content.php?hid=14).

<sup>343</sup> [www.presserat.at/rte/upload/pdfs/fallstatistik\\_presserat\\_2011\\_2014.pdf](http://www.presserat.at/rte/upload/pdfs/fallstatistik_presserat_2011_2014.pdf).

<sup>344</sup> [www.oejc.at/index.php?id=16&L=-1%27](http://www.oejc.at/index.php?id=16&L=-1%27).

<sup>345</sup> [www.oejc.at/index.php?id=78&L=0%27%22%22](http://www.oejc.at/index.php?id=78&L=0%27%22%22).

<sup>346</sup> Cf. OGH 20.12.2001, 6 Ob 249/01p.

lead to remarkable delays<sup>347</sup>; the people concerned must at least have the opportunity to comment on the results of the journalistic research – unless the source of information is notably reliable and the request for a statement would not be possible within a reasonable timeframe – and that comment has to be considered when producing and publishing the relevant information<sup>348</sup>; if the source of information is a mere technical one [camera, tape, etc.] further sources of information are needed, e.g. witnesses, etc.<sup>349</sup>; official notification or documents are classified as notably reliable<sup>350</sup> whereas that does not apply to news agencies in the same way<sup>351</sup>),

- the duty to take into consideration the consequences of the intended publication for the people concerned (editorial note concerning objectively existing doubts, taking into account the personal situation of the people concerned; with regard to journalistic publications the OGH basically affirms the right to be and to stay anonymous<sup>352</sup> whereas not only revealing someone's name can lead to a disclosure of that person's identity<sup>353</sup>) and
- the duty to avoid mockery and defamation in the context of journalistic publications (duty of thorough selection and verification in the context of taking over external content and taking into account that further research work will often be necessary [quantitatively depending on the reliability of the source of information<sup>354</sup>]; careful consideration whether a source of information could perhaps be politically motivated to accuse other persons<sup>355</sup>; referring to anonymous sources only in exceptional cases<sup>356</sup>; clear distinction between factual reports and value judgements; no excessive use of value judgements).

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<sup>347</sup> OGH 11.9.1997, 6 Ob 168/97t; 5.10.2000, 6 Ob 78/00i.

<sup>348</sup> OGH 21.1.2009, 15 Os 125/08h; 21.1.2009, 15 Os 126/08f; OLG Wien 29.3.2004, 18 Bs 22/04 (= MR 2004, 240). It is obligatory to inform the beneficiary about all incriminatory results found during the research work, cf. *Heindl* in: Berka et al. (FN 7), § 29 MedienG Rz. 18.

<sup>349</sup> LG Innsbruck 22.1.2010, 38 Hv 208/09v.

<sup>350</sup> E.g. OGH 14.12.2000, 6 Ob 291/00p; 17.2.2005, 6 Ob 357/04z; 21.1.2009, 15 Os 127/08b.

<sup>351</sup> Cf. OGH 21.1.2009, 15 Os 125/08h; also cf. OLG Wien 16.12.1996, 18 Bs 313/96 (= MR 1997, 15 et seqq.).

<sup>352</sup> OGH 22.10.1986, 1 Ob 36/86.

<sup>353</sup> E.g. shortened name in conjunction with job-related information, etc; cf. OGH 20.10.1992, 4 Ob 107/92 and Berka, in: Berka et al. (FN 7), Vorbemerkungen zu §§ 6 ff. MedienG Rz. 28 with further references.

<sup>354</sup> OGH 11.9.1997, 6 Ob 168/97t.

<sup>355</sup> ECHR 22.2.2007, Appl.-Nr. 26.606/04 (Falter).

<sup>356</sup> *Mersch*, (FN 15), 96 et seqq.

With regard to all of the mentioned aspects it has to be considered that there are several factors that either reduce or raise the standard of diligence to be exercised<sup>357</sup>: factors that reduce the required diligence are e.g. the legitimate interest in actuality (concerning the medium and the frequency of publication); on the other hand factors that raise the required diligence are e.g. severity of the accusation; taking into consideration whether (and to which extent) a certain information belongs to the private or to the public sphere; authenticity of the sources of information; taking into consideration the widespread impact of the publication and its power of suggestion.

## **5. Liability in the editorial chain**

As mentioned above the liability depends on the concrete regulations: With regard to criminal law and Article 29 MedienG both the media worker/journalist and the media owner are basically liable. In fact, the proof of diligence by the media worker/journalist does not automatically relieve the media owner, although it will often indicate the lack of culpability of the media owner with regard to selection and/or monitoring (cf. Article 3 VbVG), so the result will be often the same as with regard to Articles 6 et seqq. MedienG (in this context basically only the media owner is liable with regard to civil claims, but he can plead to the proof of due diligence by the media worker/journalist (or claim for compensation against the responsible journalist according to the DHG)). Compared to Articles 6 et seqq. MedienG it can sometimes be advantageous for the claimant to invoke Article 1330 para. 2 ABGB (also material damages; additional liability of the media worker/journalist), but it has to be noted that with regard to Article 29 MedienG or Articles 6 et seqq. MedienG the defendant always has to pay the costs of litigation, while in the case of Article 1330 para. 2 ABGB the claimant has to pay them if the proof of journalistic diligence succeeds.

## **6. Conclusion and perspectives.**

Up to now the privilege of due diligence pertaining to the journalistic work (Article 29 respectively Articles 6 et seqq. MedienG) as well as the privilege of the protection of journalistic sources (Article 31 MedienG) are seen and applied as exclusively job-related. On this account only media workers/journalists and/or media owners in terms of Article 1 para. 1 MedienG are entitled to invoke the mentioned privileges. However, this view attaches too little attention to the fact, that – due to the increasing advance of technology – more and more people carry the same or at least

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<sup>357</sup> *Mersch* (FN 15), 79 et seqq.

comparable risks but are not entitled to invoke the mentioned privileges (e.g. bloggers, website operators, etc.).<sup>358</sup> The work of these – not quite new – participants in the process of receiving and transmitting information has often the same social value as traditional media and is therefore characterized by comparable needs of protection. In view of the foregoing, it has to be reflected if and to what extent the privileges should rather be seen risk-related (which of course makes it necessary to coordinate the topic at hand with other legal fields, especially the field of data protection law).

## 7. Used abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code)
AMD-G	Audiovisuelle Medien-Gesetz (Austrian Act on audio-visual Media)
B-VG	Bundes-Verfassungsgesetz (Austrian Federal Constitutional Law)
CFREU	EU-Grundrechtecharta (Charta of Fundamental Rights of the EU)
DHG	Dienstnehmerhaftpflichtgesetz (Federal Act on the civil liability of employees)
DSG 2000	Datenschutzgesetz 2000 (Austrian Data Protection Act)
ECHR	EMRK (European Convention on Human Rights)
LG	Landesgericht (Regional Court)
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (Higher Regional Court)
ORF-G	ORF-Gesetz (Federal Act on the Austrian Broadcasting Corp.)
PrR-G	Privat-Radio-Gesetz (Austrian Private Radio Act)
StGB	Strafgesetzbuch (Austrian Criminal Code)
StPO	Strafprozessordnung (Austrian Code of Criminal Procedure)
UrhG	Urheberrechtsgesetz (Austrian Copyright Act)

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<sup>358</sup> Cf. *Mersch* (FN 15), 28 et seqq.; Brandstetter/Schmid, Kommentar zum MedienG2, § 28 MedienG Rz. 10 and Zöchbauer, MR 1997, 187 and Heindl, in: Berka et al. (FN 7), § 31 MedienG Rz. 5.

VbVG	Verbandsverantwortlichkeitsgesetz (Federal Act on the Criminal Responsibility of Associations)
VfGH	Verfassungsgerichtshof (Austrian Constitutional Court)
ZPO	Zivilprozessordnung (Austrian Code of Civil Procedure)



## **2. Belgium**

Edouard Cruysmans and Alain Strowel



## 1. Questions 1. – 4.

There is no particular legislation regarding the use of illegally or improperly obtained information. However Belgium has a law on the protection of journalistic sources (at the federal level) since 2005<sup>359</sup>. This law allows journalists to conceal their source. They do not have to reveal the identity of the person(s) who provided them with information. According to Article 2 of the 2005 Act, the right of journalists not to disclose their sources of information applies to “any person and any legal person, directly contributing to the gathering, writing, production or dissemination of information through media for the public”. Initially the scope of this law was more restricted in that it only benefited professional journalists. Following an action for annulment lodged by bloggers (who are not professional journalists), the Constitutional Court has modified the original definition to widen its scope<sup>360</sup>.

Article 5 of the 2005 Act prohibits any request for information or any investigative action that would seek to obtain information about the journalists' sources. However, the journalists' right to silence their sources and the prohibitions outlined in Article 5 are not absolute. Indeed, Article 4 of the Act sets out the circumstances under which, at a judge's request, journalists will be obliged to disclose their source (i. e. when there is a clear threat to the physical integrity of some persons). Finally, the law specifies that the failure to disclose sources may not lead to prosecution based on the criminal act of handling stolen goods (Article 505 of the Criminal Code). Similarly, a failure to reveal one's sources when the information results from a breach of professional secrecy cannot lead to the journalist's prosecution for his/her involvement in the secrecy breach.

The 2005 Act was adopted as a follow-up to the European Court of Human Rights decision in *Ernst and others v. Belgium*<sup>361</sup>. The Court found a violation of Article 10 of the European Convention on Human Rights (ECHR). Stressing that “*protection of journalistic sources is one of the basic conditions for press freedom*”<sup>362</sup>, the Court considered the searches and seizures conducted at the homes of the claimants as well as their workplace (newsrooms of several Belgian newspapers) as an unjustified interference with the freedom of expression. The European Court of

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<sup>359</sup> Law of April 7, 2005 relative à la protection des sources journalistiques, M.B., 27 April 2005. This act largely reflects the Recommendation (2000)7 on the right of journalists not to disclose their sources of information.

<sup>360</sup> Constitutionnal Court, 7 June 2006, n° 91/2006.

<sup>361</sup> ECtHR, 15 July 2003, *Ernst et autres v. Belgium*. See the case law pre-dating the ECtHR decision: Court of Cassation, 1<sup>er</sup> April 1996, Pas., 1996, I, p. 255 ; Court of Cassation, 21 June 1995, J.T., 1996, 26.

<sup>362</sup> ECtHR (Gd ch.), 27 March 1996, *Goodwin v. United Kingdom*, § 39).

Human Rights reached the same conclusion in another case involving similar facts. The judgment in the case *Tillack v. Belgium* addresses searches and seizures, both at home and at the applicant's work premises, which were intended to determine who had supplied the reporter with confidential documents leaked from the European Anti-Fraud Office (OLAF)<sup>363</sup>.

Although they are not specifically applicable to the media sector, two articles of the Criminal Code may also be mentioned here as they restrict the journalists' possibility to conduct their research for information and sources.

Article 314*bis* deals with offences relating to the secrecy of private communications and telecommunications. Intentional listening, awareness of, and recording of private communications are classified as criminal offences. The mere holding, divulgement or disclosure of the content of such communications is also an offense. A Belgian court has recently relied on this provision to conclude that nothing can justify a violation of a person's private correspondence (in this case, an exchange of email messages with a representative from the press). Thus the protection of the journalist' sources can derive from the protection of the secrecy of the emails directly addressed to the journalist<sup>364</sup>.

Article 460*ter* of the Criminal Code prohibits any use of the information obtained by getting access to a criminal file which aims at, or has the effect of, "*impeding the progress of the investigation, infringing the privacy, physical or moral integrity or property of a person named in the criminal record*". This provision of the Criminal Code was the subject of a ruling by the Belgian Supreme Court in a dispute relating to the dissemination of information contained in a criminal file<sup>365</sup>. For the Court, the condemnation of a journalist as the co-author of the criminal offence defined by Article 460*ter* satisfies the conditions of Article 10 § 2 ECHR. In particular, the court of appeal had correctly balanced the various interests and adequately taken into account "*the detrimental effect of increasing media pressure on the defendants and civil parties in order to obtain a copy of a criminal file as quickly as possible*". Ruling that the journalist is not guilty would risk to "*jeopardise the confidentiality of information related to the*

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<sup>363</sup> ECtHR, 27 November 2007, *Tillack v. Belgium*. See the Belgian decision in this case: Court of Cassation (2<sup>nd</sup> ch.), 1<sup>er</sup> December 2004, Pas., 2004, p. 1892.

<sup>364</sup> Brussels (Court of Appeal), 29 October 2014, *Journal des Tribunaux*, 2015, p. 381.

<sup>365</sup> Court of Cassation (2<sup>nd</sup> ch.), 7 December 2004, *Revue de droit pénal*, 2005, p. 1265, note *G. Rosoux*. See also: Ghent (Court of Appeal, 4<sup>th</sup> ch.), 25 May 2004, *Auteurs & Media*, 2004/4, p. 363; Corr. Ghent (19<sup>th</sup> ch.), 25 June 2003, *Auteurs & Media*, 2004/1, p. 79.

*presumed innocence of an accused person".*

The codes of ethics contain provisions relating to the collection of information by journalists. The Code of Ethics drawn up by the Council for the Ethics of Journalists (Conseil de déontologie journalistique), responsible for French and German language media, states that journalists, facing the argument that they should respect the secrecy in certain public or private affairs, can only agree not to disclose for grounds of public interest duly justified and "provided that these restrictions do not create unjustified obstacles to the freedom of information" (Art. 2). This Code, as well as the Code of Ethics codified by the Raad voor de Journalistiek (responsible for Flemish language media), require that journalists act with loyalty, in particular that they make clear they operate as journalist when collecting information<sup>366</sup>. Article 17 of the Code of Ethics from the Council for the Ethics of Journalists<sup>367</sup> underlines in this respect that "[t]he journalists must use fair methods to collect and process information, photos, images and documents. The commission of criminal offences, the concealment of journalistic status, the use of deception regarding its purposes, the use of false identities, clandestine recording, provocation, blackmail, harassment and remuneration of sources of information are considered unfair methods". However, the same provision adds that "[t]hese methods are not considered as unfair if all the following conditions are met: - the information sought is of general interest and is of importance to society; - it is impossible to obtain the information by other means; - the risks faced by journalists and by third parties are proportionate to their purpose; - the methods used are permitted or, where applicable, validated by the chief editor, except unforeseen exceptional circumstances"<sup>368</sup>.

There is no legislation on the use of hidden cameras by the media and the case law in this area is scarce. A Brussels Court has already considered that when the journalists use hidden cameras "it cannot be argued that the filmed persons tacitly agreed to being filmed [...]. The diffusion of the image and voice of another person without his/her prior consent breaches his/her right to one's own image and by itself constitutes gross negligence"<sup>369</sup>. The court thus agrees that the reporter can conceal the use of a recording

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<sup>366</sup> Article 17 of the Code of Ethics from the Raad voor de Journalistiek. See a decision applying this article: Civ. Brussels (20<sup>th</sup> ch.), 27 March 2012, Auteurs & Media, 2012/6, p. 602.

<sup>367</sup> See also Article 15 of the Code of Ethics from the Raad voor de Journalistiek.

<sup>368</sup> See also Article 40 of the Internal Regulation relating to the Treatment of Information and the Ethics of the Staff, adopted by the RTBF (the French-speaking public broadcaster in Belgium).

<sup>369</sup> Civ. Brussels (réf.), 18 December 2007, Auteurs & Media, 2008/6, p. 488. See also Civ. Brussels (33<sup>rd</sup> ch.), 19 May 2000, Auteurs & Media, 2000/3, p. 338.

device, but in the particular case, it "does not appear that the use of a sequence captured by hidden camera filmed was [...] of major interest to the public once it was established that, had the information been obtained lawfully, it could have been communicated to the public by the journalist himself, without broadcasting images or voices" of the persons involved. Thus, to reveal the content of an interview "does not violate the freedom of expression of the persons interviewed nor the right to remain silent" "when they could not ignore the interviewers were journalists. The prohibition of the dissemination of images taken with a hidden camera, when the information is not of major public interest, does not prevent a public debate which could restrict freedom of expression in accordance with the principle of proportionality required by Article 10 § 2 of the European Convention on Human Rights". For the Brussels Court of First Instance, there must be a compelling reason for recording with a hidden camera. The decision to use some hidden recording device to obtain information "must not be taken lightly, as the use of a hidden camera always results in a serious breach of privacy and integrity"<sup>370</sup>.

A Brussels court found that it cannot sanction a normally prudent journalist for reporting on an ongoing judicial inquiry (or disclosing the names of the persons concerned) when public figures acting in the course of their duties are involved, "as long as the usual precautions are respected, the truth is not manipulated and mere suspicions are not presented as certainties"<sup>371</sup>. The journalist is not responsible when the press article contains no firm accusation, when the conditional tense is used in the text of the article and the matter is presented honestly, when the journalist stresses that the person involved in the proceedings "categorically denies" the allegations, when this person is presented as being simply "suspected" of having committed some misdeeds and/or when no responsibility for the offence has been formally established.

The mere fact of covering a court case does not undermine the principles of a fair trial or the presumption of innocence benefiting the persons involved. Belgian media law does not expressly impose an obligation to respect the defendants' presumed innocence<sup>372</sup>. But it is a fundamental principle for criminal proceedings that journalists must respect. Respect for objectivity in the processing and dissemination of information implies, de facto, to take the presumption of innocence seriously. This might require to remain reserved and discreet<sup>373</sup>. The press cannot portray a person

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<sup>370</sup> Civ. Brussels (20<sup>th</sup> ch.), 27 March 2012, *Auteurs & Media*, 2012/6, p. 602.

<sup>371</sup> Civ. Brussels (14<sup>th</sup> ch.), 27 October 2009, *Auteurs & Media*, 2010/1, p. 124.

<sup>372</sup> See *J. Englebert*, *La procédure garante de la liberté de l'information*, Limal, Anthemis, 2014, pp. 135 à 171, n° 163 à 212.

<sup>373</sup> *S. Hoebeke, B. Mouffe*, *Le droit de la presse*. Presse écrite. Presse

presumed innocent as guilty, until a final verdict has been issued. The presumption of innocence cannot lead to muzzling the freedom of the press which is considered in the Constitution as one of the basic principles of democracy. When a media covers a judicial case, the presumption of innocence requires to apply the requirements of objectivity and impartiality more strictly<sup>374</sup>.

### *Media hype*

Whatever the source of information and its dissemination, the judicial authorities cannot be held responsible for any media hype around the current proceedings<sup>375</sup>. A violation of the presumption of innocence by the press does not lead to a violation of the presumption of innocence by the court. Thus, the Supreme Court ruled that the violations through a media campaign or through the reproduction in the press of certain extracts of the criminal file does not mean "that the jury or the Criminal Court judges were not impartial or have disregarded the presumption of innocence "<sup>376</sup>. Similarly, the fact that when an investigation is opened, many media might have a bias against some defendants does not necessarily influence the judiciary and does not automatically affect the presumption of

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audiovisuelle. Presse électronique, 3rd éd., Limal, Anthemis, 2012, p. 473, n° 689.

<sup>374</sup> Liège, 30 June 1997, *Revue de Jurisprudence de Liège Mons et Bruxelles*, 1998, p. 9. See also Brussels (Court of Appeal, 4<sup>th</sup> ch.), 31 May 2005, *Auteurs & Media*, 2005/4, p. 322; Civ. Brussels (14<sup>th</sup> ch.), 25 June 2002, *Auteurs & Media*, 2004/4, p. 367; Brussels (9<sup>th</sup> ch.), 9 November 2001, *Algemeen Juridisch Tijdschrift*, 2001-02, p. 707; *Auteurs & Media*, 2002/6, p. 527; *Journal des Tribunaux*, 2002, p. 167; *Revue de Jurisprudence de Liège Mons et Bruxelles*, 2002, p. 418. Other decisions condemn the media for violating the presumption of innocence: Liège (20<sup>th</sup> ch.), 30 June 2010, *Revue Régionale de Droit*, 2009, p. 416; *Journal des Tribunaux*, 2010, p. 579; *Auteurs & Media*, 2010, p. 551, *Revue de Jurisprudence de Liège Mons et Bruxelles*, 2011, p. 511 (confirmed by Court of Cassation (1<sup>st</sup> ch.), 27 June 2014, *Revue de Jurisprudence de Liège Mons et Bruxelles*, 2014, p. 1947); Civ. Brussels (14<sup>th</sup> ch.), 16 December 2003, *Revue de Jurisprudence de Liège Mons et Bruxelles*, 2004, p. 793.

<sup>375</sup> See also *B. Taevernier*, « La présomption d'innocence et la médiatisation de la justice : une cohabitation difficile », *Revue de droit pénal*, 2005, pp. 33-85.

<sup>376</sup> Court of Cassation (2<sup>nd</sup> ch.), 15 December 2004, *Journal des Tribunaux*, 2005, p. 4; *Nieuw juridisch Weekblad*, 2005, p. 766; *Revue de droit pénal*, 2005, p. 331, concl. R. Loop; *Pasicrisie*, 2004, p. 1985, concl. R. Loop. See also Court of Cassation (2<sup>nd</sup> ch.), 27 February 2008, *Pasicrisie*, 2008, II, p. 536; *Rechtskundig Weekblad*, 2008-2009, p. 960; Court of Cassation (2<sup>nd</sup> ch.), 19 February 2008, *Nieuw juridisch Weekblad*, 2008, p. 256, note E. BREWAEYS; *Nullum Crimen*, 2008, p. 144; *Pasicrisie*, 2008, II, p. 480; *Tijdschrift voor Strafrecht*, 2008, p. 110, note; Court of Cassation, 16 septembre 1998, *Algemeen Juridisch Tijdschrift*, 1998-99, p. 207; *Journal des Tribunaux*, 1998, p. 656; *Revue de Jurisprudence de Liège Mons Bruxelles*, 1998, p. 1340; *Revue de droit pénal*, 1999, p. 106.

innocence<sup>377</sup>. The Supreme Court further underscored that the presumption of innocence concerns “primarily the attitude of the judge called upon” to decide. Therefore, would an investigator’s statement or a press report be false, malicious or of criminal origin, this would not automatically taint the judgment and result in a violation of Articles 6.1 and 6.2 ECHR<sup>378</sup>.

#### *The recall of old legal cases*

Criminal facts and condemnations cannot be recalled ad infinitum by the press. Invoking the right to be forgotten, judges have demanded the delisting as well as the anonymisation of older articles published in online archives<sup>379</sup>. Thus, freedom of expression conflicts with the right of the condemned person to be forgotten after the passing of some time. This right relates to the right to privacy. To address these disputes, the courts carry out a proportionality analysis by applying the criteria initially established by case law<sup>380</sup> and then confirmed by commentators<sup>381</sup>. For assessing whether the right to be forgotten can be claimed against the press, the courts rely on two cumulative conditions (a first lawful disclosure of information and a second disclosure consisting in the recall) and several criteria (the time between the two disclosures, the nature of the initial information whether it belongs to history and whether there is a duty towards memory, the existence of a contemporary interest in the

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<sup>377</sup> Brussels (11<sup>th</sup> ch.), 2 mai 2002, *Revue de Jurisprudence Liège Mons et Bruxelles*, 2003, p. 71, note.

<sup>378</sup> Court of Cassation (2<sup>nd</sup> ch.), 16 juin 2004, *J.L.M.B.*, 2004, p. 1137 ; *Tijdschrift voor Strafrecht*, 2005, p. 277, note S. VANDROMME ; *Revue de droit pénal*, 2005, p. 106 ; *Pasicrisie*, 2004, p. 1053.

<sup>379</sup> Liège (20<sup>th</sup> ch.), 25 September 2014, *Revue de Jurisprudence de Liège Mons et Bruxelles*, 2014, p. 1952, note E. Cruysmans, *Nieuw juridisch Weekblad*, 2015, p. 26, note P. van Eecke. *Le Boudec*, Civ. Liège (4<sup>ème</sup> ch.), 3 November 2014, *Revue de Jurisprudence de Liège Mons Bruxelles*, 2014, p. 1961, note E. Cruysmans, Civ. Neufchâteau (2<sup>nd</sup> ch.), 25 January 2013, *Auteurs & Media*, 2013/6, p. 478, note ; *Revue de Jurisprudence de Liège Mons et Bruxelles*, 2013, p. 1182.

<sup>380</sup> *Voy. Civ. Namur* (1<sup>st</sup> ch.), 17 November 1997, *Revue de Jurisprudence de Liège Mons et Bruxelles*, 1998, p. 781, note A. Strowel, *Auteurs & Media*, 1998/3, p. 269 ; *Journal des Tribunaux.*, 1998, p. 187 ; *Journal des procès*, 1997/337, p. 29 ; *Civ. Brussels* (14<sup>th</sup> ch.), 30 June 1997, *Journal des Tribunaux*, 1997, p. 710.

<sup>381</sup> See A. Strowel, « Le droit à l’oubli du condamné : après le moment du compte rendu, vient le temps du silence », in P. Gérard, F. Ost, M. van de Kerchove (dir.), *L’accélération du temps juridique*, Brussels, Publications des FUSL, 2000, pp. 737 à 748 ; A. Strowel, « Liberté de rappeler des faits contre droit au silence : les contretemps de la presse », note under *Civ. Namur* (1<sup>st</sup> ch.), 17 November 1997, *Revue de Jurisprudence de Liège Mons et Bruxelles*, 1998, pp. 785 à 791.

information, the exposure to the public of the involved person, the type of information recalled, the interest in the re-socialisation of the condemned person). The judge-made right to be forgotten constitutes therefore a limit to the press freedom.

## 2. Liability in the editorial chain

With regard to print media, Article 25 § 2 of the Belgian Constitution organises a layered system of liability: "where the author is known and resident in Belgium, the publisher, printer or distributor may not be prosecuted." This system limits the liability of certain persons when other persons can be made accountable (system of "successive and isolated accountability")<sup>382</sup>. Thus, when the author is known and has a residence in Belgium, the other persons mentioned in Article 25 § 2 benefit from a liability exemption, whether in civil or criminal cases<sup>383</sup>. The author – and therefore freedom of expression –enjoys the special protection granted by this provision: the layered liability prevents those assisting the author from refusing to publish, print and/or distribute the author's work out of fear of being convicted<sup>384</sup>. However, when the publisher, printer or distributor themselves commit a fault, they may be sued in court for this separate fault. Similarly, if one of those assistants in the publishing process is involved in the drafting of the press article, he will be considered as a co-author and can end up in court.

While this system is not applicable to broadcasting, the question of its applicability to internet remains controversial. Some commentators and

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<sup>382</sup> E. Montenero, H. Jacquemin, « La responsabilité civiles des médias », in Responsabilités – Traité théorique et pratique, titre II, 26ter, vol. 3, Brussels, Kluwer, 2004, p. 7, n° 166 ; F. Tulkens, M. Verdussen, « La radio et la télévision, le délit de presse et le droit de réponse », Annales de droit de Louvain, 1987, p. 59 ; S. Hoebeke, B. Mouffe, Le droit de la presse. Presse écrite. Presse audiovisuelle. Presse électronique, 3<sup>ème</sup> éd., Limal, Anthemis, 2012, p. 655, n° 909 ; M. Hanotiau, « La responsabilité en cascade en matière civile », note under Court of Cassation (1<sup>st</sup> ch.), 31 May 1996, Revue Critique de Jurisprudence Belge, 1998, p. 361, n° 1.

<sup>383</sup> See Court of Cassation (1<sup>st</sup> ch.), 31 May 1996, Auteurs & Media, 1996/3, p. 362, note F. Jongen, Journal des Tribunaux, 1996, p. 567 ; Chroniques de Droit public – Publiekrechtelijke Kronieken, 1997, p. 412, note A. Schaus, Revue Critique de Jurisprudence Belge, 1998, p. 357, note M. Hanotiau, Rechtskundig Weekblad, 1996-1997, col. 565 ; Court of Cassation, 24 janvier 1863, Pasicrisis, 1863, I, p. 110 ; Bulletin Juridique, 1863, p. 262.

<sup>384</sup> F. Jongen, C. Dony, « La liberté de la presse », in M. Verdussen, N. Bonbled (dir.) Les droits constitutionnels en Belgique. Les enseignements de la Cour constitutionnel, du Conseil d'Etat et de la Cour de cassation, vol. 2, Brussels, Bruylant, 2011, p. 857 ; K. Lemmens, La presse et la protection juridique de l'individu. Attention aux chiens de garde !, Brussels, Larcier, 2004, p. 343, n° 474.

judges refuse to extend this system to the internet<sup>385</sup>. Others are more favourable to its transposition to the digital networks<sup>386</sup>, but the list of accountable persons must then be adapted to this new medium.

### *The right of reply*

*A federal law organises the right of reply for the written and audio-visual press<sup>387</sup>. These legal provisions, whilst different in some respects, are unsatisfactory. In addition, they are rightly criticised for not taking into account the situation of the new (online) media. Jurisprudence and commentaries do not agree on a possible application of the provisions to the online press<sup>388</sup>, which in any case would require a series of adaptations<sup>389</sup>.*

### **3. Conclusion and perspectives**

In Belgium, there is no specific framework for investigative journalism. Investigative journalists enjoy rights and have obligations under the constitutional provisions and the laws on the protection of sources and the right of reply. They are also subject to ethical obligations. These rules, however, make no direct reference to investigative journalism. On some issues, case law fills the gaps by balancing the interests slightly differently when investigative journalists (and information of public interest) are involved. The lack of specific rules is not optimal, it implies that the freedoms of expression and of the press and the general principles (proportionality) as interpreted by European and Belgian case law are

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<sup>385</sup> For example, Brussels Court of Appeal, 12<sup>th</sup> ch., 23 January 2009, *Auteurs & Media*, 2009/6, p. 639.

<sup>386</sup> *S. Hoebeke, B. Mouffe*, op. cit., pp. 667 and f., n° 926 and f. ; D. VOORHOOF, « De regel van de getrapte verantwoordelijkheid : van de 19de naar de 21ste eeuw ? », note under Court of Cassation (1<sup>st</sup> ch.), 31 May 1996, *Récents arrêts de la Cour de cassation*, 1996, pp. 387 and f. ; *Corr. Brussels* (54<sup>th</sup> ch.), 23 June 2009, *Revue de Jurisprudence de Liège Mons et Bruxelles*, 2010, p. 123, note *F. Jongen*, *Civ. Brussels* (14<sup>ème</sup> ch.), 23 January 2007, *A&M*, 2008/1, p. 78; *Brussels*, 25 May 1993, *Journal des Tribunaux*, 1994, p. 104, note *F. Jongen*, *Brussels*, 19 February 1985, *Rechtskundig Weekblad*, 1985-86, col. 806, note *J. Ceulers*.

<sup>387</sup> See the law of 23 June 1961 « relative au droit de réponse », M.B., 8 July 1961 and the law of 4 March 1977 providing for a right to reply in the audio-visual sector, M.B., 15 March 1977.

<sup>388</sup> Pour la jurisprudence semblant admettre cette interprétation large see *Civ. Brussels* (44<sup>th</sup> ch.), 30 October 2009, *Auteurs & Medias*, 2010/5-6, p. 573 ; *Civ. Brussels* (14<sup>th</sup> ch.), 13 April 2010, *Auteurs & Media*, 2010/5-6, p. 583. For decisions refusing such interpretation, see *Civ. Brussels*, 9 December 2008, *A&M*, 2009/4, p. 454; *Corr. Brussels* (45<sup>th</sup> ch.), 14 November 2007, *Journal des Tribunaux*, 2008, p. 198.

<sup>389</sup> See *E. Cruysmans* « La presse en ligne et le droit », in *A. Degand, B. Grevisse* (dir.), *Journalisme en ligne. Pratiques et recherches*, Coll. Info Com, Bruxelles, De Boeck, 2012, pp. 225-228.



relied upon.

Several rules applicable in Belgium should be modernised and clarified, in particular with regard to their application to the internet. For example, Article 25 of the Constitution has not been amended since 1831 and the guarantees it offers only apply to the *printed* press. Legislation on the right of reply also has to be adapted for the digital environment. Despite the need of modernisation, the political parties do not want to engage in a challenging exercise that would lead to major legislative changes in the legal framework applicable to the press.

### **3. Bulgaria**

Evgeniya Scherer

## 1. Relevant Legislation and Case law

The Bulgarian Constitution provides the three fundamental freedoms: freedom of expression, freedom of press and other mass information media and freedom of seeking, obtaining and disseminating information (Art. 39, 40 and 41). According to the decision of the Bulgarian Constitutional Court the freedom of expression is the fundament of the other two and it incorporates them.<sup>390</sup> The reason for mentioning the freedom of the mass information media is to underline their important public function. In regard to the press there is one more special provision. According to Art. 40 (2) a suspension or a confiscation of printed matter or another information medium shall be allowed only through an act of the judicial authorities in the case of an encroachment on public decency or incitement of a forcible change of the constitutionally established order, the perpetration of a crime, or the incitement of violence against anyone. An injunction suspension shall lose force if it is not followed by a confiscation within 24 hours.

The reasons for the restrictions of these three fundamental rights that the actual provisions of Art. 39-41 contain, can be classified by interest groups as follows:

- from the standpoint of protection of the constitutional order (Art. 39 (2) and Art. 40 (2));
- protection of the national security (Art. 41 (1));
- maintain public order and crime prevention (Art. 39 (2), Art. 40 (2) and Art. 41 (1));
- protection of health or morals (Art. 40 (2) and Art. 41 (1));
- protection of the reputation or rights of other citizens (Art. 39 (2), Art. 40 (2), Art. 41 (1) and Art. 41 (2)) and
- reasons for confidentiality (Art. 41 (2)).<sup>391</sup>

Art. 32 of the Constitution protects the private sphere, honour, dignity and reputation. Accordingly no one shall be followed, photographed, filmed, recorded or be subject to any other similar activity without his knowledge or despite his expressed disapproval, except when such actions are permitted by the law.

Bulgaria is a signatory to the European Convention on Transfrontier Television of the Council of Europe. The Convention, which has entered into force for Bulgaria on 11 April 1999, became part of its internal legislation and, according to Art. 5 (4) of the Bulgarian Constitution, has precedence over those national regulations which are in contradiction to it.

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<sup>390</sup> Decision No. 7 from 1996 of the Bulgarian Constitutional Court.

<sup>391</sup> Decision No. 7 from 1996 of the Bulgarian Constitutional Court.

Parallel to that, the main law regulating broadcasting in Bulgaria is the Law on Radio and Television (LRT), adopted in 1998 (State Gazette No. 138 from 24 November 1998) and last amended in 2014 (State Gazette No. 107 from 24 December 2014). The Law implements the provisions of the AVMS Directive in February 2010 (State Gazette No. 12 from 12 February 2010). It regulates the linear and non-linear media services.

The main principles are tackled in Art.10 of the LRT. Accordingly the public and private broadcasters shall be guided in carrying out their activities by the following principles:

- guaranteeing the right to free expression of opinion;
- guaranteeing the right to information;
- preservation of the secret of the source of information;
- protection of the personal inviolability of the citizens;
- non-admission of programmes suggesting intolerance among the citizens;
- non-admission of programmes contradicting the good manners, especially if they contain pornography, praising or freeing from blame cruelty or violence or instigate hatred based on racial, sexual, religious or national nature;
- guaranteeing the right to response;
- guaranteeing the copyright and related rights and
- preservation of the purity of the Bulgarian language. The implementation of these principles in the journalistic practice is regulated in Art. 11 – 16 LRT.

Art. 11 concerns the relationship between the journalists and the management bodies of the media service providers. Editorial statutes for work has to be agreed between the owners and/or management bodies of the media service providers and the journalists who have concluded contracts with them.

Pursuant to Art. 13 the media service providers shall have the right to receive any information as they may need from state and municipal bodies, unless this information contains any legally secured secret. The media service providers shall be obligated to use any information received accurately and non-tendentially.

Art. 15 regulates the modalities of the obligation to protect the confidentiality of the source of information.

The press content is not subject of specific law. There are some legal provisions in other acts such as the Law on Compulsory Deposit of Printed or Other Works (LCDPOW, State Gazette No. 108 from 29 December 2009, last amendments: State Gazette No. 101 from 28 December 2010). The Law provides the obligation for compulsory depositing printed or other works at the National Library. According to the Art. 7a every periodical

printed work shall publish information about the “*real owner*” of the publication in the first issue of the year. The publisher shall be obliged to submit a statement by the Ministry of Culture, which identifies the “*real owner*” of the publisher as well. Every change of the “*real owner*” has to be published and the Ministry has to be notified. The Law defines the notion “*real owner*” as “*the natural persons, who are the end beneficiaries of the ownership in the juristic person, who singly or through related parties participates in the publisher*”. Pursuant to the motives of the law, the rule shall guarantee the transparency of the press ownership and the effective protection of the human rights such as the protection of the honesty and reputation.

The Law on Access to Public Information (LAPI, State Gazette No. 55 from 7 July 2000, last amendments: State Gazette No. 39 from 20 May 2011) contains further important provisions concerning the access to public information that is created or kept by public authorities, their territorial units and local authorities in the Republic of Bulgaria. Public information under this Act is any information related to public life in Bulgaria and enabling citizens to form their own opinion about the activities of the subjects required by law (Art. 2 (1)). Bulgarian journalists often use these rights to get access to information.

For insult or defamation made in public or through a publication or otherwise, the Criminal Code (CC, State Gazette No. 26 from 2 April 1968, last amendments: State Gazette No. 41 from 5 June 2015) provides a fine (Art. 148).

The journalistic duties are subject of self-regulatory as well. In 2004 the Code of Ethics of the Bulgarian media (CEBM) was adopted and signed from more than 200 media. The Code provides the protection of freedom of speech, the rights of citizens to access full and reliable information, the personal dignity and sanctity of personal life of citizens and the defending of the unified professional and ethical standards for journalistic activities.

The CEBM applies for broadcasting, press and online services. The “National Council for Journalistic Ethics” was established to monitor the compliance with the Code.<sup>392</sup> At the beginning, there were two commissions within the Council – Ethics Commission on Printed Media and Ethics Commission on Electronic Media, each of which consists of 12 members. From 2015 on, all claims for violations of the CEBM are considered by one and the same commission consisting of 12 members.

Since December 2013 there is a second code of ethics as a self-regulatory instrument, namely the Code of Professional Ethics (CPE) adopted by the

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<sup>392</sup> More information on the National Council for Journalistic Ethics can be found at the website: <http://www.mediaethics-bg.org>.

Bulgarian Media Union. The media that did not sign the CEBM or renounced it, drafted and signed the CPE. The Regulation for the Implementation of the Code of the CPE is the framework for dealing with complaints. Accordingly the decisions of the Ethic Commission are mandatory for the members of the Bulgarian Media Union.

## 2. Obtaining of information and boundaries of law enforcement

Mainly the self-regulatory instruments have regulated this issue especially regarding the journalists. After the Code of Ethics of the Bulgarian Media (CEBM) and the Code of Professional Ethics (CPE) journalists have to gather information by fair and legal means (2.1.1. CEBM and 1.7. CPE). They shall only make use of subterfuge, hidden cameras, microphones or other special equipment or obscure their professional identity, if there is no other means to obtain exceptionally important information in public interest (2.1.2. CEBM and 1.9. CPE). The utilisation of such methods shall be indicated on context with the story (2.1.2. CEBM).

- The existing legal provisions concern not only the journalists. They are subject of regulations by the Criminal Code (CC). One is the breach of confidence in connection with the professional occupation. According to Art. 145 (1) CC everyone who detect illegal foreign secret dangerous for the good name of someone which has been entrusted or has become known in connection with his professional occupation shall be punished with imprisonment of up to one year or a fine of one hundred to three hundred lev (approximately 50 - 150 euro).
- The illegal obtaining of information is only sanctioned if the data, circumstances or allegations concerning another person are broadcasted, printed or otherwise distributed and they are from the archives of the Ministry of Interior (Art. 148a CC). The person shall be punished by a fine of five thousand to twenty thousand levs (approximately 2 500 – 10 000 euro).
- Regarding the utilisation of business/trade secrets there are no special rules concerning the journalists as well. Therefore, the general provisions of the Law on Competition (LC) and the Law on Access to Public Information is applicable. According to the definition of the §1 (9) LC *"production or trade secret are facts, information, solutions and data relating to the economic activities keeping in secret in the interests of those entitled, for which they have taken the necessary measures."*

According to Art. 37 already the knowledge, the use or disclosure of a trade secret in contradiction with fair trade practice and the use or

disclosure of a trade secret, where it has become known or communicated on condition not to be used or disclosed is forbidden.

The Law on Access to Public Information (LAPI) contains a special rule concerning the access to public information that is a trade secret. The access to such information is not free if its disclosure or dissemination would lead to unfair competition between traders except in cases of overriding public interest (Art. 17 (2) LAPI). According to §1 (6) of the additional provision of the LAPI "overriding public interest" occurs when the requested information purposes disclosure of corruption and abuse of power, increase transparency and accountability of the obligated persons under this law.

Under the provisions of Art. 9 (2) LAPI, certain public information can be declared as a classified information constituting a state or official secret and the Law on Protection of Classified Information regulates the access to state or official secret. However, no regulations do certain specific rights or obligations for journalists.

Nevertheless, the dissemination of state secrets is a crime under the provisions of the Criminal Code and shall be punished with imprisonment from two to eight years (Art. 357).

There are no special rules on this matter. As mentioned above the Bulgarian Constitution prohibits the seizure and contains special provision regarding the suspension or confiscation of printed works or another information medium.

### **3. Reporting about on-going investigations**

Art. 2.6. of the Code of Ethics of the Bulgarian Media (CEBM) concerns the duty of care by reporting about on-going investigations. Therefore, journalists shall respect the "assumption of innocence" and shall not describe someone as a criminal prior to their conviction (corresponds to Art.1.14 of the Code of Professional Ethics). If media have identified a person as being charged with a crime, they shall also make known the outcome of the trial (no corresponding provision of the CPE).

Media service providers cannot create and submit for broadcasting programs containing information relating to the privacy of citizens without their consent (Art.16 (1) LRT). The broadcasting of video concerning citizens in on-going investigations without editing the video, for example, "*by dimming the image and indicating the name with initials*", constitutes a breach of the principle of protection of privacy, and brought up as a

constitutional right stipulated in Art. 32 of the Constitution.<sup>393</sup> This restriction, i.e. broadcasting without the consent of the person does not apply only when regarding the person has enacted sentence for premeditated crime of general nature (Art. 16 (4) LRT)

According to Art. 1.1.4 CEBM journalists shall clearly distinguish facts from comments and suggestions (corresponds to Art.1.6 of the CPE).

Art.1.2 (CEBM) regulates the correction of information. The media shall publish a clear and appropriately prominent correction when it can be demonstrated that inaccurate or misleading information has been published, and provide an apology if necessary. It shall provide a right of reply to individuals and organisations directly affected by inaccurate or misleading publications (corresponds to Chapter IV of the CPE). The CPE contains one more modality namely that the affected person shall be entitled within three days from the release of the information to request its right of reply in written form.

Concerning the linear media services there is a special provision in the Law on Radio and Television. Art. 18 regulates the right of reply when persons have been affected in linear media services in which they did not appear personally or through a representative thereof. Within seven days after the day of transmission, the persons have the right to request from the respective broadcaster, that he provides their reply and distributes it. The contested allegations as well as the date and time of the transmission, must be specified in any such request. The broadcaster is obligated to ensure insertion of the reply in the next succeeding edition of the same programme or in an equivalent time within 24 hours after receipt of the reply. Modifications or abridgments of the text are not allowed.

#### **4. Due diligence guidelines for journalists**

Regarding dissemination of truthful information to the society the Code of Ethics of the Bulgarian Media (CEBM) and the Code of Professional Ethics (CPE) provides three obligations: correctness of the information, correction of untruthful information (described above) and using trustful sources.

According to Art.1.1. CEBM the media shall supply the public with accurate and verified information and shall not deliberately suppress or distort facts (corresponds to Art.1.1 of the CPE). The journalists shall not mislead the public and have to indicate clearly, where manipulated texts, documents, images and sounds have been used (no corresponding provision of the CPE).

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<sup>393</sup> Judgment № 478 from 14 March 2013, civil case № 3241/2012 of the Court of Appeal – Sofia.



After Art.2.6.3 CEBM, the media shall treat with caution the identification of victims and witnesses of crime, especially in cases involving sexual assault, unless they give consent to be identified (corresponds to Art.1.11 of the CPE). They shall refrain from glorifying or unnecessarily sensational reporting about crime, violence and brutality (no corresponding provision of the CPE). Regarding child protection, the CPE inserts in cases of sexual or other crimes against a child, that media shall not be entitled to disclose the identity of the child regardless of whether he/she is a victim or a witness (Art.1.15). So far the CPE differentiates depending on whether the victim or the witness is a child or not. It is absolutely forbidden to disclose the identity of a child, while adults have to be treated “*with caution*” on which concerns their identification.

There are no more specific requirements for the legitimacy of text- or/and pictorial reporting.

A further obligation of the two Ethical Codes is to use trustful sources. Art. 1.3 CEBM provides that the journalists shall seek to verify information before it is published, as they look for and use different sources and indicate properly their provenance. They shall prefer to use identified sources rather than anonymous sources whose honesty and reliability cannot be assessed by the public (corresponds to Chapter II of the CPE). Information, which is not confirmed, has to be indicated (no corresponding provision of the CPE).

Regarding especially the linear media services there are two applicable provisions of the Law on Radio and Television (LRT). According to Art. 13 (2) LRT the media service providers shall be obligated to use any information received accurately and non-tendentiously. Furthermore, they shall have the right to include information from an unidentified source, expressly stating this fact (Art.15 (3)).

There are no more guidelines or legal provisions for journalists in order to present the “objective truth”.

## **5. Liability in the editorial chain**

According to Art. 17 (1) LRT the media service providers shall be legally responsible for the content of the media services. The providers can carry administrative or civil liability. If a journalist commits a crime, then he/she must bear the liability under the criminal law personally.

Regarding the press there are no special legal or self-regulatory provisions. In legal practice, publishers as legal persons bear in most cases the liability in civil issues. If a journalist or an editor has violated internal (or other) regulations in these cases, the publisher can sue him according to the general labor and/or civil law.

## 6. Conclusion and perspectives

According to the World press freedom index 2015 Bulgaria takes place 106 and it is on the last place under the EU countries.<sup>394</sup>

One of the main problems is the transparency of press ownership. The Bulgarian legislator tried to solve the problem with the amendments of the Law on Compulsory Deposit of Printed or Other Works (LCDPOW) providing the obligation that every periodical printed work shall publish information about the “*real owner*” (see above: A). The efficiency of this regulation has to be seen as critical because of the facts that it has neither been regulated that documents have to be added as proof nor is there a procedure for checking the statements and asking for additional evidence if required. The Law does not provide content examination of the statements but only supervision if the statements has been published and submitted respectively by the Ministry of Culture. The sanctions for not fulfilling the obligations are not high (between 511 Euro and 1023 Euro). Hence, it follows that hundreds of printed works do not publish or submit the information about the “*real owner*”. According to the latest data of the National Statistical Institute of Bulgaria 354 newspapers were published in 2012 (57 of these were dailies) but only 150 Bulgarian publishers have declared the “*real*” ownership of nearly 223 newspapers and magazines to the Ministry of Culture by the end of 2013 as required by law.<sup>395</sup>

The lack of transparency of press ownership has to be seen in context with the media concentration issue in general and the fact, that Bulgaria does not have specific regulation on media concentration. The “New Bulgarian Media Group”, which owns publications and broadcast media, the “BTV Media Group”, whose portfolio includes the most popular TV-channel bTV, other broadcasting programmes and radio stations and the “Nova Broadcasting Group” with seven TV-channels, dominate the media market. Moreover, there are a number of media owned by offshore companies, whose real ownerships and cross media relationships are not clear. This situation is repeatedly a matter of concern at European and Bulgarian Level.<sup>396</sup> Regarding these circumstances, it can be stated, that Bulgaria has to change urgently its legislation concerning the media ownership and concentration to insure transparency and media pluralism.

Another important issue in Bulgaria is the journalist’s self-censorship.

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<sup>394</sup> <http://index.rs.f.org/#/>.

<sup>395</sup> Velislava Antonova, Media of the semi darkness, Capital newspaper from 10 January 2014, [http://www.capital.bg/biznes/media\\_i\\_reklama/2014/01/10/2217422\\_medii\\_na\\_polumraka/](http://www.capital.bg/biznes/media_i_reklama/2014/01/10/2217422_medii_na_polumraka/).

<sup>396</sup> <http://seemo.org/Bulgaria-2014-Media-Report.html>.

Because of many different types of pressure from different sources, the Bulgarian journalists are resorting to “self-censorship on a regular basis”, stated by the Bulgaria Media Report 2014 of SEEMO.<sup>397</sup> The report describes many cases in which political representatives or different state bodies used pressure against journalists (e.g. denying interviews to journalists from some media, verbal attacks from political representatives, pressure by different controlling bodies such as tax authorities and labor expectations) and a number of violent attacks as well.<sup>398</sup> Therefore, it is not surprising that there are very critical reactions of international organisations because of police violence during the protests against the government in 2013. In the night of 23/24 July 2013, a blogger, seven journalists and a number of other citizens injured by police violence.<sup>399</sup>

Journalists report that people are very often willing to submit information to the media anonymously because they are afraid of being identified by picture or name.<sup>400</sup>

All this issues are part of the general problem, which Bulgaria has, that the ineffective judicial system does not guarantees the rights of the citizens sufficiently.

Another problem is that the press is mainly only subject to self-regulation and the self-regulation in Bulgaria has no long-lasting tradition. More time will be needed for the development of self-regulation mechanisms and their acceptance. This shows the poor practice of the both Ethics Commissions implementing the CEBM. Since the beginning of their work in 2006 they have reviewed and decided only 39 cases up to the beginning of 2015. Since the new elected Commission started to work in January 2015, there are already 23 decided cases. Among its new members are well-known Bulgarian journalists and legal experts<sup>401</sup>, so there is a progress in this field. Because of these positive changes the “Association of European Journalists – Bulgaria” hopes “that the decisions to be taken would be beneficial to the media environment in the country and would prove to be a high ground for the reestablishment of the self-regulation in the sector.”<sup>402</sup>

On the other hand, the adoption of the Code of Professional Ethics (CPE)

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<sup>397</sup> In this sense also FES, Balkan Media Barometer Bulgaria 2014, S. 79.

<sup>398</sup> <http://seemo.org/Bulgaria-2014-Media-Report.html>.

<sup>399</sup> <http://en.rsf.org/bulgarie-police-attack-journalists-covering-26-07-2013,44980.html>.

<sup>400</sup> FES, Balkan Media Barometer Bulgaria 2014, S. 21.

<sup>401</sup> <http://www.mediaethics-bg.org/index.php?do=55&lang=bg>.

<sup>402</sup> <http://www.aej-bulgaria.org/eng/p.php?post=2046&c=146&d=2015-01-06>.

by the Bulgarian Media Union parallel to the CEBM is considered to be problematic in the media environment. The two co-existing documents are an expression of the division of the Bulgarian media market in two major groups and their owners, which has increased substantially in recent years.<sup>403</sup> The “Association of European Journalists – Bulgaria” has therefore criticized the existing self-regulatory system and especially the new Code: “Unfortunately, instead of this model being reformed and expanded, an attempt is made for it to be destroyed and replaced by self-regulation for private benefit.”<sup>404</sup>

In this respect, it has to be stated that also the ignorance of journalists regarding the ethical and professional standards is a critical issue. For example, many media disclose regularly the identity of crime-victims, report of sensational way about crime, violence and cruelty and do not regard the presumption of innocence.<sup>405</sup>

These experiences show that even if a large part of the issues of this study are regulated by the ethic codes, the regulatory efficiency is questionable, since the self-regulation in practice does not work properly yet.

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<sup>403</sup> In this sense also FES, Balkan Media Barometer Bulgaria 2014, S. 71.

<sup>404</sup> <http://www.aej-bulgaria.org/eng/p.php?post=1644>.

<sup>405</sup> FES, Balkan Media Barometer Bulgaria 2014, S. 71.



## **4. Cyprus**

Christophoros Christophorou

## 1. Relevant Legislation and Case-law

Primary sources:

- The Constitution of the Republic of Cyprus  
[http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/\\$file/CY\\_Constitution.pdf](http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/$file/CY_Constitution.pdf)
- The amendment of art. 17 of the Constitution  
[http://www.cylaw.org/nomoi/enop/non-ind/2010\\_1\\_51/full.html](http://www.cylaw.org/nomoi/enop/non-ind/2010_1_51/full.html)
- The Press Law N. 145/1989  
[http://www.cylaw.org/nomoi/enop/non-ind/1989\\_1\\_145/full.html](http://www.cylaw.org/nomoi/enop/non-ind/1989_1_145/full.html)
- The Radio Television Stations Law 7(l)/1998  
[http://www.cylaw.org/nomoi/enop/non-ind/1998\\_1\\_7/full.html](http://www.cylaw.org/nomoi/enop/non-ind/1998_1_7/full.html)
- Excerpts in English  
[http://avada.access-info.org/wp-content/uploads/Cyprus\\_Radio\\_\\_Television\\_Law\\_7l.docx](http://avada.access-info.org/wp-content/uploads/Cyprus_Radio__Television_Law_7l.docx)
- Regulations on Radio Television Stations of 1998, KDP 10/2000  
<http://crtc.org.cy/images/users/1/kanonismoi/KANONISMOI.pdf>
- Law on the Criminal Code, ch. 154  
[http://www.cylaw.org/nomoi/enop/non-ind/0\\_154/full.html](http://www.cylaw.org/nomoi/enop/non-ind/0_154/full.html)
- Law on Civil Wrongs, ch. 148  
[http://www.cylaw.org/nomoi/enop/non-ind/0\\_148/full.html](http://www.cylaw.org/nomoi/enop/non-ind/0_148/full.html)
- Media Code of Practice  
[http://cmcc.org.cy/code\\_practice2.html](http://cmcc.org.cy/code_practice2.html)
- Law on the Public Service N. 1/1990  
[http://www.cylaw.org/nomoi/enop/non-ind/1990\\_1\\_1/full.html](http://www.cylaw.org/nomoi/enop/non-ind/1990_1_1/full.html)

## 2. Questions 2. – 5.

*Basic Sources*

The Constitution of Cyprus<sup>406</sup> provides for the safeguard of fundamental rights and freedoms, namely the following that have a bearing on the issue of investigative journalism: Freedom of expression, right to secrecy of communication, right to privacy and right to fair trial.

*Article 19*, on Freedom of expression, defines this right in paragraphs 1 and 2 and sets restrictions and constraints in paragraph 3. The 3rd clause which constraints should abide with, i.e 'be necessary in a democratic

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[http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/\\$file/CY\\_Constitution.pdf](http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/$file/CY_Constitution.pdf).

society', is missing. However, courts fully implement the case-law of the ECHR. Paragraph 4 makes seizure of newspapers and printed material possible possible, which is a risk against democratic values; the intervention of a court to confirm the decision, without which the seizure order is lifted, should take place within 72 hours, which can be judged as too extensive under today's rhythm of life. This may be deemed as a serious threat against media freedoms and investigative journalism.

*Article 17*, on the right for an to the secrecy of communication has been amended in 2010, to allow interference with it in three cases: In the case of persons in jail or in custody, following a court order in the interest of public order, security, investigation of specific serious crimes and other, and a court order for the disclosure of telecommunication metadata for the investigation of serious crimes.

*Article 15*, on the right to privacy, allows interferences prescribed by law and in the interests of the security of the Republic, public order, safety, health, safeguard of fundamental rights and liberties and other.

Article 30, provides for the right to a fair trial and cases where exclusion of the press and the media from court hearings is allowed, or publicity would prejudice the interests of justice.

The Press Law<sup>407</sup> N.145/1989 provides for the rights and obligations of journalists and the press, access to information, publication, protection of sources, right to correction and right of reply and liability clauses.

*Article 7* stipulates that journalists, Cypriots or aliens have the right to freely approach and get information from private sources without any interference by authorities; also to seek information from public sources and get information from public competent authorities, and transmit it by any means. Restrictions relate to issues of security, public order, morals etc and respect of the dignity and rights of others. According to 7(3), the authorities have an obligation to furnish the requested information the soonest possible, unless restrictions apply, related to state security, public order, morals, health etc.

*Article 8* on the protection of sources, allows their disclosure only in cases where the court orders such a disclosure; three pre-requisites must concurrently exist: Investigation of a criminal case where the information is directly linked to the crime, it cannot be obtained otherwise and a superior public interest imposes it.

*Article 38* provides for the terms, conditions and modalities of the exercise of the right of correction by a public servant, in case of an inaccurate

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<sup>407</sup> [http://www.cylaw.org/nomoi/enop/non-ind/1989\\_1\\_145/fulIN.html](http://www.cylaw.org/nomoi/enop/non-ind/1989_1_145/fulIN.html).



publication on actions relevant to his duties.

*Article 39* sets the modes and conditions of the exercise of the right of reply and the obligations and liability of the owner, the responsible under the law or the director of the newspaper.

*Article 11* provides for the role and obligations as well as the liability of the person responsible under the law (RUL), as well as of the owner.. Whatever the liability of the owner, the person RUL bears responsibility for all torts of the owner.

*Article 36* is about the responsibility of the owner of the presses; before printing a newspaper, he must verify that the tile is duly registered with the ministry of the Interior, a formality for securing the name but also paying a small deposit of money that could be used in case of conviction to pay damages.

The Law on Radio and Television Stations, N. 7(1)/1998 regulates issues pertaining to the licensing and operation of audiovisual media services. It's main provision related to the work of journalists and collection and dissemination of information are as follows:

*Article 3(2)(f)* provides that the media regulator, i.e. the Radio Television Authority, ensures the editorial and creative independence of those working in the AVMS, to avert any interference, intervention or influence with the work of journalists and creative personnel.

*Article 26*, on the principles that govern radio and television programmes, stipulates in (1)(e) that programmes should be governed by respect to the personality, the reputation and the private life of individuals.

*Article 41(f)* sets the rights of persons affected by programmes content to apply to the authority or open a case before the courts for reparation.

*Article 42* refers cases of libel-defamation to the respective laws, the law on civic torts and the criminal code.

*Article 44*, defines the terms, conditions and modalities of exercising the right of reply, the obligations of AVMS providers and the role and powers of the Authority on the issue.

The Regulations on the Law on Radio and Television Stations, in the form of normative administrative acts (Κανονιστικές Διοικητικές Πράξεις), KDP 10/2000, set various rules on the respect of dignity, reputation and private life and the use of hidden cameras and other means for gathering and the dissemination of pictures and information collected therefrom.

*Regulation 21(3)* sets in detail how persons should be treated :

*The stations are obliged in all programmes (including advertisements) to ensure respect for the personality, honor, reputation, private life, professional, scientific, social, artistic, political or other similar activity of*

*every person, the image of which appears on the screen or the name of which is transmitted from the station or reference is made to or information is transmitted about it, such as that results in the recognition of his identity. The above obligation is extended with respect to any individual or the image of man in general as an individual or member of a group.*

The above formulation “to ensure respect” may be interpreted as requiring a proactive role by the media, not just to respect but to take care, in order to ensure this respect. In this sense, the rule appears to be stricter than a mere proof of respect.

Regulation 27, under the heading 'private life', sets specific rules in respect of the way and means used for gathering information and its dissemination. Thus, in (a) secret filming, recording or photographing of persons in private or public places and transmission of the material is prohibited without the persons' consent. Transmission is justified if that relates to the public interest. In a similar vein, in (c) the use of hidden devices for spying on person and the transmission of material gathered is prohibited. No exception in the name of public interest is made here. In (d) filming, recording or photographing in a private place without the consent of the persons involved is prohibited as well as the dissemination of the material gathered. Consent is also required for recording and transmitting telephone conversations.

Regulation 37 prohibits filming or photographing police or military installations or manoeuvres, unless this serves the public interest.

Similar rules as above apply in the case of the public service broadcaster RIK (Ραδιοφωνικό Ίδρυμα Κύπρου – Cyprus Broadcasting Corporation), in compliance with the Regulations KDP 93/2001, that replicate the above-mentioned regulations.

The Code of media ethics, adopted and signed by the Union of Journalists, the Broadcasters and the Association of Publishers in May 1997, became a statute law when it was incorporated as appendix to the aforementioned regulations on Radio Television Stations KDP 10/2000. Their status has remained a peculiar one, as it had already been stipulated in the Law N. 7(I)/1998 that the regulator, the Radio Television Authority cannot examine a case of possible breach of the Code, unless seized by the Media Complaints Commission. The latter has also been established by media professionals in 1997 for the enforcement of the Code and denies any powers to the Authority on matters of ethics.

The Code sets various rules pertaining to seeking and publishing information. They refer to respect to privacy and avoidance of any kind of interference with, filming etc without consent; publication should be an

exceptional case in the service of public interest only (reg. 4<sup>408</sup>); similarly, except for reasons of public interest, no disguised or through misleading, deception, threats or intimidation gathering of information should take place (reg. 7). Payment or bribing criminals or their relatives for gathering information on crimes is also subject to the same clauses above (reg. 9). Other rules refer to presumption of innocence (reg. 10), protection of sources (reg. 15) and avoidance of publication of matters that may harm national security (17).

A significant part of the code is the explanatory annex, which offers guidance in practical terms. The document exists both in English<sup>409</sup> and in Greek versions.

The Law on the Public Service N. 1/1990, has a very strict provision that limits access to information detained by public authorities. Thus article 67(1) stipulates that

*Any written or oral information that comes to the knowledge of a public officer in the execution of his duties is confidential and it is prohibited to be communicated to any person unless this is done for the proper fulfilment of his service duties or after an express instruction by the competent authority.*

In a similar way, when a public servant is summoned under the laws to give testimony or deposit documents in his possession, this can be done only after the competent authority, i.e. the minister decides. Decision would be based on first verifying that this is not against the public interest and after the advice of the Attorney general.

The Criminal Code ch. 154 has several provisions related to the publication or sending by post various categories of information. The relevant provisions are relics of the colonial past of Cyprus (British rule from 1878 to 1960). Thus,

*Article 50* stipulates that the publication of false news or information that can shake the public's trust to the state and its organs, or cause concern to the public or harm the good order and peace etc is punishable as misdemeanour; proof of good faith and presentation of facts on which this could be founded are valid defences. The case can only be opened on instructions of the attorney general.

*Articles 50A and 50B* provide that publication in any form of material on defence and military works, and unauthorised entry or approach, filming etc of military camps or defence installations is also punishable. Both

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<sup>408</sup> Figures refer to numbering in the legal text and is not exactly the same in the media professionals' document.

<sup>409</sup> [http://cmcc.org.cy/code\\_practice2.html](http://cmcc.org.cy/code_practice2.html).

articles are formulated in a generic manner, not specifying any type of harm, intention etc that make such acts punishable.

*Article 59* provides for the punishment of any person that transmits by post or has at his possession printed matter of seditious content; punishable as criminal offences are also the printing, publication, selling and display for sale of a newspaper or any form of printed matter that relate to an outlawed association. However, the meaning of 'seditious' is referred to art. 48 of the same law that has been abrogated.

*The law on Civil Wrongs, ch. 148*

Provisions on libel and defamation have found their place in this law in 2003, following their de-criminalisation by amending law of the Criminal Code N. 84(I)2003<sup>410</sup> abrogating the relevant sections of the Law. The law on Civil Wrongs provides for the definition of libel-defamation and the defences and privileges in lawsuits, namely: Definition and publication (art. 17 and 18), defence of truth (art. 19(a)), public interest and honest opinion-fair comment (art. 19(b)), privilege (art 19(c)), absolute privilege (art. 20) and qualified privilege (art 21), offer of amends (art. 22) and special defence for the owner of a publication (art.24).

*Police search and investigations*

With regard to searches in media or press offices, the rule is that no search can take place unless a warrant is issued by a court. The author is not aware of any search of this type during the past 20 years.

*Case Law On issues of investigative journalism*

Note: In the absence of secondary sources, the author of the present report searched into case-law, in an effort to locate indicative examples that can inform this report. The search through the website [www.cylaw.com](http://www.cylaw.com), a portal under the auspices of the Pancyprian Lawyers Association produced only four cases in which there is explicit mention to 'investigative journalism' [Διερευνητική Δημοσιογραφία]. However, we have also collected more cases on both the Press and Television. What follows is just indicative of jurisprudence on matters and concepts relevant to the interpretation of law provisions by the Courts. Cases come from ordinary or trial courts and from the Supreme Court, 1<sup>st</sup> and 2<sup>nd</sup> instance.<sup>411</sup>

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<sup>410</sup> [http://www.cylaw.org/nomoi/arith/2003\\_1\\_84.pdf](http://www.cylaw.org/nomoi/arith/2003_1_84.pdf).

<sup>411</sup> The Supreme Court reviews decisions by the administration or entities /persons exercising administrative power (Revisional) and by trial Courts or its revisional instance (Appellate). See: [http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLS\\_Court\\_en/DMLSCourt\\_en?OpenDocument](http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLS_Court_en/DMLSCourt_en?OpenDocument) accessed 3 August 2015.

*Investigative Journalism (role)*

In its decision on the appeal of civil case 1260/1999,<sup>412</sup> the Supreme Court cited the opinion of the justice of the trial court on investigative journalism. It reads,

*“The publication was on an important matter of public interest and is placed in my view in the framework of what is labelled as investigative journalism, which is basic component of the modern democratic regime, it serves the need for transparency and operates as dissuasive to any form of arbitrariness and abuse”*

*Concepts and terminology*

The Court<sup>413</sup> replying to arguments by broadcasters that in its decisions the Radio Television Authority does not define or give the meaning of concepts and terms that are employed in determining breaches of the law or other matters, noted:

*“The Court is examining whether the Authority’s decision judged on the basis of the justification and the content of the files, was reasonably allowed within the limits of its discretionary powers. Thus, the definition in the Regulations of concepts such as personality, reputation, privacy and their reference to the facts of the case are not out of the above framework.”*

Similar to the above arguments are included in other court decisions. It is further noted that

*“the Authority had neither the obligation to predetermine the meaning of various words or phrases of the relevant legislation, nor to seek any testimony with regard to what the society in Cyprus considers as quality programme”.*<sup>414</sup>

*Person /Device used for recording /Knowledge of the person involved*

The transmission by a TV channel of information in the form of sounds recorded in class by a student without the knowledge of his teacher, gave the Court the opportunity to clarify a variety of issues: they included

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<sup>412</sup> Cited in Appeal Case Philippou V. Arktinos, 12138/2004, [www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros\\_1/2006/rep/2006\\_1\\_1124.htm](http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2006/rep/2006_1_1124.htm) decided 1 November 2006.

<sup>413</sup> Supreme Court, decision on Appeal case 76/2007, Antenna V. CRTA, decided 8 February 2010, available in Greek at [http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros\\_3/2010/rep/2010\\_3\\_0029.htm](http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2010/rep/2010_3_0029.htm) accessed 3/8/2015.

<sup>414</sup> Supreme Court, decision on Case 1829/2008Antenna V CRTA, decided 30 September 2011, available in Greek at [http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros\\_4/2011/4-201109-1829-08.htm](http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2011/4-201109-1829-08.htm).

whether any relationship with the channel matter, or the device or if it was visible or not. The court noted,<sup>415</sup>

“The substance of the case lies on the fact that the recording of the teacher in class was made without him knowing and it was transmitted without his consent. Whether the recording was done by the student involved or another person does not matter, as it does not matter if the same student was aware that a recording was taking place. What is important is that this was a secret recording of the teacher without him having been informed about it. It is obvious that with regard to the teacher this recording was done with the use of a hidden or covered recording device that did not come to his knowledge. Whether this device was placed at a point where others – students in the class, could see it, it is not important. It is of no importance the fact that the recording was not made by the channel /broadcaster.”

#### *On transmission and Liability*

The court notes that the identity of the person that does a recording is of no value as what is of significance is the transmission. Thus in the case 1105/2005, where a recording by a student in class was transmitted by a channel, the court decided:<sup>416</sup>

*“It is of no importance the fact that the recording was not made by the channel /broadcaster. Under paragraphs (a), (c) and (d) of regulation 27, there is a violation also when the recording is not done by the broadcaster but it is transmitted by it”.*

The court continues by noting that liability of the broadcaster that used the recording is no smaller than that of the person(s) that effected it.

“The use of the recording is an endorsement and through the dissemination of the content it extended the infringement to the teacher’s right to personality.”

#### *Publication and liability*

Liability of the owner is dismissed in cases where no proof is given that he had a role in the publication. Example to this are the appeal case Philippou

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<sup>415</sup> Supreme Court, decision on case 1105/2002, Antenna V. CRTA, decided 21 May 2004, available in Greek at: [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_4/2004/rep/2004\\_4\\_0411.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_4/2004/rep/2004_4_0411.htm).

<sup>416</sup> Idem.

V. Arktinos 12138/2004<sup>417</sup> and civil case Koulias V. Arktinos, 2289/2007<sup>418</sup>. In the first case, the main shareholder of the publication was acquitted because the charges against him had been withdrawn, while in the second case the court decided that “no testimony had been furnished that he had any link or involvement in the incriminated articles, i.e. that he had encouraged the publication and /or that the published material had its approval.

*A private place*

An example where the question of defining a place as a private one is taken in case 1105/2005, in respect of secret recording in a school teaching room. The court noted<sup>419</sup> that this poses a question, but it defines the criteria on which the decision can be made:

*“The notion of a private space, cited in paragraph (d) of regulation 27(1) presents a special difficulty in the present case. A space integrated in the operation of a public school or found in a public place is not meant that it cannot be private. This always depends on all that makes up its physiognomy and the needs of the specific case. A lyceum class-room is a space, a private one. This is the place which during teaching is dedicated to a goal that excludes any one who does either not belong to the class or has no institutional access, with a main feature of that goal the relationship of confidentiality between teacher and students, a relationship that its accomplishment needs that privacy of the place.”*

*Private life /privacy*

In the same vein as above, the court examined whether the circumstances of a teacher in a classroom justify the claim that this is part of his private life. It is noted<sup>420</sup> that

*“the fact that the recording was effected in the place of the persons professional activity and aimed at stigmatising an unacceptable behaviour of him, this does not mean that the recording did not connect to his private life too. This did not belong to the framework of a*

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<sup>417</sup> Supreme Court decision on appeal case Philippou V Arktinos, decided 1 November 2006, available in Greek at [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_1/2006/rep/2006\\_1\\_1124.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_1/2006/rep/2006_1_1124.htm) accessed 6 August 2015.

<sup>418</sup> District Court of Nicosia, decision on civil case 2289/2007, Koulias V. Arktinos, decided 20 March 2013, available in Greek at <http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseised/pol/2013/1120130157.htm>.

<sup>419</sup> See note 10.

<sup>420</sup> Idem.

*professional function. It was harming his personality of teacher as part of his private life”, concluded the court.*

#### *Consent and issues of identification*

Various examples are provided on the matter of identification of a person – victim of a defamatory or damaging publication. On the issue of consent, two cases are illustrating the criteria to use in deciding whether consent has been secured during collection of information and before transmission. The regulator's decision to punish a TV channel that transmitted, in a live programme, a recorded interview of a woman, raped by Turkish army men during the summer 1974, without any attempt not to disclose her identity was dismissed by the court.<sup>421</sup> It is noted in the court's decision that she gave her consent and she had initiated the interview by calling herself the journalist, in an effort as she had said to share her pain with the public and “liberate” her self. The fact that the interview was recorded before transmission and that she did not react in any way to avert the broadcast means that she had control on the content and the process, noted the court.

In a second case, a TV crew that entered a public school without authorisation was called by teachers to hand them the tape of recordings they did without their consent. Their reactions became the subject of a TV news item, where they were presented in a defamatory manner, as the court decided. However, the trial court did not find a sure connection of the plaintiffs, except for one teacher. The appellate court<sup>422</sup> dismissed that approach and noted that the image of the teachers that was shown on the screen, and where they had identified themselves in the picture, even without explicitly named, could not be separated from the narration that was defamatory. Identification does not necessarily mean naming a plaintiff.

In a third case, the TV channel that was punished for possibly causing strain to persons or relatives of persons involved in a car accident by not hiding the cars' plates on screen challenged the decision on various ground; among other, it claimed that the Radio Television Authority had not made any official investigation to verify the identity of the vehicles'

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<sup>421</sup> Supreme Court, decision on case 166/2007, *Antenna V CRTA*, decided 1 November 2011, available in Greek, at [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_3/2011/rep/2011\\_3\\_0691.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_3/2011/rep/2011_3_0691.htm), accessed 5 August 2015.

<sup>422</sup> Supreme Court, decision on appeal case 11972/2004, *Ioannou et alii V. Paphos TV*, decided 19 April 2006, available in Greek at, [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_1/2006/rep/2006\\_1\\_0344.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_1/2006/rep/2006_1_0344.htm), accessed 5 August 2015.



owners. The court<sup>423</sup> decided that for the purpose of the procedure before the Authority this kind of identification was not necessary.

The law does not prescribe any details or guidance on how to avoid a violation of the rights of persons and protect their dignity, reputation etc. The exposure of persons in custody or prosecuted by the press and broadcast media is a daily phenomenon, as is also a practice to name them and present news in a way that presumption of innocence is not respected. However, there are cases where efforts are made to disguise or alter pictures in a way to make persons or places non-recognisable. Rasterisation, pixelisation, reverse black and white, a circle covering faces or places and other techniques are employed. However, the means and processes used vary and they do not indicate any customised practices do exist. Thus, the attempt is sometimes a failed one, not ensuring protection. Such is the following case, where data on a female teacher's mobile phone were secretly stolen by lyceum students and her photos sent to other students. The relevant report of the CRTA noted that instead of employing various techniques to cover/hide faces or change how places appear in reality, as well as some information disclosed could not exclude the possibility to recognise the buildings and identify persons involved. As the Court cited from the Authority's report, "*Information transmitted by the channel have probably disclosed the identity of the teacher, since in two reportages in the news, details on the school, the specialisation of the teacher and her age were presented, while her photo naked [altered] was repeatedly shown with a mention that she was naked.*"<sup>424</sup>

Further, there appears also the example of an erroneous identification, due to not sufficient investigation by the journalist and his newspaper and exposing the wrong person. This was the case of a pilot that was presented as flying with an expired license. The court noted<sup>425</sup> that "*The claim of the appellants that the report was about another person, based also on an error of date, was not supported by the facts and circumstances of the*

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<sup>423</sup> Supreme Court, decision on case 511/2005, Sigma V CRTA, decided 16 February 2007, available at: [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_4/2007/4-200702-511-2005.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_4/2007/4-200702-511-2005.htm) accessed 5 August 2015.

<sup>424</sup> Supreme Court, decision on case 1829/2008, Antenna V CRTA, decided 30 September 2011, available in Greek at: [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_4/2011/4-201109-1829-08.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_4/2011/4-201109-1829-08.htm).

<sup>425</sup> Supreme Court of Cyprus, decision on Appeal Case 15/2009, Phileleftheros & Theocharides v. Christodoulou, decided on 20 July 2012, available in Greek at: [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_1/2012/rep/2012\\_1\\_1763.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_1/2012/rep/2012_1_1763.htm).

case, the Court decided. Thus, the respondent could also be identified as the pilot of the specific flight by a small number of persons.”

#### *The right to correction*

Remedies for persons that believe their rights are damaged are set in the laws and they vary from the right to correction, the right to reply and seeking damages in court for libel or defamation. With respect to the exercise of this right, it appears interesting the decision of the court on the case of the recording of a teacher in class above.<sup>426</sup> Fairness and pluralism through the presentation of the views of the 'other' set in art. 26(2) of the law N. 7(I)/1998 and the right to correction under regulation 24(1), have no meaning under the circumstances, noted the court:

*“Art. 26(2) and reg. 24(1) are linked here more with the circumstances of transmission and their significance recedes in view of the conclusion that because of the circumstances of the recording is was unacceptable to transmit the content of the recording. For the channel, to offer the teacher the opportunity for [presenting] his views or explanations might have no substantial value here.”*

#### Case law on privileges and defences

Standard privileges and defences are provided in legislation and implemented by courts. We take here three cases from the press in cases of suits for libel and defamation.

#### *Defence of Truth*

In the aforementioned appeal case 15/2009<sup>427</sup>, in spite of the fact that the newspaper claimed that it had referred to another person, the Supreme Court decided that the article was indeed defamatory; this was so because the facts on which it was founded were not true, that the respondent flew in fact the plane and could be identified as the person to which the report referred.

In case *Arktinos V. Georgiades*, 108/2008<sup>428</sup>, where publishers of a newspaper appealed a decision punishing them with heavy fines for libel

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<sup>426</sup> Supreme Court, decision on case 1105/2002, *Antenna V. CRTA*, decided 21 May 2004, available in Greek at, [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_4/2004/rep/2004\\_4\\_0411.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_4/2004/rep/2004_4_0411.htm).

<sup>427</sup> Supreme Court of Cyprus, decision on Appeal Case 15/2009, *Phileleftheros & Theocharides v. Christodoulou*, decided on 20 July 2012, available in Greek at: [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_1/2012/rep/2012\\_1\\_1763.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_1/2012/rep/2012_1_1763.htm).

<sup>428</sup> Supreme Court of Cyprus, Appeal Case 108/2008, *Arktinos Publications V. Georgiades*, decision 4 March, 2011, available in Greek, at [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_1/2011/1-201103-118-08.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_1/2011/1-201103-118-08.htm).

/defamation of a singer /artistic agent, the first instance decision was reversed. After reviewing in detail the material published by the newspaper, the Supreme Court decided that *“the published material has nothing of any unreasonable excess and they show in a balanced manner a realistic picture of the flow of events on the specific case, which was undoubtedly one of public interest”*. It continues in stressing that the published material did not deviate from the testimony that the police had in their hands and what was testified in court. The first instance court failed to give due weight to the fact that the police was investigating sexual assault against females based on written testimonies by the plaintiffs without identifying them as the truth. It also failed to seek the meaning of the published material as a whole, erroneously examining each publication in a narrow way, even seeking concepts and meanings of individual terms not within the spirit of the article.

In the case *Droushiotis V. Papadopoulos*, 54/2008<sup>429</sup>, the Supreme Court did not agree with the first instance court that the article imputed to N.P. “dishonesty, immorality, indignity, corruption, interweaving and use of unethical methods to obtain financial and personal benefits”, but it found that the article was defamatory as it left open the possibility of such an interpretation. It further disagreed with the rejection by the lower court of the defence of truth, noting that the fact that N.P. was member of the governing body of another company named *Suphire xxxx* of which the criminally investigated company was a subsidiary did not change the substantially true basis of the statement.

We see in the cases above explicit mention to public interest, as was the case 108/2008<sup>430</sup> above where the court decided that press reports offered *“a realistic picture of the flow of events on the specific case, which was undoubtedly one of public interest”*.

#### *Privilege and Fair comment – Public interest*

In the appeal case above, 15/2009,<sup>431</sup> the court rejected the defence of qualified privilege and fair comment. It noted,

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<sup>429</sup> Supreme Court, appeal case *Makarios Droushiotis V. Nicholas Papadopoulos*, 54/2008, decided 30.01.2012, available in Greek at [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_1/2012/1-201201-54-08.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_1/2012/1-201201-54-08.htm).

<sup>430</sup> Supreme Court of Cyprus, Appeal Case 108/2008, *Arktinos Publications V. Georgiades*, decision 4 March, 2011, available in Greek, at [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_1/2011/1-201103-118-08.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_1/2011/1-201103-118-08.htm).

<sup>431</sup> See note 18.

*“...the claim of privilege, based on fair comment was rejected as this was not an opinion, but about facts, the expiration of the licence, that was not true. The Court took into account innuendos /the implicit meanings of an irresponsible, negligent and careless pilot that performed his duties inadequately, as he flew for weeks with his licence expired. Additionally, the publication took place some days after the crash of a flight...”*

In the second case, *Arktinos V. Georgiades*, 108/2008<sup>432</sup>, it was observed by the Court that

*“the factual basis of the published material was a real one and comments were reasonable, fair and honest. Where an issue of a qualified privilege was raised, the publication was well founded on that right and made it in good faith; when reporting on deliberations in court this was done in a fair manner.”*

In the case of *Droushiotis V. Papadopoulos*, 54/2008<sup>433</sup>, the court evaluated favourably the article as a whole, noting that it shows that the journalist’s comments “...are an expression of sincere and honest opinion on a matter of great public interest”. It also concluded that in the absence of any proof by the appellant that the comments were made in bad faith, and given that the defendant had an obligation, as a journalist to proceed to the publication, inform the public on a matter of public interest and protect thus the public, the qualified privilege of fair comment also applied.

### **3. Conclusion and perspectives**

Legislation, regulation and self-regulation in respect of media work and journalism in the Republic of Cyprus are limited to the founding principles and basic rules. There is very little with regard to recommendations and guidelines that could inform the daily work of media and journalists. This has been done by sole the media complaints Commission (CMCC) that has appended explanatory notes to the Code of Ethics. They can serve as guidance to media professionals, but the lack of systematic or any training at all, open to the public or in-house does not allow a good knowledge and understanding of how to deal with daily tasks. Decisions by the media regulator - the Cyprus Radio Television Authority, since 2000, and most importantly case law by the Supreme Court are offering a clearer picture on standards, offering interpretation of the general principles and rules set in the laws. This is enriched by the fact that the courts closely follow and

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<sup>432</sup> See note 21.

<sup>433</sup> Supreme Court, appeal case *Makarios Droushiotis V. Nicholas Papadopoulos*, 54/2008, decided, 30.01.2012, available in Greek at [http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros\\_1/2012/1-201201-54-08.htm](http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_1/2012/1-201201-54-08.htm).

apply the case law of the ECHR. However, in the absence of specialised works, articles, books and secondary sources, there is difficulty in addressing and assessing the actual state of the matter or even having a comprehensive picture of it. There are however some significant observations to make:

- Cyprus is among the countries with the highest number of libel court cases, per 1000 people, following Sweden and Moldova.<sup>434</sup> Political figures and other public figures are in most cases the plaintiffs. At the same time one may notice very few cases where plaintiffs are companies. The above may point to various directions: Media are dependent on businesses, while business people control in some way the information flow, through intertwined interests. There might be also a need for more informed journalists in the exercise of their profession, while at the same time they might subject their work to self-censoring.
- Most products of investigative journalism, which remain however very limited, appear to relate to the administration with little done on businesses and the private sector in general. It is guided to a great extent by political rivalries, in particular after the 2004 referenda on a plan of the United Nations for the Re-unification of the island. This caused a division among media and society in general between the supporters and the opponents of the plan.
- The standard of journalists training and understanding of their work remain also limited, while not any significant effort has been undertaken in a systematic way to improve the situation. This a matter that needs to be urgently addressed. In a similar vain, media need to have legal advisors as many libel cases emerge out of ignorance of the basic rules to avoid publishing a libel.

The above point to the need for substantial work in the education and regular training of journalists on ethical and legal standards, while at the same time, various instances from the state level to professional media agents should work on the elaboration of more detailed rules, but also guidelines, regulatory and self regulatory measures. These products should not remain simply on paper, they should become the guides of journalists and be regularly reviewed and updated.

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<sup>434</sup> Report by Article 19, available at: <https://www.article19.org/data/files/medialibrary/1427/civil-defamation.pdf>, p. 7.

## Epilogue

Drafting this report was not an easy task, in particular because of the nature of the topic. In fact, the concept 'investigative journalism' is neither a legal nor a narrowly defined term; it is a practice of a relatively vague definition, that is generic and broad. As such, it is linked to many different aspects of media and journalism work, as well as to various legal concepts: Free expression, secrecy of communication, privacy, respect of dignity and other rights etc. An important concept that is connected to such issues is that of libel-defamation, as a result of publications based on investigative journalism, which is by itself a huge subject. As it appears from the brief overlook of concepts that courts referred to in decisions and succinctly presented here, presenting simply rules on secret recordings, searches of offices and how courts deal with investigative journalism do not suffice to enlighten the subject. There is need to talk about the interpretation by courts of many concepts, in the light of different circumstances and a variety of cases. Most importantly, we rather need to make the topic more specific, leaving aside terms and concepts that are broad and relatively vague, which is 'investigative journalism'.

What we are missing is a statistics and studies on the role of media in respect of the issues linked to investigative work and establish their various parameters: Cases, ratio of public figures and businesses targeted, motives, outcome in practice (investigations by justice system, dismissals, punishments etc) as well as how many cases end up in libel or other lawsuits and their outcome.



## **5. Czech Republic**

Jan Fucik



## 1. Questions 1. – 5.

### *Constitution*<sup>435</sup>

The right to freedom of expression and the information is regulated by Article 17 of the Declaration of Human rights and Fundamental Freedoms – which is an integral part of the Czech Constitution:

#### *Art. 17*

Everyone has the right to express his views in speech, writing, printing, painting or otherwise, as well as the freedom to seek, receive and impart information and ideas regardless of frontiers.

#### *Case Law*

The Czech Constitutional Court has heard a complaint from a broadcaster about a fine imposed on it for broadcasting a “Big Brother”-type reality show. The Broadcasting Council had decided that the broadcaster should pay a fine of CZK 200,000 for violating Article 32 of Law no. 231/2001, which prohibits broadcasters from broadcasting TV programmes that endanger the physical, spiritual or moral development of children, between 6 a.m. and 10 p.m. Some parts of the programme had contained scenes that harmed human dignity and interpersonal relations, as well as vulgar and bad language. After appeals against the Broadcasting Council’s decision had been rejected by the Prague Municipal Court and the Supreme Administrative Court, the broadcaster lodged an appeal with the Constitutional Court because it thought the decisions of the Broadcasting Council and the courts had infringed its fundamental rights. The Constitutional Court agreed with the administrative courts’ interpretation of the law. It also explained that the appellant had not been prosecuted for broadcasting the show, but because of the timing of the broadcast. The fact that the appellant disagreed with the courts’ conclusions did not mean that the complaint about infringement of the Constitution was well-founded and, in any case, did not represent a violation of its fundamental rights. Since the decisions of the courts could not be described as arbitrary, they did not infringe the appellant’s fundamental rights. The Constitutional Court therefore rejected the complaint.<sup>436</sup>

On 25 November 2010, the Constitutional Court of the Czech Republic ruled on a case concerning freedom of expression in caricatures and noted that the freedom of expression was not limitless and that drawings showing naked politicians carrying out sex acts exceeded the admissible limit of

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<sup>435</sup> Declaration of Human rights and Fundamentals Freedoms.

<sup>436</sup> Usnesení Ústavního soudu České republiky č.j. I.US 1110/2009 ze dne 23. září 2010 (Decision of the Czech Constitutional Court, 23 September 2010) <http://merlin.obs.coe.int/redirect.php?id=12837>.

satire and exaggeration. This decision represented victory for a former Czech minister in a legal dispute with the Czech magazine Reflex. The magazine's publisher, Ringier, therefore lost its appeal to the Constitutional Court, in which it had claimed that it had suffered damage as a result of the courts' order that it should apologise for the aforementioned caricatures. It had argued that its freedom of expression and artistic freedom had been violated. The dispute over the caricatures lasted nine years. In May 2001, a caricature had been published in the satirical comic strip Green Raoul, showing the then minister naked, engaging in sex acts with colleagues. The minister sued the magazine for damaging his reputation as a citizen and a minister and exceeding the limits of freedom of speech. The municipal court in Prague, the appeal court and the Supreme Court all decided that the magazine's publisher should apologise. They rejected the defence's argument that political satire and exaggeration of this kind were acceptable. The Supreme Court in Prague ruled that the images bordered on pornography and seriously infringed the common rules of decency. The Senate of the Constitutional Court upheld the courts' arguments and rejected the magazine publisher's claims. The judges confirmed that, although politicians had to endure a high level of criticism, freedom of expression was not totally limitless. Even caricatures, which could go further than other works, had to respect certain boundaries in relation to the freedom of expression.<sup>437</sup>

The Ombudsman of the Czech Republic had asked the Constitutional Court to rule on the compatibility with the Constitution of the Decree implementing the Secrecy Act. It was claimed that the Decree would not be consistent with the constitutional law principles of legal certainty and the predictability of state action. The protection of classified information is organised on two levels in the Czech Republic: general regulations are set out in the Secrecy Act, which defines matters that should be kept secret as "matters which, if known to the public, could jeopardise the interests of the Czech Republic or interests which the Czech Republic is obliged to protect". In order to implement the Act, the government has to issue a Decree listing matters that must be kept secret. A list of 18 such matters was appended to the Decree that was subsequently issued. Of these, 17 refer to actual files, while the final one covers "sensitive economic and security information linked to international relations". In the Ombudsman's view, such a general provision is open to abuse and arbitrariness on the part of the authorities, particularly in relation to the transmission of information to the media. The list of secret matters should be worded in

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<sup>437</sup> Nález Ústavního soudu II.ÚS 468/03 z 25.11.2010 (Constitutional Court decision of 25 November 2010): <http://merlin.obs.coe.int/redirect.php?id=12930> CS.

precise terms. However, the Constitutional Court dismissed the Ombudsman's application on the grounds that if all secret matters had to be worded in precise terms, the objectives of the Act could not be met. Then, secret information might instead have to be revealed. Predictability and legal certainty, however, should not be considered absolute objectives.<sup>438</sup>

*Broadcasting Act*<sup>439</sup>

ACT No. 231/2001 of 17 May 2001 on Radio and Television Broadcasting and on Amendment to Other Acts. This Act transposes the relevant regulations of the European Union and regulates the exercise of state administration in the field of radio and television broadcasting. Issues concerning the program content are regulated in Article 31 of the Act.

*Section 31 (Broadcasting Act)*

(1) A broadcaster and rebroadcaster shall be entitled to broadcast programmes in a free and independent manner. Any intervention in the contents of the programmes is only admissible on the basis of law and within the limits thereof.

(2) A broadcaster shall provide objective and balanced information necessary for opinions to be freely formed. Any opinions or evaluating commentaries shall be separated from the information having the nature of news.

(3) A broadcaster shall ensure that principles of objectivity and balance are complied with in news and political programme units and that, in particular, no one-sided advantage is – within the broadcast programme as a whole – given to any political party or movement, or to their views, or the views of any groups of the public, taking account of their real position within the political and social life.

Protection of persons affected by the content of radio or television broadcasting

The Broadcasting Act stipulates, in accordance with the European Directive on Audiovisual Media Services, that if any announcement containing any factual information affecting the honour, dignity or privacy of a natural person or the good name or reputation of any juristic person was made public in television broadcasting, then such a natural person or juristic person shall have the right to request that a response be transmitted

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<sup>438</sup> Nález Ústavního soudu České republiky (Ruling of the Constitutional Court of the Czech Republic), 23 February 2004, No. Pl. ÚS 31/03, available at: <http://merlin.obs.coe.int/redirect.php?id=9004>.

<sup>439</sup> Broadcasting Act <http://www.rtv.cz/cz/static/cim-se-ridime/stavajici-pravni-predpisy/pdf/231-2001.pdf>.

by the broadcaster. If the request is justified the broadcaster is obliged to make it public. The reply must be limited to a factual assertion through which the contested assertion is rectified or through which any incomplete or otherwise distorting assertion is complemented or put more precisely. The reply must be adequate to the extent of the announcement concerned; in the event that the reply only applies to part of such an announcement the reply must be adequate to the extent of such a part. The reply must also indicate by whom the reply is made. The Broadcasting Act also stipulates the right to an additional announcement. This applies in the case that the television broadcasting makes public any announcement of criminal proceedings or proceedings in respect to petty offences where proceedings were taken against a natural person, or proceedings in respect of administrative tort which proceedings were taken against a natural person or juristic person, whereby the natural person or juristic person can be identified from such proceedings, and if such an action or proceedings have not been terminated by an effective decision. The person affected has the right to request that information on the results of such proceedings be transmitted as an additional announcement by the broadcaster.

The request to transmit a reply and additional announcement must be made in writing. It must clearly indicate what in the transmitted announcement was the actual information affecting the honour, dignity or privacy of the natural person or the good name or reputation of the juristic person. Such a request must also contain the proposed wording of the reply or additional announcement. Should the broadcaster fail to grant the request, the right may be enforced at the courts of justice.

Protection of personality may also be claimed by invoking provision of the Civil Code. Pursuant to the Civil Code, the person whose right to the protection of personality was infringed upon by broadcasting may claim adequate satisfaction. The satisfaction is provided in monetary form, unless another form of genuine and sufficiently effective redress of the inflicted damage is found. Such another form may consist, e.g., of the publication of an apology in broadcasting or the sending of a letter of apology.

#### *Section 35 (Broadcasting Act) – Right of reply*

(1) If any announcement containing any factual information affecting the honour, dignity or privacy of a natural person or the good name or reputation of any legal person was made public in radio or television broadcasting, then such a natural person or legal person shall have the right to request that a reply be broadcast by the radio or television broadcaster. The radio or television broadcaster shall broadcast such a reply upon such a natural person's or legal person's request.

(2) The reply shall be limited to a factual assertion by which any assertion referred to in Paragraph 1 above is rectified or by which any incomplete or otherwise distorting assertion is complemented or put more precisely. The reply shall be adequate to the extent of the announcement concerned; if the reply only applies to a part of such an announcement the reply shall be adequate to the extent of such a part. The reply shall also indicate by whom the reply is made.

(3) The natural person or legal person upon whose request a reply was broadcast by the radio or television broadcaster under this Act may not request that a further reply to such a reply be broadcast.

(4) Upon the death of the natural person, the right referred to in Paragraph 1 above shall be held by such a person's spouse and minors and, if there are no spouse and minors, then such a right shall be held by such a person's parents.

(5) Provisions of a special legal regulation on the protection of personality and on the protection of the good name or reputation of legal persons shall remain unaffected by the provisions referred to Sections 35(1) to (4).

*Section 36 – Additional announcement*

(1) If the radio or television broadcasting makes public any announcement of criminal proceedings or proceedings in respect of petty offences which proceedings were taken against a natural person, or proceedings in respect of administrative offences, which proceedings were taken against a natural person or legal person, whereby the natural person or legal person can be identified from such an announcement, and if such proceedings have not been terminated by a final decision, then such a person shall have the right to request that information on the result of such proceedings be broadcast as an additional announcement by the broadcaster. The broadcaster shall broadcast information on such a final decision as additional announcement upon such a person's request.

(2) Upon the death of the natural person, the right referred to in Paragraph 1 above shall be held by such a person's spouse and minors and, if there are no spouse and minors, then such a right shall be held by such a person's parents.

(3) Provisions of a special legal regulation on the protection of personality and on the protection of the good name or reputation of legal persons shall remain unaffected by the provisions referred to Sections 36(1) and (2).

*Section 37 – Submission of request to broadcast a reply and additional announcement and the requisites thereof*

(1) The request to make public a reply or additional announcement shall be in writing.

(2) The request to broadcast a reply shall clearly indicate what in the transmitted announcement was the actual information affecting the honour, dignity or privacy of the natural person or the good name or reputation of the legal person. Such a request shall also contain the proposed wording of the reply or additional announcement.

(3) The request to broadcast a reply shall be delivered to the broadcaster no later than 30 days of the date on which the challenged announcement was made public in radio or television broadcasting, otherwise the right to reply shall lapse.

(4) The request to broadcast an additional announcement shall be delivered to the broadcaster no later than 30 days from the finality of the decision by which the proceedings were finally terminated, otherwise the right to additional announcement shall lapse. In the event that the final decision was cancelled the above provision shall apply *mutatis mutandis*.

*Section 38 – Conditions for making public a reply and additional announcement*

(1) A broadcaster shall broadcast a reply or additional announcement:

(a) in the same programme unit in which the challenged announcement was broadcast and if that is not possible, then in a broadcasting time of the same value as that at which the challenged announcement was broadcast. In terms of form the new announcement shall be on a par with, and in terms of extent it should be adequate to, the challenged announcement,

(b) with express indication of “Response” or “Additional Announcement”,

(c) at the broadcaster’s own expenses,

(d) in the same language in which the challenged announcement was broadcast,

(e) with indication of the name and surname of the natural person or name of the legal person who or which applied for the reply or additional announcement to be broadcast, if such a person so requests.

(2) The broadcaster shall broadcast such a reply or additional announcement within 8 days after delivery to it of the request for such a reply or additional announcement to be broadcast.

(3) In the event that a broadcaster’s radio and television broadcasting authorisation terminates, such a broadcaster shall, at its expense and under conditions laid down herein, ensure that the reply or additional announcement is broadcast in another broadcaster’s radio or television broadcasting, covering a similar number of listeners or viewers in the same region in which the challenged announcement was made public.

*Section 39 – Enforcement through a court of the right of reply and additional announcement*

(1) If the broadcaster fails to transmit a reply or additional announcement or if the broadcaster fails to meet the conditions of broadcasting the reply or additional announcement as referred to in Section 38 above, then a Court shall decide on the obligation to broadcast such a reply or additional announcement, doing so upon request submitted by the person who requested such a reply or additional announcement to be broadcast.

(2) Such a request shall be filed with the Court no later than 15 days after expiry of the period required for the broadcasting of the reply or additional announcement, otherwise the entitlement to enforce the broadcasting of a reply or additional announcement through the court shall lapse.

*Section 40 – Exemptions from the obligation to broadcast a response and additional announcement*

(1) A broadcaster shall not be obliged to broadcast a reply or additional announcement if:

(a) making the proposed text public would involve the commitment of a criminal act or administrative offence,

(b) making the proposed text public would involve immoral offence,

(c) the challenged communication or part thereof is quoted from a third party's communication intended for the public, or is a true interpretation thereof, and was marked or presented as such.

(2) The broadcaster shall not be obliged to broadcast a reply if the relevant request challenges a text published on the basis of a conclusive prior consent of the person who submits such a request.

(3) The broadcaster shall not be obliged to broadcast an additional announcement if prior to the delivery to the broadcaster of the request to broadcast such an additional announcement the broadcaster had made public, upon its own initiative, an announcement corresponding to the additional announcement, provided that the conditions laid down in this Act were met.

*Section 41 – Protection of the information source and content*

(1) Any natural person or legal person who/which took part in obtaining or processing the information made public or to be made public in radio or television broadcasting shall have the right to deny disclosure of the origin of such information or the content thereof to the court or any other State authority or public administration authority.

(2) Any natural person or legal person who/which took part in obtaining or processing the information made public or to be made public in radio or television broadcasting shall have the right to deny submission or delivery,

to a court or a State authority or public administration authority, of any items from which the origin or content of such information might be derived.

(3) The obligations laid down in a special legal regulation and requiring avoidance of any favouritism for offenders and to prevent or report criminal offence shall remain unaffected by the rights referred to in Paragraph 1 and Paragraph 2 above, and so shall remain, in relation to such obligations laid down in specific legislation, any obligations as may be prescribed in the penal proceedings.

*Case law – Decision of the Highest Court concerning personality protection<sup>440</sup>*

Broadcaster TV Prima failed in the long litigation to defend the publication of untreated photos thirteen year old boy, one of the supporting actors of so called Kuřimská cases. The Supreme Court upheld the verdict, which the boy awarded compensation of 100,000 CZK. The FTV Prima in the appeal referred to the so-called news license, but the court supposed rather denigration or defamation goals. The so-called Kuřimská case is probably the most famous case of the brutal treatment of children in the country. Two maltreated boys lived with his divorced mother. According to the judgment mother, her sister and friends imprisoned the boys in cages, beaten and otherwise mistreated boys from summer 2006 to May 2007 at various locations. Mother of boys court imposed nine years in prison, her sister ten years. They are now free. The background of the event has never been satisfactorily explained. Media later published picture of a boy. The family considered it as unjustified interference with privacy rights. Action to protect the personality of the boy first ended in failure in 2012. The Supreme Court ordered the case reopened and the Board of the Prague High Court ruled in favor of boy. Publication of photos was not necessary and exceeded the interests of the public information. Prima appealed under which the photos were published in accordance with the principles of so called news license. The public apparently has the right to know about the dangers of various sects, while it is apparently important to involve her in the search for the perpetrators of crime. Publication of photos was not accompanied by any derogatory information. Advocate of the boys, now an adult young man, on the contrary, reminded that if we have in penal law protection of juvenile offenders against publication of their pictures, we must have a protection of victim of a crime. The highest court in the final resolution recalled that the portrait of a person must not be used in news

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<sup>440</sup> Usnesení Nejvyššího soudu č.j. 30 Cdo 252/2014 z 25.6.2014 (Decision of the Highest Court): [http://www.nsoud.cz/judikatura/judikatura\\_ns.nsf/WebSearch/6C59B8F1C215D1C0C1257D2D0034D2B0?openDocument&Highlight=0](http://www.nsoud.cz/judikatura/judikatura_ns.nsf/WebSearch/6C59B8F1C215D1C0C1257D2D0034D2B0?openDocument&Highlight=0).



contrary to its legitimate interests. Publication of photos of the boy apparently was not used merely to inform society, but also with defamation and denigration goal, and therefore cannot be included under news license.

*Public Broadcasters Czech Television and Czech Radio* <sup>441</sup>

Czech Television (ČT) and Czech Radio (ČRo) are operators of public service television and radio broadcasts. Czech Television provides a public service by creating and distributing television programmes or other multimedia content and services throughout the Czech Republic. Czech Radio is tasked with the production and broadcasting of radio programmes. ČT and ČRo were founded by separate laws that establish their personality and independence of the state. These laws defined the tasks of public services and the organization of these institutions. According to the Law on the Czech Television (Nr. 483/1991 Coll)<sup>442</sup>, the remit is defined more precisely in Article 2 as follows:

(1) Czech Television shall provide public service by creating and distributing television programmes and prospectively also other multimedia content and supplemental services in the entire territory of the Czech Republic (hereinafter referred to as “public service in the television broadcasting area”).

(2) The main tasks of public service in the television broadcasting area include, without beány limited to:

(a) provision of objective, verified and generally balanced and comprehensive information as may be needed for opinions to be freely formed,

(b) contributing to legal awareness among the citizens of the Czech Republic,

(c) creating and disseminating programmes and providing a well-balanced offer of programme units for all groups of population with respect to the freedom of their faith and conviction, culture, ethnic or national origin, national identity, social origin, age or gender so that the programme units reflect the diversity of opinions and political, religious and philosophical orientations and artistic trends, with a view to promoting mutual understanding and tolerance and supporting coherence of the plurality society.

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<sup>441</sup> Zákon o českém rozhlase: <http://www.rrtv.cz/cz/static/cim-se-ridime/stavajici-pravni-predpisy/pdf/484-1991.pdf>.

<sup>442</sup> Zákon o České televizi: <http://www.rrtv.cz/cz/static/cim-se-ridime/stavajici-pravni-predpisy/pdf/483-1991.pdf>.

*Kodex ČT - principles of public service provision*

in the area of television broadcasting<sup>443</sup> Czech Parliament approved a code for the public service broadcaster Česká televize (Czech Television - CT), which, in accordance with Article 8 (1c) of the Czech Television Act, had been drawn up by the CT Director General and approved by the CT Council. The code is designed to set out and establish the principles for the operation of public service television and thus become an effective instrument for ensuring that the objectives of public service television are fulfilled. The code's provisions apply to CT and its employees, including those recruited on a contractual basis. Breaches of the code are treated as disciplinary offences and may result in dismissal. According to the law and the code, CT plays a part in the process of the free formation of opinion and is thus under an obligation to the general public. Its programmes must, in accordance with the relevant programme category, help to provide comprehensive information and contribute to the free formation of individual and collective opinions. They must provide education, advice and entertainment and fulfil the cultural remit of television. They should contribute to social cohesion and take into account in an appropriate manner the whole spectrum of views present in society. They should therefore include programmes of interest to society which, under purely economic considerations, would not normally be broadcast. CT must also lay down quality standards. This part of the remit of public service television is developed further in the code, which is to serve as a reference point for decisions taken in relation to practical questions and problems. The code also establishes a CT ethics committee, the members of which will be appointed by the CT Director General. Its tasks are to protect freedom of opinion and independence and to draft reports on programming issues.

*Article 5 (Kodex CT) – The culture of information in news and current affairs programmes*

5.1 The primary task of Czech Television is to provide information in news and current affairs programmes. It shall provide the viewers with information necessary for their overall orientation in the world and for a free formation of opinion. The schedule shall always include slots reserved for regional news.

5.2 In cases of urgent need, Czech Television shall be prepared to interrupt the broadcasting of scheduled programmes by special news editions.

5.3 The primary task of the current affairs programmes of Czech Television is to offer a critical reflection of reality; they must go into the core of things, bring to light true causes of events or phenomena, and describe the extent

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<sup>443</sup> Kodex ČT: <http://img.ceskatelevize.cz/boss/image/contents/kodex-ct/pdf/kodex-ct.pdf>.

of their consequences. Current affairs programmes shall also provide the actual protagonists of the reported events with more opportunities to present arguments justifying their opinions and attitudes. Investigative current affairs programmes examining serious breaches of law, corruption and the protection of rights and interests of the citizens play an indispensable monitoring role in the development of a democratic society. Current affairs programmes shall also deal with environmental issues and the problems of ethnic minorities, physically handicapped citizens and other groups like e.g. senior citizens, people in difficult material circumstances or consumers. The range of the aforementioned programmes must correspond to the current needs of society, surveyed principally via representative socio-demographic research.

5.4 The placement of a piece of information in the news agenda shall be determined by the seriousness of its expected impact on the lives of the inhabitants of the Czech Republic. The editors responsible for the character of the news may not, however, overlook the importance of international influences and relationships whose effect is felt across the boundaries of states, continents or cultures. News and current affairs thus shall present the Czech Republic within the context of European and world affairs.

5.5 Czech Television shall treat information acquired in the interest of viewers as a value that it may not usurp for its own use, nor trade or make the object of any speculation. The primary motive of Czech Television must always be to act in such a way as to prepare the information with expert care for broadcasting and thus communicate it without delay to the viewers. 16

5.6 In its news and current affairs programmes, Czech Television shall pay attention to accuracy and impartiality of its broadcasting, which task consists primarily in the ascertaining and verification of facts.

5.7 Czech Television shall make strict distinction between news and judgment (commentary). In this context, the term "news" means a factual statement providing information about a particular process or state. News usually also contains information on the attitudes of the main protagonists of the reported event. As opposed to news, judgment expresses opinions, attitudes or feelings. In its relationship to viewers, Czech Television must be able to maintain a clear separation of news from judgment; in particular, it may not blend news and judgment in one sentence of the editor. It is also unacceptable to present mere suppositions and conjectures as news.

5.8 All news must be based on established and verified data. The collection and processing of information in Czech Television is subject to the imperative requirement to establish a true image of reality and present it to the viewers, or, where this is not wholly possible because of the lack of some relevant information, try to get as close to the truth as possible. The withholding of important information from the viewers or any suppression

of some of its important aspects shall always constitute a serious violation of the aforementioned imperative.

5.9 Czech Television may broadcast a piece of news confirmed by at least two creditable and mutually independent sources; only in the case of information made available officially by public authorities and institutions may it accept just the single official source, unless the circumstances clearly indicate that the data provided by it are untrue or inaccurate.

5.10 Evaluative judgments are always subjective and as such they are not subject to the test of truth. However, this does not relieve Czech Television of its duty to include in the news and current affairs programmes only those evaluative judgments that are presented honestly, without any misleading manipulation of facts whereby the judgment is to be supported. The aforementioned duty, however, shall not prevent Czech Television from providing the audience with evaluative judgments of the protagonists themselves. In such a case, Czech Television shall leave it to the viewers to form their own opinion on whether the protagonists present their judgments in an honest way.

5.11 Czech Television may not broadcast information of unknown origin. It is obliged to inform the viewers about the source of the information broadcast, with the exception of facts that are generally known or of information taken from prestigious news agencies, supplying Czech Television with information on the basis of a valid contract. If the requirements of Articles 16.11 and 16.12 are met, the editor-in-chief of the relevant department may decide to protect the source in question and authorize an exception from the rule of mandatory source identification. The aforementioned provisions shall not prejudice the legal right of the editors to protect their sources.

5.12 Czech Television is obliged to ensure that the visual and graphic parts of the information in news and current affairs programmes contribute to the truthfulness and accuracy of the message. In this respect it must particularly avoid such methods of image processing that blend the news communicated by spoken word or written text with elements of judgment contained in the processing of the accompanying image (e.g. a deliberate selection of non-photogenic shots of the protagonists, artificial changes of dynamics or image quality etc.)

5.13 Czech Television may acquire information only by means of honest methods allowed by law.

5.14 The editors of Czech Television appearing in news and current affairs programmes must act in such a way as not to enable the viewer to divine their opinion on the issue about which they inform or report.

5.15 Where possible and suitable, Czech Television shall accompany the broadcasting of a piece of news with the identification of the editors responsible for its preparation.

5.16 The preparation of the content of Czech Television news and current affairs shall be governed by the principle of editorial autonomy, which consists principally in the duty of senior employees to exclude all external influences that could have bearing on the inclusion or non-inclusion of a piece of information in broadcasting, on its placement in the sequence or on its content. Apart from the organisational hierarchy of the relevant editorial department, only the Director-General or a senior manager of Czech Television authorised by the Director-General may influence the content of a piece of news or the decision on its inclusion or non-inclusion in broadcasting or on its placement in the sequence, and even the aforementioned persons may do so only in cases where it is clear that the publication of the news in question has resulted or immediately threatens to result in a breach of law. The instruction whereby the aforementioned intervention is made must be submitted to the editor-in-chief of the relevant department in writing. The provisions of the present Article shall not prejudice the competence of the Director-General and other senior managers to control and direct the departments in matters concerning personnel and operation.

5.17 The editorial decision-making is governed primarily by the criteria ensuing from the Code. The responsibility for news and current affairs programmes lies with the editors-in-chief of the respective departments.

5.18 If the preparation of a piece of news for broadcasting involved also the use of information or material processed by a person operating a public relations business (PR agency), it is the duty of Czech Television to point out to the viewers during the broadcasting of the news that the information or material in question come from the aforementioned source. The above provisions shall not affect the provision of Article 5.11.

*Article 14 (Kodex CT) – Presumption of innocence*

14.1 Czech Television is obliged to respect the principle of the presumption of innocence. According to the aforementioned principle, an accused person shall be deemed innocent and may not be spoken of as the perpetrator of the crime or misdemeanour in question till the coming into force of the court decision ascertaining his or her guilt. The principle of the presumption of innocence is binding in the first place on state authorities and in relation to Czech Television it may not be interpreted as an obstacle that would prevent Czech Television from informing the viewers about suspected criminal behaviour of a concrete person or from the publication of testimonies and information on the steps taken by state authorities in criminal or misdemeanour proceedings. Such interpretation would not enable Czech Television to inform truthfully about matters of public interest. However, Czech Television shall always have the duty to refrain from any statements that would present the suspect (the accused) as though he or she were already convicted by a legitimate decision.

14.2 If the publication of information gained by Czech Television independently of the bodies responsible for penal proceedings could jeopardise the tracing or detention of the perpetrator of a serious crime, Czech Television shall on the basis of a decision by the relevant editor-in-chief observe information embargo imposed on the case by the bodies responsible for penal proceedings, i.e. it shall not for the necessary period of time publish the relevant information. However, in such cases Czech Television shall always inform the viewers about its acceptance of the embargo.

14.3 If Czech Television informs its viewers that a certain person is suspected of having committed a crime, for which he or she has not yet been convicted by a legitimate decision, Czech Television shall broadcast also a corresponding statement of the suspect (the accused), if, with regard to the ongoing proceedings, such statement is available and may be published. The responsibility for the non-inclusion of the aforementioned statement in broadcasting for reasons of its unavailability or unsuitability for publication, shall be borne by a senior editor authorised by the editor-in-chief.

14.4 When informing about persons suspected of the perpetration of a minor crime, Czech Television shall refrain from the publication of the full name of the suspect (or, possibly, the convict) unless public interest in the particular case requires full identification. Under no circumstances, however, shall it publish the full name of the suspected or convicted person in cases of minor crimes perpetrated by juvenile delinquents.

14.5 When informing about criminal activities or misdemeanours, Czech Television shall not identify the relatives of the suspected or convicted person, except in cases where they do not conceal their identity or where they themselves took part in the wrongful activities, benefited from them or could exert practical influence on the course of the criminal or misdemeanour proceedings. If the suspected or convicted person has among its relatives a representative of public interest (e.g. a politician or a public official), the editor-in-chief of the relevant department may decide to identify such person in broadcasting even if none of the aforementioned conditions is met, provided that the criminal or misdemeanour proceedings could be significant for the judging of the actions of such person in a certain function, profession or office.

14.6 When broadcasting programmes or information on criminal activities, Czech Television shall refrain from provoking or enhancing sentiments conducive to revenge or to an illegal ostracising of suspected or convicted persons. It shall also refrain from scheduling programmes whose content would exert pressure on judges to deliver a specific judgment on guilt or penalty.

*Protection of the source and origin of information*

16.11 Czech Television shall have the right to guarantee anonymity to persons that have provided information or background material for its recordings, if the topic to which the information relates concerns public interest and the provision of the aforementioned guarantee is justified by serious reasons. Serious reasons within the context of this rule shall include justified concern about the safety, livelihood or the preservation of dignity of the source or persons close to the source. If, after prior instruction of the source about the legal limits of the guarantee, Czech Television decides to provide it, it is bound to keep its obligation not to reveal the source within the extent of its legal right to do so, except if it were uncovered that the source acted fraudulently in relationship to Czech Television. Czech Television is obliged to instruct the source in advance about the extent and limits of the aforementioned guarantee.

16.12 Under the conditions specified in Article 16.11, Czech Television shall not reveal nor surrender documents or other material or objects on the basis of which the source could be identified. The provisions of Articles 16.11 and 16.12 shall not prejudice the right of individual editors to protect their sources within the limits stipulated by law.

*Hidden camera or microphone*

16.13 Czech Television is authorised to make recordings without the knowledge of the persons recorded only in the cases and under the conditions provided for in the following Articles. The aforementioned Articles lay down the rules for the use of a hidden camera or microphone in news or current affairs as well as in the making of entertainment or art programmes.

16.14 Czech Television is authorised to use hidden camera or microphone for news or current affairs purposes in the treatment of a topic seriously concerning public interest, on the condition that the material to be recorded cannot, even with increased effort, be obtained otherwise and that such material is necessary for the treatment of the topic in question. When using a hidden camera or microphone, Czech Television shall pay special attention to the observance of restrictions protecting privacy (Articles 15.1 to 15.4). The selection of those parts of the recorded material that are to be used in the programme may include only sections directly related to the topic of the programme. Czech Television shall prevent any unauthorised use or publication of those parts of the material not used in the programme. Recording with a hidden camera or microphone shall include also situations when the person being recorded sees the camera or microphone, but has sufficient reasons to believe, that they are not in operation. When the recordings made with hidden camera or microphone are broadcast, the viewer must be informed of the fact that the shots have been obtained with the use of the aforementioned techniques.

16.15 In the recording of entertainment or art programmes, Czech Television may use hidden camera or microphone on the condition that the use of such devices does not inconvenience the persons being recorded or otherwise encroach upon their rights as private individuals. The use of such devices is authorised to make recordings without the knowledge of the persons recorded only in the cases and under the conditions provided for in the following Articles. The aforementioned Articles lay down the rules for the use of a hidden camera or microphone in news or current affairs as well as in the making of entertainment or art programmes.

16.14 Czech Television is authorised to use hidden camera or microphone for news or current affairs purposes in the treatment of a topic seriously concerning public interest, on the condition that the material to be recorded cannot, even with increased effort, be obtained otherwise and that such material is necessary for the treatment of the topic in question. When using a hidden camera or microphone, Czech Television shall pay special attention to the observance of restrictions protecting privacy (Articles 15.1 to 15.4). The selection of those parts of the recorded material that are to be used in the programme may include only sections directly related to the topic of the programme. Czech Television shall prevent any unauthorised use or publication of those parts of the material not used in the programme. Recording with a hidden camera or microphone shall include also situations when the person being recorded sees the camera or microphone, but has sufficient reasons to believe, that they are not in operation. When the recordings made with hidden camera or microphone are broadcast, the viewer must be informed of the fact that the shots have been obtained with the use of the aforementioned techniques.

16.15 In the recording of entertainment or art programmes, Czech Television may use hidden camera or microphone on the condition that the use of such devices does not inconvenience the persons being recorded or otherwise encroach upon their rights as private individuals. The use of the recorded material shall be subject to prior consent of the persons whose shots recorded by the hidden camera are to be used in the programme. Similar approach as with news and current affairs may be used also in the area of art documentaries. (Articles 16.13 and 16.14).

#### *Reporter's licence*

16.17 In exceptional cases which involve the monitoring of matters of public interest in news and current affairs programmes and in which information cannot be obtained or verified otherwise, Czech Television may resort to the use of a reality test. The test consists in the provision of fictitious information or the simulation of a non-existent position on the condition that such behaviour would not lead to any breach of legal obligations nor be detrimental to the rights of third parties. As soon as the revelation of the real state of affairs no longer jeopardises the outcome of the test, Czech Television shall explain the real situation to the persons



who have been mystified by the use of the reporter's licence.

16.18 The use of the reporter's licence in the recording of entertainment and arts programmes shall be possible under conditions similar to those stipulated in Article 16.15, provided that such use will not result in any breach of legal obligations.

## **2. Conclusion and perspectives**

Legislative and the CT Kodex set conditions for investigative journalism in the Czech Republic. Fundamental condition for the investigative journalism are independent media. The Government and Parliament should push forward legislative changes to increase the independence, sanctioning power and effectiveness of the Broadcasting Council turning it into a regulator that would be able to monitor the rapid changes in the broadcasting markets. The Government and Parliament should ensure that liberal licensing system will not endanger diversity and standards in the broadcasting markets. Yet, with a new procedure that makes licensing appear more like a mere formality, the Czech Republic has one of the most liberal licensing systems in Europe. It has yet to be seen how this will shape the media market and whether this system will bring more diversity. A lot of the regulation has been left to the market. The licensing system of DTT resembles the licensing of satellite and cable broadcasting. The change is likely to intensify competition in the broadcast market, which is something that advertisers have wanted to see happen for a long time. The Government and Parliament should adopt legislative changes to guarantee the independence of the public service broadcaster. The Government should initiate changes in legislation to increase the TV and radio licence fee regularly and in line with the rate of inflation or the retail price index.

## **6. Germany**

Jörg Ukrow

## 1. Relevant Legislation and Case-law

The German Basic Law (Grundgesetz, GG) guarantees freedom of expression and freedom of the media (Article 5) as well as the privacy of letters, posts, and telecommunications (Article 10). These articles generally safeguard offline as well as online communication. In addition, a groundbreaking 2008 ruling by the Federal Constitutional Court established a new fundamental right warranting the “confidentiality and integrity of information technology systems” that is grounded in the general right of personality guaranteed by Article 2 of the Basic Law.<sup>444</sup>

The German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) has repeatedly emphasized the importance of free mass media for a free and democratic State: Free mass media that are subject neither to control by the public powers nor to censorship are a characteristic element of free government and are indispensable to a modern democracy. If citizens are to be able to make political decisions, they must be not only thoroughly informed, but also be familiar with the opinions of others and be able to weigh them against one another. The media keep this ongoing debate alive; they provide the information, take their own positions and function thereby as a frame of reference for public debate. They are a vehicle for public opinion; positions are elucidated in a process of argument and rebuttal, take on clear contours and in that way make it easier for the public to form judgments and make decisions. In a representative democracy, the media function at the same time as a permanent communication and control channel between the people and their elected representatives in parliament and government. They provide critical recapitulation of the opinions and exigencies that are in an incessant state of flux within society and its constituent groupings, submit them for discussion and bring them to the attention of the political actors involved in the various bodies of government, which can in this way constantly measure their decisions, including those pertaining to everyday political issues, against the opinions that are actually held by the public.<sup>445</sup>

Regulations related to the journalistic duty of diligence in investigative workings can be found in the Constitutional Law (in particular Article 5 of the Basic Law [freedom of expression and information, freedom of press and of broadcasters] (A.), in provisions of sub-constitutional status, including Article 10 ECHR,<sup>446</sup> especially in the press laws and the

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<sup>444</sup> See BVerfGE 120, 274 (302 ff.).

<sup>445</sup> See BVerfGE 7, 198 [208]; 20, 162 [174 f.]; 52, 283 [296]; 20, 162 [174 f.]; 50, 234 [239 f.] 77, 65 [74] (consistent jurisprudence).

<sup>446</sup> In national law, the European Convention on Human Rights has the status of non-constitutional federal law (see BVerfGE 74, 358 (370); 82, 106 (114);

Broadcasting Treaty of the German Länder, in the broad field of criminal law [Sections 80 et seqq., 184 et seqq., 185 et seqq., 201 et seqq., 353 of the German Criminal Code (Strafgesetzbuch, StGB), Sections 53, 102 et seqq., 111m, 111n of the German Code of Criminal Procedure (Strafprozessordnung, StPO)], in civil law [especially Sections 823, 826 of the German Civil Code (Bürgerliches Gesetzbuch, BGB), Sections 22 et seq. of the German Act on the Copyright in Works of Plastic Art and Photography [Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie, KunstUrhG] and – in the form of a general remit to the „generally recognized principles of journalistic work” – in provisions of the media law [*inter alia*, Sections 10 (1) and 54 (2) of the Broadcasting Treaty and corresponding rules in the press laws and laws for public broadcasters of the German Länder) (B.) and, finally, in non-legislative standards (especially in the “German Press Code” as „Guidelines for journalistic work as recommended by the German Press Council”) (C.).

The legal (and normative) source of all media regulation is the constitution. Article 5 (1) of the Basic Law (Grundgesetz) states:

*“Every person shall have the right to freely express and disseminate his opinion in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.”*

a) There is no doubt that the main purpose of these basic rights is to protect the individual's sphere of freedom against encroachment by public power: they are the citizen's bulwark against the state. This emerges from both their development as a matter of intellectual history and their adoption into the constitutions of the various states as a matter of political history: it is true also of the basic rights in the Basic Law, which emphasizes the priority of human dignity against the power of the state by placing the section on basic rights at its head and by providing that the constitutional complaint (Verfassungsbeschwerde), the special legal device for vindicating these rights, lies only in respect of acts of the public power. But this is not the sole function of the basic rights according to the permanent jurisdiction of

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111, 307 (316, 317); 120, 180 (200)). The guarantees of the Convention and the case-law of the European Court of Human Rights further serve as aids in interpreting the content and scope of fundamental rights at the level of constitutional law, insofar as this does not result in a limitation of or derogation from the protection offered by any human rights or fundamental freedoms under the Basic Law – which is not desired by the Convention itself (see Article 53 of the Convention) – (see BVerfGE 111, 307 (317, 329); 120, 180 (200 f.)).

the German Federal Constitutional. Far from being a value-free system the Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.<sup>447</sup>

Although the constitutional freedoms for mass communication first of all – by virtue of the standing of the provision within the legal system and the way it has been traditionally understood – represent personal fundamental rights that guarantee individuals and enterprises involved in the area of the press freedom as well as the freedom of reporting by means of broadcasts from governmental coercion and under certain circumstances accords them a privileged legal status, the German Federal Constitutional Court interprets the freedom of mass media communication according to a different underlying concept. Under this concept, Article 5 has also an objectively legal aspect. It guarantees the existence of the “free press” as well as of other “free media” as an institution. The state has – apart from the personal rights of individuals – a duty to respect the principle of freedom of the media in its legal system whenever the sphere of operation of a provision of law affects the media. The freedom to establish publications, free access to journalistic professions and the duty of public authorities to divulge information are principles that follow from this; on the other hand, it is also possible to conceive, for example, of a duty on the part of the state to avert the threat to a free media system that could arise from the formation of monopolies on opinion.<sup>448</sup> However, the lawmaker has to fulfil this task without interfering with the journalistic autonomy of the media. Mass media communication has to function without any state interference.<sup>449</sup>

The function of free mass media in the democratic State corresponds with its constitutional status. As a subjective right, freedom of the media ensures that persons and companies working in the media sector are free from State dictates. With regard to its objective significance, freedom of the media protects the “institutional autonomy” of the media – from the procurement of information to the dissemination and propagation of news

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<sup>447</sup> See BVerfGE 7, 198 (204).

<sup>448</sup> See BVerfGE 7, 198 (204); 20, 162 (Spiegel); 57, 295 (319).

<sup>449</sup> See *Hoffmann-Riem*, *Regulating Media*, New York 1996, 119.

and opinion.<sup>450</sup>

At the core of the fundamental-rights guarantee of freedom of the media lies the right to freely determine the manner and focus, as well as contents and form of the organ of publication. This includes the decision as to whether and how a media product is to be illustrated. Pictorial statements are covered by the constitutional-law protection of the report which they serve to illustrate.<sup>451</sup> The protection of freedom of the press and of other media thereby also includes the photographic representations of persons.<sup>452</sup> Protection does not depend on the singularity or quality of the product of the media or the text.<sup>453</sup> The press as well as other media have the right to decide according to their own journalistic criteria, what they do or do not consider worthy of public interest.<sup>454</sup> Even entertaining contributions concerning prominent persons, for instance, are covered by the protection of freedom of the media.<sup>455</sup> It is only where the courts are called upon to weigh competing rights of personality that the informational value and the manner in which the article shows a relevance to questions which truly concern the public becomes important.<sup>456</sup>

Yet, the circle of legitimate general public interest would be prescribed too narrowly if one were to restrict this to behaviour that is scandalous, or morally or legally questionable. Even the normality of everyday life, as well as conduct of celebrities that is in no way objectionable, may be brought to the attention of the public if this serves to form public opinion on questions of general interest.<sup>457</sup>

The entertainment value of the contents or its presentation is frequently an important requirement if public attention is to be won and thereby a contribution possibly made to the formation of public opinion. Even “mere entertainment”, cannot per se be denied all relevance in the formation of opinions. Entertainment is an essential part of media activity which enjoys the protection of the right of freedom of the press in its subjective and objective legal aspects. The journalistic and economic success of the media which is in competition with other available media and sources of

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<sup>450</sup> See BVerfGE 10, 118 [121]; 12, 205 [260]; 62, 230 [243]; 66, 116 [133]; 77, 65 [74 ff.] (consistent case law).

<sup>451</sup> See BVerfGE 120, 180 (196); BVerfG, *Neue Juristische Wochenschrift* (NJW) 2005, p. 3271 (3272).

<sup>452</sup> See BVerfGE 101, 361 (389); 120, 180 (196); BVerfG, *Neue Juristische Wochenschrift* 2001, p. 1921 (1923).

<sup>453</sup> See BVerfGE 34, 269 (283); 50, 234 (240); 120, 180 (196 f.).

<sup>454</sup> See BVerfGE 97, 228 (257); 101, 361 (389); 120, 180 (197).

<sup>455</sup> See BVerfGE 66, 116 (134); 101, 361 (390); 120, 180 (197)).

<sup>456</sup> See BVerfGE 34, 269 (283); 101, 361 (391); 120, 180 (197).

<sup>457</sup> See BVerfGE 101, 361 (390); 120, 180 (203 f.).

entertainment can be dependent upon having an entertaining content and corresponding photographic representations. In recent times the significance of visual portrayals for press reporting has in fact increased.<sup>458</sup>

However, particularly where the content is entertaining, a weighing consideration of the competing legal positions is required. In weighing the interest in information relative to the competing protection of personality rights, the subject matter of the report is of determining importance.<sup>459</sup> In the case of photojournalism, the reasons for, as well as the circumstances in which the image was obtained, are of importance.<sup>460</sup> The right of the media, encompassed by the protection of Article 5 (1) of the Basic Law, to decide, in accordance with its journalistic criteria, what constitutes public interest does not also encompass deciding what weight is to be attached to the interest in information while weighing this against competing legal rights and deciding how to reconcile the legal interests concerned.<sup>461</sup> In the event of a dispute, it is for the courts to carry out the determining valuation of the public's interest in information for the purposes of weighing it against the conflicting interests of the persons concerned.<sup>462</sup>

In order to determine the weight to be attached to the need to protection personality rights, the situation in which the person concerned is photographed and how he or she is portrayed is also of importance, as are the circumstances under which the photograph was taken, for instance by taking advantage of secrecy or continuous harassment. The degree of detriment to the rights of personality associated with the photographic representation increases where the visual portrayal in its theme touches on private life by disseminating details of the private life [of the person concerned] which are usually excluded from public discussion. The same shall be true if the person concerned, under the circumstances under which the photograph was taken, would typically be reasonably entitled to expect that he or she will not be depicted in the media, perhaps because he or she is in a situation characterised by geographical privacy, above all in an especially protected area.<sup>463</sup> The need to protect the general rights of personality can, however, acquire a greater weight even without the requirements of spatial seclusion, where, for instance, media reporting captures the person concerned during moments where he or she is in a state of relaxation and "letting go" outside the sphere of obligations

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<sup>458</sup> See BVerfGE 35, 202 (222); 101, 361 (390 ff.); 120, 180 (204).

<sup>459</sup> See BVerfGE 34, 269 (283); 101, 361 (391).

<sup>460</sup> See BVerfGE 120, 180 (205).

<sup>461</sup> See BVerfGE 120, 180 (205); BVerfG, *Neue Juristische Wochenschrift* 2001, p. 1921 (1922).

<sup>462</sup> See BVerfGE 120, 180 (206).

<sup>463</sup> See BVerfGE 101, 361 (384).

imposed by professional or everyday life.<sup>464</sup>

The protection of the freedom of the press encompasses protection against encroachment by the state on the confidentiality of editorial work as well as on the confidential relationship between the press and their informants.<sup>465</sup> This protection is indispensable since the media cannot function without information from private sources, but this information will continue to flow freely only if informants can in principle be certain that "editorial privilege" will remain intact.<sup>466</sup> Therefore, editorial secrecy is also protected by freedom of the press and other media.<sup>467</sup>

Even when a disclosure of the workings of an editorial office does not report on informants, it may still result that such publications carry the danger that sources of information will dry up. Considerations of a general nature also argue in favor of such protection: when confidentiality is not ensured, informants will be unwilling to speak openly and without regard for the danger of abbreviated or distorted recounting. This also applies to the work of. Where it is no longer ensured that newspaper or magazine editors are speaking confidentially, spontaneous statements -- perhaps erroneous but nevertheless stimulating for the discussion -- will become a rarity; an editorial office at a newspaper or magazine that lacks free speech will have difficulty accomplishing that which it is supposed to do: the task of an editorial office requires a manner of work that does not comport with having to watch carefully what is said for fear that it might seep outside.<sup>468</sup>

The fact that the protection of the confidentiality of all editorial work is an essential condition for a free press results directly from a consideration of the basic direction taken by this protection, i.e., against the State. It would be incompatible with the basic right if State authorities were allowed to inspect the procedures leading to the production of a newspaper or magazine. In that it is directed against the State, the protective scope of freedom of the press therefore clearly encompasses the confidentiality of the work of editors. With regard to "interference" by societal forces or private persons, on the other hand, Article 5 (1), second sentence, GG as subjective right does not reveal a "third-party direction" comparable to that against the State. The confidentiality of the work of editors nevertheless is one of the conditions for a free press, which can be impaired not only by the State but also by societal forces or private persons. To this extent, it is

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<sup>464</sup> See BVerfGE 120, 180 (207).

<sup>465</sup> See BVerfGE 117, 244 (258); ECLI:DE:BVerfG:2015:rk20150713.1bvr248013 Para. 20.

<sup>466</sup> See BVerfGE 20, 162 [176, 187]; 36, 193 [204]; 50, 234 [240]; 64, 108 [114 f.].

<sup>467</sup> See BVerfGE 66, 116 [134].

<sup>468</sup> See BVerfGE 66, 116 [134 f.].



a cardinal component of the guarantee of press autonomy as an objective principle, which determines how the relevant civil-law provisions are to be interpreted and applied.<sup>469</sup>

As defined in this manner, freedom of the press is safeguarded for all press publications. The term "press" is to be interpreted broadly and formally; it cannot be made dependent -- regardless of the standards used -- on a determination of the printed product. Freedom of the press is thus not limited to the "serious" press).<sup>470</sup> This does not mean that in evaluating a given case, its special features are irrelevant; however, these can only be taken into consideration solely within the scope of the review of (admissible) legal restrictions.<sup>471</sup>

All basic rights under Art. 5 (1) of the Basic Law may be limited; when the issue is the effects of the basic right on provisions of private law, then with respect to the special nature of the legal relationships regulated by the latter, different -- under certain circumstances, narrower -- boundaries may be placed on the right than in its guise as a claim to ward off State interference (Abwehrrecht). Only once these boundaries have been taken into consideration does the reach of the basic right arise in a given case. Limits may result from the laws referred to in art. 5(2) GG but also directly from the Constitution itself.<sup>472</sup>

Article 5 (2) defines the limitations as follows

*"These rights shall find their limits in the provisions of general laws, in provisions for the protection of young person, and in the right to personal honor."*

Article 5 (2) of the Basic Law underlines that the freedom of the media entail the possibility of conflict with other values that are protected by the Basic Law; this may involve rights and interests of individuals, associations or even society itself. The Basic Law makes reference to the general laws, to which the media are also subject, for the purposes of regulating such conflict situations. Legal interests of others and the general public that enjoy at least equal rank with freedom of the media must also be respected by the media. The members of the press and other mass media are afforded their status, which is in certain respects privileged, because of their responsibility and only in connection with this responsibility. This is not a matter of personal privilege; exemptions from generally applicable laws must be consistently justifiable on the basis of the nature and reach of the matter at hand.

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<sup>469</sup> See BVerfGE 66, 116 [135].

<sup>470</sup> See BVerfGE 25, 296 [307]; 34, 269 [283]; 50, 234 [240].

<sup>471</sup> See BVerfGE 34, 269 [283]; 66, 116 [134].

<sup>472</sup> See BVerfGE 44, 37 [49 f.]; 66, 116 [135 f.].

The protection of minors constitutes an important legal framework for the regulation of content of media. Youth protection on the internet is principally addressed by states through the Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting (JMStV), which bans content similar to that outlawed by the criminal code such as the glorification of violence and sedition.<sup>473</sup>

The “provisions of general law” are to be understood as meaning all laws that are not directed against civil rights and liberties guaranteed by Article 5 (1) of the Basic Law themselves, but which serve to protect a quintessential legal interest, irrespective of any particular opinion. This legal interest must be protected in the legal system generally and is thus independently of whether it may be violated by expressions of opinion or in any other manner.<sup>474</sup>

However, because the basic right to freedom of expression as well as the freedom of mass media are absolutely essential to a free and democratic state, it would be illogical for a constitution to make its actual scope contingent on mere statute (and thus necessarily on the holdings of courts construing it). Therefore, general laws which have the effect of limiting a basic right must be read in the light of its significance and always be construed so as to preserve the special value of this right, with, in a free democracy, a presumption in favour of freedom of speech and media in all areas, and especially in public life. Accordingly, the relationship between basic right and ‘general laws’ must be construed in the light of the special significance of this basic right in a free democratic state, so that the limiting effect of ‘general laws’ on the basic right is itself limited.<sup>475</sup>

As applied to freedom of the media, the purpose of this jurisdiction is therefore to prevent dilution of this freedom by general laws – and the courts applying them – and, by compelling consistent construction of general laws in alignment with the basic value of freedom of the media, to ensure appropriate latitude and prevent any restriction of freedom of the press that is not absolutely necessary in order to respect legal interests of at least equivalent standing. The objectively legal, institutional aspect of freedom of the media and its effect as a standard and principle of construction for the general legal system are especially pronounced here.<sup>476</sup>

The Federal Constitutional Court has recognized as „general laws“ within

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<sup>473</sup> See the respective paragraphs 130 and 131 of the German Criminal Code.

<sup>474</sup> See BVerfGE 117, 244 (260); 120, 180 (200).

<sup>475</sup> BVerfGE 7, 198, B II 2.

<sup>476</sup> See BVerfGE 20, 162 (176 f.).

the meaning of Article 5 (2) of the Basic Law *inter alia*:

- *the provisions pertaining to treason (sections 93 et seq. of the German Criminal Code [Strafgesetzbuch, StGB])*<sup>477</sup>

Protection of the continued existence of the Federal Republic of Germany against external enemies, which the provisions of criminal law governing treason are intended to achieve, conflicts with freedom of the media when media publish facts, subject matter or knowledge whose secrecy would be in the interest of national defense. This conflict cannot be resolved summarily and in general by arguing against freedom of the media that the existence of the Federal Republic of Germany is a necessary prerequisite for freedom of the media and that freedom of the media itself would be lost with the destruction of the Federal Republic of Germany. For the existence of the Federal Republic of Germany, which must be protected and preserved, is to be understood to mean not only its organizational structure, but also its basic free democratic order. It is endemic to this order that the affairs of state, including military affairs, albeit conducted by the responsible bodies of government, are subject to constant criticism or approval by the people.

- *the provisions relating to the breach of official secrets and special duties of confidentiality (section 353b of the German Criminal Code [Strafgesetzbuch, StGB])*<sup>478</sup>

It is not contrary to Article 5 (1) of the Basic Law when an official or employee of the public service who believes to have found an unconstitutional act of its authority in a particular case is principally obliged to exploit the remedies which exist in the institutional order of the

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<sup>477</sup> See BVerfGE 20, 162 (177); 21, 239 (239).

<sup>478</sup> Whoever unlawfully discloses a secret which has been confided or become known to him in his capacity as 1 a public official; 2. a person entrusted with special public service functions; or 3. a person who exercises duties or powers under the laws on staff representation and thereby causes a danger to important public interests, shall be liable to imprisonment not exceeding five years or a fine. If by the offence the offender has negligently caused a danger to important public interests he shall be liable to imprisonment not exceeding one year or a fine. Whoever other than in these cases unlawfully allows an object or information to come to the attention of another or makes it publicly known 1. which he is obliged to keep secret on the basis of a resolution of a legislative body of the Federation or a state or one of their committees; or 2. which he has been formally put under an obligation to keep secret by another official agency under notice of criminal liability for a violation of the duty of secrecy, and thereby causes a danger to important public interests shall be liable to imprisonment not exceeding three years or a fine.

democratic state lying before he or she is entitled to inform the public, the press or other media.<sup>479</sup>

In a ruling of 27 February 2007, the Federal Constitutional Court strengthened the freedom of the press and the protection of sources. In their decision, the judges declared that both a search of the editorial offices of political magazine *Cicero*, and the confiscation of computer data in September 2005 were actions that were unconstitutional. These actions were taken following the publication of an article by a journalist concerning a terrorist in April 2005. In a description of the background and life story of this terrorist and the attacks for which he had been responsible, a "classified" report of the Federal Criminal Police Office (*Bundeskriminalamt*, BKA) was referred to - in great detail in places - and also cited. Charges were then brought by the BKA for a suspected violation of official secrecy in accordance with Section 353b of the *Strafgesetzbuch* (Criminal Code - StGB). The responsible public prosecutor's office also instigated preliminary proceedings against the chief editor of the magazine and the author of the article for aiding and abetting in the commission of this offence. As part of the investigation, the editorial offices of *Cicero* were searched and computer data was seized. The Federal Constitutional Court thereafter expressly stated that the mere publication by a journalist of an official secret within the meaning of Section 353b StGB was not sufficient, in view of Article 5 (1) of the Basic Law, to justify the suspicion that the said journalist had aided and abetted a breach of official secrecy. The searches and confiscation of material had been based on such a suspicion. Rather, specific factual evidence was required to show that the person concerned had deliberately published the secret and thus committed the offence of aiding and abetting a breach of official secrecy. Otherwise, there was a risk that public prosecutors could instigate preliminary proceedings against editors or journalists solely, or mainly, in order to discover the identity of the source and chief culprit. This, however, would infringe the right of sources to protection. Therefore, searches and seizures as part of preliminary proceedings against members of the press should, in principle, be considered unconstitutional if they were solely, or mainly, aimed at establishing a source's identity.<sup>480</sup>

As a legislative reaction to this judgment, since 2012<sup>481</sup> acts of aiding to the breach of official secrets and special duties of confidentiality by a person listed under section 53 (1) 1<sup>st</sup> sentence No 5 of the Code of Criminal

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<sup>479</sup> See BVerfGE 28, 191 [203 ff.].

<sup>480</sup> See BVerfGE 117, 244 [264 ff.].

<sup>481</sup> Act on Strengthening Press Freedom (Gesetzes zur Stärkung der Pressefreiheit im Straf- und Strafprozessrecht, PrStG).

Procedure<sup>482</sup> shall not be deemed unlawful if they are restricted to the receipt, processing or publication of the secret or of the object or the message in respect of which a special duty of secrecy exists.

- *Sections 823 and 826 of the Civil Code in conjunction with Section 1004<sup>483</sup> of the Civil Code [Bürgerliches Gesetzbuch, BGB]*<sup>484</sup>

To the extent that Article 5 (1) of the Basic Law is to be taken into account in specifying open norms like these norms of the Civil Code, the rank of this guarantee is especially determined by two factors. On the one hand, the central point is the purpose of the disputed statement: increasing weight is to be accorded the basic right of freedom of opinion the more it does not involve a statement in private -- particularly in commercial -- intercourse aimed directly at a private object of legal protection and in pursuit of goals for personal gain but rather deals with a contribution to the intellectual contest of opinions in a matter fundamentally affecting the public.<sup>485</sup>

On the other hand, the means used to pursue such a purpose are also of essential importance, e.g., the publication of information unlawfully obtained by deception and used for an attack on the party deceived. Such means often indicate a not insubstantial interference in another's sphere, particularly when this sphere is protected due to its confidentiality; moreover, this comes into serious conflict with one of the basic conditions of the legal system, namely, that law is unswerving. In view of the underlying facts here, publication is basically to be prohibited. An exception can only be made when the significance of the information for informing the public and for the formation of public opinion clearly outweighs the detriments that the violation brings for the party affected and for the (actual) validity of the legal system. This is normally not the case when information unlawfully obtained and used in the above-described manner discloses conditions or behavior that for its part is not unlawful; this indicates that the information does not deal with circumstances of such considerable weight that there is an overwhelming public interest in their disclosure.<sup>486</sup>

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<sup>482</sup> These are individuals who are or have been professionally involved in the preparation, production or dissemination of periodically printed matter, radio broadcasts, film documentaries or in the information and communication services involved in instruction or in the formation of opinion.

<sup>483</sup> See below, Section 3.

<sup>484</sup> See BVerfGE 66, 116 [138 ff.].

<sup>485</sup> See BVerfGE 7, 198 [212]; 61, 1 [11]; 66, 116 [138 f.] (consistent jurisprudence).

<sup>486</sup> See BVerfGE 66, 116 [139].

- *Sections 22 et seqq. of the German Act on the Copyright in Works of Plastic Art and Photography [Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie, KunstUrhG*  
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In the form of the requirement for consent provided for in Section 22 sentence 1 of the German Act on the Copyright in Works of Plastic Art and Photography for the dissemination of pictures of persons, of the exceptions, particularly with regard to pictures portraying an aspect of contemporary history named in Section 23 (1), no. 1 of the of this Art and of the exception to the exception governed by Section 23 (2) of this Act for cases where legitimate interests of the person portrayed apply, these contain a graded protective concept that has regard both to the need for protection of the person portrayed and to the general public's interest in information.<sup>488</sup>

- *Article 8 of the European Convention on Human Rights*<sup>489</sup>

In conformity with the constitutionally guaranteed protection of personality rights, the protection granted by Article 8 (1) of the Convention in respect of the private life of the individual also covers the sum of all personal, social and financial relationships which make up the private life of each individual.<sup>490</sup> In determining the scope of such protection, the extent to which, in the given situation, the individual's expectations of privacy are justified, must be considered.<sup>491</sup> The guarantee enshrined in Article 8 (1) of the Convention can also, e.g., include a right to protection from publication of images of individuals taken in their everyday life through the national courts.<sup>492</sup>

In its *Wallraff/Bild* decision of 1984 the central issue for the Federal Constitutional Court was whether the right (of third parties) to express an opinion freely (Article 5 (1), first sentence, of the Basic Law) and freedom of the press as the right to publicize opinions in a printed work (Article 5 (1), second sentence, of the Basic Law) place limits on the constitutional protection of the confidentiality of the work of the press. The Federal

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<sup>487</sup> See BVerfGE 101, 361 (387); 120, 180 [199 ff.].

<sup>488</sup> See BVerfGE 35, 202 (224 f.); 101, 361 (387); 120, 180 (202).

<sup>489</sup> See BVerfGE 120, 180 [199 f.].

<sup>490</sup> See BVerfGE 120, 180 (201); BVerfG, Europäische Grundrechte-Zeitschrift 2007, p. 467 (470).

<sup>491</sup> See BVerfGE 120, 180 (201); BVerfG, Neue Juristische Wochenschrift 2006, p. 3406 (3408).

<sup>492</sup> See BVerfGE 120, 180 (201) referring to European Court of Human Rights (ECHR), Judgment of 24 June 2006, Application no. 59320/00, von Hannover v. Germany, §§ 50 et seq., Neue Juristische Wochenschrift 2004, p. 2647 (2648).

Constitutional Court stressed that neither the basic right of free expression of opinion nor freedom of the press protects the unlawful procurement of information. Such procurement is also not protected by the basic right of freedom of information (Article 5 (1), first sentence of the Basic Law).<sup>493</sup>

On the other hand, the propagation of unlawfully acquired information falls within the protective scope of Article 5 (1) of the Basic Law. This is supported by a number of reasons. First, it would not be very consistent to infer from freedom of the press a right to refuse to give evidence when this freedom did not also cover the publication of that which an informant obtained in an unlawful manner and passed on to the press. Second, the press's supervisory duty could also suffer, since one of its functions is to point out improper circumstances of public significance. The same goes for the freedom of the flow of information, which is particularly to be maintained and ensured by the freedom of the press. From this standpoint, but also from that of protection of the press and its activities, complete exclusion from the protective sphere of Article 5 (1) of the propagation of unlawfully obtained information would lead to the situation where from the very outset basic-rights protection is also not available in those cases where this is needed. In view of the variety of conceivable cases, this cannot be ruled out. Such might, with respect to the contents of the information, range from the uncovering of a serious crime to the publication of the personal affairs of a citizen. Similarly, as regards the way in which information was obtained, there can also be various gradations: on the one hand, intentional violation of the law in order to publicize the information procured in this manner or to sell it, and on the other, the mere cognizance of unlawfully procured information, whereby, even observing the requisite duty of care, the unlawfulness of the procurement is likely not at all evident. Also of importance might be the degree to which the rights of the individual concerned have been violated.<sup>494</sup>

Of specific importance with respect to limits of the freedom of media is the fundamental right to protection of general rights of personality pursuant to Article 2 (1) in conjunction with Article 1 (1) of the Basic Law, too. The aim of this fundamental right is to maintain the fundamental basis of social relations between the owner of the fundamental rights and his or her environment.<sup>495</sup> The protection of freedom of conduct and privacy safeguards elements of free development of the personality which are not the subject of expressly guaranteed freedoms in the Basic Law, but are just as important in terms of their significance for the narrowest personal

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<sup>493</sup> See BVerfGE 66, 116 [137].

<sup>494</sup> See BVerfGE 66, 116 [137 f.].

<sup>495</sup> See BVerfGE 54, 148 (153); 97, 391 (405); 114, 339 (346); 120, 180 (197).

sphere of life of the individual and the maintenance of its basic conditions.<sup>496</sup> A concrete interest in legal protection is associated with the various aspects of protection of personality rights depending upon the type of danger to the personality. Of determining importance are the circumstances surrounding the event concerned and the expected consequences thereof which will have an impact on fundamental rights, particularly on the development of the personality and the private life of the person concerned.<sup>497</sup>

Indeed, the constitutional protection of personality rights does not grant a comprehensive right to control the portrayal of one's own person. The right to one's own image does, however, grant the individual a means of exerting influence and taking decisions as far as the creation and use of pictorial recordings of his person by others is concerned. The need for protection arises above all as a result of the possibility that the image of a person in a particular context may be removed from that context and reproduced by third parties at any time under circumstances which the person concerned cannot control. The easier it is to do this, the greater can be the need for protection. Thus, advancements in the field of recording equipment are associated with growing opportunities to endanger rights of personality. The increasing availability of small and portable cameras, such as digital cameras built in to mobile telephones, for instance, exposes prominent persons in particular to the increased risk of being photographed in practically any situation without warning and without their knowledge, and the resulting image being published in the media.<sup>498</sup> A particular need for protection can further arise in the case of a secret or surprise approach.<sup>499</sup> In assessing the need for protection, the situation in which the person concerned is portrayed is also significant, for instance in the context of his usual everyday life or in situations where he is relaxing after work and the activities of the day, during which he is entitled to assume that he is not exposed to the view of photographers.<sup>500</sup>

In addition to the right to one's image, the fundamental right to protection of personality rights also comprises, *inter alia*, protection of private life.<sup>501</sup> There are several aspects to this protection. Thematically it affects in particular those matters which the holder of the fundamental right would

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<sup>496</sup> See BVerfGE 99, 185 (193); 118, 168 (183); 120, 180 (197); BVerfG, *Neue Juristische Wochenschrift* 2008, p. 39 (41).

<sup>497</sup> See BVerfGE 101, 361 (380); 106, 28 (39); 118, 168 (183 f.); 120, 180 (197 f.)).

<sup>498</sup> See BVerfGE 101, 361 (380 f.); 120, 180 (198).

<sup>499</sup> See BVerfGE 101, 361 (394 f.); 120, 180 (198).

<sup>500</sup> See BVerfGE 120, 180 (198).

<sup>501</sup> See BVerfGE 101, 361 (382); 120, 180 (199)).



tend to withhold from public mention or display. Spatially, private life includes an individual's area of retreat, which ensures that he may centre himself and relax, in particular in the domestic sphere but also outside the home and which helps to realise the need "to be left alone".<sup>502</sup> A further-reaching level of protection can arise out of the increased need to protect personality rights as required by Articles 6 (1) and 6 (2) of the Basic Law in situations where parents are together with their minor children in a public space.<sup>503</sup>

b) Germany is a federal republic consisting of 16 states (Länder). Therefore, legislative power is shared between the federation and the states. According to Article 70 (1) of the Basic Law the states have the legislative competence unless the constitution provides a legislative competence for the federal state. There is a federal state competence for telecommunications, for combatting economical concentration, and in respect of several other subjects, which can be of importance when media regulation is concerned. However, the competence to ensure the functioning of the media system is in the hand of the states.

Therefore, we have as many press laws as we have states. In general, the press laws aim at securing press diversity and quality of content. They emphasize again that "the press is free. It serves the basic free and democratic order". Then regulations, differing from state to state, are laid down for the journalists' duty of care in the treatment of information and their right to information: "The authorities have the obligation to provide representatives of the press with information required for the fulfilment of their public duty". All press laws contain articles regarding journalistic accountability, due diligence and a provision demanding the clear (and visible) separation between editorial content and advertisements. At the same time, these laws protect the newsroom from searches and confiscation by state authorities. Journalists have the right to conceal the source of their information.

c) The journalistic principles of the German Press Council (*Deutscher Presserat*) define the professional ethics of the press including the duty of maintaining the standing of the press and defending press freedom. The principle of professional self-monitoring has been familiar for a long time. If effective, it makes control by the state superfluous and, thus, ensures the freedom of the press.

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<sup>502</sup> See BVerfGE 27, 1 (6 f.); 101, 361 (382 et seq.); 120, 180 (199). The boundaries of the protected private sphere cannot be generally or abstractly determined (see BVerfGE 101, 361 (384); 120, 180 (199)).

<sup>503</sup> See BVerfGE 101, 361 (385); 120, 180 (199); BVerfG, *Neue Juristische Wochenschrift* 2008, p. 39 (41).

In 1952 the Federal government submitted a draft Press Act, providing for the establishment of a self-monitoring instance under public law. This draft met with tremendous opposition from the journalist and publisher associations and was not carried through. Inspired by the British Press Council of 1953, the journalist and publisher associations formed the German Press Council on November 20, 1956.<sup>504</sup> This organization is a non-profit association, an organ of the major associations of the press under private law. Its structure and duties are governed in its statutes of 1985. According to Article 9 of its statutes, the Press Council has the following duties:

- To determine irregularities in the press and to work towards clearing them up
- To stand up for unhindered access to the sources of news
- To give recommendations and guidelines for journalistic work
- To stand against developments which could endanger free information and formation of opinions among the public
- To investigate and decide on complaints about individual newspapers, magazines or press services
- Encourage self-regulation of editorial data protection.<sup>505</sup>

In performing its duties the Press Council issues recommendations and guidelines. The journalistic principles and the guidelines are contained in the Press Code or Code of Conduct.<sup>506</sup> The key task of the Press Council is, thus, to investigate and to decide on individual complaints on publications in the press. This is done on the basis of a complaints code<sup>507</sup> that ensures that everybody can turn to the Press Council free of charge in order to receive help from there.

Every year, more than 700 people, associations, institutions, etc. write to the German Press Council seeking help and making complaints. They are complaining about publications due to possible infringements against the duties of care, due to search methods by journalists or due to the

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<sup>504</sup> The German Press Council ( Deutsche Presserat - DPR), founded in 1956, has four pillars: the Federal Association of German Newspaper Publishers ( Bundesverband Deutscher Zeitungsverleger - BDZV); the Association of German Magazine Publishers ( Verband Deutscher Zeitschriftenverleger - VDZ); the German Journalists' Association ( Deutschen Journalistenverband - DJV) and the trade union for the journalists „Deutsche Journalistinnen- und Journalisten-Union (dju) in ver.di“; see <http://www.presserat.de/presserat/aufgaben-organisation/>.

<sup>505</sup> See <https://accountablejournalism.org/press-councils/Germany>.

<sup>506</sup> See below, Section 4.

<sup>507</sup> See

[https://www.presserat.de/fileadmin/user\\_upload/Downloads\\_Dateien/Press\\_ekodex13english\\_web.pdf](https://www.presserat.de/fileadmin/user_upload/Downloads_Dateien/Press_ekodex13english_web.pdf), pp. 11 et seqq.

infringement of the right to personal freedom, for example within the framework of court reporting. Often questions in connection with the publication of readers' letters or satirical contributions have to be answered and investigated as to whether the contribution contains discriminatory information on groups of people.

Approximately 50% of all complaints can be dealt with at an early stage without a formal decision by the complaints commission. Sometimes the central office of the German Press Council can successfully mediate between the parties concerned. In justified cases the complaints commission of the German Press Council issues editorial notes, censures and - in the case of severe journalistic infringements - public reprimands. The latter have to be published in the publication complained about within the framework of a voluntary undertaking.<sup>508</sup> More than 95% of all publishing houses in Germany have voluntarily signed to publish reprimands and to accept the press code as the ethical guideline.

These measures of the German Press Council, in the event of infringements of the Press Code being detected, in particular censures and reprimands, are a form of "peer scolding" that is particularly unpopular in publishing houses.

The Press Council decided to extend its system of journalistic self-regulation beyond the printed word to cover publications in digital form on November 20, 1996. Since January 1, 2002, the German Press Council also has taken responsibility for self-regulation of editorial data protection in the press. If a reader believes that his or her data have not been handled properly in an editorial office he or she can make a complaint about this to the Press Council

## 2. Obtaining of information and boundaries of law enforcement

Information is regarded as illegally obtained if the journalist – at this stage: while doing his research work – commits a violation of **criminal law**, especially concerning

- Articles 201 et seqq. of the German Criminal Code (StGB) (violation of the privacy of the spoken word,<sup>509</sup> violation of intimate privacy by

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<sup>508</sup> See Section 16 of the German Press Code.

<sup>509</sup> Section 201 of the Criminal Code regulates, that (1) whosoever unlawfully 1. makes an audio recording of the privately spoken words of another; or 2. uses, or makes a recording thus produced accessible to a third party, shall be liable to imprisonment not exceeding three years or a fine, (2) whosoever unlawfully 1. overhears with an eavesdropping device the privately spoken words of another not intended for his attention; or 2. publicly communicates, verbatim or the essential content of, the privately spoken words of another

taking photographs,<sup>510</sup> violation of the privacy of the written word,<sup>511</sup> data espionage,<sup>512</sup> phishing,<sup>513</sup> acts preparatory to data espionage and phishing,<sup>514</sup> violation of private secrets,<sup>515</sup> violation of the postal and telecommunications secret,<sup>516</sup>

- concerning media content offences Articles 185 et seqq. StGB

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recorded pursuant to subsection (1) No 1 above or overheard pursuant to subsection (2) No 1 above shall incur the same penalty. The offence under the 1st sentence No 2 above, shall only entail liability if the public communication may interfere with the legitimate interests of another. It is not unlawful if the public communication was made for the purpose of safeguarding overriding public interests.

<sup>510</sup> Section 201a of the Criminal Code regulates, that (1) whosoever unlawfully creates or transmits pictures of another person located in a dwelling or a room especially protected from view and thereby violates their intimate privacy shall be liable to imprisonment not exceeding one year or a fine; (2) whosoever uses or makes available to a third party a picture created by an offence under subsection (1) above shall incur the same penalty; (3) whosoever unlawfully and knowingly makes available to third parties a picture that was created with the consent of another person located in a dwelling or a room especially protected from view and thereby violates his intimate privacy shall be liable to imprisonment not exceeding one year or a fine.

<sup>511</sup> Section 202 of the Criminal Code regulates, that (1) whosoever unlawfully (1.) opens a sealed letter or another sealed document not intended for him; or (2.) obtains knowledge of the content of such a document without opening the seal by using technical means, shall be liable to imprisonment not exceeding one year or a fine unless the act is punishable under section 206. (2) whosoever unlawfully obtains knowledge of the contents of a document not intended for him and which was specially protected by means of a sealed container after he has opened the container shall incur the same penalty.

<sup>512</sup> Section 202a of the Criminal Code regulates, that whosoever unlawfully obtains data for himself or another that were not intended for him and were especially protected against unauthorised access, if he has circumvented the protection, shall be liable to imprisonment not exceeding three years or a fine. Such data shall only be those stored or transmitted electronically or magnetically or otherwise in a manner not immediately perceivable.

<sup>513</sup> Section 202b of the Criminal Code regulates, that whosoever unlawfully intercepts data (section 202a(2)) not intended for him, for himself or another by technical means from a non-public data processing facility or from the electromagnetic broadcast of a data processing facility, shall be liable to imprisonment not exceeding two years or a fine, unless the offence incurs a more severe penalty under other provisions.

<sup>514</sup> See Section 202c of the Criminal Code.

<sup>515</sup> See Section 203 of the Criminal Code.

<sup>516</sup> See Section 206 of the Criminal Code.

[insult,<sup>517</sup> defamation,<sup>518</sup> intentional defamation<sup>519</sup>]. If the asserted or disseminated fact is an offence proof of the truth thereof shall be provided if a final conviction for the act has been entered against the person insulted. Proof of truth is excluded if the insulted person had been acquitted by final judgment before the assertion or dissemination.<sup>520</sup> Proof of truth of the asserted or disseminated fact shall not exclude punishment under section 185 if the insult results from the form of the assertion or dissemination or the circumstances under which it was made.<sup>521</sup> Critical opinions about scientific, artistic or commercial achievements, utterances made in order to exercise or protect rights or to safeguard legitimate interests, as well as remonstrations and reprimands by superiors to their subordinates, official reports or judgments by a civil servant, and similar cases shall only entail liability to the extent that the existence of an insult results from the form of the utterance of the circumstances under which it was made.<sup>522</sup>

If the insult was committed publicly or through dissemination of written

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<sup>517</sup> Section 185 of the Criminal Code regulates, that an insult shall be punished with imprisonment not exceeding one year or a fine and, if the insult is committed by means of an assault, with imprisonment not exceeding two years or a fine.

<sup>518</sup> Section 186 of the Criminal Code regulates, that whosoever asserts or disseminates a fact related to another person which may defame him or negatively affect public opinion about him, shall, unless this fact can be proven to be true, be liable to imprisonment not exceeding one year or a fine and, if the offence was committed publicly or through the dissemination of written materials, to imprisonment not exceeding two years or a fine. Section 188 (1) of the Criminal Code regulates, that if an offence of defamation is committed publicly, in a meeting or through dissemination of written materials against a person involved in the popular political life based on the position of that person in public life, and if the offence may make his public activities substantially more difficult the penalty shall be imprisonment from three months to five years.

<sup>519</sup> Section 187 of the Criminal Code regulates, that whosoever intentionally and knowingly asserts or disseminates an untrue fact related to another person, which may defame him or negatively affect public opinion about him or endanger his creditworthiness shall be liable to imprisonment not exceeding two years or a fine, and, if the act was committed publicly, in a meeting or through dissemination of written materials (section 11(3)) to imprisonment not exceeding five years or a fine. Section 188 (2) of the Criminal Code regulates, that if an offence of intentional defamation is committed publicly, in a meeting or through dissemination of written materials against a person involved in the popular political life based on the position of that person in public life, and if the offence may make his public activities substantially more difficult the penalty shall be imprisonment from six months to five years.

<sup>520</sup> See Section 190 of the Criminal Code.

<sup>521</sup> See Section 192 of the Criminal Code.

<sup>522</sup> See Section 193 of the Criminal Code.

materials and if a penalty is imposed the court shall, upon application of the victim or a person otherwise entitled to file a request, order that the conviction be publicly announced upon request. The manner of publication shall be indicated in the judgment. If the insult was committed through publication in a newspaper or magazine the publication shall also be included in a newspaper or magazine, if possible in the same one which contained the insult; this shall apply *mutatis mutandis* if the insult was committed through publication by broadcast,<sup>523</sup>

or of civil law-provisions (e.g. nuisance, right of a person to its own likeness according to Section 22 of the German Act on the Copyright in Works of Plastic Art and Photography [Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie, KunstUrhG]. etc.).

The necessity of taking into account freedom of the media and its importance for the basic free democratic order in the context of the construction and application of general laws also applies as regards the Criminal Procedure Code (Strafprozessordnung – StPO), especially as regards coercive measures in connection with criminal proceedings such as searches and seizures carried out against a publishing company or a member of the press due to or in connection with publication in the press.<sup>524</sup>

These coercive measures, which are ordered at the discretion of a judge or otherwise responsible authorities, will by their very nature regularly constitute significant encroachment upon the sphere of life protected by fundamental rights and in particular upon the fundamental rights under Articles 2 and 13 of the Basic Law. The use of such measures is therefore from the outset subject to the general legal principle of proportionality.<sup>525</sup> The coercive measure must be commensurate with the severity of the criminal offense and the strength of the existing suspicion; in addition, this specific measure must be necessary for the investigation and prosecution of the criminal offense, which is not the case if other, less severe, means are available. Finally, the search must be likely to yield appropriate evidence.<sup>526</sup>

In the case of searches and seizures involving a publishing enterprise or other media enterprises, possible or probable encroachment upon freedom of the media must also be taken into account. This pertains first of all to the obstruction of the exercise of the fundamental right that may occur – for example, as a result of the sealing of necessary working areas or

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<sup>523</sup> See Section 200 of the Criminal Code.

<sup>524</sup> See BVerfGE 20, 162 [186].

<sup>525</sup> See BVerfGE 19, 342 [348-349]; 17, 108 [117]; 16, 194 [202].

<sup>526</sup> See BVerfGE 20, 162 [186 f.].

deprivation of materials required for current work – but even more so intrusion upon editorial privilege, which is regularly associated with such coercive measures. Since the confidential relationship between the media and its employees and informants constitutes an essential prerequisite for the functional viability of a concrete media enterprise and jeopardization of this confidential relationship may entail negative effects upon the freedom of the media that go beyond the respective individual case, this necessarily entails a conflict between the interest in prosecution of criminal offenses and the protection of the freedom of the media that must be resolved with the help of the balance of interests.<sup>527</sup>

It is in principle the affair of the legislature to undertake this balance of interests. The Criminal Procedure Code takes this requirement into account only to a limited extent: the relevant provisions (sections 53 (1) no. 5 and 97 (5) of the German Code of Criminal Procedure [Strafprozessordnung, StPO]) cover only the case of publication of illegal content that constitutes grounds for prosecution of the author, contributor or informant. They operate on the assumption of what is referred to as guarantor liability, according to which the greater difficulty in the prosecution of criminal offenses is accepted in the interest of the confidential relationship between informants and members of the press if at least one editor of the printed publication involved is or may be punished.<sup>528</sup>

According to Section 97 (5) of the German Code of Criminal Procedure, the seizure of documents, sound, image and data media, illustrations and other images in the custody of

- individuals who are or have been professionally involved in the preparation, production or dissemination of periodically printed matter, radio broadcasts, film documentaries or in the information and communication services involved in instruction or in the formation of opinion or of
- the editorial office, the publishing house, the printing works or the broadcasting company

shall be inadmissible insofar as they are covered by the right of such persons to refuse to testify.<sup>529</sup>

According to Section 53 (1) sentence 2 such persons may refuse to testify concerning the author or contributor of comments and documents, or concerning any other informant or the information communicated to them

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<sup>527</sup> See BVerfGE 20, 162 [187].

<sup>528</sup> See BVerfGE 20, 162 [187 f.].

<sup>529</sup> A similar regulation can be found in Section 383 (1) No. 5 of the German Code of Civil Procedure (Zivilprozessordnung, ZPO).

in their professional capacity including its content, as well as concerning the content of materials which they have produced themselves and matters which have received their professional attention. This shall apply only insofar as this concerns contributions, documentation, information and materials for the editorial element of their activity, or information and communication services which have been editorially reviewed.

The restrictions on seizure shall not apply if

- certain facts substantiate the suspicion that the person entitled to refuse to testify participated in the criminal offence, in accessoryship after the fact, obstruction of justice or handling stolen goods, and (since 2012) where the particular facts substantiate strong suspicion of participation; in these cases, too, seizure shall only be admissible, however, where it is not disproportionate to the importance of the case having regard to the basic rights arising out of Article 5 paragraph (1), second sentence, of the Basic Law, and the investigation of the factual circumstances or the establishment of the whereabouts of the perpetrator would otherwise offer no prospect of success or be much more difficult
- or where the objects concerned have been obtained by means of a criminal offence or have been used or are intended for use in perpetrating a criminal offence, or where they emanate from a criminal offence.<sup>530</sup> The restrictions on seizure shall also not apply where certain facts substantiate the suspicion that the person who is entitled to refuse to testify participated in the offence or in accessoryship after the fact, obstruction of justice or handling stolen goods.<sup>531</sup>

In this context, it is necessary to take into account the provisions of law governing the press, according to which the “responsible editor” and under certain circumstances also other members of the press involved in the production and distribution of the respective publications are held to higher standards of responsibility under criminal law for the appearance of illegal content in periodical publications. If these conditions for guarantor liability are satisfied, then the responsible editor or other members of the press involved benefit from the right to refuse to give testimony under Section 53 (1) no. 5 of the Criminal Procedure Code and – to preclude circumvention of this right to refuse to give testimony – prohibition of any seizure in respect of the above members of the press pursuant to section 97 (5) of the Criminal Procedure Code as well immunity from searches as inferred

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<sup>530</sup> See Section 97 Subsection (5), second sentence in combination with Section 97 Subsection (2), third sentence of the German Code of Criminal Procedure.

<sup>531</sup> See Section 97 Subsection (5), second sentence in combination with Section 160a Subsection (4) of the German Code of Criminal Procedure.



therefrom in the case law. The prohibition of seizure applies only to investigations of authors, contributors or informants of illegal publications, but not to all written correspondence between members of the press with the right to refuse to give testimony and not to all informants or records made by members of the press of information entrusted to them. No provision is made for editorial privilege when an investigation is directed against a source of information that is not illegal or in the case of investigatory proceedings involving the responsible editor or another member of the press as a suspect. Such members of the press may to be sure refuse to testify in this capacity; however, they are then not immune from searches and seizures even if such measures relate to documents that could yield the name of an informant. The above provisions of the Criminal Procedure Code contain no exhaustive regulation of the matter. They do not exclude the possibility that the protection of editorial privilege may be taken into account to a greater extent in the context of the exercise of discretion by the courts as to whether and to what extent a search or seizure is to be ordered. In the absence of legal reform, it was therefore at the time that is at issue here the responsibility of the judge to strike the required balance, taking into account the importance of the fundamental right of freedom of the press as a standard.<sup>532</sup>

An information is improperly obtained if its attainment is in breach of „soft law“-regulations, e.g. the „German Press Code“ of the German Press Council.<sup>533</sup>

### **3. Reporting about on-going investigations**

The juristic duty of care by reporting about on-going investigations is strengthened by the aforementioned rules of the Criminal Code.

Especially with regard to the „German Press Code“, the main fields of the journalistic duty of care by reporting about on-going investigations are:

- the duty to act carefully
- Research is an indispensable instrument of journalistic due diligence. The publication of specific information in word, picture and graphics must be carefully checked in respect of accuracy in the light of existing circumstances. Its sense must not be distorted or falsified by editing, title or picture captions. Unconfirmed reports, rumours or assumptions must be quoted as such.<sup>534</sup>

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<sup>532</sup> See BVerfGE 20, 162 [189].

<sup>533</sup> See below, Section 4.

<sup>534</sup> Section 2 (Care) of the German Press Code.

- The Press bears full journalistic responsibility for advance reports published in a compressed form which announce a forthcoming story. Anyone who further distributes advance reports by Press organs by stating the source must, basically, be able to rely on their validity. Abridgements or additions must not lead to a situation where the basic elements of the story are given a new slant or prompt incorrect conclusions which may harm the legitimate interests of third parties.<sup>535</sup>
- A verbatim interview is absolutely journalistically correct if it correctly relays what has been said. If the text of an interview is quoted in full or in part, the publication concerned must state its source. If the basic content of verbally expressed thoughts is paraphrased, it is nonetheless a matter of journalistic honour to state the source.<sup>536</sup>
- In reporting actual and threatened acts of violence, the Press should weigh carefully the public's interest in information against the interests of the victims and other people involved. It should report on such incidents in an independent and authentic way, but not allow itself to be made the tool of criminals. Nor should it undertake independent attempts to mediate between criminals and the police. There must be no interviews with perpetrators during acts of violence.<sup>537</sup>
- In principle, the Press does not accept news 'blackouts'. Co-ordination between the media and the police shall occur only if the action of journalists can protect or save the life and health of victims and other involved persons. The Press shall comply with police requests for a partial or total news embargo for a certain period of time in the interest of solving crime, if the request is justified convincingly.<sup>538</sup>
- the duty to respect the presumption of innocence
  - Reports on investigations, criminal court proceedings and other formal procedures must be free from prejudice. The principle of the presumption of innocence also applies to the Press.<sup>539</sup>
  - Reports on investigations and court cases serve to inform the public in a careful way about crimes and other infringements of the law, their prosecution and court judgement. In the process it must not prejudice

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<sup>535</sup> Guideline 2.3 (Advance Reports) of the German Press Code.

<sup>536</sup> Guideline 2.4 (Interviews) of the German Press Code.

<sup>537</sup> Guideline 11.2 (Reporting acts of violence) of the German Press Code.

<sup>538</sup> Guideline 11.4 (Co-ordination with the authorities/News "Blackouts") of the German Press Code.

<sup>539</sup> Section 13 (Presumption of innocence) of the German Press Code.

them. The Press may call a person a perpetrator if he/she has made a confession and there is also evidence against him/her or if he/she committed the crime in public view. In the language of reporting, the Press is not required to use legal terms that are irrelevant to the reader. In a state based on the rule of law, the aim of court reporting must not be to punish convicted criminals socially as well by using the media as a ‚pillory‘. Reports should make a clear distinction between suspicion and proven guilt.<sup>540</sup>

- If the Press has reported on the unconfirmed conviction of a person, it should also report an ensuing acquittal or a marked lessening of charges if the legitimate interests of the person affected do not dictate to the contrary. This recommendation also applies to the dropping of an investigation.<sup>541</sup>

German constitutional jurisprudence protects the right of journalists to report on suspected facts (Verdachtsberichterstattung) that may harm a person's honour as long as the report is done in defence of legitimate interests (i.e. opinion formation). In order to benefit from this defence, journalists must prove that the existence of several criteria:

- The report must touch on a question of public interest.
- The report must be supported by at least a minimum degree of conclusive facts.
- The report must be fair and balanced with respect to its subject, and it must not create the impression that the question of the subject's guilt is a settled matter of fact (this generally also demands the inclusion of any exonerating circumstances), and
- The report must include or have allowed to include the account or point of view of the subject.<sup>542</sup>

German substantive civil law knows multiple remedies that ensure an appropriate liability for violations of personal rights due to a violation of the journalistic duty of care.

Provided that a person's personal rights were violated through publications in the media, the right of reply enables the violated person to demand the publication of a statement from his point of view.<sup>543</sup> It is explicitly regulated

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<sup>540</sup> Guideline 13.1 (Prejudice) of the German Press Code.

<sup>541</sup> Guideline 13.2 (Follow-On Reporting) of the German Press Code.

<sup>542</sup> See Federal Court of Justice (Bundesgerichtshof) decision of December 17, 2013 - VI ZR 211/12, available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=66571&pos=0&anz=1>.

<sup>543</sup> See, e.g., *Ohrmann*, Der Schutz der Persönlichkeit in Online-Medien, Wesel

in section 56 of the German Interstate Broadcasting Treaty and the broadcasting and press (media) acts of the German Länder. It is a special remedy because it neither requires illegality – the personal right only needs to be interfered, not violated – nor fault.<sup>544</sup>

Moreover, revision of a violating statement referring to a person can be accomplished through four different types: by removing it (revocation), by adjusting its content to the truth (correction), by adding new content to it (addition) or by dissociating oneself from it (dissociation).<sup>545</sup> Claims of revision do not require fault.<sup>546</sup> The claims of revocation, correction or addition are derived from sections 823,<sup>547</sup> 824,<sup>548</sup> 826<sup>549</sup> of the German Civil Code or from an analogy to section 1004 (1)<sup>550</sup> of the German Civil Code.<sup>551</sup>

Furthermore, the affected person can be empowered to assert injunctive

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2009, pp. 120 et seq.; Sedelmeier, in: Löffler, *Presserecht*, 6th ed., Munich 2015, § 11 LPG.

<sup>544</sup> See *Roth*, *Die internationale Zuständigkeit deutscher Gerichte bei Persönlichkeitsrechtsverletzungen im Internet*, Frankfurt am Main 2007, pp. 38 et seq.; *Wüllrich*, *Das Persönlichkeitsrecht des Einzelnen im Internet*, Cologne 2005, pp. 157 et seq.

<sup>545</sup> See *Gramlich*, *Civil Liability for Violations of Personal Rights on the Internet from the German Point of View*, [http://www.freilaw.de/wordpress/wp-content/uploads/2012/05/Gramlich\\_Civil-Liability.pdf](http://www.freilaw.de/wordpress/wp-content/uploads/2012/05/Gramlich_Civil-Liability.pdf), p. 2.

<sup>546</sup> See *Wüllrich*, *Das Persönlichkeitsrecht des Einzelnen im Internet*, Cologne 2005, p. 161.

<sup>547</sup> Section 823 of the German Civil Code regulates that (1) a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this; (2) the same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

<sup>548</sup> Section 824 of the German Civil Code regulates that (1) a person who untruthfully states or disseminates a fact that is qualified to endanger the credit of another person or to cause other disadvantages to his livelihood or advancement must compensate the other for the damage caused by this even if, although he does not know that the fact is untrue, he should have known. (2) a person who makes a communication and is unaware that it is untrue is not obliged to pay damages if he or the recipient of the communication has a justified interest in the communication.

<sup>549</sup> Section 826 of the German Civil Code regulates that a person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.

<sup>550</sup> Section 1004 (1) of the German Civil Code regulates that if the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.

<sup>551</sup> See Sedelmeier, in: Löffler, *Presserecht*, 6th ed., Munich 2015, § 11 LPG mn. 233.

relief: The acting person is forbidden to carry out a certain action that will or already has violated a personal right.<sup>552</sup> This right is set explicitly in section 97 (1) of the German Copyright Act (Urheberrechtsgesetz, UrhG) for the author's personal rights of sections 12 to 14 of this Act. Moreover it can be derived out of sections 823 (2) in conjunction with (e.g.) sections 185 to 187 of the German Criminal Code, sections 824, 826 of the German Civil Code for the protection of one's honour and good reputation. For the privilege as to one's own image, omission can be asserted out of section 823 (2) of the German Civil Code in conjunction with sections 22, 23 of the German Act on the Copyright in Works of Plastic Art and Photography [Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie, KunstUrhG]. Concerning the General Personal Right (allgemeines Persönlichkeitsrecht),<sup>553</sup> injunctive relief is derived from an analogy to sections 12,<sup>554</sup> 862<sup>555</sup> and 1004 of the German Civil Code.

Compensation for damages can be granted for tangible and intangible damages – bases of claims (requirements) and legal consequences vary.

Compensation for tangible damages is regulated in section 823 (1) of German Civil Code for the infringement of „another right“ which is every special personal right and the general personal right.<sup>556</sup> It can also be granted by section 823 (2) of the German Civil Code which requires the

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<sup>552</sup> See Gramlich, Civil Liability for Violations of Personal Rights on the Internet from the German Point of View, [http://www.freilaw.de/wordpress/wp-content/uploads/2012/05/Gramlich\\_Civil-Liability.pdf](http://www.freilaw.de/wordpress/wp-content/uploads/2012/05/Gramlich_Civil-Liability.pdf), p. 2.

<sup>553</sup> The General Personal Right protects persons from the falsification of their personality and the publication of untrue allegations about them, discrimination and decrease of their honour, their personal rights (such as name or pictures) being used economically against their will, the exposure of personal information, the decrease of their freedom of choice and pestering; see Gramlich, Civil Liability for Violations of Personal Rights on the Internet from the German Point of View, [http://www.freilaw.de/wordpress/wp-content/uploads/2012/05/Gramlich\\_Civil-Liability.pdf](http://www.freilaw.de/wordpress/wp-content/uploads/2012/05/Gramlich_Civil-Liability.pdf), p. 1 et seq.

<sup>554</sup> Section 12 of the German Civil Code regulates that if the right of a person to use a name is disputed by another person, or if the interest of the person entitled to the name is injured by the unauthorised use of the same name by another person, the person entitled may require the other to remove the infringement. If further infringements are to be feared, the person entitled may seek a prohibitory injunction.

<sup>555</sup> Section 862 of the German Civil Code regulates that if the possessor is disturbed in his possession by unlawful interference, he may require the disturber to remove the disturbance. If further disturbances are to be feared, the possessor may seek a prohibitory injunction. The claim is excluded if the possessor possesses the property defectively in relation to the disturber or the predecessor in title of the disturber and the possession was obtained in the last year before the disturbance.

<sup>556</sup> See, e.g., Ohrmann, Der Schutz der Persönlichkeit in Online-Medien, Wesel 2009, pp. 128 et seqq.

breach of a „statute that is intended to protect another person“. Such protective laws can be found in sections 22 to 24 of the German Act on the Copyright in Works of Plastic Art and Photography for the „privilege as to one’s own image“,<sup>557</sup> in sections 185 to 187 of the German Criminal Code for the „protection of one’s honour and good reputation“,<sup>558</sup> in section 201 of the German Criminal Code for the „protection against violation of intimate privacy by taking photographs“<sup>559</sup> and in sections 202 and 203 of the German Criminal Code for the „protection of secrecy“. <sup>560</sup> Section 824 of the German Civil Code allows compensation for tangible damages if the „protection of one’s honour and good reputation“ is infringed. Section 97 (2) of the German Copyright Act (Urheberrechtsgesetz, UrhG) grants compensation for tangible damages in case the „author’s personality rights“ of sections 12 to 14 of the German Copyright Act is infringed.<sup>561</sup>

German case law admits compensation for intangible damages besides section 253 (2) of the German Civil Code<sup>562</sup> if a special personality right or the general personality right is profoundly violated and cannot be just compensated through other claims such as the right of reply or an injunctive relief.<sup>563</sup> Compensation for intangible damages then is based on section 823 (1) of the German Civil Code in conjunction with articles 1, 2 (1) of the German Basic Law.<sup>564</sup>

#### 4. Due diligence guidelines for journalists

A key requirement of the press is the observance of journalistic diligence in reporting. This is a general media law principle which is enshrined

- for press products in the press laws of the German Länder,
- for broadcasting services and internet services in the Broadcasting Treaty.

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<sup>557</sup> See, e.g., BGHZ 20, 345 (347); 26, 349 (351).

<sup>558</sup> See, e.g., BGHSt 1, 288 (289); 11, 67 (70 f.); 36, 145 (147); 26, 349 (351).

<sup>559</sup> See, e.g., *Gounalakis/Rhode*, Persönlichkeitsschutz im Internet, Munich 2002, mn. 176.

<sup>560</sup> See *Gramlich*, Civil Liability for Violations of Personal Rights on the Internet from the German Point of View, [http://www.freilaw.de/wordpress/wp-content/uploads/2012/05/Gramlich\\_Civil-Liability.pdf](http://www.freilaw.de/wordpress/wp-content/uploads/2012/05/Gramlich_Civil-Liability.pdf), p. 2.

<sup>561</sup> See, e.g., *Gounalakis/Rhode*, Persönlichkeitsschutz im Internet, Munich 2002, mn. 97.

<sup>562</sup> Section 253 (2) of the German Civil Code regulates only that if damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss.

<sup>563</sup> See, e.g., BGHZ 128, 1 (12); 132, 13 (27); 160, 298 (306); 165, 203 (210f.).

<sup>564</sup> See, e.g., BGHZ 39, 124 (131f.); 143, 214 (218 f.).

The German Press Code can be used as a means of interpretation for determining the legal care requirements. The obligation to observe journalistic diligence is an obligation of the respective press or other media organ, which then in turn contractually requires its employees to comply.

In concrete terms, the journalistic duty of diligence rules that content, origin and truth of messages must be checked before publication. The obligation to keep printing products free of criminal contents remains unaffected.<sup>565</sup>

Unconfirmed reports or rumors must be marked as such. Comments must be clearly separated from the reporting.

Especially with regard to the „German Press Code“, the main fields of the journalistic due diligence are:

■ *the duty of honesty*

- Dishonest methods must not be used to acquire person-related news, information or photographs.<sup>566</sup>
- Journalists must, as a fundamental principle, identify themselves as such. Untrue statements by a journalist about his/her identity and their publication when doing research work are fundamentally irreconcilable with the standing and function of the Press. Undercover research may be justifiable in individual cases if in this way information of particular public interest is gained which cannot be procured by other means. In the event of accidents and natural disasters, the Press must bear in mind that emergency services for the victims and those in danger have priority over the public right to information.<sup>567</sup>
- When conducting research among people requiring protection, particular restraint is called for. This applies especially to people who are not in full possession of their mental or physical powers or who have been exposed to an extremely emotional situation, as well as to children and juveniles. The limited willpower or the special situation of such people must not be exploited deliberately to gain information.<sup>568</sup>

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<sup>565</sup> See, e.g., Section 6 Landespressegesetz Nordrhein-Westfalen; Section 6 (2) Saarländisches Mediengesetz; see also, e.g., *Steffen*, in: Löffler, *Presserecht*, 6th ed., Munich 2015, § 6 LPG.

<sup>566</sup> Section 4 (Limits of research) of the German Press Code.

<sup>567</sup> Guideline 4.1 (Principles of Research) of the German Press Code.

<sup>568</sup> Guideline 4.2 (Research among people requiring protection) of the German Press Code.

- *the duty to respect the dignity of men*
  - Violating people's dignity with inappropriate representations in word and image contradicts journalistic ethics.<sup>569</sup>
  - A report is inappropriately sensational if the person it covers is reduced to an object, to a mere thing. This is particularly so if reports about a dying or physically or mentally suffering person go beyond public interest and the readers' requirement for information.<sup>570</sup>
- *the duty to respect the protection of young people*
  - The Press will refrain from inappropriately sensational portrayal of violence, brutality and suffering. The Press shall respect the protection of young people.<sup>571</sup>
  - When placing pictorial representations of acts of violence and accidents on front pages, the Press shall respect the possible effects on children and young people.<sup>572</sup>
  - When reporting on investigations and criminal court proceedings against young persons and on their appearance in court, the Press must exercise especial restraint out of consideration for their future.<sup>573</sup>
- *the duty of tolerance and of non-discrimination*
  - The Press will refrain from vituperating against religious, philosophical or moral convictions.<sup>574</sup>
  - There must be no discrimination against a person because of his/her sex, a disability or his membership of an ethnic, religious, social or national group.<sup>575</sup>
  - When reporting crimes, it is not permissible to refer to the suspect's religious, ethnic or other minority membership unless this information can be justified as being relevant to the readers' understanding of the incident. In particular, it must be borne in mind that such references could stir up prejudices against minorities.<sup>576</sup>

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<sup>569</sup> Section 11 of the German Press Code.

<sup>570</sup> Guideline 11.1 (Inappropriate portrayal) of the German Press Code.

<sup>571</sup> Section 9 of the German Press Code.

<sup>572</sup> Guideline 11.1 (Inappropriate portrayal) of the German Press Code

<sup>573</sup> Guideline 13.3 (Crimes committed by young persons) of the German Press Code.

<sup>574</sup> Section 10 of the German Press Code.

<sup>575</sup> Section 12 (Discrimination) of the German Press Code.

<sup>576</sup> Guideline 12.1 (Reports on crimes) of the German Press Code.



■ *the duty to respect the rights of personality*

- The Press shall respect the private life of a person and his/her right to self-determination about personal information. However, if a person's behaviour is of public interest, it may be discussed by the Press. In the case of identifying reporting, the public interest in information must outweigh the interests worthy of protection of the persons involved; sensational interests alone do not justify identifying reporting. As far as an anonymization is required, it must be effective. The Press guarantees editorial data protection.<sup>577</sup>
- The public has a legitimate interest in being informed about crimes, investigation proceedings and trials. It is the task of the Press to report on these issues. Yet, the Press shall only publish names, photographs and other information enabling the identification of suspects or perpetrators if the legitimate interest of the public outweighs the interests worthy of protection of the persons involved in the individual case. Factors that are to be taken into account in particular are: the intensity of the suspicion, the seriousness of the allegation, the state of proceedings, the suspect's or perpetrator's degree of fame, the suspect's or perpetrator's earlier behaviour and the intensity with which he/she seeks publicity. In general, a prevailing public interest may be assumed if:
  - the crime in question is extremely serious or special in terms of its type and dimension;
  - there is a connection resp. a contradiction between office, mandate, social role or function of a person and the action he/she is accused of;
  - there is a connection between a famous person's position and the crime he/she is accused of or if the crime the person is accused of is contrary to his/her public image;
  - a serious crime was committed publicly;
  - an arrest warrant has been applied for by the investigating authorities. If there are reasons to believe that a suspect is deemed to be incapable of committing a crime, the press shall refrain from identifying reporting.<sup>578</sup>
- In the case of renewed reporting on criminal proceedings lying in the past, as a rule no name or picture of the perpetrator should be published in the interest of resocialisation. The resocialisation interest is all the greater, the longer the time period that has passed since the conviction.

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<sup>577</sup> Section 8 (Protection of the personality) of the German Press Code.

<sup>578</sup> Guideline 8.1 (Criminal reporting) of the German Press Code.

- In the case of persons involved in the administration of justice, such as judges, prosecuting attorneys, lawyers and expert witnesses, identifying reporting is permissible as a rule if the persons in question are exercising their functions.
- Publication of the names or photographs of witnesses is generally inadmissible.<sup>579</sup>
- Victims have the right to special protection of their identity. Knowledge about the victim's identity is generally irrelevant for understanding an accident occurrence, the circumstances of a disaster or crime. Publication of the name and photograph of a victim is permissible if the victim resp. the relatives or other authorized persons have given their consent or if the victim is a public figure.<sup>580</sup> The limit of acceptability in reports on accidents and disasters is respect for the suffering of the victims and the feelings of their dependants. Victims of misfortune must not be made to suffer a second time by their portrayal in the media.<sup>581</sup>
- In particular with regard to reporting on crimes and accidents, as a rule the identification of children and young people is inadmissible before completion of their 18th year.<sup>582</sup>
- In the case of relatives and other persons who are indirectly affected by a publication and have nothing to do with the actual object of reporting, the publication of names and photographs is generally impermissible.<sup>583</sup>
- The names and photographs of missing persons may be published, however only in agreement with the responsible authorities.<sup>584</sup>
- Physical and mental illnesses or injuries are part of a person's private sphere. As a rule the press should refrain from reporting about illnesses or injuries without the consent of the affected persons.<sup>585</sup>
- Reporting on suicide calls for restraint. This applies in particular to the publication of names and photographs and the description of the particular circumstances.<sup>586</sup>

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<sup>579</sup> Guideline 8.1 (Criminal reporting) of the German Press Code.

<sup>580</sup> Guideline 8.2 (Protection of victims) of the German Press Code.

<sup>581</sup> Guideline 11.3 (Accidents and disasters) of the German Press Code.

<sup>582</sup> Guideline 8.3 (Children and young people) of the German Press Code.

<sup>583</sup> Guideline 8.4 (Relatives and third parties) of the German Press Code.

<sup>584</sup> Guideline 8.5 (Missing persons) of the German Press Code.

<sup>585</sup> Guideline 8.6 (Illnesses) of the German Press Code.

<sup>586</sup> Guideline 8.7 (Suicide) of the German Press Code.

- The private address as well as other private locations, such as hospitals, care facilities, rehabilitation centres enjoy special protection.<sup>587</sup>
- In reports on countries where opposition to the government can mean danger to life and limb, the Press must always consider whether, by publishing names or photographs, those involved may be identified and persecuted. Furthermore, the publication of details concerning escapees and their escape may result in relatives and friends who are still in the escapees' homelands being endangered, or in still-existing escape-routes being closed.<sup>588</sup>
- *the duty of corrections*
  - Published news or assertions, in particular those of a personal nature, which subsequently turn out to be incorrect must be promptly rectified in an appropriate manner by the publication concerned.<sup>589</sup>
  - The reader must be able to recognise that the previous article was wholly or partly incorrect. For this reason a correction publishing the true facts must also refer to the incorrect article. The true facts are to be published even if the error has already been publicly admitted in another way.<sup>590</sup>
  - If journalistic-editorial research, processing or use of person-related data results in the Press having to publish corrections, retractions, refutations by the persons concerned or to a reprimand by the German Press Council, the publication involved must store them along with the original data and document them for the same period as the original data.<sup>591</sup>
- *the duty of professional secrecy and confidentiality*
  - The Press shall respect professional secrecy, make use of the right to refuse to bear witness and shall not reveal informants' identities without their explicit permission.<sup>592</sup>
  - Confidentiality is to be adhered to in principle. Should an informant stipulate, as a condition for the use of his/her report, that he/she remain unrecognizable or unendangered as the source, this is to be respected. Confidentiality can be non-binding only if the information concerns a

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<sup>587</sup> Guideline 8.8 (Location) of the German Press Code.

<sup>588</sup> Guideline 8.11 (Opposition and escape) of the German Press Code.

<sup>589</sup> Section 3 (Corrections) of the German Press Code.

<sup>590</sup> Guideline 3.1 (Requirements) of the German Press Code.

<sup>591</sup> Guideline 3.2 (Documentation) of the German Press Code.

<sup>592</sup> Section 5 (Professional secrecy) of the German Press Code.

crime and there is a duty to inform the police. Confidentiality may also be lifted if, in carefully weighing interests, important reasons of state predominate, particularly if the constitutional order is affected or jeopardised. Actions and plans described as secret may be reported if after careful consideration it is determined that the public's need to know outweighs the reasons put forward to justify secrecy.<sup>593</sup>

- Secret service activities by journalists and publishers are irreconcilable with the duties stemming from professional secrecy and the prestige of the Press.<sup>594</sup>
- *the duty to protect the credibility of the Press*
- Journalists and publishers shall not perform any activities that could throw doubt over the credibility of the Press.<sup>595</sup>
- Should a journalist or publisher exercise another function in addition to his or her journalistic activity, for example in a government, a public authority or a business enterprise, all those involved must take care strictly to separate these functions. The same applies in reverse.<sup>596</sup>
- The acceptance of privileges of any kind that could possibly influence the freedom of decision on the part of publishers and editors are irreconcilable with the prestige, independence and responsibilities of the Press. Anyone accepting bribes for the dissemination of news acts in a dishonourably and unprofessional manner.<sup>597</sup>
- Even the appearance that the freedom of decision of a publishing house and its editorial staff can be impaired is to be avoided. Journalists shall therefore not accept any invitations or gifts whose value exceeds the extent that is usual in business and necessary as part of working life. The acceptance of advertising articles or other lowvalue objects is harmless. Research and reporting must not be influenced, hindered or even prevented by the accepting of gifts, invitations or discounts. Publishing houses and journalists shall insist that information be given regardless of the acceptance of a gift or an invitation. If journalists report on Press trips to which they have been invited, they shall make this financing clear.<sup>598</sup>

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<sup>593</sup> Guideline 5.1 (Confidentiality) of the German Press Code.

<sup>594</sup> Guideline 5.2 (Secret Service Activities) of the German Press Code.

<sup>595</sup> Section 6 (Separation of activities) of the German Press Code.

<sup>596</sup> Guideline 6.1 (Dual functions) of the German Press Code.

<sup>597</sup> Section 15 (Preferential treatment) of the German Press Code.

<sup>598</sup> Guideline 15.1 (Invitations and gifts) of the German Press Code.

- *especially the duty to separate advertising and editorial content*
- The responsibility of the Press towards the general public requires that editorial publications are not influenced by the private or business interests of third parties or the personal economic interests of the journalists. Publishers and editors must reject any attempts of this nature and make a clear distinction between editorial and commercial content. If a publication concerns the publisher's own interests, this must be clearly identifiable.<sup>599</sup>
- Paid publications must be so designed that the reader can recognise advertising as such. They can be separated from the editorial section by means of identification and/or design. Furthermore, regulations under advertising law apply.<sup>600</sup>
- Editorial stories that refer to companies, their products, services or events must not overstep the boundary to surreptitious advertising. This risk is especially great if a story goes beyond justified public interest or the reader's interest in information or is paid for by a third part or is rewarded by advantages with a monetary value. The credibility of the Press as a source of information demands particular care when handling PR material.<sup>601</sup>
- Journalists and publishers who research or receive information within the context of exercising their profession shall use this information prior to publication only for journalistic purposes and not for their own personal advantage or the personal advantage of others. Journalists and publishers may not publish any reports about securities and/or their issuers with the intention of enriching themselves, their family members or other close persons through the price development of the security in question. They should not buy or sell securities, either directly or through agents, on which they have published something in the previous two weeks or on which they are planning to report in the next two weeks. Journalists and publishers shall take the necessary measures to ensure compliance with these regulations. Conflicts of interest in drawing up or passing on financial analyses shall be revealed in an appropriate manner.<sup>602</sup>

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<sup>599</sup> Section 7 (Separation of advertising and editorial content) of the German Press Code.

<sup>600</sup> Guideline 7.1 (Distinction between editorial text and advertisements) of the German Press Code.

<sup>601</sup> Guideline 7.2 (Surreptitious advertising) of the German Press Code.

<sup>602</sup> Guideline 7.2 (Economic and financial market reporting) of the German Press Code.

■ *the duty of data protection*

- If a press report has a negative effect on someone's personal rights, on request the affected person must be given information about the respective personal data stored by the responsible publication organ. The information may be declined if:
  - the data is indicative of the names of persons who are collaborating or have collaborated in the research, processing or publishing of contributions as part of their journalistic work;
  - the data is indicative of the names of contributors, guarantors or informants of contributions, documents and reports for the editorial section;
  - imparting the data obtained by research or other means would negatively affect the publication organ's journalistic mission by revealing the information it possesses; or
  - it otherwise proves to be necessary in order to conciliate the right to privacy with the applicable regulations regarding the freedom of expression.<sup>603</sup>
- Personal data gathered in violation of the Press Code are to be blocked or deleted by the publication involved.<sup>604</sup>
- All person-related data gathered, processed and used for journalistic-editorial purposes are subject to editorial secrecy. Transfer of such data between editorial departments is permissible. It is not to be done until conclusion of a formal complaint procedure under data protection law. A data transfer is to be annotated with the remark that the data is to be edited or used only for journalistic-editorial purposes.<sup>605</sup>

## 5. Liability in the editorial chain

The liability rules based on the costs-by-cause principle (Verursacherprinzip). Accordingly, a journalist who has adequately caused by his own unlawful and culpable act a damage to a third person has to compensate for this damage.<sup>606</sup> Only in exceptional cases, there is also a responsibility for actions of third parties. For statements of third parties, for example in letters to the editor, the mere disseminator of such a statement is not liable if he hasn't adopted this statements, has sufficiently distanced from it and if there exists a legitimate interest of the public in the

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<sup>603</sup> Guideline 8.10 (Informational) of the German Press Code.

<sup>604</sup> Guideline 4.3 (Blocking or deletion of personal data) of the German Press Code.

<sup>605</sup> Guideline 5.3 (Data Transfer) of the German Press Code.

<sup>606</sup> See BGH NJW 1997, 2180.

information.<sup>607</sup>

The publisher is basically personally liable in any event for an illegal publication and can possibly even be held criminally liable. If the publisher participates in the publication, he is liable for his own action. Otherwise, the responsibility of the publisher for actions of employed journalists and other employees can be based on § 831 of the German Civil Code.<sup>608</sup>

In contrast to the publisher, the editor usually is not liable. Exceptionally, there is a liability of the editor when he was involved in the production of the article in any way. In addition, he is liable as a publisher, if he holds a comparably authoritative position like the publisher.<sup>609</sup>

Finally, the accountability arrangements for internet players is directed by the German Telemediengesetz which implements the rules of the E-Commerce Directive of the EU.

For German courts, the overriding factor in assessing the admissibility of a particular expression has been, in addition to truth, whether or not the expression can be seen to contribute to the formation of opinion (Meinungsbildung) on a socially or publicly relevant matter.<sup>7</sup> If this can be shown, the legitimate-interest defence (Wahrnehmung berechtigter Interessen, Section 193 of the German Criminal Code) can be invoked. Whether or not a statement meets the opinion-formation test, which applies to expressions of both fact and value, is subject to a holistic examination of the circumstances, but does not depend upon the intention of the author of the statement.

The German Federal Constitutional Court has affirmed that assertions of fact (Tatsachenbehauptungen) and value judgments (Werturteile) must be treated distinctly. Assertions of fact are characterised by an objective relationship between the expression and reality and can be examined as to their truthfulness. Opinions in contrast to assertions of fact are defined by an element of point of view, estimation, or opinion.<sup>610</sup> In general, the Court has considered that whether a particular statement should be understood as an assertion of fact or a value judgment depends upon the overall context.<sup>611</sup>

The Constitutional Court does not recognise an absolute defence of truth for factual assertions: The protection of free expression for assertions of fact ends when the assertion cannot contribute anything to the

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<sup>607</sup> See BVerfG AfP 2004, 49.

<sup>608</sup> See BGH NJW 1963, 484; BGH NJW 1963, 902; BGH NJW 1965, 685.

<sup>609</sup> BGH NJW 1954, 1682.

<sup>610</sup> See ECLI:DE:BVerfG:2012:rk20121025.1bvr090111 para. 18.

<sup>611</sup> See ECLI:DE:BVerfG:2012:rk20121025.1bvr090111 para. 20.

constitutional criterion of opinion formation. Insofar as this criterion is seen as fulfilled, true statements must as a rule be accepted, even when they are unfavourable to those involved, while untrue or unproven statements are assumed to be unlawful.<sup>612</sup>

As in the case of true speech (assertions of fact), the Constitutional Court has consistently held that value judgments (criticism and opinion) are protected by freedom of expression if and insofar as they contribute to the formation of opinion” on a socially or publicly relevant matter.<sup>613</sup>

Specifically the Court has established the following principles:

- Because of the fundamental importance of freedom of opinion for the democratic order, an assumption in favour of free speech is appropriate when concerning a contribution to the intellectual debate on a publicly relevant question.
- In a public debate, and particularly in political battle of opinions, criticism that is expressed in an exaggerated or polemic manner must be accepted, as otherwise there arises the danger of paralysis in or constriction of the process of opinion building. In contrast, however, the protection of honour is given greater weight the less an expression can be seen as contributing to a publicly relevant question and more as having been made in the private sphere in order to pursue personal ends.
- The limits of acceptable criticism are drawn at the level of “formal insult (Formalbeleidigung)” or what is known as Schmähkritik. In the jurisprudence of the Court, Schmähkritik in general refers to speech that is no longer principally related to the debate or any factual matter at hand, but is instead essentially intended to defame a particular individual. However, the Court has expressly narrowly defined what constitutes Schmähkritik, which goes above and beyond merely exaggerated or polemic speech such that “even excessive or abusive criticism does not in and of itself constitute Schmähkritik”.<sup>614</sup>

Relevant to the meaning of an expression is neither the subjective intention of the person expressing himself or the subjective understanding of the person whom the expression concerns, but rather the sense of the expression according to the understanding of an unprejudiced and rational public. Although the actual phrasing of the expression may be taken into account, far more important is the “linguistic context” and the “recognisable

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<sup>612</sup> See ECLI:DE:BVerfG:2012:rk20121025.1bvr090111 para. 19.

<sup>613</sup> See ECLI:DE:BVerfG:2012:rk20120917.1bvr297910 para. 25.

<sup>614</sup> See ECLI:DE:BVerfG:2009:rk20090512.1bvr227204 para. 28.



accompanying circumstances” under which the expression was made.<sup>615</sup> If there is more than one objective interpretation of an expression, then any interpretations that would exonerate the person accused of defamation must be given precedence.<sup>616</sup>

## **6. Conclusion and perspectives.**

Online journalists are generally accorded the same rights and protections as journalists in print or broadcast. Although the functional boundary between journalists and bloggers is becoming blurry, the German federation of journalists maintains professional boundaries by handing out press cards only to full-time journalists. Similarly, the German Code of Criminal Procedure grants the right to refuse testimony solely to individuals who have “professionally” participated in the production or dissemination of journalistic materials.

Incidents of confiscated video material covering demonstrations, for example, have led to a debate about extending the right to refuse testimony to a larger group including persons who have not “professionally” participated in the production or dissemination of journalistic materials

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<sup>615</sup> See ECLI:DE:BVerfG:2012:rk20121025.1bvr090111 para. 20.

<sup>616</sup> See ECLI:DE:BVerfG:2009:rk20090512.1bvr227204 para. 31.

## **7. Denmark**

Martin Dahl Pederson

## 1. Questions 1. – 2.

There are several Danish statutes and codes that regulate the utilization of improperly obtained information.

The Danish Penal Code<sup>617</sup> has provisions that specifically regulate the legality of means used for obtaining information through investigative journalism. A violation of the Code may result in a fine or imprisonment.

Section 152-152c of the Danish Penal Code prescribe that anyone that works in or for a public office who unwarranted passes on or utilizes confidential information, may be fined or face 6 months of imprisonment. The same punishment may befall anyone who uses or gains information in violation of section 152-152c, or passes on confidential information regarding a person's private matters or national state security.<sup>618</sup>

The Danish Penal Code section 264 prohibits a person from entering a house or area, which is not accessible, and section 264a prohibits photography in non-accessible locations, i.e. the use of hidden cameras in a private sphere. However, in a recent case from 2012, a journalist and a photographer were acquitted for taking photographs and video recordings with a hidden camera in a house that they had entered under false pretenses. The recordings were later used in a documentary regarding illicit trafficking of dogs. The Supreme Court found that the documentary was concerned with issues of public interest regarding animal welfare and ethics, and that the use of hidden cameras had been a necessary mean in the making of it. Furthermore the recordings had shown little of the home owner and privacy of the home.<sup>619</sup> In a previous case from 2010, the Supreme Court found, that an injunction against a news feature recorded by hidden camera in a treatment Centre, could not be upheld, as the injunction was an infringement on the freedom of speech ensured by the Danish Constitution and the European Convention on Human Rights.<sup>620</sup>

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<sup>617</sup> The Danish Penal Code, LBK no. 152 of 18/02/2015, in Danish here: <https://www.retsinformation.dk/Forms/r0710.aspx?id=168118>.

<sup>618</sup> The Danish Penal Code, section 152d. Section 152d was implemented to boost freedom of the press giving the press the freedom to publish information leaked in contravention of a duty of secrecy, if the information does not regard a person's private matters or national security. See also Advokaten 10, "Retten til at offentliggøre lækkede oplysninger" written by Oluf Jørgensen, link here: <http://www.advokatsamfundet.dk/Service/Publikationer/Tidligere%20artikler/2012/Advokaten%2010/Retten%20til%20at%20offentliggøre%20lækkede%20oplysninger.aspx>.

<sup>619</sup> Ugeskrift for Retsvæsen 2012.2328.H.

<sup>620</sup> UfR.2010.1869H.

In the aftermath of these cases, an ardent discussion regarding the legality of the use of hidden cameras was ignited,<sup>621</sup> concerning what limits - if any - there are, as to ensure the protection of privacy, as the latter seems to give way to the freedom of information whenever a case contains any form of information of public interest.

Furthermore, the Danish Penal Code section 263 prohibits a person from accessing a closed message whether a written message or a spoken conversation that the journalist is taping or bugging.<sup>622</sup> The ban only covers recordings of conversations between others. In other words, it is not illegal for journalists to tape a phone conversation that he himself takes part in. A case from 1980 establishes that it is sufficient that just one of the parties to the conversation has consented to it being taped for the situation to fall out of the scope of section 263, para. no. 3.<sup>623</sup> Section 263, para. no. 3, only protects statements and actual conversation, not other types of sound recordings of human activity. However publishing of other types of recordings in which people are identifiable, could constitute an injury to a person's reputation, which could result in them being entitled to monetary indemnification.<sup>624</sup>

Article 8 of The European Convention on Human Rights protects a person from being followed by the media, when the media's main goal is to cover the person's private affairs.

Furthermore, there is a statute on TV-surveillance<sup>625</sup>, which forbids surveillance in public streets<sup>626</sup> and a separate act regarding media liability<sup>627</sup> which contains rules regarding the liability and accountability of mass media, including criminal sanctions.<sup>628</sup>

The Danish Marketing Practices Consolidation Act<sup>629</sup> contains provisions

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<sup>621</sup> See for instance, adjunkt, ph.d. *Vibeke Borberg's* article, U.2014B.258 "Mediernes brug af skjult kamera på privat område" and Skov, Lambert and Gjessing's comment in U.2014B.359, "Om rettighedssammenstød og skjult kamera - en kommentar til U 2014B.258".

<sup>622</sup> The Danish Penal Code, section 263, para. 1, no. 1 and 3.

<sup>623</sup> UfR.1980.670H.

<sup>624</sup> In accordance with The Danish Liability and Compensations Act art. 26, see "Mediejura - det handler om informations- og ytringsfrihed", Oluf Jørgensen, 2011, forlaget Ajour, page 94-97.

<sup>625</sup> The Danish Act on TV-surveillance LBK no. 1190 of 11/10/2007, in Danish here: <https://www.retsinformation.dk/Forms/r0710.aspx?id=105112>.

<sup>626</sup> The Danish Act on TV-surveillance, section 1.

<sup>627</sup> The Danish Act on Media Liability, LBK no. 914 of 11/08/2014, in English here: <http://www.pressenaevnet.dk/Information-in-English/The-Media-Liability-Act.aspx>.

<sup>628</sup> The Danish Act on Media Liability, chapter 3, 4 and 8.

<sup>629</sup> The Danish Marketing Practices Consolidation Act, LBK no. 1216 of 25/09/2013, in Danish here:

regarding the obtaining and use of trade secrets. According to section 19, individuals and businesses must not obtain or try to obtain knowledge or disposal of the trade secrets of the business in an improper manner. If nonetheless such knowledge is obtained in either a lawful manner or contrary to section 19, it must not be used or passed on.

Any restriction on the diffusion of information due to a person's privacy rights must be weighed against the principles of Freedom of Information and Freedom of Speech codified in article 10 of The European Convention on Human Rights. A violation may be legitimized if it conveys news coverage of public interest. In 1994 a demonstration against a new bridge link was staged in the garden of the minister responsible for the new bridge. A journalist had entered the garden with the demonstrators, wanting to cover the protest. The protesters were later found guilty of violating section 264 in the Danish penal code, whereas the journalist was acquitted due to the Freedom of Speech, as he was covering a story of public interest.<sup>630</sup> The Supreme Court reached the same conclusion in a later case from 1999, where a group of journalists who had followed protesters to a private building site, were acquitted of violating section 264. The Court emphasized that their stay had not been unjustified and the violation of private space had been unobtrusive.<sup>631</sup>

### *Injunctions*

The use of injunctions is regulated in the Danish Administration of Justice Act.<sup>632</sup> A person, company or an authority who anticipates a violation of their rights by the publishing of an article, a program or a photograph has the option to sue for a prohibitive injunction and thereby prevent publication, if the consideration for their protection outweighs the public interest. A prohibitive injunction is a temporary measure which must be followed up by a lawsuit within two weeks after the injunction is granted in order to uphold it.<sup>633</sup>

In a case from 2010<sup>634</sup> (mentioned above) both the High Court and the Supreme Court revoked an injunction against a news feature regarding a treatment Centre. The injunction had been imposed by the district court on behalf of the treatment Centre's management as they themselves and the

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<https://www.retsinformation.dk/forms/r0710.aspx?id=158302>.

<sup>630</sup> UfR. 1994.988.H, see "Mediejura - det handler om informations- og ytringsfrihed", Oluf Jørgensen, 2011, forlaget Ajour, p. 76-82 and 89.

<sup>631</sup> UfR. 1999.1675.H.

<sup>632</sup> See chapter 40 of the Danish Administration of Justice Act, LBK no. 1308 of 09/12/2014, in Danish here: <https://www.retsinformation.dk/Forms/r0710.aspx?id=164280>.

<sup>633</sup> The Danish Administration of Justice Act, section 425.

<sup>634</sup> UfR. 2010.1859.H.

Centre's staff appeared in the video and had been unaware that they were being recorded at the time. The Supreme Court explained the reasons for revoking the injunction as being that the news feature was of significant public interest and that the management and the staff only appeared for short and had been effectively camouflaged.

#### *Seizure of documents*

Documents used for illegal purposes or intended for the use of illegal purposes can be seized.<sup>635</sup> However, it must not be used as an attempt to suppress the freedom of speech and information. For these reasons, journalists enjoy an extensive protection against seizure of documents in their possession.<sup>636</sup> A journalist who becomes subject to such a petition may demand that a court examines the material first to revise whether the seizure is justified, and in order to protect the journalist's sources<sup>637</sup>.

In a very exposed case from 2015, the Supreme Court found that seizure of computer equipment and mobile phones from a publishing house and former magazine staff was justified. The Supreme Court stated that the consideration to the private nature of the material and protection of the journalists' sources was not enough to exempt the material from sequestration due to the specific circumstances of the case, including the serious criminal charges against the publishing house and the materials' significance for the case. However the Supreme Court instructed that the material was first sorted by the district court so that anonymous sources were not revealed. Under this procedure the sequestration of material was in accordance with the Danish Administration of Justice Act and the European Convention on Human Rights.<sup>638</sup>

### **3. Reporting about on-going investigations**

Journalists covering on-going-investigations have certain obligations to act in accordance with a certain code of conduct. These rules are found in the Press Ethical Rules<sup>639</sup>. The Danish Press Council oversees complaints regarding media and journalists' violations of acceptable press conduct.<sup>640</sup>

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<sup>635</sup> The Danish Administration of Justice Act, chapter 74.

<sup>636</sup> The Danish Administration of Justice Act, section 802, para. 3, and section 803, para. 2, cf. section 172.

<sup>637</sup> The Administration of Justice Act section 807 (3).

<sup>638</sup> The Supreme Court's ruling in H.K. 8. januar 2015 i sag 154/2014 (1. afdeling).

<sup>639</sup> In Danish: "de presseetiske regler", which can be found in English here: <http://www.pressenaevnet.dk/Information-in-English/The-Press-Ethical-Rules.aspx>.

<sup>640</sup> In Danish "Pressenævnet". Their website can be found here: <http://www.pressenaevnet.dk/>.

The European Convention on Human Rights also contains certain principles that must be complied with by journalists and media. One of them is the obligation to avoid prejudgment in accordance with the principal of innocence until proven otherwise, stipulated in article 6 of the Convention. In the case EMD 29.8.1997 a journalist reported that an Austrian minister was guilty of tax-evasion. The story was written as if it were based on facts and not, as was the case, allegations. Even though the claims later turned out to be true, the journalist was nevertheless fined for prejudgment.<sup>641</sup>

Journalists must also respect their subject's right to privacy in accordance with the Conventions article 8. In 2013 the Danish Press Council made a ruling in a case concerning a paper coverage of two men who were taken hostage by Somalian pirates for more than 2 years. One of the former hostages claimed that the paper had violated his right to privacy during their news coverage campaign which lasted for over 10 months, and that the paper had failed to show the necessary scepticism towards their sources who were freelance journalists with a Somalian background. The campaign had inter alia included almost daily photos of the former hostage, portraying him in great detail and constantly printing his name over the course of the coverage. His name and picture had also been exhibited on two large banners that hung from the Town Hall square in Copenhagen. The Council expressed severe criticism of the papers coverage, which although it had contained news of public interest, far exceeded what could be seen as sound and ethical press conduct.<sup>642</sup>

In Denmark, journalists may report what happens in a courtroom. When doing so the journalist must be objective and fair in accordance with the Administration of Justice Act and the Press Ethical Rules.<sup>643</sup> However, according to the Administration of Justice Act, a journalist must refrain from certain actions covering a court case; He or she must respect a prohibition of the publication of the names of suspects in order to avoid punishment.<sup>644</sup> Furthermore, it is not allowed to tape or transmit pictures of sound from a judicial hearing unless the court has extraordinarily permitted it.<sup>645</sup>

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<sup>641</sup> See "Mediejura - det handler om informations- og ytringsfrihed", Oluf Jørgensen, 2011, forlaget Ajour, p. 223.

<sup>642</sup> The Danish Press Council's ruling in 12/11/2013, in Danish here: <http://www.presseaevnet.dk/Søg-Nyheder.aspx?M=News&PID=127&NewsID=7866>.

<sup>643</sup> The Press Ethical Rules, C.3. and "Mediejura - det handler om informations- og ytringsfrihed", *Oluf Jørgensen*, 2011, forlaget Ajour, p. 231-232.

<sup>644</sup> The Danish Administration of Justice Act, section 31.

<sup>645</sup> The Danish Administration of Justice Act, section 32, para. 1 and 2.

According to the Press Ethical Rules, a person, who is being charged, should not be identified before the police has taken measures.<sup>646</sup> If not public interests are being achieved by doing otherwise, the accused should remain anonymous.<sup>647</sup>

Caution should be exercised in publishing statements to the effect that information has been laid with the police against a person mentioned by name. Such information should as a rule not be published until the information laid has resulted in the intervention of the police or the prosecution.<sup>648</sup> However, this rule shall not apply to statements referred to by the person informed against, or if the information laid is already widely known or is of considerable public interest, or if under the existing circumstances it must be assumed that the information laid was well-founded.<sup>649</sup>

A suspect, an accused, or a convicted person should be spared from having attention called to an earlier conviction if it is without importance in relation to the offence concerning which he/she is now suspected, charged, or convicted. Previous criminal charges against a named person should not, as a rule, be mentioned in connection with other news.<sup>650</sup>

#### 4. Due diligence guidelines for journalists

The general criteria regarding information reported by journalists is that the information must be correct.<sup>651</sup> The more intense the information is, the more severe the demands of the journalist become.<sup>652</sup> This criterion includes a duty to fact check the information, but it must be weighed against the demand for fast news.<sup>653</sup> The more reliable a source is, the less a journalist has to fact check the information.<sup>654</sup> Information, which can be hurtful to a person, must be presented to that person for comments.<sup>655</sup>

In 2004 several articles were brought in a Danish paper accusing members of Jehovah's Witnesses of incest and sexual abuse, inter alia under the

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<sup>646</sup> The Press Ethical Rules, C.7.

<sup>647</sup> The Press Ethical Rules, C.6. and "Mediejura - det handler om informations- og ytringsfrihed", *Oluf Jørgensen*, 2011, forlaget Ajour, p. 226.

<sup>648</sup> The Press Ethical Rules C.7.

<sup>649</sup> The Press Ethical Rules, C.7.

<sup>650</sup> The Press Ethical Rules, C.8.

<sup>651</sup> Press Ethics Rules, A.1.

<sup>652</sup> *Medieretten*, 2013 *Søren Sandfeld Jakobsen og Sten Schaumburg-Müller*, page 403-431 – 406.

<sup>653</sup> Press Ethics Rules, A.1.

<sup>654</sup> See *Medieretten*, 2013 *Søren Sandfeld Jakobsen og Sten Schaumburg-Müller*, page 409 and The Danish Press Complaints Commission's ruling in 2004-6-43/46.

<sup>655</sup> Press Ethics Rules, A.3



headline "Jehovah's leaders want sex". The organisation brought a complaint against the paper, claiming that it had acted in violation of press ethics. The Danish Press Council found that the paper should have verified the very serious accusations and presented the information to those concerned in the organisation. The paper should have exercised more scepticism in regards to their sources, who were former members of the organisation. Based on this, the Council ruled that the paper had been in violation of proper press conduct, amplified by the headlines used in the articles. The paper was ordered to print the Jehovah's witness organisation's reply to the accusations as a form of restitution for the organisation.<sup>656</sup>

The case also exemplifies the right of reply stated in the Press Ethic Rules, which stipulates that verbal attacks and replies must, where reasonable, be brought in the same context and form. This is especially the case in regards to injurious and damaging statements.<sup>657</sup>

## 5. Liability in the editorial chain

As previously mentioned, the Danish Media Liability Act<sup>658</sup> regulates the chain of civil and criminal liability in cases where contents of mass media is in violation of the Press Ethical Rules or any of the previously mentioned statutes.

An author is liable if he consents to publishing a story in his own name.<sup>659</sup> He is only liable for the content which he authored. If multiple authors have written a story together, they become jointly liable unless it is clear who wrote what.<sup>660</sup> In television and on radio the author is liable when he consents to the publication of his information.<sup>661</sup>

The editor is held liable under strict liability for written publications or photos.<sup>662</sup> In television and on radio the editor only assumes strict liability when the author or the photographer is anonymous.<sup>663</sup>

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<sup>656</sup> The Danish Press Complaints Commission's ruling in 2004-6-69.

<sup>657</sup> Press Ethics Rules, A.4.

<sup>658</sup> The Danish Act on Media Liability, LBK no. 914 of 11/08/2014, in English here: <http://www.pressnaevnet.dk/Information-in-English/The-Media-Liability-Act.aspx>.

<sup>659</sup> The Danish Act on Media Liability, section 10, para. 1.

<sup>660</sup> The Danish Act on Media Liability, section 10, para. 3.

<sup>661</sup> The Danish Act on Media Liability, section 17, para. 1.

<sup>662</sup> The Danish Act on Media Liability, section 11.

<sup>663</sup> The Danish Act on Media Liability, section 17, para. 2.

The general rule is that a publisher does not become liable for the author or the editor - unless no liability can be asserted against the editor.<sup>664</sup>

## 6. Conclusion and perspectives.

We refer to our latest published articles in Media Law International.

1. The year 2015 started with a landmark decision on source protection by the Danish Supreme Court. The decision raises concern that sources in the future will be reluctant to tip the media, as a source under certain circumstances might not be guaranteed protection for disclosure. Furthermore, as the decision creates uncertainty whereby sources might be less inclined to give journalists information, the decision might also affect the principles of free press and freedom of speech.

<http://www.medialawinternational.com/page121.html>

2. Changes in the Media Liability Act, revised Press Ethical Rules and signs of a different approach in the latest rulings of the Press Council. These are some examples of recent changes in Danish press law. The essence of the changes is a tightening of the responsibility and sanctions imposed on the media. The effect is an easier access for the public to file complaints over the media and get redress.

<http://www.medialawinternational.com/Denmark%20Article.pdf>

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<sup>664</sup> The Danish Act on Media Liability, section 15 and "Mediejura - det handler om informations- og ytringsfrihed", *Oluf Jørgensen*, 2011, forlaget Ajour, page 264-274.



## **8. Estonia**

Pirkko-Liis Harkmaa

## 1. Relevant Legislation and Case-law

Before proceeding with the description of any particular provisions of legal acts, regulations, codes, etc., we first give a brief overview of the relevant legislation and case law concerning journalism in Estonia.

### *Legal acts*

Estonian legal acts are rather brief in respect of regulating journalism and do not contain many specific norms on the topics elaborated below. Nevertheless, the following provisions of legal acts are of relevance:

- Constitution<sup>665</sup> § 45 sets out the general principle of freedom of expression:

*“Everyone has the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means. This right may be circumscribed by law to protect public order, public morality, and the rights and freedoms, health, honour and good name of others. This right may also be circumscribed by law in respect of public servants employed by the national government and local authorities, or in order to protect a state secret, trade secret or information received in confidence which has become known to the public servant by reason of his or her office, and to protect the family and private life of others, as well as in the interests of the administration of justice. There is no censorship.”*

- Media Services Act,<sup>666</sup> which regulates audio-visual media (incl. television, radio, on-demand audio-visual media), sets out several general principles such as freedom of activity (§ 13), requirement for political balance during active election campaigning (§ 14), protection of source of information (§ 15), requirement to assign an executive producer (§ 17), protection of minors and morality and assurance of legality (§ 19), right of reply (§ 20), self-regulation (§ 22). Some of these provisions have been described in further detail below.
- Public Information Act<sup>667</sup> has been enacted to ensure that the public and every person has the opportunity to access information intended for public use, based on the principles of a democratic and social rule of law and an open society, and to create opportunities for the public to monitor the performance of public duties. The act sets out rules

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<sup>665</sup> Unofficial English translation available at: <https://www.riigiteataja.ee/en/eli/ee/rhvv/act/521052015001/consolide>.

<sup>666</sup> Unofficial English translation available at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/511052015002/consolide>.

<sup>667</sup> Unofficial English translation available at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/522122014002/consolide>.

and procedures for disclosing public information, but it is generally widely used by journalists to obtain information from any public bodies.

- Code of Criminal Procedure<sup>668</sup> § 72 sets out general assurances for persons processing information for journalistic purposes allowing refusal to give testimony in criminal proceedings under certain conditions, and § 91 gives certain assurances with respect to search.
- Code of Civil Procedure<sup>669</sup> § 257 sets out general assurances for persons processing information for journalistic purposes allowing refusal to give testimony in civil proceedings concerning the fact which enables to identify the person who has provided the information.

#### *Self-regulation*

- Estonian Newspaper Association has published the Code of Ethics of the Estonian Press<sup>670</sup>, which is a self-regulatory instrument applicable to press in Estonia.
- General supervision over the Estonian press is exercised by the Estonian Press Council (*Pressinõukogu*)<sup>671</sup>, which is a voluntary body of media self-regulation to handle complaints from the public about material in the media. The Council provides the public with a possibility to find solutions to disagreements with the media without the need to go to court. The Estonian Press Council has ten members, including six from the media sector and four lay members from the non-media sectors.
- Besides Estonian press Council, another self-regulation body *Avaliku Sõna Nõukogu* (word-by-word translation: the Council of Public Word)<sup>672</sup> also reviews complaints from the public.
- In addition, Estonian Public Broadcasting (ERR) has also adopted a Good Practice document<sup>673</sup>, which is applicable to the employees of

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<sup>668</sup> Unofficial English translation available at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/501042015002/consolide#para72>.

<sup>669</sup> Unofficial English translation available at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516062015009/consolide#para257>.

<sup>670</sup> English version available at: <http://www.eall.ee/code.html>.

<sup>671</sup> See more: <http://www.eall.ee/pressinoukogu/index-eng.html>.

<sup>672</sup> See more: [http://www.asn.org.ee/english/in\\_general.html](http://www.asn.org.ee/english/in_general.html).

<sup>673</sup> English version available at: [http://err.ee/files/ERR\\_good\\_practice\\_ERRpdf.pdf](http://err.ee/files/ERR_good_practice_ERRpdf.pdf).

ERR. This document elaborates on the Code of Ethics of the Estonian Press and sets out some further guidelines for employees of ERR.

*Case law*

Majority of court dispute relating to investigative journalism have been centred on the privacy of public figure issue. Some of such case law has been described below.

**2. a) Obtaining of information**

- There are no legal acts particularly addressed to such issues in the context of journalism.
- As regards self-regulation, the Code of Ethics of the Estonian Press sets out the following principles:
- Journalists shall not accept posts, bribes, or other inducements which may cause a conflict of interest in connection with their journalistic activity and which may compromise their credibility. (clause 2.1)
- Journalists working with financial and economic information shall not distribute it privately or use it in their personal interests. (clause 2.2)
- Journalists may not work for an institution whose activities they cover. (clause 2.3)
- Editorial staff members may not be obliged by their employer to write or perform any like activity contradicting their personal convictions. (clause 2.4)
- When conducting interviews, journalists must always identify themselves and the media outlet they represent. It is also recommended that the journalist specify the intended use of the information being gathered. (clause 3.1)
- Journalists may not take advantage of people lacking experience in relating to the media. The possible consequences of their statements shall be explained prior to the conversation. (clause 3.2)
- Journalists must strictly keep any promises made to their sources and must avoid making promises they may not be able to keep. (clause 3.3)
- Media outlets have a moral obligation to safeguard the identity of confidential sources of information. (clause 3.4)
- A journalist shall use honest means of obtaining audio or video recordings and information, with the exception of cases where the public has a right to know information that cannot be obtained in an honest way. (clause 3.7)

- Materials violating the privacy of an individual can only be disseminated if public interest outweighs the right to privacy. (clause 4.9)

As regards the practice of Estonian Press Council regarding applying the above provisions, a violations of clauses 3.1; 3.2 and 3.3 have been established in several occasions. However, we are not aware of practice concerning the violation of clause 3.7, which deals directly with the honesty of means of obtaining audio or video recordings and information.

As regards court practice, most of the case law relates to disputes on whether the information obtained by the media was obtained and made public in a way that violated the privacy of the data subject. The disputes are primarily about the dichotomy of private life and public life, whether the data subject is a public figure or not etc.

The Supreme Court has consistently ruled that public figures are under increased scrutiny and must therefore expect more intensive criticism from the media and society as a whole. For instance, the public increased attention with respect to the personality and political and official activities of politicians and the higher officials of executive power is justified.

At the same time, the Supreme Court has also noted that the increased scrutiny and attention cannot be invasive and extend to the private life of the public figure. For example, public figures involved in art creation are also individuals, who earn their living through publicly promoting their persona or their art work. The increased media attention can extend only to the creational work of the public figure, not his/her private life. Even if the public figure has made certain aspects of his/her private life public - that does not give the media freedom to obtain further private information about said public figure. Mere commercial interest does not justify the invasion of one's privacy.

It has been disputed in the practice of lower courts whether obtaining and disclosing a public figure's residential address constitutes a violation of privacy. In the given case, a public figure had filed candidacy for the position of mayor and court stated that in the context of political debate, the public has a justified interest in the residence of the candidate – primarily because the right of candidacy is predicated on residential requirements.

Similarly, obtaining and disclosing information about a person's business does not qualify as a violation of privacy. That is because a business is open and directed towards the public. The public has the right to know the owners of any given business are and who the members of the management board are, which is for such information is made publicly available through Commercial Register. In addition, making the revenues



and assets of any given company public serves to encourage societal debate about economic issues.

## 2. b. Boundaries of law enforcement

The law sets out the following boundaries of law enforcement:

- Media Services Act § 15 sets out the protection of source information in the following wording:

*“(1) A person who is processing information for journalistic purposes shall have the right not to disclose the information that would enable identification of the source of information.*

*(2) A person who is processing information for journalistic purposes shall have no right, without the consent of the source of information, to disclose the information that would enable identification of the source of information.*

*(3) The obligation provided for in subsection (2) of this section shall not apply if the source of information has knowingly provided false information to the person processing information for journalistic purposes.*

*(4) Subsections (1)-(3) of this section shall be applied to a person who is professionally exposed to information that enables identification of the source of information of a person who is processing information for journalistic purposes.*

*(5) It is prohibited to use direct or indirect influence, to identify the source of information, on a person who is processing information for journalistic purposes or a person who is professionally exposed to information that enables identification of the source of information of the person who is processing information for journalistic purposes.*

*(6) A person processing information for journalistic purposes and a person who is professionally exposed to information that enables identification of the source of information of a person who is processing information for journalistic purposes are obliged to submit this information pursuant to the conditions and in the procedure provided for in the Code of Criminal Procedure.”*

- Code of Criminal Procedure § 72 sets out the following general assurances regarding giving testimony:

*“(1) The following persons have the right to refuse to give testimony as witnesses concerning the circumstances which have become known to them in their professional or other activities:*

*/.../*

3<sup>1</sup>) persons processing information for journalistic purposes regarding information which enables identification of the person who provided the information, except in the case taking of the evidence by other procedural acts is precluded or especially complicated and the object of the criminal proceeding is a criminal offence for which at least up to eight years' imprisonment is prescribed as punishment, there is predominant public interest for giving testimony and the person is required to give testimony at the request of a prosecutor's office based on a ruling of a preliminary investigation judge or court ruling;

/.../

(2<sup>1</sup>) In the case provided for in clause (1) 3<sup>1</sup>) of this section, the persons who in their professional activities come across the circumstances which may identify the person who provided information to the person processing the information for journalistic purposes has the right to refuse to give testimony.

(3) The persons specified in subsection (1) of this section and their professional support staff and the persons specified in subsection (2<sup>1</sup>) do not have the right to refuse to give testimony if their testimony is requested by a suspect or accused.

(4) If the court is convinced on the basis of a procedural act that the refusal of a person specified in subsection (1) or (2) of this section to give testimony is not related to his or her professional activities, the court may require the person to give testimony."

- Code of Criminal Procedure § 91(2<sup>1</sup>) sets out the following concerning searches:

"(2<sup>1</sup>) A search may be conducted on the basis of an order of a prosecutor's office, except for searches of a notary's office or advocate's law office or at the persons processing information for journalistic purposes, if there is reason to believe that:

1) the suspect used or uses the site or vehicle to be searched at the time of commission of a criminal act or during the pre-trial proceedings, or

2) a criminal offence was committed at the site or in the vehicle, or it was used in the preparation for or committing of a criminal offence."

The Supreme Court has ruled in this respect that the police requires a court permit to conduct a search at the premises of a person who processes information for journalistic purposes. As such, the protection against searches is very extensive in the context of the media as it extends to rooms other than the media headquarters – such as the home of the person, who processes journalistic information. The person does not need

to be a journalist himself – he can be whomever, as long as he processes information for journalistic purposes in one way or another. This protection is far greater compared to the protection offered to notaries and attorneys, which is limited to notary/attorney bureaus. In order to stop a search, the person must inform the police of the nature of his occupation and the function of the rooms to be searched.<sup>674</sup>

- Finally, as noted above Code of Civil Procedure § 257 sets out general assurances for persons processing information for journalistic purposes allowing refusal to give testimony in civil proceedings concerning the fact which enables to identify the person who has provided the information.

### 3. Reporting about on-going investigations

The law contains the following requirements in this respect:

- Media Services Act § 20 sets out the right of reply in the following wording:

*“(1) Each natural or legal person, irrespective of the citizenship or location, whose legal rights, particularly reputation, have been damaged by the incorrect presentation of facts in the television or radio service, shall have the right of reply or to apply for implementation of other equivalent remedies that are in accordance with the legislation.*

*(2) A television or radio service provider shall ensure the opportunity to submit the reply or the implementation of other equivalent remedies and shall not cause difficulties by setting unreasonable deadlines or conditions. A written notice of the intention for reply is to be submitted to the television or radio service provider within 20 days as of the transmission of the programme that caused the application. The television or radio service provider shall transmit the reply free of charge in the same programme service within 20 days as of the receipt of the reasoned request.*

*(3) The request for reply may be rejected if the reply is not justified and the request includes a punishable act, or if satisfaction of the request would lead to civil liability for the television or radio service provider, or if generally accepted moral standards would be neglected by satisfaction of the request.”*

- In addition, the law also contains an exceptional possibility to prohibit certain content, namely Media Services Act § 13(2) sets out that the court may prohibit the transmission of a programme or part of it in the

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<sup>674</sup> Supreme Court judgment of 3 March 2014 in case 3-1-1-100-13, para 9.

pending court cases on the bases and in the procedure prescribed by law.

- As regards restrictions to the content of the information that may be disclosed, the Personal Data Protection Act<sup>675</sup> § 11(2) sets out the following:

*“Personal data may be processed and disclosed in the media for journalistic purposes without the consent of the data subject, if there is predominant public interest therefore and this is in accordance with the principles of journalism ethics. Disclosure of data shall not cause excessive damage to the rights of a data subject.”*

In this respect, the Supreme Court has ruled that if the personal data leaks or becomes public by some other means without the consent of the data subject – that alone does not give the media the unconstrained right to make that leaked data or new data repeatedly public. Data that becomes public in a court hearing does not give the media the freedom to transmit that data through their media channels without first judging, whether the criteria listed in Personal Data Protection Act §11(2) have been satisfied.<sup>676</sup>

Further, as regards self-regulation, the Code of Ethics of the Estonian Press sets out the following principles:

- A journalist shall be responsible for his or her own statements and work. Media organizations shall undertake to prevent the publication of inaccurate, distorted or misleading information. (clause 1.4)
- The reputation of any individual shall not be unduly harmed without there being sufficient evidence that the information regarding that person is in the public interest. (clause 1.5)
- Materials violating the privacy of an individual can only be disseminated if public interest outweighs the right to privacy. (clause 4.9)
- Individuals subjected to serious accusations should be offered an opportunity for immediate rebuttal in the same edition or programme. (clause 5.1)
- The objection should correct any factual errors and misquotations. The space/time taken up by the objection may not exceed the space/time for the offending statement. The objection shall be

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<sup>675</sup> Unofficial English translation available at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/529012015008/consolide#para11>.

<sup>676</sup> Supreme Court judgment of 18 February 2015 in case 3-2-1-159-14. para 14.

published immediately and prominently, without any editorial comment. (clause 5.2)

- A correction shall be issued in the event of any inaccuracies. (clause 5.3)
- As regards the practice of Estonian Press Council regarding applying the above provisions, a violations of the clauses 1.4 and 5.1 are the most frequent grounds for establishing the breach of the code.

#### **4. Due diligence guidelines for journalists**

There are no legal acts particularly addressed to such issues. As regards self-regulation, the Code of Ethics of the Estonian Press sets out the following principles (in addition to clauses described above):

- News, opinion and speculation shall be clearly distinguishable. News material shall be based on verifiable factual evidence. (clause 4.1)
- In the case of materials concerning a controversy, the journalist shall hear all sides of the conflict. (clause 4.2)
- It is not recommended to emphasize nationality, race, religious or political persuasion and gender, unless it has news value. (clause 4.3)
- The media shall not treat any individual as a criminal prior to a court sentence to that effect. (clause 4.4)
- Care should be taken in the use of quotes, photographs, audio and video materials in a context different from the original. Editing likely to mislead, as well as distortion of sound shall be identified by a corresponding subtitle or announcement. (clause 4.10)
- Photographs, captions, headlines, leads and broadcast lead-ins may not mislead the audience. The content, context and intended time of release of materials submitted by an outside contributor should not be altered without the author's knowledge and consent. (clause 4.11)

As regards the practice of Estonian Press Council regarding applying the above provisions, a violations of the clauses 4.1 and 4.11 have been rather frequent grounds for establishing the breach of the code.

As regards court practice in in this respect, the Supreme Court has ruled that that factual claims and value judgements must be differentiated. Factual claims must be verifiable and their truth-value must be provable.<sup>677</sup> Furthermore, the Supreme Court has stated that the use of indirect or

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<sup>677</sup> Supreme Court judgment of 12 June 2012 in case 3-3-1-3-12, para 42.

inconclusive data about a person can lead the public to reasonably make unfounded (and false) deductions about the person. Such distortion can lead to civil liability, if the inconclusive data has created a negative image of the person.<sup>678</sup>

## 5. Liability in the editorial chain

The law generally places the responsibility for the compliance ethics code and other requirements generally on the media service provider, who must assign an executive producer. Media Services Act § 17 states the following:

*“(1) The media service provider assigns the executive producer for the programme service or the programme catalogue to be transmitted.*

*(2) The executive producer shall guarantee that the transmitted programme service or the programme catalogue complies with this act and the good journalism practice and pursues the principles of freedom of expression.*

*(3) The media service provider shall keep a list of executive producers for one year as of the date of transmission of the programme in the programme service or as of the termination of the placement of the programme in the programme catalogue.”*

Further, the Code of Ethics of the Estonian Press sets out the following principles regarding the responsibilities of editors:

- A journalist shall be responsible for his or her own statements and work. Media organizations shall undertake to prevent the publication of inaccurate, distorted or misleading information. (clause 1.4)
- The editors shall, especially in the case of controversial materials, confirm the accuracy of the information and the reliability of the sources. The editors shall also verify the accuracy of all significant facts if the author of the material to be disseminated is not a member of the regular editorial staff. (clause 3.5)

## 6. Conclusion and perspectives

As evident from the above, the laws are not very detailed as to the regulation of journalism and much has left for self-regulation. In this way, the state avoids excessive involvement in the field of journalism and respects the freedom of press. At the same time, the self-regulatory instruments work generally rather well in solving the disputes arising in relation to the activities of journalists.

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<sup>678</sup> Supreme Court judgment of 31 May 2006 in case 3-2-1-161-05, para 12.

Moreover, legal guarantees for the journalists (such as protection of information source as well as assurances against the obligation to give testimony and more stringent rules on searched) further procure position of investigative media.

Freedom House has evaluated the status of Estonian media and as at 2014, it considered the Estonian media to be free, scoring 16 in the scale of 100 (where 0 represents the best and 100 the worst).<sup>679</sup>

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<sup>679</sup> See more at: [https://freedomhouse.org/report/freedom-press/2014/estonia#.VdxdO\\_ntlBd](https://freedomhouse.org/report/freedom-press/2014/estonia#.VdxdO_ntlBd).

## **9. Spain**

Julian Rodriguez-Pardo



## 1. Relevant Legislation and Case-law

### Introduction

Considering one of the reasons for the existence of a free press is the possibility of shaping a free, plural and critical public opinion, investigative journalism has become one of the most outstanding examples of it: moving away from official sources and notorious and obvious facts, it aims to cover and bring to light issues of public interest which individuals, public and private institutions try to hide, due to their illegal or unethical character.

The dictatorship of General Franco (1939-1975), under a regime of strict control of the press, gave birth to a constitutional and democratic State, where freedom of the press became an indispensable symbol of it; which, over the years, has increased its value as a fundamental freedom through the spread of news and reports of great influence.

From the beginning of the current democratic period, in 1977, to the present day, different affairs of public interest have been made available to the public, thanks to the work of investigative journalists. Newspapers such as *Diario 16* (closed in 2001), *El País* or *El Mundo* have displayed a determinant role in the issue, although freelancer's books cannot be diminished, besides of the fact that radio and television broadcasters have also discussed and commented on them. Matters attached to police corruption (case "Nani", 1983), State terrorism (case GAL, 1987), illegal financing of political parties (case Filesa, 1989), family misuse of governmental influences (case Juan Guerra, 1989), bank fraud (case BANESTO, 1993) or black payments within a political party (case Barcenás, 2013), must be outlined as remarkable works of the press.<sup>680</sup>

General frame for investigative journalism: freedom of information in Article 20 of the Spanish Constitution and the requirement of truthfulness.

Article 20 of the 1978 Spanish Constitution recognizes and protects freedom of expression and freedom of information, both framed within its Title I, devoted to fundamental rights and duties of citizens: freedom of expression is considered as the right to "freely express and disseminate thoughts, ideas and opinions through words, writing or any other means of reproduction"; while freedom of information consists on "the right to freely communicate or receive truthful information by any media",<sup>681</sup> which

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<sup>680</sup> In respect of the main cases occurred between 1975 and 2000, see the very interesting work of *Díaz Guell, L.*, Journalism and investigative journalists in Spain, 1975-2000: contribution to political, legal, economic and social change, PhD, Universidad Complutense de Madrid, 2003, consulted during July 2015 <http://library.ucm.es/thesis/inf/ucm-t27114.pdf>.

<sup>681</sup> Article 20 of the Spanish Constitution, 1978: "1. The following rights are recognised and protected: a) the right to freely express and disseminate

according to the Declaration of Human Rights of 1948 and the European Convention on Human Rights of 1950, embraces also the investigative faculty, both for citizens and journalists.

Besides the above mentioned differences between these two rights, the Spanish Constitutional Court has gone further, by stating those differences, but also pointing at the field of intersection between them: STC 127/2003, June the 30<sup>th</sup>, makes clear how “in real cases that life offers (...), the expression of thoughts often needs to rely on the narrative of facts and (...) communication of facts or news often includes some evaluative element”.<sup>682</sup>

This dualistic approach leaves aside the idea of objectivity to focus on truthfulness, as the result of a diligent and industrious procedure of the journalist: so on, in the case of freedom of expression, the requirement of truthfulness does not operate at all, as its object comprises the thoughts, ideas, opinions, beliefs and value judgments; whereas the right to information, about facts which can be considered newsworthy, is subject to the test of accuracy and reality. Therefore, and according to the STC 105/1990, June the 6<sup>th</sup>, truthful journalism excludes “inventions, rumours or mere maliciousness information”; and places itself in the wide space between the strict and thorough verification of a fact and the transmission of mere assumptions (...) or unfounded news”, as the STC 192/1999, October the 25<sup>th</sup>, stated.

Furthermore, on those occasions whereas the journalistic work is limited to reporting statements of people or reproducing any article published by

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thoughts, ideas and opinions through words, in writing or by any other means of communication; b) the right to literary, artistic, scientific and technical production and creation; c) the right to academic freedom; d) the right to freely communicate or receive accurate information by any means of dissemination whatsoever. The law shall regulate the right to invoke personal conscience and professional secrecy in the exercise of these freedoms. 2. The exercise of these rights may not be restricted by any form of prior censorship. 3. The law shall regulate the organisation and parliamentary control of the social communications media under the control of the State or any public agency and shall guarantee access to such media to the main social and political groups, respecting the pluralism of society and of the various languages of Spain. 4. These freedoms are limited by respect for the rights recognised in this Title, by the legal provisions implementing it, and especially by the right to honour, to privacy, to personal reputation and to the protection of youth and childhood. 5. The confiscation of publications and recordings and other information media may only be carried out by means of a court order”. See The Spanish Constitution, english version, on the web page of the Congress of Deputies of Spain, consulted in July 2015, at: [http://www.congreso.es/constitucion/ficheros/c78/cons\\_ingl.pdf](http://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf).

<sup>682</sup> All Constitutional Court cases mentioned in this work, can be found at: <http://www.tribunalconstitucional.es>.

other media, the Constitutional Court has ruled the standard of the so-called "neutral news report", exempting the journalist and the media from the duty of its internal truthfulness, as far as the author of the statement is identified and the journalist merely transcribes such opinions, without endorsing them any comment (STC, 134/1999, July the 15<sup>th</sup>). The Court has also considered that investigative journalism does not fit into this neutral category, as it is the media company the one to create or cause the journalistic issue itself (STC 6/1996, January the 16<sup>th</sup>).

## **2. Questions 2. – 4.**

Specific issues in investigative journalism

### 2.1. Journalist's privilege and citation of sources.

If the reference to the source is usually an indispensable tool for journalistic credibility, in the case of investigative journalism, in many cases, only the guaranteed anonymity of the source will allow the disclosure of certain information to the journalist:

The question of credibility, diligence and truthfulness, is inevitably linked to the contrast of sources, and has been addressed by the national Constitutional Court, stating that "contrast of the news is not an ambiguous term but, beyond its generic formulation as a duty, it requires casuistic clarifications. Thus, one of the circumstances modulating this obligation is the source that provides the news, because if suited with objective characteristics that make it credible, serious and reliable, it could make not necessary any other controls than accuracy and identity of the source" (STC 4/1996, February the 19<sup>th</sup>). Therefore "pure and general references to unspecified sources" (STC 172/1990, November the 12<sup>th</sup>) demands from the reporter a more thorough check. In the case of a truthfulness problem of the journalistic information, due to the use of undetermined sources, the journalist shall be responsible of its accuracy, unless a reputable source or enough diligence is provided. So on:

- a) In the case of official source, further contrast is not needed.
- b) In the case of notorious facts or indisputable facts, further contrast is not needed.
- c) If sources are not specified, the reporting procedure shall not be considered as diligent, except under those cases whereas the journalist's privilege is applied and the existence of the sources can be proved.
- d) If the journalist reveals the source, but cannot prove its existence, the procedure shall not be taken as diligent.

On the other hand, preserving the anonymity of the source, constitutes one of the most important tools for investigative journalism, as in the frame of illegal or unethical public affairs, many sources would not disclose the

information if they could not rely on keeping their identity hidden.

The journalist's privilege (or newsreporter's privilege) is the legal figure which covers this anonymity, as far as it allows the journalist the privilege to not declare the identity of the source, either demanded by the mass media, or by the public authorities. Further, it is an ethical duty of the journalist to the source. Otherwise, it would be difficult to conceive the existence of the fiduciary relationship between reporter and source. In the Spanish case, Article 20 of the Spanish Constitution recognizes and protects this figure, although there is not an ordinary law developing it; however, once give this figure as a constitutional right, it is legally covered and qualified (STC 15/1993, January the 18<sup>th</sup>).<sup>683</sup>

But, as in some other countries, the Spanish newsreporter's privilege is not an absolute, as it is limited by cases and situations in which a possible commission of a serious crime, affecting the integrity of individuals and their personal rights, could exist; as well as those occasions in which collective rights such as peace, security, the defence of the State or public health, could be in danger. Limits, however, do not legally come out specifically for journalists, but for any citizen, as far as Article 118 of the Spanish Constitution states the duty for any individual of collaborating with the judicial system in the pursue of Justice. Particularly, Article 410 of the Criminal Procedure Act (1882, with some amendments) states the obligation for

*"those who reside in Spanish, either native or foreign, and who are not disabled, (...) to attend any Court call to declare all they know about any given question (...)"*.

2.2. Access to information: public information, business information and State's official secrets.

a) *The right of access to public information.*

Article 105 of the Spanish Constitution places the regulation of the right of access to public information within the regulation of administrative procedures, making a distinction from freedom of information (Article 20), as the second one is referred to news coverage, while the first one is entitled to any citizen demanding any administrative information or data which should be made available to the public by the Public Administration:

*"The Law shall regulate (...) the access of citizens to administrative files and records, except under those cases in which their disclosure*

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<sup>683</sup> On the issue of newsreporter's privilege, see Belmar Talon A. The legal definition of journalist in the History of Spain: Article 20 of the Spanish Constitution of 1978 as legal statute for professionals, PhD, pro manuscripto, Chapter 6, 2015.

*could affect the security and defence of the State, the investigation of crimes and the privacy of individuals".<sup>684</sup>*

Further, the administrative legislation also links the right of access to public information with the principle of transparency that must prevail in the management of public administration.

However, in terms of investigative journalism and the constitutional right of access to public information, the most important regulation is the Act 19/2013, December the 9th, on Transparency, Access to Information and Good Governance. Its basic objective is to enhance the transparency of public institutions or any institution receiving public funds, through the implementation of the Constitutional principle of publicity; recognizing and guaranteeing the right of access to public information concerning those subjects.

The Act states the principle of active publicity as a fundamental, which demands from the Public Administration and other publicly subsidized institution the periodical publishing and updating of the information relevant to their activity. Limits to this obligation, as well as to the possibility of individually obtaining that information, lies on fundamental collective and individual rights, issues of national security and defence; State's foreign affairs; public security and law enforcement; data on criminal, administrative and disciplinary proceedings; documents related to the exercise of access to Justice, governmental monetary policy, professional secrecy and industrial property; documents under a confidentiality clause; documents related to the environment protection; and, of course, the protection of personal data in the absence of sufficient public interest, according to the Act 15/1999, of December the 13<sup>th</sup>, on the Protection of Personal Data.

*b) Official secrets and classified materials.*

On the opposite side of the rule of administrative transparency, we can also find those documents legally undisclosed, due to their character and matter, concerning the highest interests of the country. Those files fall under two categories, depending on the degree of disclosure: secret and confidential.

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<sup>684</sup> Article 105 of the Spanish Constitution. "The Law shall regulate: The hearing of citizens, directly or through organizations and associations recognized by the law, in the process of drawing up the administrative provisions which affect them. The access of citizens to administrative files and records, except under those cases in which the disclosure of information could affect the security and defence of the State, the investigation of crimes and the privacy of individuals. The legitimate procedure to be followed by the administrative acts, taking into consideration, when appropriate, the hearing of the individuals concerned by those acts. "

They are regulated by the Act 9/1968, April the 5th, on Official Secrets, amended by Act 48/1978, October the 7th, and provided with an implementing regulation in 1969 (Decree 242/1969, February, the 20th). Its Article 1 states that it is the nature or object of a file or document, which leads to its classification, under which "its secret or limited knowledge is legally covered". And it corresponds to the Council of Ministers or to the Military High Staff Chiefs the decision on the degree of protection, who should decide on the duration of the undisclosed time period.

According to the 1995 Spanish Criminal Code, the disclosing of these documents, by any individual, shall be punished under articles 584 and 598, as far as the information is given to another country.

*c) Trade secrets.*

Trade secrets include a variety of information and data concerning the productive, financial and commercial processes of any company; therefore, it the term does not refer only to the know-how of manufacturing a product or providing a service, or secrets protected by patent regulations, but it covers any information and knowledge that owners and managers want to keep hidden and secret, in order to enjoy a determined position in the market over competitors.<sup>685</sup>

As a signatory of the TRIPS Agreement, of the World Trade Organization (1994), Spain legally protects the confidentiality of all business information and data, which could be used by competitors in unfair commercial manners (art. 39, TRIPS Agreement). Further, Article 13 of the Act 3/1991, January the 10<sup>th</sup>, on Unfair Competition (as amended in 2009 and 2014) punishes the violation and disclosure of business and industrial secrets, whether accessed illegitimately, or legitimately, but under confidentiality duty.

Besides those cases in which internal sources provide specific information to journalists, without the authorization of the managers/owners, investigative journalism finds a legal path for its developing through the possibility of accessing those data stored at the Mercantile Register and at the Property Register: while at the first one you can get information on the general data of a company, including the names of their managers and agents, the subscribed capital, the share capital, the annual accounts and the different legal and economic special situations; at the second one, any citizen can obtain data related to real estates.

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<sup>685</sup> Vidal-Quadras, and Ramon M., O., "The know-how and its protection in Spain", article disposable at the Patent Centre of the University of Barcelona, accessed on July 2015 at: [http://www.ub.edu/centredepateents/pdf/doc\\_dilluns\\_CP/Vidal\\_Quadras\\_Ramon\\_%20Know-how\\_en\\_ES.pdf](http://www.ub.edu/centredepateents/pdf/doc_dilluns_CP/Vidal_Quadras_Ramon_%20Know-how_en_ES.pdf).

### 2.3. Right to privacy.

But public disclosing of information does not only affect to public documents or those belonging to companies and enterprises, but also to personal and family ones. So on, the right to privacy, entitled to both individuals and relatives, fixes a limit to freedom of expression and freedom of information in article 20 of the Spanish Constitution. And it has its legal development through: the Act 1/1982, May the 5<sup>th</sup>, on Civil Protection of the Right to Honour, Personal and Family Privacy and Self-Image (article 7); the already mentioned Act 15/1999, December the 13<sup>th</sup>, on the Protection of Personal Data; and the Spanish Criminal Code of 1995 (articles 197 and following), which determines those cases in which actions and omissions against privacy can be taken under a criminal perspective.

Generally speaking, both the 1982 Act and the Criminal Code prosecute the disclosing of privacy, no matter the means and tools used for this purpose; and they especially focus on the placement and use of technological devices that capture, record, play and disclose privacy, and the seizure of any personal document, either under paper format or electronic format; once given that both of these actions have taken place without the knowledge and consent of the victim.<sup>686</sup>

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<sup>686</sup> Article 197 of the 1995 Spanish Criminal Code: "1. Whoever, in order to discover the secrets or to breach the privacy of another, without his consent, seizes his papers, letters, electronic mail messages or any other documents or personal belongings, or intercepts his telecommunications or uses technical devices for listening, transmitting, recording or to play sound or image, or any other communication signal, shall be punished with imprisonment of one to four years and a fine of twelve to twenty four months. 2. The same penalties shall be imposed upon whoever, without being authorised, seizes, uses or amends, to the detriment of a third party, reserved data of a personal or family nature of another that are recorded in computer, electronic or telematic files or media, or in any other kind of file or public or private record. The same penalties shall be imposed on whoever, without being authorised, accesses these by any means, and whoever alters or uses them to the detriment of the data subject or a third party. 3. Whoever, by any means or procedure and in breach of the security measures established to prevent it, obtains unauthorised access to computer data or programs within a computer system or part thereof, or who remains within it against the will of whoever has the lawful right to exclude him, shall be punished with a prison sentence of six months to two years. When, pursuant to the terms established in Article 31 bis, a legal person is responsible for the offences included in this Article, the punishment of a fine from six months to two years shall be imposed thereon. Pursuant to the rules established in Article 66 bis, the Judges and Courts of Law may also impose the penalties established in SubSections b) to g) of Section 7 of Article 33. 4. A sentence of imprisonment shall be imposed from two to five years if the data or facts discovered, or the images captured to which the preceding numbers refer, are broadcast, disclosed or ceded to third parties. Whoever, being aware of their unlawful

Finally, and in respect of documents with interest for investigative journalism, the Act 16/1985, June the 25<sup>th</sup>, on the Spanish Historical Heritage, whenever private documents are referred to sensitive personal data or affect honour, privacy or self-image, access is forbidden without the consent of people affected by the content of those documents, and until a period of 25 years after the death of the owners has passed (50 years, if the date of the death cannot be properly stated).

#### 2. 4. Self-Image rights and the use of hidden camera.

The same Act 1/1982, May the 5<sup>th</sup>, on the Civil Protection of the Right to Honour, Personal and Family Privacy and Self-Image establishes the grounds for legitimate use of the image of people without their consent. Its Article 8 declares its legitimate use in the case of public figures, whenever two conditions apply: they can be considered publicly renowned people and the pictures/images are taken in public places.

Legal and ethical issues raised by the use of hidden cameras, in investigative journalism, have been brought up by the Spanish Constitutional Court, which framed this dubious technique under the proportionality test: STC 12/2012, January the 30<sup>th</sup>, refers to consent as the key to the capture and publishing of these images, as far as public interest does not always justifies sufficiently the infringement of this personal right, despite of considering freedom of information as category equal right. So on, the Court encourages the use of other means to obtain the information, as well as the possibility of blurring the lines of the face of the victim. And this is so, as the right on self-image confers to the individual the authority to determine “the graphical information generated personally

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origin and without having taken part in their discovery, perpetrates the conduct described in the preceding Section shall be punished with imprisonment from one to three years and a fine of twelve to twenty four months. 5. Should the acts described in Sections 1 and 2 of this Article be perpetrated by persons in charge of or responsible for the files, computer, electronic or telematic media, archives or records, a sentence of imprisonment of three to five years shall be imposed on them, and if they disclose, communicate or reveal reserved data, the upper half shall be imposed. 6. Likewise, when the acts described in the preceding Sections concern personal data that reveal the ideology, religion, belief, health, racial origin or sexual preference, or when the victim is a minor or incapacitated, the penalties imposed shall be those foreseen in the upper half. 7. If the acts are perpetrated for profit- making purposes, the penalties shall be imposed as foreseen in Sections 1 to 4 respectively of this Article in the upper half. If they also affect the data mentioned in the preceding Section, the punishment to be imposed shall be that of imprisonment from four to seven years. 8. Should the acts described in the preceding Sections be committed within a criminal organisation or group, the higher degree penalties shall be applied respectively”. The english version of the Spanish Criminal Code is disposable at <http://www.legislationline.org>.



and that might have a public dimension” (STC 81/2001, March the 26th).

## 5. Liability in the editorial chain

### *Legal responsibilities of journalists and editors*

Besides any civil sanction or criminal penalty stated by all the laws mentioned on the before pages, the 1995 Spanish Criminal Code refers specifically to the prosecution of crimes committed through the use of mass media, in order to establish a chain of personal responsibilities without the publishing and media companies. This system attends to the idea of subsidiary, criminal and selective responsibility; that is to say, a kind of waterfall system, in which appealing to the next step of the chain only applies whenever the before step cannot be identified or fulfil the punishment. So on, the system does also look at legal solidarity.

### *Article 30*

(1) In felonies and misdemeanours that are committed using media or supports of mechanical diffusion, neither the accessories, nor those who have personally or actually favoured these shall be held criminally accountable.

(2) The principals to which Article 28 refers shall be held accountable in a progressive, excluding and subsidiary manner, in the following order:

(a) Those who materially drafted the text or produced the sign concerned, and those who induced others to perpetrate the act;

(b) The directors of the publication or programme in which it is disseminated;

(c) The directors of the printing, broadcasting or distribution company;

(d) The directors of the recording, playing or printing company;

(3) When, for any reason other than extinction of criminal accountability, or for declaration of contempt of court or not residing in Spain, any of the persons included in any of the Sub-Sections of the preceding Section may be prosecuted, proceedings shall be taken against those mentioned in the Sub-Section immediately following”.<sup>687</sup>

### *Investigative journalism from a self-regulatory perspective*

- Finally, self-regulation gives us little extra information on the boundaries of investigative journalism, due to the fact that journalistic self-regulation has not had a big impact on the profession, as far as belonging to any professional legally entitled Society is not

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<sup>687</sup> The english version of the Spanish Criminal Code is disposable at: <http://www.legislationline.org>.

compulsory for the exercise of the journalistic work.

- However, we can outline some references from the two main ethical codes:
- The Ethical Code of the Spanish Federation of Press Associations (1993) mentions that privacy can only be interfered whenever justified by a public interest matter (art. 4); journalists must always respect the principle of innocence presumption whenever reporting about any public affair (art. 5); the newsreporter`s privilege gives the journalist the right and the duty of keeping the source identity hidden, with the exception of those cases in which personal or collective rights could be in danger, or whenever the source provides the journalist with false data and information (art. 10).<sup>688</sup>
- The Ethical Code of the Professional Society of Journalists in Catalunya (1992) determines that journalists shall only make information available to the public, whenever the data provided are accurate and precise (art. 2); on the other hand, the acquisition of data and images shall only be considered as ethical, whenever obtained through legitimate methods (art. 4); journalists must respect “off the record” information (art. 5); besides, professionals must also obey the principle of innocence presumption (art. 10).<sup>689</sup>
- On the other hand, the ethical codes of the professional societies of journalists in Galicia, Andalucia and Murcia are just copies of these two original texts mentioned above.<sup>690</sup>

## 6. Conclusion and perspectives

- Once given all the before information on investigative journalism, it is quite clear that the current constitutional frame constitutes the undeniable basis of it. The recognition and protection of freedom of information, despite of its constitutional limits, opened possibilities for the developing of news reporting which had not been considered

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<sup>688</sup> See Ethical Code of the Spanish Federation of Press Associations, disposable at the web page of the Federation, consulted on July 2015 at: <http://fape.es/home/codigo-deontologico>

<sup>689</sup> See Ethical Code of the Professional Society of Journalist in Catalunya, disposable at the web page of the Colegi de Periodistes de Catalunya, consulted on July 2015 at: <http://www.periodistes.org/ca/home/periodisme/codi-deontologic.html>

<sup>690</sup> See Ethical Code of the Professional Society of Journalists in Galicia at: [http://www.xornalistas.com/colexio/interior.php?txt=m\\_codigo&lg=gal](http://www.xornalistas.com/colexio/interior.php?txt=m_codigo&lg=gal); see Ethical Code of the Professional Society of Journalists in Andalucia, at: <http://periodistasandalucia.es/periodismo/codigo-deontologico>; and see Ethical Code of the Professional Society of Journalists in Murcia at: <http://periodistasrm.es/codigo-deontologico>.

before, whenever public interest of the issue, truthfulness and accuracy meet.

- The Constitutional Court has not ruled directly about the concept or characteristics of this type of Journalism, but has stated some ideas directly related with it, in respect of the three most controversial issues: the use of hidden camera, privacy of public or renowned people and citation/protection of sources. None of these three issues, however, could be legally understood or legitimized without matching the standard of public interest of the news, which is constantly attached to the case law of the Court, but has never been defined with enough accuracy as to settle a fixed rule.
- The legal frame is exhaustive, complete and allows journalists to develop their work, within a proportional balance between the right to information and other personal rights that must be respected. However, and despite of this positive framework, two issues must be taken into account, when assessment about possible future perspectives is demanded:
  - On the one hand, the boundaries of newsreporter's privilege and citation of sources: despite of its constitutional protection under article 20 of the 1978 Spanish Constitution, the fact of not being an absolute privilege on behalf of journalists, opens possibilities for real cases in which the reporter shall finally reveal the identity of his/her source. However, there is not yet case-law by the Constitutional Court on the issue, which makes it difficult to foresee those cases. In fact, the Court has made clear two statements that could bring some light, although not enough: firstly, the newsreporter's privilege cannot be appealed when the journalist acts under the "neutral news report" doctrine, as far as this doctrine always requires the identification of the source who makes declarations and statements (Auto 23/1995, January the 30<sup>th</sup>); secondly, whenever sources are not identified because of the newsreporter's privilege, truthfulness of the information must be unavoidable proved by other means (STC 320/1994, November the 28<sup>th</sup>).
  - On the other hand, self-regulation does not help in defining those boundaries, as far as: ethical codes are mainly promoted by professional societies with no compulsory membership in order to work as journalist; and the existent ethical codes do not go further in defining precisely the meaning of legitimate or illegitimate tools for developing investigative journalism.

## **10. Finland**

Anette Alén-Savikko

## 1. Relevant Legislation and Case-law

The fundamental legal basis for investigative journalism are provided in Section 12 of the Constitution of Finland (Suomen perustuslaki; 731/1999)<sup>691</sup> safeguarding freedom of expression and access to information:

Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are to be laid down by an Act. Provisions on restrictions relating to audiovisual programmes that are necessary for the protection of children may be laid down by an Act.

Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.<sup>692</sup>

Free speech and access to public documents are thus guaranteed for all while prior censorship is forbidden. However, more specific legislation exists. Firstly, the Act on the Exercise of Freedom of Expression in Mass Media (*laki sananvapauden käyttämisestä joukkoviestinnässä*; 460/2003; later FEA)<sup>693</sup> includes more detailed provisions on media activity (not the content as such). Secondly, the Act on the Openness of Government Activities (*laki viranomaisten toiminnan julkisuudesta* 621/1999; later OA)<sup>694</sup> builds on the principle of openness and anything to the contrary must be specifically provided in the OA or another Act (§ 1(1)). The Act includes provisions on access as well as on the duties of officials related to publicity and secrecy. Taxation documents and information for their part are covered by the Act on the Public Disclosure and Confidentiality of Tax Information<sup>695</sup>.

The Constitution also includes safeguards for fair trial (§ 21) part of which is the publicity of proceedings before the courts: according to Section

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<sup>691</sup> Unofficial translation by the Ministry of Justice; amendments up to 1112/2011 included: <http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>.

<sup>692</sup> Unofficial translation by the Ministry of Justice.

<sup>693</sup> Unofficial translation of the Ministry of Justice; available at <http://www.finlex.fi/fi/laki/kaannokset/2003/en20030460.pdf>.

<sup>694</sup> Unofficial translation by the Ministry of Justice; amendments up to 1060/2002 included: <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990621.pdf>.

<sup>695</sup> *Laki verotustietojen julkisuudesta* (346/1999), unofficial translation; amendments up to 1156/2005 included: <http://www.finlex.fi/fi/laki/kaannokset/1999/en19991346.pdf>. Cf. C-73/07 *supra*.

21(2), the publicity of proceedings alongside other elements of fair trial are to be laid down by a parliamentary act.<sup>696</sup> The acts governing the matter are tailored respectively for the general courts (*laki oikeudenkäynnin julkisuudesta yleisissä tuomioistuimissa*; 370/2007)<sup>697</sup> and the administrative courts (*laki oikeudenkäynnin julkisuudesta hallintotuomioistuimissa*; 381/2007)<sup>698</sup>. The starting point is that court proceedings and documents are public if not otherwise provided in law (§ 1; § 1). Moreover, the OA applies where not otherwise provided in the acts (§ 2(3); § 3). In addition, relevant provisions are found in the Code of Judicial Procedure (*oikeudenkäymiskaari*; 4/1734)<sup>699</sup> and in the Criminal Procedure Act (*laki oikeudenkäynnistä rikosasioissa*; 689/1997)<sup>700</sup> while the Criminal Investigations Act (*esitutkintalaki*; 805/2011; later CIA)<sup>701</sup> may also apply. An example is provided by provisions on confidentiality of sources.<sup>702</sup>

The Criminal Code (*rikoslaki* 39/1889; later CC)<sup>703</sup> frames free speech by criminalizing defamation, among others, and by including provisions on data and communication offences (Ch. 38). The Tort Liability Act (*vahingonkorvauslaki* 412/1974; later TLA)<sup>704</sup> includes general provisions on liability for damages.

The Information Society Code (*tietoyhteiskuntakaari* 917/2014; later

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<sup>696</sup> Cf. *Tiilikka* 2008, 186–190 on criminal proceedings in particular.

<sup>697</sup> Act on the Publicity of Court Proceedings in General Courts; unofficial translation by the Ministry of Justice: <http://www.finlex.fi/en/laki/kaannokset/2007/en20070370.pdf>.

<sup>698</sup> Act on the Publicity of Administrative Court Proceedings; unofficial translation by the Ministry of Justice: <http://www.finlex.fi/en/laki/kaannokset/2007/en20070381.pdf>.

<sup>699</sup> Unofficial translation by the Ministry of Justice; amendments up to 718/2011 included: <https://www.finlex.fi/fi/laki/kaannokset/1734/en17340004.pdf>.

<sup>700</sup> Unofficial translation by the Ministry of Justice; amendments up to 260/2002 included: <http://www.finlex.fi/fi/laki/kaannokset/1997/en19970689.pdf>.

<sup>701</sup> Unofficial translation by the Ministry of Justice; amendments up to 1145/2013 included: <http://www.finlex.fi/fi/laki/kaannokset/2011/en20110805.pdf>.

<sup>702</sup> Amended provisions were enacted in June 2015 and enter into force 1.1.2016. The reform as a whole, including i.a. new provisions on anonymous witnesses, aims to modernize the law and integrate elements of ECtHR praxis and directive 2012/29/EU. Cf. Government bill on the reform of Chapter 17 of the Code of Judicial Procedure and related legislation on presentation of evidence in general courts (Hallituksen esitys eduskunnalle oikeudenkäymiskaaren 17 luvun ja siihen liittyvän todistelua yleisissä tuomioistuimissa koskevan lainsäädännön uudistamiseksi) (HE 46/2014 vp).

<sup>703</sup> Unofficial translation by the Ministry of Justice; amendments up to 927/2012 included: <https://www.finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf>.

<sup>704</sup> Unofficial translation by the Ministry of Justice; amendments up to 61/1999 included: <http://www.finlex.fi/en/laki/kaannokset/1974/en19740412.pdf>.

ISC)<sup>705</sup> entered into force 1.1.2015 codifying provisions on electronic communication and repealing acts, such as the TV and Radio Act implementing the TVvFD/AVMSD and the e-Commerce Act implementing a directive of the same name. PSB is regulated in the Act on Yleisradio Oy (*laki Yleisradio Oy:stä* 1380/1993)<sup>706, 707</sup>.

The media rely on self-regulation and professional standards and ethics. The Guidelines for Journalists (*Journalistin ohjeet*)<sup>708</sup> are drafted by the Union for Journalists and associations for publishers and applied and enforced by the industry itself. The Guidelines apply across the field (print, broadcast, and online) to those that have committed to them, which means all major media in Finland. The Council for Mass Media (*Julkisen sanan neuvosto*; later CMM) was established as an independent body by the media. It decides on good professional practice by interpreting the Guidelines and good practices by resorting to discretion. CMM has no legal jurisdiction but its decisions are abided by the committed media.<sup>709</sup> Furthermore, there are specific internal guidelines for media outlets while the police also has its guidelines and regulations concerning communication and informing the public.<sup>710</sup>

In Finland, an association exists for investigative journalism (*Tutkivan journalismin yhdistys*) which promotes the work of investigative journalists.<sup>711</sup> The association disseminates information on methods,

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<sup>705</sup> Unofficial translation by the Ministry of Transport and Communications: <https://www.finlex.fi/en/laki/kaannokset/2014/en20140917.pdf>.

<sup>706</sup> Unofficial translation by the Ministry of Transport and Communications; amendments up to 474/2012 included: <http://www.finlex.fi/fi/laki/kaannokset/1993/en19931380.pdf>.

<sup>707</sup> For a comprehensive English language account on media law in Finland, see *Alén-Savikko – Korpisaari* (forthcoming).

<sup>708</sup> See the guidelines in English at: [http://www.jsn.fi/en/guidelines\\_for\\_journalists/](http://www.jsn.fi/en/guidelines_for_journalists/) (30.12.2014). The current guidelines have been in force since 1.1.2014. During the years, the Guidelines have undergone revision.

<sup>709</sup> See the homepage in English at: [http://www.jsn.fi/en/Council\\_for\\_Mass\\_Media/the-council-for-mass-media-in-finland/](http://www.jsn.fi/en/Council_for_Mass_Media/the-council-for-mass-media-in-finland/) (8.7.2015). For more, see *Alén-Savikko – Korpisaari* (forthcoming).

<sup>710</sup> See, e.g., the news and picture agency STT-Lehtikuva (<http://www.stt.fi/en>) and its internal guidelines at: [http://www.stt.fi/sites/default/files/uploads/8.2\\_sttn\\_sisaiset\\_ohjeet.pdf](http://www.stt.fi/sites/default/files/uploads/8.2_sttn_sisaiset_ohjeet.pdf); the ethical guidelines of the Finnish public service broadcaster Yleisradio (Yle) at <http://yle.fi/yleisradio/toimintaperiaatteet/ots-ohjeet>. For the police, see <http://www.poliisi.fi/viestintä>; cf. the handbook at: [https://www.poliisi.fi/instancedata/prime\\_product\\_julkaisu/intermin/embeds/poliisiwwwstructure/15034\\_POLIISI\\_viestintakasikirja\\_v090511.pdf?c70326c8b636d288](https://www.poliisi.fi/instancedata/prime_product_julkaisu/intermin/embeds/poliisiwwwstructure/15034_POLIISI_viestintakasikirja_v090511.pdf?c70326c8b636d288).

<sup>711</sup> See the homepage of the association at <http://www.tutkiva.fi/> (8.7.2015).

openness, sources, and critique. It arranges training and promotes cooperation, and it also distributes awards for journalists annually (the so called *Lumilapio*; eng. Snow shovel award).<sup>712</sup> There is also an association for journalists who report on legal issues and trials (*Oikeustoimittajat ry*)<sup>713</sup>. The association administers awards for publicity and secrecy called *Valokeila* (engl. *Spotlight*) and *Sumuverho* (engl. *Smokescreen*) respectively.

## 2. a) Obtaining of information

It must be noted that if the source commits an offense by providing information to the media (e.g., “leaks” information contrary to their duty of confidentiality), journalists are not held liable for those actions. It is another thing if they themselves commit offences (e.g., being themselves bound by a duty to disclosure), are accessories to offences, or cause damage.<sup>714</sup> However, *making information public* may amount to an offense whereas the possibility to break the confidentiality of sources exists in some cases (cf. *supra*).

Journalists have no special rights regarding access to information since the constitutional rights belongs to everyone (cf. *infra*).<sup>715</sup> Alongside the administrative courts, which deal with cases concerning access to information in the public domain, the (Deputy) Parliamentary Ombudsman (*Eduskunnan oikeusasiamies*) has assessed practices related to publicity.<sup>716</sup> The officials also have *duties to inform the public* (e.g., § 20 OA).<sup>717</sup> However, not all information gained from public documents or proceedings can be published as such by the media as the OA does not regulate dissemination of information but access to it.<sup>718</sup>

Cf. data protection law in *Markkinapörssi and Satamedia* (C-73/07) where

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<sup>712</sup> See information at <http://www.tutkiva.fi/tietoa-yhdistyksesta> and the rules of the association at <http://www.tutkiva.fi/saannot> (8.7.2015).

<sup>713</sup> See the homepage at <http://www.oikeustoimittajat.fi> (20.7.2015).

<sup>714</sup> Cf. KKO 2009:3; *Tiilikka* 2011, 29–30.

<sup>715</sup> Cf. access to information of the parties beyond general publicity (e.g., 11 OA; 4:15 CIA).

<sup>716</sup> See, e.g., the following rulings of the Supreme Administrative Court (Korkein hallinto-oikeus): KHO 2002:90, KHO 2003:77, KHO 2004:25, KHO 2005:26, KHO 2007:83, KHO 2008:52, KHO 2010:31, KHO 2011:27, KHO 2012:3, KHO 2013:90, KHO 2012:124; decisions of the (Deputy) Ombudsman: 1049 and 1075/4/98, 2044/4/00, 1775/4/00, 586/4/02, 152/4/04, 1247/4/04, 4111/2/06, 846/4/07, 3876/4/07 (cf. 1357/4/08), 313/4/09, 3149/4/10, 2557/4/11 (cf. 199/4/11), 4114/4/12, 1163/4/13, 1400/4/13, 175/4/14. For more on publicity, see *Alén-Savikko – Korpisaari* (forthcoming).

<sup>717</sup> Cf. *Tiilikka* 2008, 43.

<sup>718</sup> *Tiilikka* 2008, 43.



the ECJ concluded (ruling, point 2) that:

*“Article 9 of [Data Protection] Directive 95/46 is to be interpreted as meaning that the activities [such as publishing comprehensive lists and enabling a text-messaging service], relating to data from documents which are in the public domain under national legislation, must be considered as activities involving the processing of personal data carried out ‘solely for journalistic purposes’, [...] if the sole object of those activities is the disclosure to the public of information, opinions or ideas.”<sup>719</sup>*

As regards secrecy and non-disclosure, public officials are bound by various duties. According to Section 17 of the State Civil Servants Act (*valtion virkamieslaki*; 750/1994) the duty to non-disclosure of a civil servant is governed by the OA and other legislation.<sup>720</sup> General duties related to non-disclosure and secrecy are included in Chapter 6 OA. Thereby, officials may not secret content, information which would be secret if documented, or any other information for which non-disclosure is laid down by law (§ 23 OA). Confidential documents are those which are secret by law, declared secret by officials, or contain information for which the duty of non-disclosure applies (§ 22 OA). Unless otherwise provided in law, secrecy applies *inter alia* (§ 24(1) OA) to: documents intended or drafted for criminal investigation until court proceedings or until the prosecutor has decided not to press charges, unless evident that access to information does not endanger the investigation, cause suffering to the parties, or hinder the court to decide on non-disclosure pursuant to the Act on the Publicity of Court Proceedings in General Courts (point 3);<sup>721</sup> and to

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<sup>719</sup> The reference for a preliminary ruling came from the Supreme Administrative Court of Finland. A media company called Markkinapörssi had collected public data from tax authorities in order to publish extracts thereof in regional editions of the Veropörssi newspaper annually. The data was also transferred as CD-ROM discs to Satamedia company for purposes of disseminating the data by a text-messaging service. The Data Protection Ombudsman (tietosuojavaltuutettu) requested the Data Protection Board (tietosuojalautakunta) to prohibit the processing of personal data. After the request was rejected the Data Protection Ombudsman brought proceedings before the Administrative Court of Helsinki and ultimately the Supreme Administrative Court. (Cf. ECLI:EU:C:2008:727, paras 25, 29-32) See also the final judgment by the Supreme Administrative Court (KHO 2009:82) whereby activity was considered to fall outside the scope of journalistic purposes. See also ECtHR *Anttila v. Finland* (inadmissible).

<sup>720</sup> For info on civil service law, see e.g., <http://vm.fi/en/civil-service-law> (28.7.2015).

<sup>721</sup> Cf. a ruling of the Supreme Administrative Court (KHO 1998:13) on the police refusing to grant access to protocol on a criminal investigation since the investigations had been dropped due to cancellation; no right of access applied.

documents containing information on private business secrets or comparable information access to which causes economic harm to the entrepreneur and it is not a question of consumer health or environmental safety (point 20). (Cf. bans on testimony concerning i.a. officials, doctors, and advocates, in Ch. 17 Code of Judicial Procedure.) Secrecy offence and violation are included in Sections 1 and 2 of Chapter 38 CC respectively. Thereby, the disclosure, contrary to a duty provided in law or ordered by law, or making use of such secret information obtained in office is criminalized. Moreover, offences in office in Chapter 40 include (negligent) breach of official secrecy (40:5). This refers to criminalization of intentional disclosure or utilization of document or information which, by law, must be kept secret or cannot be expressed. Negligence means reduced sanction.

As regards gathering information, interception, eavesdropping, and illicit observation as well as preparation thereof (e.g., by placing equipment) are criminalized (24:5-7 CC).<sup>722</sup> Message interception, as in unjustifiable interception of the contents of a letter, phone call, or text message, etc., is criminalized in Sections 3 and 4 (aggravated) of Chapter 38 CC.<sup>723</sup> Data system break-in is criminalized in Sections 8 and 8 a (aggravated) of Chapter 38 CC.<sup>724</sup> Section 5 of Chapter 24 CC criminalizes unjustified listening to or recording of, with a technical device, conversations or other sounds within the private sphere (domestic peace<sup>725</sup>) and not meant for the listener to hear. The same applies outside domestic premises if recording of talk is done secretly and the talk is not intended for third parties nor is there a reason to believe that outsiders would hear it. Section 6 of the same Chapter contains provisions on illicit observation, as in unjustified watching or recording of, with a technical device, a person in domestic premises, toilets, dressing rooms, or comparable places. The same applies to places not open to the public, pursuant to Section 3 on public peace,<sup>726</sup>

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<sup>722</sup> For more on photography and illegal means of gathering info, see *Tiilikka* 2008, 205 ff.

<sup>723</sup> The provisions on interception as amended by act 368/2015 which enters into force 4.9.2015. The amendments stem from implementation of directive 2013/40/EU; cf. Government bill for act amending certain provisions on cybercrime in the Criminal Code and certain acts related thereto (Hallituksen esitys eduskunnalle laiksi eräiden rikoslain tietoverkkorikoksia koskevien säännösten muuttamisesta ja eräksi siihen liittyviksi laeiksi) (HE 232/2014 vp).

<sup>724</sup> The provisions on hacking as amended by act 368/2015 which enters into force 4.9.2015. Cf. *infra* on directive 2013/40/EU.

<sup>725</sup> Cf. § 11: domestic peace covers apartments and other places of residence, e.g., tents, hotel rooms, corridors, private yards, etc.

<sup>726</sup> 24:3 CC criminalizes invasion of public premises, such as offices, production facilities, meeting room, and comparable premises and their fenced yards, as

if observing is conducted in a manner which violates the privacy of its object.<sup>727</sup> However, recording one's own conversations does not fall within the provisions (cf. KKO 1981 II 182 on eavesdropping).<sup>728</sup> Moreover, photography and video-recording in public places are in principle allowed whereas publication of the material is another question. However, it is good practice to ask and inform, and permission to record is not one for publishing. Then again, even illegally obtained material may be published in cases of major public interest.<sup>729</sup> However, the Police Act (*poliisilaki*; 872/2011)<sup>730</sup> includes provisions relevant for scenes of crime or accident (Chs 1-2 on orders and cordons); journalist may thus face some restrictions on recording and reporting.

Cf. decision of the Parliamentary Ombudsman (3149/4/10) concerning a ban on photography in a court lobby. Issuing such a ban was considered to fall outside the scope of Section 21 of the Act on the Publicity of Court Proceedings in General Courts (on recording oral hearings with the permission and as instructed by the chairman) which limited to the court room. Illicit observation was not at hand.<sup>731</sup> The Deputy Ombudsman has also promoted allowing dissemination of information from scenes of accident and pointed to resorting only to necessary restrictions while allowing coverage at least to some extent (cf. decisions 442/4/04 and 2633/4/98).<sup>732</sup> Another decision (3447/4/05) refers to free speech with regard to photography in a health-care center; prior permit cannot be required and bans must be based on law. The privacy of patients and secrecy of health-related data must however be observed and guaranteed. Illicit observation could not be conducted in a lobby open to the public but publication might amount to an offense.<sup>733</sup> Cf. 1140/4/11 on photography

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well as areas used by the army or the border guard where access has been denied.

<sup>727</sup> For more, see *Neuvonen* 2014, 86, 131-135.

<sup>728</sup> *Neuvonen* 2014, 133; Government bill on renewing the penal provisions concerning offences against privacy, public peace and personal reputation (Hallituksen esitys Eduskunnalle yksityisyyden, rauhan ja kunnian loukkaamista koskevien rangaistussäännösten uudistamiseksi) (HE 184/1999 vp), 14. Cf. however, *Neuvonen* 2014, 133 on personal data in the recording and processing thereof.

<sup>729</sup> *Neuvonen* 2014, 135; *Tiilikka* 2008, 213-215.

<sup>730</sup> Unofficial translation by the Ministry of the Interior; amendments up to 1168/2013 included: <http://www.finlex.fi/en/laki/kaannokset/2011/en20110872.pdf>.

<sup>731</sup> Available in Finnish at: [http://www.eduskunta.fi/triphone/bin/thw.cgi/trip/?\\${APPL}=ereoapaa&\\${BASE}=ereoapaa&\\${THWIDS}=0.33/1436960193\\_25366&\\${TRIPPIFE}=PDF.pdf](http://www.eduskunta.fi/triphone/bin/thw.cgi/trip/?${APPL}=ereoapaa&${BASE}=ereoapaa&${THWIDS}=0.33/1436960193_25366&${TRIPPIFE}=PDF.pdf) (22.7.2015); for more, see *Neuvonen* 2014, 172.

<sup>732</sup> For more, see *Tiilikka* 2008, 218-220.

<sup>733</sup> Available in Finnish at:

in a social welfare office.

The Unfair Business Practices Act (*laki sopimattomasta menettelystä elinkeinotoiminnassa* 1061/1978; later UBPA)<sup>734</sup> includes provisions on business secrets in Section 4: nobody may thus (try to) obtain information on trade secrets, where this is unjustified, nor may they use or reveal information they have obtained this way (§ 4(1)). Whoever has received information on a business secret during employment must not unjustifiably use or reveal the information in order to gain personal benefit or to benefit or harm someone else (§ 4(2)). Similarly, Section 4(3) includes corresponding bans on those who act on behalf of an entrepreneur as well as those who have been entrusted with a technical model or instruction for business purposes (§ 4(3)). Furthermore, a ban on using or revealing information applies to *whoever has been informed* by someone else of a business secret or technical model and instruction *knowing* that the informant has unjustifiably obtained or revealed the information (§ 4(4)). Acting against the law may cause harm and liability for damages is regulated in the Tort Liability Act (§ 7 a UBPA).

According to Section 9 of the Guidelines, journalists are encouraged to make known their profession on assignment, and “[i]nformation should be obtained openly.” However, journalists may pursue information “by means that depart from standard practice” should they encounter a situation where matters of public interest cannot be otherwise investigated (Sec 9). As a principle, permission must be obtained for interviews and the purpose of the conversation should be clear (i.e. interview, background material; Sec 17). Indeed, the rights of interviewees are included in Sections 17 to 19 of the Guidelines: the context and media platforms are to be made clear to the interviewees (Sec 17). Personal statements can be submitted for “proofreading” by the interviewees within the time limits (Sec 18). Usually, consent to an interview cannot be withdrawn afterwards. However, according to Section 19, refusal concerning publishing must be complied with where circumstances have radically changed making the publication unjust.<sup>735</sup>

Cf. a decision by the CMM (5673/SL/14) where breach of good journalistic practice was found; accusations of misleading marketing were published in a paper based on one interview and information the journalist obtained

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[http://www.eduskunta.fi/triphome/bin/thw.cgi/trip/?\\${APPL}=ereopaa&\\${BASE}=ereopaa&\\${THWIDS}=0.9/1437988509\\_10208&\\${TRIPPIFE}=PDF.pdf](http://www.eduskunta.fi/triphome/bin/thw.cgi/trip/?${APPL}=ereopaa&${BASE}=ereopaa&${THWIDS}=0.9/1437988509_10208&${TRIPPIFE}=PDF.pdf). Cf. *Tiilikka* 215-216.

<sup>734</sup> Unofficial translation by the Ministry of Employment and the Economy; amendments up to 461/2002 included: <http://www.finlex.fi/en/laki/kaannokset/1978/en19781061.pdf>. The act applies to entrepreneurs and business activity.

<sup>735</sup> Such might be the case particularly in cases of death.

i.a. as an undercover client. Readers were not informed of the methods. The company was presented in a negative light. The company's subsequent statement was accompanied by the journalist's opinionated comment. (Cf. *supra* on reply and correction)

## **2. b) Boundaries of law enforcement**

Law enforcement has its boundaries when it comes to publishing, broadcasting, and media activity in general. First and foremost, prior censorship is forbidden by Section 12 of the Constitution ("without prior prevention by anyone"). This means that publishing can be targeted only afterwards (e.g., civil or criminal liability).<sup>736</sup> General provisions on competence and measures to be taken by the police as well as on criminal investigation are included in the Police Act, the Criminal Investigation Act, and the Coercive Measures Act (*pakkokeinolaki*; 806/2011)<sup>737</sup>. Provisions tailored for the mass media are included in Chapter 5 FEA on coercive measures, including the possibility to hinder the distribution of network messages.<sup>738</sup>

According to Section 6 FEA, every program and network publication must be recorded unless evident from the technical execution that the communication cannot be rendered punishable due to its content. The recordings must be held on to for three weeks; however, the time is prolonged by ongoing proceedings (§ 6(2)). According to Section 15, those recordings must be accessible to those who have justified reason to believe they are the object of a crime due to the content or damage to its communication, those wishing to exercise their right to reply or correction, and officials carrying out criminal investigation or prosecutorial evaluation. Section 17(1) notes that a court may order a service provider to submit identification data necessary for the identification of the sender of a network message; such is the case where there is reason to believe that the content is such as to render the communication punishable. According to Section 18(1), the court may order a publisher, a provider of programs, or a service provider to seize the distribution of a published network

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<sup>736</sup> Cf. a repealed 2002 decision of a District Court dating back to previous legislation (incl. ban on prior censorship) where a publisher was obliged pursuant to Enforcement Act not to write on a particular person. For more, see Neuvonen 2008, 44–45.

<sup>737</sup> Unofficial translation by the Ministry of Justice; amendments up to 1146/2013 included: <http://www.finlex.fi/en/laki/kaannokset/2011/en20110806.pdf>.

<sup>738</sup> A network message means information, opinion, etc. communicated to the public via technical means; a publication, a periodical (min. 4/year), a program, and a network publication (comparable to a periodical online) are also defined (cf. § 2 FEA).

message<sup>739</sup> where evident that keeping the message available for the public is punishable. For its part, Section 20 enables the seizure of publication: all copies may be confiscated only if evident that the publication will be declared forfeit (§ 20(1)). The decision must be submitted to a court of justice (§ 20(2)). The provisions on confiscation in the Coercive Measures Act apply (§ 20(3) FEA).<sup>740</sup> Alongside the possibilities offered by the FEA, e.g., devices containing information may be confiscated (*supra*), albeit exceptionally.<sup>741</sup>

The Coercive Measures Act includes some restrictions on confiscation and copying (Ch. 7) alongside its general principles (Ch. 1); a ban with exceptions applies also where confidentiality of sources is concerned (7:3; cf. *supra*)<sup>742</sup>. Chapter 8 contains provisions on searches of homes, premises, and devices, among others. A special search of a domicile is defined in Section 1(3) so that it occurs in premises in which it can be assumed that the object would reveal information for which there is a duty or right not to testify pursuant to 17:10-14, 16, 20-21 of the Code of Judicial Procedure and in respect of which no confiscation or copying of a document may be directed pursuant to 7:3 of the Coercive Measures Act.

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<sup>739</sup> Only the relevant part(s) of the message may be targeted; cf. Niiranen – Sotamaa – *Tiilikka* 2014, 136; Government bill for the Act on the Exercise of Freedom of Expression in Mass Media and certain laws relating thereto (Hallituksen esitys eduskunnalle laiksi sananvapauden käyttämisestä joukkoviestinnässä ja eräiksi siihen liittyviksi laeiksi) (HE 54/2002 vp), 78-79.

<sup>740</sup> For more on coercive measures pursuant to the FEA, see Niiranen – Sotamaa – *Tiilikka* 2014, 128–141; free speech has to be taken into account. Cf. § 1(2) FEA, interference with communication in applying the Act is legitimate only to the extent imperative taking into account the importance of free speech in a democratic society.

<sup>741</sup> Niiranen – Sotamaa – *Tiilikka* 2014, 132; HE 54/2002 vp, 83–84. Documents are primarily copied; cf. Government bill on reforming legislation on criminal investigations and coercive measures (Hallituksen esitys Eduskunnalle esitutkinta- ja pakkokeinolainsäädännön uudistamiseksi) (HE 222/2010 vp), 2. See also Report (2009:2), 401.

<sup>742</sup> Sec 3 as amended by act 737/2015 which enters into force 1.1.2016; cf. Government bill (HE 46/2014 vp), 148 whereby conformity was pursued with other proposed amendments and neutrality was introduced with regard to objects (documents, data, goods, etc.). Regarding a ban, possession is required by the person or the one who enjoys the right. Exceptions apply, e.g., where the person referred to in 17:20(1) Code of Judicial Procedure consents or where the crime is with at least six years' imprisonment and the court could oblige pursuant to 17:20(2) of the Code (*ibid.*, 149) (cf. confidentiality of sources). Previously, only the latter was included in the provision and the wording was slightly changed. The exception related to information, the unjustified obtaining, revelation, or utilization of which is under charges (cf. 17:9(3) Code of Judicial Procedure *supra*), does not apply to objects in possession of persons referred to in 17:20(1) of the Code of Judicial Procedure (7:3(3), point 4 Coercive Measures Act).

This refers, among others, to confidentiality of sources (cf. *supra*).<sup>743</sup> The prerequisites include suspicion of a crime with the maximum of at least six months' imprisonment or investigation of circumstances relevant for a corporate fine and the probability of finding material (document, information, etc.) linked to the investigated crime. The search may be conducted in premises not in the possession of the accused only if the crime has been committed there or the accused was caught there or if weighty reasons support the assumption that above mentioned material is found. (8:2) Moreover, a search ombudsman (*etsintävaltuutettu*) must be appointed to control a search does not target information referred to in Section 1(3) (8:7). The search of premises means searching other than domestic premises where public access is restricted, for documents, information, or the like (8:1(4)). The prerequisites include probability of finding material linked to the investigated crime (8:4).<sup>744</sup>

Chapter 10 of the Coercive Measures Act includes provisions on covert measures, such as telecommunications interception (10:3) and traffic data monitoring (10:6). The prerequisites require suspicion of severe crimes (e.g., aggravated distribution of child pornography, crime with the max. min. four years of imprisonment)<sup>745</sup> and probability of obtaining necessary data (10:2).<sup>746</sup> Section 6(3) notes that the obligation to submit identification data for network messages is laid down in Section 17 FEA (cf. *supra*). The Police Act also includes a right, in individual cases, to have access to information on a network address if necessary for carrying out duties of the police (4:3(2)).<sup>747</sup> Further restrictions are included in Section 52 of Chapter 10 of the Coercive Measures Act on bans to observation: paragraph 2, point 3 notes that, unless the crime is with the maximum of at least six years of imprisonment, interception or technical observation cannot target

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<sup>743</sup> Para. 3 as amended by act 737/2015 which enters into force 1.1.2016; cf. Government bill (HE 46/2014 vp), 149 which notes that the definition covers situations where material is under the confidentiality of sources (as before) (cf. *infra* conformity with other proposed amendments).

<sup>744</sup> For more, see Government bill (HE 222/2010 vp); the provisions were renewed with a focus on increased protection for homes and private data.

<sup>745</sup> Para. 2, point 12 of Sec 10:3 and paragraph 2 of Sec 10:6 as amended by act 369/2015 which enters into force 4.9.2015. The amendments stem from implementation of directive 2013/40/EU and aim at coordination with the amended CC; cf. Government bill (HE 232/2014 vp), 39.

<sup>746</sup> The provisions apply in criminal investigations and telecommunications interception may target public communications networks (cf. Information Society Code); Government bill (HE 222/2010 vp), 314 ff. In some cases monitoring may be conducted with the possessor's consent (10:7). For more, see *Neuvonen* 2014, 128-131.

<sup>747</sup> Cf. Confiscation of benefit derived from a crime may involve the increase in sales or subscriptions due to scandalous content; see *Tiilikka* 2008, 281.

communication between the accused and the originator of a message, publisher, or program provider (and those in their service). These bans do not apply if the person is suspected of the same crime or a crime directly linked to that of the accused and a decision was made on such measures.<sup>748</sup>

Of particular importance for the media, and investigative journalism, are the provisions on confidentiality of sources and anonymity.<sup>749</sup> These are covered by Section 16 FEA: originators of messages, publishers, and program providers are entitled to preserve the confidentiality of their information sources. In addition, publishers and program providers are entitled to maintain the confidentiality of the identity of the originator of the message (§ 16(1)-(2)). The confidentiality of sources applies across media and applies to all originators of messages, not only professional journalists. Every originator and those in their service has a legal *right* (not a duty) to maintain confidentiality whereas only publishers and providers of program activity and those in their service are granted the right to preserve anonymity of expression.<sup>750</sup> This is balanced by the extended liability of publishers and program providers (cf. point 4. *supra*).<sup>751</sup> Furthermore, Section 14 of the Guidelines for Journalists reads as follows:

The journalist is *entitled and duty bound* to conceal the identity of any person who has provided confidential information by agreement with the source. If the publication of information that is in the public interest results in highly negative publicity, it is desirable that the editorial office makes public how the reliability of the anonymous source and the information obtained from it has been assured.<sup>752</sup> (Italics supplied)

Previous editions of the Guidelines (prior to 2011) referred either merely to the duty or the right to confidentiality. The right allegedly enabled revelation in exceptional cases, such as where journalists were deliberately misled or provided with false information. The recommendation to inform the public was yet another addition.<sup>753</sup>

Regarding breaking the confidentiality of sources, provisions are scattered. Section 8 of Chapter 7 CIA includes provisions on the obligation to testify and refusal to testify in investigations. The general rule is that a witness

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<sup>748</sup> Sec 52 as amended by act 737/2015 which enters into force 1.1.2016; cf. Government bill (HE 46/2014 vp), 149-150 which notes the aim in this regard only to update references pursuant to other proposed amendments.

<sup>749</sup> Cf. the ban on self-incrimination for the accused and suspect.

<sup>750</sup> Prior to the 2004 FEA, confidentiality was restricted to print, radio, and television; the scope was widened from print to the latter two by act 220/1971 (*Tiilikka* 2011, 32-33).

<sup>751</sup> *Tiilikka* 2008, 35.

<sup>752</sup> See the English version linked *supra*.

<sup>753</sup> *Tiilikka* 2011, 21–22; see also *Alén-Savikko – Korpisaari* (forthcoming).



has obligations and rights to refrain similar to the ones provided in selected provisions of Chapter 17 of the Code of Judicial Procedure (7:8(1)); notwithstanding paragraph 1, a witness is obliged to testify in a few cases, including where the investigated crime (or attempt or accessory thereto) is one with the maximum penalty of at least six years of imprisonment and the court could oblige the witness to testify pursuant to the Code of Judicial Procedure (7:8(2), point 2 CIA). The exception related to information, the unjustified obtaining, revelation, or utilization of which is under charges (cf. 17:9(3) Code of Judicial Procedure *supra*), does not apply to persons referred to in 17:20(1) of the Code of Judicial Procedure, such as a publisher (7:8, point 3 CIA).<sup>754</sup> The confidentiality of sources can thus only be broken where serious crimes are concerned, excluding i.a. defamation and secrecy offences. As a principle, derogations from the rights and duties are similar in scope to those in the Code of Judicial Procedure. One important exception is still the confidentiality of sources which cannot be broken in investigation on secrecy offences (cf. trial *supra*). The preparatory works point to a Committee Report (2009:2) promoting changes to legislation in this regard. However, its exclusion from the subsequent Government bill (HE 222/2010 vp) is noted alongside stating how nothing thereafter has given reason to rethink the situation.<sup>755</sup> The CMM gave its statement (4152/L/09) in connection to the Report (2009:2) noting that it opposes any legislative attempts to weaken the confidentiality of sources.<sup>756</sup>

During trial the confidentiality of sources can be broken when information has been given contrary to a legal duty to non-disclosure. According to the Code of Judicial Procedure, the originator of a message, publisher, and program provider as referred to in the FEA are entitled to refrain from testifying on the identity of information sources or creators of messages

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<sup>754</sup> Sec 8 as amended by act 736/2015 which enters into force 1.1.2016. According to the preparatory works, the aim here was to update references and clarify the provisions in question (e.g., express references to the Code of Judicial Procedure); cf. Government bill (HE 46/2014 vp), 144-146; see also *ibid.*, 59 which notes that the added 17:9(3) might apply i.a. in cases concerning industrial espionage or secrecy offences (30:4 or 38:1 CC); it also notes that where there is a right to refrain from testifying there is a right to testify (e.g., business secrets).

<sup>755</sup> See Government bill (HE 46/2014 vp), 144 ff., esp. 145; see also 146 which notes that an exception was tailored for confidentiality of sources with regard to 7:8(3) (cf. 17:9(3) Code of Judicial Procedure); Government bill (HE 222/2010 vp), 159; *Tiilikka* 2011, 28. For more on the above mentioned amendments and the 2016 reform, see *Alén-Savikko – Korpisaari* (forthcoming).

<sup>756</sup> Available in Finnish at: <http://www.jsn.fi/sisalto/4152-l-09/?search=l%C3%A4hdesuoja> (22.7.2015).

(17:20(1))<sup>757</sup>. However, these persons may be obliged to answer where the prosecuted crime is with the maximum of at least six years' imprisonment or concerns a duty to non-disclosure is infringed in a punishable manner (17:20(2)). (Cf. Similar provisions apply to business secrets (17:19) with the exception that refusal to testify is justified unless pressing reasons point to the other direction. The obligation for officials to refrain from testifying is included in 17:12.)<sup>758</sup> According to 17:9(3) Code of Judicial Procedure, the duties or rights to refrain from testimony do not apply where information is concerned, the unjustified obtaining, revelation, or utilization of which is under charges.

Breaking the confidentiality of sources has yet to be decided by courts of law. Indeed, for instance, defamation is not among the crimes which justify the breakage. However, the Supreme Court (*Korkein oikeus*) (KKO 2004:30) has touched upon the matter due to the prosecution's attempt to find out the author of an anonymous book of defamatory nature. The court was of the opinion that the representative of the publisher had the right to refrain from answering questions around the identity of the author or the source. The new FEA was applied in the case although the publication dated to an earlier time.<sup>759</sup> The court decided similarly in another case concerning aggravated defamation in the online environment (KKO 2009:88); letters relating to a subsequent printed book on the subject could not be used as evidence on the online author's identity.<sup>760</sup>

Regarding the administrative line (cf. *infra* on general courts: civil and criminal cases), the Administrative Judicial Procedure Act (*hallintolainkäyttölaki*; 586/1996)<sup>761</sup> was amended by act 799/2015 which enters into force in 1.1.2016. The new Section 39 b includes provisions on

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<sup>757</sup> Those in their service and assistance are covered by Sec 22(2) which refers to similar right as in Sec 20(1) (cf. previously included in the same Section). Moreover, duties and rights persist even after the position in question (§ 22(1)).

<sup>758</sup> Secs 12, 19-20, 22 as amended by act 732/2015 which enters into force 1.1.2016. Regarding confidentiality of sources, the Government bill (HE 46/2014 vp, 79, 81) notes that the substance in principle corresponds to previous law even if the wording and division into (separate) Sections were amended. Previously attempt and accessory to a crime with min. six years' imprisonment were also mentioned while a reference with regard to secrecy was made to information given contrary to a duty to disclosure the breach of which is criminalized.

<sup>759</sup> *Mäntylä* 2011, 108; for more on the case and its media coverage, see *ibid.* 105-124; *Pesonen* 2011, 147-148.

<sup>760</sup> For more, see *Niiranen – Sotamaa – Tiilikka* 2014, 124.

<sup>761</sup> Unofficial translation by the Ministry of Justice; amendments up to 435/2003 included: [http://www.finlex.fi/fi/laki/kaan\\_nokset/1996/en19960586.pdf](http://www.finlex.fi/fi/laki/kaan_nokset/1996/en19960586.pdf) (3.8.2015).

the right of refusal for witnesses: such a right covers information pursuant to Section 16 FEA (§ 39 b(3), point 2); this refers to confidentiality of sources (cf. business secrets in point 1).<sup>762</sup>

Finally, the ISC includes provisions on data protection and rights of corporate subscribers to process data for retracing disclosures of business secrets. Restrictions exist in this regard (automated search or processing of traffic data) for information referred to in 17:20(1) of the Code of Judicial Procedure (i.e. confidentiality of sources) (§ 151(1)). The investigation conducted by an employer due to disclosure of business secrets may also target only those persons who have been provided with access to business secrets by the corporate subscriber in question (§ 151(2)). Moreover, rights of access to traffic and location data and messages granted to the Finnish Communications Regulatory Authority (FICORA) and the Data ombudsman pursuant to Section 316 ISC do not apply to information referred to in 17:20(1) of the Code of Judicial Procedure (§ 316(5)).<sup>763</sup>

The confidentiality of sources has acquired attention over the years, both in courts and in the media. In particular two issues have been under scrutiny: resorting to one anonymous source and paying anonymous sources.<sup>764</sup> A few well-known cases include news reporting on doping allegations in Finnish sport, a book about the company Sonera, as well as reporting on election finances of a former Prime Minister (*Lautakasa-gate*) and on deals by a company called Patria.<sup>765</sup> One recent incident was a news story by MTV concerning an information leak. MTV published an unusual account of an offer it had received from a person having access to information leaked from the police. Criminal investigations were initiated. The person (part of the police force) ended up dead. For its part, a journalist in her Yle-blog questioned the difference between confidentiality *vis-à-vis* paid and un-paid leaks and a possible emerging practice of the media itself feeling justified to break confidentiality. This could allegedly lead to increased risks for those who are willing to leak public interest information to the media.<sup>766</sup>

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<sup>762</sup> For more, see Government bill for act amending the Administrative Judicial Procedure Act and certain related acts (Hallituksen esitys eduskunnalle laiksi hallintolainkäyttölain muuttamisesta ja eräksi siihen liittyviksi laeiksi) (HE 245/2014 vp), 12-13; previously the act included a reference to the Code of Judicial Procedure regarding the witness' right to refuse.

<sup>763</sup> Secs 151(1) and 316(5) as amended by act 758/2015 which enters into force 1.1.2016; the references were updated. Cf. Government bill (HE 46/2014 vp), 155.

<sup>764</sup> *Mäntylä* 2011, 141. Then again, most regular coverage relying on confidential sources is often ignored (*Mäntylä – Mörä* 2011, 144).

<sup>765</sup> For more, see *Mäntylä* 2011, 78–141.

<sup>766</sup> See the blog by *Sanna Ukkola*: Pyhä, pyhempi – lähdesuoja:

The CMM decided on the matter (5660/TV/14) whereby no breach of confidentiality of sources was found; concealing the identity of the source had not been agreed upon.<sup>767</sup>

Furthermore, there is a bundle of ongoing criminal cases, with huge media attention, concerning a leading police officer in connection to which the possibility of breaking the confidentiality of sources has been opened. According to news coverage, the prosecutor would like the court to oblige, for the first time in Finland, the media to reveal where they got the information for their coverage on a secret register. This would allegedly be possible since the underlying crimes are those related to official secrets.<sup>768</sup>

### 3. Reporting about on-going investigations

As noted above, journalists are not held liable for “leakages” where third parties provide information contrary to their duty of confidentiality. It is another thing if they themselves commit offences, act as accessories to offences, or inflict damage. Publishing information may also constitute an offence due to its content violating privacy or containing false information. For allocation of liability, see point 4. *supra*.

Cf. a ruling of the Supreme Court (KKO 2009:3) where a journalist interviewing a person revealing private and secret information was considered an instigator to the secrecy offence and the editor in chief was considered an abettor thereto (journalists were not bound by a duty to disclosure).<sup>769</sup> According to legal literature, this might be the case with breach of official secrecy as well if a journalist intentionally induces an official to disclose secret information.<sup>770</sup>

The right to privacy is enshrined in Section 10 of the Constitution. It covers privacy in a strict sense but also domestic peace, honor, and confidentiality of communication.<sup>771</sup> Unlawful dissemination of information violating personal private life is criminalized in Section 8 of Chapter 24 CC so that it applies to unjustified dissemination, via mass media or otherwise to many, of information, an insinuation, or an image of the private life of another person, in a manner apt to cause damage, suffering, or contempt

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[http://yle.fi/uutiset/sanna\\_ukkola\\_pyha\\_pyhemp\\_i\\_lahdesu\\_oja/7633687](http://yle.fi/uutiset/sanna_ukkola_pyha_pyhemp_i_lahdesu_oja/7633687)  
(8.7.2015).

<sup>767</sup> Available in Finnish at: [http://www.jsn.fi/sisalto/5660-tv-14/?search=l%C3%A4hdesuoja\\_](http://www.jsn.fi/sisalto/5660-tv-14/?search=l%C3%A4hdesuoja_)

<sup>768</sup> Cf. news coverage on 19.5.2015: <http://www.hs.fi/kotimaa/a1432002164377>  
(22.7.2015).

<sup>769</sup> *Tiilikka* 2011, 29–30. Cf. the ECtHR did not take the case.

<sup>770</sup> *Tiilikka* 2011, 29–30.

<sup>771</sup> *Neuvonen* 2014, 46; for a comprehensive account on the protection of privacy in Finland, see in toto.

(§ 8(1)). However, an exception applies with regard to persons in politics, business, public office or position, and comparable position when necessary due to public interest (§ 8(2)). Finally, an overall assessment must be made taking into account the content, the rights of others, circumstances, and general acceptability (§ 8(3)). The aggravated form in the newly added (act 879/2013) Section 8 a of the same Chapter requires great suffering or particularly vast damage as well as overall assessment of seriousness. It must be noted that a person may consent to dissemination of information about their private life. Sometimes *ordre public* considerations may require dissemination such as in the case of dangerous criminals escaping from prison.<sup>772</sup> Defamation is criminalized in Sections 9 and 10 (aggravated) of Chapter 24 CC so that it covers dissemination of false information or insinuation about another person in a manner apt to cause damage, suffering, or contempt and other ways of disparaging another (§ 9(1)). Exception for disparagement, not false information, is provided for criticism of activities in politics, business, public office or position, science, art, and comparable public activity (§ 9(3)). An overall assessment similar to the one in Section 8(3) must be conducted (§ 9(4)).

Amended provisions on dissemination of information violating privacy and on defamation entered into force 1.1.2014. Thereby, the maximum penalty was reduced to fines instead of imprisonment (excl. aggravated) and paragraphs on overall assessment and acceptability were introduced. Protection of privacy was not to hinder the societal role and functions of the media. Moreover, the provision on aggravated defamation no longer includes the use of mass media or communication to many *per se* as aggravating elements. Instead, Section 10 applies where great suffering or particularly vast damage is caused alongside an overall serious nature of the crime. The aim was to achieve greater compatibility with ECtHR praxis. Court praxis in Finland had rather focused on literal reading of the law whereas the requirements of the ECHR and its interpretation by the ECtHR had been somewhat overlooked. Even if the aforementioned provisions were quite new and had been under scrutiny by the Constitutional Law Committee during the legislative procedure, whereby the assumption of compliance also with the ECHR applied, the application and interpretation thereof was not optimally compatible with ECtHR praxis (esp., not “necessary in a democratic society”).<sup>773</sup> However, in its more recent praxis

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<sup>772</sup> Cf. *Tiilikka* 2008, 135 ff.; Government bill (HE 184/1999 vp).

<sup>773</sup> See Government bill on amending the Criminal Code, Section 7 of Chapter 10 of the Coercive Measures Act, and Section 9 of Chapter 5 of the Police Act (Hallituksen esitys eduskunnalle laeiksi rikoslain, pakkokeinolain 10 luvun 7 §:n ja poliisilain 5 luvun 9 §:n muuttamisesta) (HE 19/2013 vp), 37-

the Supreme Court arguably, more than before, considers contexts and balances rights. Issues related to privacy and defamation have also been intertwined. Regarding coverage of criminal investigation illegality was found (KKO 2013:100) whereas in other cases on covering suspected crimes and affairs not (KKO 2013:69, 2013:70, 2011:72) (cf. points 2. and 3. *supra*).<sup>774</sup> Publishing false information concerning business activity may also cause damage to the business concerned or such information may be defamatory to natural persons behind the corporation (cf. KKO 2000:45 *supra*).<sup>775</sup> Damage to financial position or goodwill or decline or loss of revenue may have to be compensated following the general principles of tort law (cf. *supra* on pure economic loss).<sup>776</sup>

Cf. older case law: a ruling of the Supreme Court (KKO 2005:1) where critique on a restaurant's products was not considered defamatory even if it contained grotesque language; the style of the critique was rather irony and assessments were based on the writer's own opinions.<sup>777</sup> Another ruling (KKO 1991:79) concerned an article in a paper on a consumer product. The article contained misleading information on the product in a biased and negative manner where an importer was portrayed as an objective specialist and good journalistic practice was breached; here damage to the company was evident.<sup>778</sup>

NB: the Securities Markets Act (*Arvopaperimarkkinlaki*; 746/2012)<sup>779</sup>

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50; Committee Report (24/2012), 91-95, 118-133; *Niiranen – Sotamaa – Tiilikka* 2014, 100; *Neuvonen* 2014, 209, 219, 225, 238; *Tiilikka* 2011, 29; *Ollila* 2006, 857. For ECtHR praxis involving Finland, see, e.g., *Ristamäki and Korvola v. Finland, Mariapori v. Finland, Ruokanen and others v. Finland, Eerikäinen v. Finland, Lahtonen v. Finland, Saaristo v. Finland, Reinboth and Others v. Finland, Iltalehti and Karhuvaara v. Finland, Soila v. Finland, Selistö v. Finland, Nikula v. Finland*. For a detailed account of the reform, see *Alén-Savikko-Korpisaari* (forthcoming).

<sup>774</sup> *Niiranen – Sotamaa – Tiilikka* 2014, 98–99; *Neuvonen* 2014, 215–217, 241–242; *Ollila* 2006, 858. *Neuvonen* (2014, 225, 228) points to the importance of modernizing preparatory works as well. He also sees ECtHR praxis being increasingly observed and notes the importance of emphasis.

<sup>775</sup> *Tiilikka* 2007, 415 ff., 534–535; Government bill (HE 184/1999 vp); defamation may currently only target natural persons whereas previous legislation was interpreted so as to render defamation applicable to legal persons as well.

<sup>776</sup> Cf. *Tiilikka* 2008, 293.

<sup>777</sup> For more, see *Neuvonen* 2012, 458; *Tiilikka* 2007, 416-417 whereby the question rather was of the possibility of the critique amounting to that of the restaurant owner's conduct in business and the appropriateness thereof.

<sup>778</sup> For more, see *Tiilikka* 2008, 301-305; appropriate critique and product testing was another thing (cf. KKO 2000:45).

<sup>779</sup> Unofficial translation; amendments up to 258/2013 included: <https://www.finlex.fi/fi/laki/kaannokset/2012/en20120746.pdf>.

includes an exemption to its Section 3(2), point 4 on the prohibition to manipulate the market by publishing or disseminating false or misleading information on securities which are subject to public trading or multilateral trading: the said Section does not apply to persons committed to the rules of either the body representing communications professionals or those of publishers or broadcasters unless the originator of the message derives a specific advantage or profit from the publication or dissemination of the information (14:4(2)).

The criminalization of incitement to racial hatred is included in Sections 10 and 10 a (aggravated) of Chapter 11 CC. The provisions were recently amended, largely following international obligations, to expressly cover various grounds for hate (i.a., origin, religion, disability) and to clearly include the act of keeping information available to the public (e.g., online). Moreover, restrictions on hosting service providers' liability in the ISC require immediate action after gaining actual knowledge of material clearly contradicting Sections 11:10 or 10 a CC. The same applies to child pornography (cf. Secs 17:18 or 18 a CC) (§ 184(1), point 2 ISC).<sup>780</sup>

The Tort Liability act does not apply to contractual liability or liability for damages within the scope of *lex specialis* unless otherwise provided in law (§ 1 TLA). Compensation for "pure" economic loss (i.e. lacking connection to personal injury<sup>781</sup> or damage to property) is only covered in situations involving exercise of public authority, punishable acts<sup>782</sup>, or particularly weighty reasons (5:1 TLA). As regards the media, the latter two may be of relevance. Punishable acts typically include defamation while acting in gross negligence, against good practices, or in a way comparable to punishable acts as well as particular vulnerability of the injured may constitute particularly weighty reasons.<sup>783</sup> Right to compensation for suffering applies, *inter alia*, with punishable act targeting liberty, peace,

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<sup>780</sup> See Government bill on the approval of the Protocol on Hate Crimes to the Council of Europe Convention on Cybercrime and on legislation bringing into force its provisions and act amending Section 15 of the Act on provision of information society services (Hallituksen esitys Eduskunnalle Euroopan neuvoston tietoverkkorikollisuutta koskevan yleissopimuksen lisäpöytäkirjan, joka koskee tietojärjestelmien välityksellä tehtyjen luonteeltaan rasististen ja muukalaisvihamielisten tekojen kriminalisointia, hyväksymisestä ja laiksi sen lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta sekä laeiksi rikoslain ja tietoyhteiskunnan palvelujen tarjoamisesta annetun lain 15 §:n muuttamisesta) (HE 317/2010 vp). See also *Niiranen – Sotamaa – Tiilikka* 2014, 101-104.

<sup>781</sup> Damages for personal injury (5:2 TLA) cover compensation also for pain and harm, etc.

<sup>782</sup> A crime and/or conviction are not required. Cf. *Tiilikka* 2007, 301–302; KKO 2001:96; KKO 2005:136 (supra).

<sup>783</sup> *Tiilikka* 2008, 296–298, 300.

honor, or privacy or where human dignity has been seriously infringed (5:6 TLA). This includes i.a. defamation, dissemination of information violating privacy, eavesdropping, and illicit observation. However, even as a civil law matter the threshold is high due to the exercise of the constitutional free speech (and “particularly weighty reason”) and the principle of legality where punishable acts are concerned.<sup>784</sup>

The Guidelines for Journalists include Sections on private and public. According to Section 26, human dignity must be respected and ethnic origin or convictions, or personal characteristics may not be inappropriately or disparagingly presented. Truly delicate matters of the private sphere may be publicized pursuant to consent or due to public interest while privacy must be respected in pictorial reporting (Sec 27). However, visual recording in public places is principally acceptable (Sec 29). Reports on illness and death requires discretion (Sec 28). Moreover, Section 30 notes that privacy applies to publishing information from public sources, such as official documents. Issues concerning minors require particular discretion (Sec 30). The Guidelines also include an Annex concerning material on media websites which is generated by the public. Content that violates privacy and human dignity must be monitored by the editorial office and promptly removed (Secs 1-2). Public forums must be separated from editorial web content (Sec 5).<sup>785</sup>

#### 4. Due diligence guidelines for journalists

It should be noted that the Guidelines for Journalists are not applicable nor intended to be used in assessing criminal liability or liability for damages, and the Supreme Court has tended to judge independently from the Guidelines (cf. KKO 2005:136)<sup>786</sup>. The principle aim of many of the Sections of the Guidelines is not to protect the party suffering damage but *public confidence* in the media. However, the Guidelines may acquire

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<sup>784</sup> *Tiilikka* 2008, 308–324; *Tiilikka* 2007, 312–314; Government bill on amending the Tort Liability Act and certain laws related thereto (Hallituksen esitys eduskunnalle laiksi vahingonkorvauslain muuttamisesta ja eräksi siihen liittyviksi laeiksi) HE 167/2003 vp, 16–17 whereby critique is expressed for legality in the penal sense; HE 54/2002 vp, 72. The question with regard to editorial misconduct has been somewhat unclear; it would not be covered by 5:6 TLA but the crime linked thereto could be (*Tiilikka* 2008, 312; HE 54/2002 vp, 72).

<sup>785</sup> Available at [http://www.jsn.fi/en/guidelines\\_for\\_journalists/](http://www.jsn.fi/en/guidelines_for_journalists/); the Annex entered into force 1.10.2011.

<sup>786</sup> Cf. *Tiilikka* 2007, 256-257 which notes little evidence on the Guidelines and CMM practice being used in civil cases, not to mention criminal cases; some references do exist (e.g., to breaches of practice or to the awareness of issues to be observed in quality journalism).



indirect significance in assessing conduct of journalists in that they affect and create expectations towards the media in the society. Regarding criminal law, the Guidelines cannot function as a basis for liability whereas in tort law they might have some relevance while assessing the level of negligence but not in establishing negligence. The question of good practices is not limited to those expressly committed to the Guidelines.<sup>787</sup> Moreover, even if the requirements of good journalistic practice often exceed those of the law, compatibility is not guaranteed.<sup>788</sup>

Cf. KKO 2000:54 where journalist was convicted of defamatory content which prematurely labelled a person guilty; the employer was mentioned and charges were eventually dismissed. The CMM did not find a breach of journalistic practice as the person was recognizable only to a close circle who knew the state of affairs (2409a-c/SL/96 and 2409d/PR/96).<sup>789</sup>

The Guidelines for Journalist include provisions on the use of sources and verification of information. According to Section 8, truthful information must be the aim. Information must be verified even if it has been previously published while criticism is to be exercised with regard to sources, especially in controversial issues (Secs 10, 12). Moreover, it is crucial for the public to be able to distinct between facts, opinions, and fiction; this applies also to pictorial and musical material which cannot be used misleadingly (Sec 11). Section 13 allows news coverage based on limited information but reports should later be supplemented with available data and subjects must be followed all the way. All elements and material, including photos and headlines, must be justified by the covered substance (Sec 15). What amounts to sufficient verification depend on many issues, including the seriousness of allegations, the precision of the object (named person, etc.), public interest in the subject, and the urgency of the matter (even if rush as such is no excuse prevention of danger etc., may speak for publication). A diligent reporter is critical and takes into account the background data.<sup>790</sup>

The CMM (4193, 4199/YLE/09) did not find a breach of good journalistic practice concerning the use of sources and fact-based dissemination of

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<sup>787</sup> *Tiilikka* 2008, 69–70, 284; 2007, 259–266. For more on tort law and activity in breach of established practice, etc., see *Tiilikka* 2007, 246 ff. See also *Möra* 2011a on confidence and the central role of the public.

<sup>788</sup> *Tiilikka* 2008, 76–77.

<sup>789</sup> CMM decisions available in Finnish at: <http://www.jsn.fi/sisalto/?id=5515&search=2409>; <http://www.jsn.fi/sisalto/?id=5516&search=2409>; <http://www.jsn.fi/sisalto/?id=5517&search=2409>; <http://www.jsn.fi/sisalto/?id=5518&search=2409>. For more, see *Tiilikka* 2008, 77.

<sup>790</sup> *Tiilikka* 2008, 286–287.

information even if the allegations based on an anonymous source were very serious. Yle had sufficient grounds for them on the basis of its own background investigations. Nonetheless, more details could have been provided. The CMM noted that it could not assess the credibility of the source's story and allegations as such. Instead, it focused on the critical perspective, the background check, the verification of information from multiple sources, and the opportunity for a simultaneous hearing. Moreover, absolute confidentiality had not been agreed upon with the source.<sup>791</sup>

A ruling of the Supreme Court (KKO 2011:71) must particularly be mentioned where the court assessed the difference between facts and value judgments in media coverage allegedly making a depart from an earlier line of assessment (literal and strict reading). The case concerned a news article on a refugee center at a time when another center was being closed down. The critique on the center and its staff as such was insulting. However, the court was of the opinion that value judgments, such as opinion of an interviewee, have to be allowed. In the case at hand, they concerned the staff in general instead of named individuals and were expressed in connection to a societal subject.<sup>792</sup> Regarding anonymous sources and/or serious allegations or statements, the duty of care is placed on a higher level. For instance, where a confidential source is used, other sources should also be resorted to, such as documents (also in case of a trial). There may however be subjects of major significance where no such account is available but the matter is covered by the media.<sup>793</sup> The Supreme Court has required verification of information on serious matters, especially where data would be available. However, recent praxis of the Supreme Court has been more favorable to free speech.

Cf. recent rulings of the Supreme Court where no defamation exists even if the information presented has not been absolutely true or accurate. The existence of facts can be shown as opposed to value judgments while

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<sup>791</sup> Available in Finnish at <http://www.jsn.fi/paatokset/4193--4199-yle-09/?year=2009>. Cf. *infra* on the Lautakasa-gate.

<sup>792</sup> *Tiilikka* 2011, 14. For more, see *Tiilikka* 2012; Neuvonen 2012, 457. *Tiilikka* (2012) notes the change in the line of assessment; the court also pointed to previous interpretation having emphasized false information where value judgment was now concerned in light of ECtHR praxis as well as to certain exaggeration and provocation as part of freedom of expression.

<sup>793</sup> Cf. *Tiilikka* 2008, 36, 286–288; *Tiilikka* 2008, 38–39 where malicious accusation and perjury are noted for the object of news coverage where the published information is correct. The *ultima ratio* nature of confidential sources has been referred to in some interviews while declaring the source should prevail; also a standard minimum of two independent sources was mentioned (*Mäntylä – Mörä* 2011, 144; cf. also *Tiilikka* 2008, 38).

unreasonable offensiveness may amount to defamation. It is also of relevance whether it is a question of general significance or mere personal attack. In a ruling (KKO 2013:70) concerning an article on a person, recognizable at least to the close circle, and suspected of serious crimes, information was not considered false as accuracy was not pursued. Overall amounts of debts or conclusions of unemployment drawn from taxation information were considered concluding from facts. The court ruled similarly in another case concerning allegations on the private life of a well-known person (KKO 2013:69) although allegations were considered partly exaggerative. An interview was also published in another paper which was taken into account in assessing possible damage.<sup>794</sup> In yet another ruling (KKO 2011:101) a critical newspaper article on a school and its principle did not amount to defamation as it did not include false information.

Cf. a ruling (KKO 2010:88) concerning a TV program where false insinuations were made concerning named persons financing a terrorist group. Information was based on multiple anonymous sources. The editor in chief had known the script but allowed the airing. According to the court, the editor in chief should have assessed the sufficiency of investigative work by the journalist and for revealing the identity of the persons in question. The editor in chief was found guilty of defamation. In another ruling (KKO 2006:62) on causerie, the writer was convicted of defamation due to false information; serious allegations required a sufficient fact-base and data was available on the matter rendering verification possible.

*Cf. more cases supra.*

Provisions on reply and correction are included in Sections 8 and 9 FEA respectively. These rights apply to all regular publishing and program activity but not one of publications. The right of reply belongs to a private person in case of an offending message. The right to have corrected incorrect information expressed in a periodical, network publication, or program belongs to individuals, corporations, foundations, and public authorities. The information must concern them or their activity. However, a *de minimis* exception applies.<sup>795</sup> However, the right to correction does not exist if correction has already been made by the media.<sup>796</sup> The editor in chief is responsible for publishing replies and corrections which must be

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<sup>794</sup> For more, see *Niiranen – Sotamaa – Tiilikka* 2014, 98.

<sup>795</sup> For more, see Government bill (HE 54/2002 vp), 61-68; *Niiranen – Sotamaa – Tiilikka* 2014, 50–72. For a detailed account in English, see *Alén-Savikko – Korpisaari* (forthcoming).

<sup>796</sup> *Niiranen – Sotamaa – Tiilikka* 2014, 56. Reply and correction do not affect the ground for damages since publication as such is enough (*Tiilikka* 2007, 431). Cf. also KKO 2000:54 *supra* where correction on request did not affect assessing the journalist's conduct from a criminal law perspective.

done free of charge and speedily (§ 10 FEA) To date, the FEA has yet played only a theoretical role largely due to the functional self-regulatory system.<sup>797</sup> Indeed, Sections 20 to 25 of the Guidelines for Journalists touch upon the matter: incorrect information must be speedily corrected and publication must occur via both editorial websites and original platforms so that attention corresponds to the magnitude of the error (Sec 20). Online, it is insufficient to merely remove the erroneous content since the public must also be informed thereof (Sec 20). According to Section 21, those criticized should have a chance to reply. Primarily, different views should be heard simultaneously, but secondarily, the other side of the story might also be heard or their comment published afterwards (Sec 22). However, critique on cultural, political, societal, and economic matters does not require reply (Sec 24). Replies should be published without undue delays or additions while changes must be negotiated where necessary (Secs 23, 25). The CMM has frequently assessed reply and correction.

See, e.g., 5411/TV/14 where a television channel acted contrary to good journalistic practice when a factual error in its news was not corrected although a news agency and a foreign newspaper had done so. In notice 4983/YLE/12 no infringement was found even though a person criticized in a TV show was later interviewed online; the person regarded the Internet the most suitable forum. Cf. a notice concerning the Guidelines of 2005 (4459/YLE/10) finding infringement when publishing a correction on a TV program's website rather than on TV. See also notice 4863/YLE/12 where no infringement was found even if the other side of the story was limitedly presented in a TV reportage since parties had refused to comment. Finally, no infringement was found in 5463AB/SL/14 when a paper published on interview of a former police officer including information on police officers' immoral and criminal conduct at work. The interviewee's story was challenged but no correction was requested nor did the other party offer its own side of the story to be published. The police had declined the opportunity for a simultaneous hearing. The interview was also published at a time when the conduct of the police was a subject of public interest (cf. *infra*).<sup>798</sup>

Cf. a notice of the CMM (3872/SL/08; vote) where a person was presented in an extremely negative light due to a story in a paper. Simultaneous hearing was not considered sufficient; the critique was not specified and

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<sup>797</sup> Indeed, self-regulation is deemed as the primary means; cf. Government bill (HE 54/2002 vp), 68.

<sup>798</sup> Available in Finnish at: <http://www.jsn.fi/sisalto/5463ab-sl-14/?search=l%C3%A4hdesuoja>.

did not enable reply while readers also could not assess the truthfulness.<sup>799</sup>

Defamation and dissemination of information violating privacy often differ on whether the information is true or false. Defamation in its one form requires “objective incorrectness” which means that an assertion does not correspond to reality. Then again, in case of disparagement, correct information may be expressed but inappropriately (with the intention to harm).<sup>800</sup> Especially in media, it may not always be possible to present absolutely “true” or verified information. However, sufficient ground must be at hand and information must be verified from multiple sources.<sup>801</sup>

Cf. an unpublished ruling (KKO 1913/2006) where a person whose statement was used in a column had used ambiguous expressions and the columnist was thus not considered to have made false insinuations. Indeed, according to commentary, it may be unclear whether it is a question of false information or unacceptable criticism.<sup>802</sup>

The Supreme Court has ruled on reporting criminal matters. Crime as such is not a private matter but some degree of conflict with privacy occurs when revealing the identity of a (suspected/accused) criminal (cf. KKO 2005:136). The matter has largely been left to case law. However, the principles of a democratic rule of law require the media being able to investigate and report on courts handling criminal matters.<sup>803</sup>

One of the most important principles in covering issues related to criminal investigations or proceedings is the presumption of innocence. This is required by Section 21 of the Constitution on fair trial. The suspect or accused cannot be labelled guilty. In this regard, it is not only relevant when and what kind of information is published, but also what kind of language is used when reporting investigation, suspicion, or conviction. There are also differences when reporting on petty violations or offences and serious crimes on one hand and on criminal activity of regular people as opposed to persons who are in significant positions on the other hand – even if an overall assessment is required (cf. *supra*).<sup>804</sup> According to Prof. of media and communication law, *Päivi Korpisaari (ex Tiilikka)*, journalism on criminal matters, such as investigation, trial, or conviction, may face four basic problems: the coverage or content is defamatory (false information

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<sup>799</sup> Available in Finnish at: <http://www.jsn.fi/sisalto/3872-sl-08/?search=I%C3%A4hdesuoja>.

<sup>800</sup> *Niiranen – Sotamaa – Tiilikka* 2014, 99; *Tiilikka* 2007, 535.

<sup>801</sup> HE 19/2013 vp, 46; *Tiilikka* 2007, 535.

<sup>802</sup> For more, see *Tiilikka* 2007, 536–538; *Neuvonen* 2014, 236–237.

<sup>803</sup> *Tiilikka* 2008, 187; *Ollila* 2006, 848–849, 856. For data protection in this context, see *Ollila* 2006, 854–856.

<sup>804</sup> *Tiilikka* 2008, 130–131, 188–190; *Ollila* 849–851, 854.

or labelling someone guilty; cf. KKO 2000:54); violates privacy (KKO 2001:96; KKO 2005:136; KKO 2006:20); or the principles of fair trial or assumption of innocence; or leads to an accumulation of sanctions. Breach of the assumption of innocence may be defamatory; damage for suffering may also be compensable pursuant to infringement on human dignity (5:6 TLA *infra*).<sup>805</sup>

Cf. a ruling of the Supreme Court (KKO 2013:100; vote) where journalist were convicted due to news coverage on criminal investigations concerning severe economic offences. However, the prosecutor did not press charges on some of the cases and the rest did not result in convictions. The presumption of innocence was severely infringed; it was essential at the time of publication when only suspicion was at hand. Moreover, information had been presented as facts and in a way apt to label the person in question guilty.<sup>806</sup> In another ruling (KKO 2005:136) no liability for damages existed for revealing the identity of a convicted person; the court noted that at the time of publication guilt had already been found by the court unlike other cases involving suspicion or ongoing trials (cf. KKO 1997:80, 2000:54, and 2001:96; cf. *supra*) – although the judgment was had not gained legal force which spoke for caution in reporting. Moreover, X had been found guilty of a severe crime degrading the victim and no picture had been published. The publication also occurred soon after the ruling.<sup>807</sup>

NB: ECtHR case Ristamäki and Korvola v. Finland finding violation of Article 10; defamation was found where information on suspected economic offences of a businessman was broadcast together with critique on tax authorities. Connection was made between two separate matters so as to create severe insinuations. A follow-up did not change this. (2008 District Court ruling; appeal was dismissed and leave to appeal refused) The ECtHR found that free speech was not duly observed and weighted while problems of cooperation between the police and the tax authorities was a matter of public interest. See also Lahtonen v. Finland finding violation where a journalist was convicted due to an article on offences of a named police officer with a mental illness. The ECtHR noted public interest and objectivity of coverage.<sup>808</sup> (Appeal ruling; no leave to appeal)

Cf. Ruokanen and Others v. Finland where no violation of Article 10 was found; an editor in chief and a journalist were convicted of aggravated defamation when reporting on an alleged crime of a baseball team

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<sup>805</sup> *Tiilikka* 2008, 186.

<sup>806</sup> For more, see *Neuvonen* 2014, 216, 241–242.

<sup>807</sup> The case was considered as one with a wider perspective and purpose to guide reporting on criminal matters; cf. *Tiilikka* 2008, 194–200.

<sup>808</sup> For more, see *Neuvonen* 2014, 217–218.

recognizable due to naming of the umbrella organization. Information was presented as facts before investigation and the subject was not of public interest. Also in *Salumäki v. Finland* no violation was found where an inappropriate link was created between a well-known person and a serious crime; e.g., a photo of the person was pictured with the headline of a paper. (Appeal ruling; no leave to appeal)

Cf. a decision of the Deputy Parliamentary Ombudsman (175/4/14) which tackled the inappropriate choice of words by the police when informing the public on the death of person and subsequent criminal investigation; “X killed Y” “the perpetrator was caught”.<sup>809</sup> In another decision (1163/4/13) on the police confirming the name of a suspect the Deputy Ombudsman noted that releases and information from the police must be based on facts.<sup>810</sup>

There are no specific provision regarding the publication of the name and picture of an accused. For their part, general provisions on privacy and defamation apply (see *infra*). The appropriateness and legality of publishing the name or identity of a convicted<sup>811</sup> person, as derived from Supreme Court praxis and legal literature, depends on various factors, including, the severity of the crime, the societal position of the person, circumstances of those close to them, other possible publicity for and actuality of the matter, as well as the tone of the publication and inclusion (also) of photos and other private information thereto. Factors that support publication include a societal connection as well as public safety and order while minority and protecting the victim, witnesses, or third parties speak against it. A line often followed by the media (i.e. min. 2 years’ imprisonment) may be workable but with above mentioned reservations.<sup>812</sup>

In a leading case (KKO 2005:136; cf. *infra*) the Supreme Court found no violation of privacy even if the name of an ordinary citizen was published in a paper specialized in criminal matters. The severity of a crime might as

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<sup>809</sup> Available in Finnish at: [http://www.eduskunta.fi/triphome/bin/thw.cgi/trip/?\\${%7bAPPL%7d=ereopaa a&\\${%7bBASE%7d=ereopaa&\\${%7bTHWIDS%7d=0.40/1436957620\\_1799 8&\\${%7bTRIPPIFE%7d=PDF}.pdf](http://www.eduskunta.fi/triphome/bin/thw.cgi/trip/?${%7bAPPL%7d=ereopaa a&${%7bBASE%7d=ereopaa&${%7bTHWIDS%7d=0.40/1436957620_1799 8&${%7bTRIPPIFE%7d=PDF}.pdf).

<sup>810</sup> Available in Finnish at: [http://www.eduskunta.fi/triphome/bin/thw.cgi/trip/?\\${APPL}=ereopaa&\\${BASE}=ereopaa&\\${THWIDS}=0.13/1436782573\\_11287&\\${TRIPPIFE}=PDF.pdf](http://www.eduskunta.fi/triphome/bin/thw.cgi/trip/?${APPL}=ereopaa&${BASE}=ereopaa&${THWIDS}=0.13/1436782573_11287&${TRIPPIFE}=PDF.pdf).

<sup>811</sup> Or a suspect or accused; cf. the phase of procedure is one of the factors that has to be taken into account (cf. *Tiilikka* 2008, 196-197, 201).

<sup>812</sup> *Tiilikka* 2008, 182, 192, 196-204 (cf. legality); *Ollila* 2006, 850-854 where public interest is emphasized as opposed to the position of a person as such. See also *Neuvonen* 2014, 226-227 where possible differences between national and local publications is noted alongside other criteria.

such be relevant; especially very serious crimes have societal significance and publicity can be expected. Then again, all criminal activity by those in significant positions might be of a public interest. In the case at hand, the person was convicted over one year of imprisonment. Protection of privacy was also not to safeguard loss of reputation as a part of conventional consequences of criminality. The line of assessment allegedly departed somewhat from a previous ruling (KKO 2001:96; vote): an article in a paper concerned proceedings where X was accused of i.a. aggravated fraud. The article used, without X's permission, a picture from another paper published prior to the article in question on a whole other subject. X was recognizable. The court found violation of privacy (then 27:3 a CC) as the individual matter was not of societal significance in a way which could justify the publication of X's name and picture. The writer, editor in chief, and the publisher were liable for damages of suffering.<sup>813</sup> Cf. a ruling (KKO 2013:100; vote; *infra*) on defamation and dissemination violating privacy; X's name and photo was published.

NB: a bundle of ECtHR rulings finding violation of Article 10 was delivered on cases concerning coverage of a public figure and his female friend as well as court proceedings or convictions involving them. The name of the latter was also published (and picture by some media). National courts found violations of privacy. The ECtHR ruled that free speech was not duly observed; the matter was of public interest, even the female friend's involvement. Cf. also ruling (KKO 2002:55) where broadcasting the female friend's name without permission was not justified in connection to coverage on the other person who had been in a societal position.<sup>814</sup> Cf. also Reinboth and Others v. Finland where violation of Article 10 was found as journalists were convicted of dissemination of information violating private life; reporting targeted a case on violation of privacy (cf. Saaristo v. Finland; KKO 2005:82) and legal policy in general. The subject was a public interest commentary based on public sources.<sup>815</sup>

Cf. The CIA includes provisions on informing in connection to criminal investigations. The head investigators and their superiors have the right to inform (11:7(4)). Information may be given, if necessary due to societal significance or general interest, for prevention of crime or damage and for solving crimes, or for other comparable reason, but it must be given in a manner which does not unduly subject someone to suspicion and cause unnecessary harm (11:7(1)). The name or picture of a person may be

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<sup>813</sup> See, e.g., *Neuvonen* 2014, 210; Ollila 2006.

<sup>814</sup> For more, see *Neuvonen* 2014, 210-212. Cf. *Jokitaipale and Others v. Finland, Tuomela and Others v. Finland, Soila v. Finland, Flinkkilä and Others v. Finland, Iltalehti and Karhuvaara v. Finland*.

<sup>815</sup> For more, see *Neuvonen* 2014, 212-213.



publicized only if imperative for prevention of crime or damage or for solving a crime, reaching the suspect (11:7(2)).<sup>816</sup> Cf. the Deputy Parliamentary Ombudsman has discussed the conduct of the police in a case (1049 and 1075/4/98) concerning original pictures of two demented missing persons submitted to the media. Blurring of the faces was required of the media. An article on elderly people being neglected in the society had already been published by a police officer where the pictures were used in black and white. The Ombudsman noted that a difference must be made between informing the public of investigations and taking part in societal discussion. It was questionable for an official to kick of public interest debate using information and pictures obtained in connection to official duties or submitting them in a way exceeding the normal informative function. More detailed guidance was called for.<sup>817</sup>

Subsequently the ruling (KKO 2001:96) was discussed in media (by judges) whereby the relevant question was not about crime being private matter but rather a person's right to their picture. A picture allegedly enjoys a higher level of protection than a (mere) name; all reported data (e.g., on persons, circumstances) must be taken into account in the overall assessment.<sup>818</sup> Indeed, previous case law<sup>819</sup> and legal literature did establish that the use of a person's image in marketing or for commercial purposes required explicit consent if the person was recognizable. Unauthorized use was compensable.<sup>820</sup> News reporting is another thing

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<sup>816</sup> In the 2011 Act the list was rendered exhaustive (cf. formerly "or otherwise weighty reasons"). Cf. a decision by the Deputy Ombudsman concerning the previous provisions (1163/4/13) where no "weighty reason" existed but the police had confirmed to a journalist that investigations on an environmental crime involved a local politician. The Ombudsman noted that the media's knowledge or allegations on a suspect's personality are not grounds for the police to publish such information. Then again, the provisions of the CIA do not govern what the media publishes. Those in power are under media scrutiny. As regards the police, equality could require a press release rather than individual confirmations: available in Finnish at: [http://www.eduskunta.fi/triphome/bin/thw.cgi/trip/?\\$%7bAPPL%7d=ereopaa&\\$%7bBASE%7d=ereopaa&\\$%7bTHWIDS%7d=0.13/1436782573\\_11287&\\$%7bTRIPPIFE%7d=PDF.pdf](http://www.eduskunta.fi/triphome/bin/thw.cgi/trip/?$%7bAPPL%7d=ereopaa&$%7bBASE%7d=ereopaa&$%7bTHWIDS%7d=0.13/1436782573_11287&$%7bTRIPPIFE%7d=PDF.pdf) Cf. also 175/4/14.

<sup>817</sup> Available in Finnish at: [http://www.eduskunta.fi/triphome/bin/thw.cgi/trip/?\\$%7bAPPL%7d=ereopaa&\\$%7bBASE%7d=ereopaa&\\$%7bTHWIDS%7d=0.42/1436959542\\_24078&\\$%7bTRIPPIFE%7d=PDF.pdf](http://www.eduskunta.fi/triphome/bin/thw.cgi/trip/?$%7bAPPL%7d=ereopaa&$%7bBASE%7d=ereopaa&$%7bTHWIDS%7d=0.42/1436959542_24078&$%7bTRIPPIFE%7d=PDF.pdf).

<sup>818</sup> Cf. *Tiilikka* 2008, 191-192, 196; including critique on the interpretation concerning a person's right to picture.

<sup>819</sup> See, e.g., the following Supreme Court cases: KKO 1940 I 10, KKO 1982 II 36, KKO 1989:62.

<sup>820</sup> See e.g., *Oesch* 2011, 745, 748, 755 with references; *Muhonen* 1996, 770-779, 772 with references.

and background imagery is allowed.<sup>821</sup> However, the topic and the manner in which images are presented can be relevant while caution is advised if connecting persons to troublesome topics or linking by-standers inappropriately to negative contexts (cf. KKO 1972 II 6, KKO 1980 II 99, KKO 2000:83).

Cf. a ruling of the Supreme Court dating back to previous legislation (KKO 1980 II 123) where violation of privacy was found and damages imposed as a picture presenting X had been taken from the archives of a paper and published in a political advertisement without X's consent.<sup>822</sup>

According to Section 26 of the Guidelines for Journalists, ethnic origin or convictions, or personal characteristics may not be inappropriately or disparagingly presented. Privacy must be respected also in pictorial reporting while discretion is required with victims of accidents or crimes and with minors (Secs 27-28, 30-31, 33; cf. *infra*). Regarding publication of names, photos, or identifying data of convicted persons, this is allowed unless deemed "clearly excessive" taking into account the person's position and activity (Sec 31). Minors and persons deemed unaccountable must not be identified (Sec 31). Information apt to lead into identification of suspects or persons under charges must be dealt with carefully (Sec 32) whereas publishing any information on the convicted, charged, or suspected person must not lead into identification of the victim of crimes of very sensitive nature (Sec 33). The identity of such victims must be kept unpublished unless a considerable public interest prevails (Sec 34). Criminal matters must be followed until the end within the possibilities at hand and journalists must not pursue affecting court rulings nor must they express premature evaluations of guilt (Sec 35).

The CMM found breach of good journalistic practice concerning the headline in a paper (5689/SL/14); the title "X is not a crime" was used before a court ruling. The paper thus took a preliminary stance on the issue of guilt.<sup>823</sup> Cf. decisions where no breach was found: 5726/SL/15 where a paper published consecutive articles on an ice hockey coach being suspected of a battery (at the time under prosecutorial evaluation). Reporting on the titles of suspected offences did not label the person guilty and publishing the name and photo of the suspect was not considered unreasonable. Regarding the name, the position of the suspect, the nature of the activity, and the factual bases of the information are to be taken into account. In the case at hand, the person was a former elite athlete and in

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<sup>821</sup> Cf. *Muhonen* 1996, 772-773, and 778-779 where the problematic lines between informational and commercial use is discussed.

<sup>822</sup> For more, see *Pesonen* 2011, 143.

<sup>823</sup> Available in Finnish at <http://www.jsn.fi/paatokset/5689-sl-14/?year=2015>.

a societally significant position as a coach and acted also as a TV commentator whereby it was a question of a public figure. The person had also been heard in connection to the story.<sup>824</sup> In another notice (5374/SL/13) a paper mentioned a CEO by name and their being suspected of economic crimes (upcoming trial). Publication of the name before a trial was not unreasonable.<sup>825</sup> Cf. a notice of the CMM where breach of journalistic practice was found (4819/YLE/12) when the name of a person was published on a media webpage (as a part of background material of a program) in such a connection that the person could unduly be linked to criminal investigation. The journalist had also suggested withdrawal of the case due to possible extra publicity. The CMM pointed out to caution when exposing identity of people in connection to criminal investigations. It also noted that the duty of care is elevated when publishing secret information and verification must be conducted even if journalistic openness was exercised.<sup>826</sup> (Cf. Patria case *infra*)

## 5. Liability in the editorial chain

General rules on liability apply to journalism and media activity; however, the context may be taken into account in courts of law. With regard to publishing and program activity, many people (journalists, etc.) and the media outlet may simultaneously be liable. Chapter 4 of the FEA contains provisions on responsibilities for published media content covering both criminal and tort liability as well as editorial misconduct. Offences are included in the CC while so called media violation is included in Section 21 FEA. Criminal liability for offences due to the contents of published messages falls on the perpetrator or the accomplice pursuant to CC (§ 12 FEA). This usually refers to the creators of messages communicated to the public, such as writers or photographers. Several persons may also act together; according to 5:3 CC, each person is deemed the perpetrator where an intentional offense is so committed. Most crimes related to free speech require intent whereby negligence is not sufficient. Tort liability and compensation for injury and loss deriving from content of published messages is covered by TLA (§ 14(1) FEA). The liability of publishers and program providers follows Chapter 3 TLA (on employer's liability) even if damage is caused by persons other than those referred to in 3:1 TLA, meaning other than those in an employment relationship (within the labour

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<sup>824</sup> Available in Finnish at: <http://www.jsn.fi/sisalto/5726-sl-15/?search=totuudenmukaisuus>.

<sup>825</sup> Available in Finnish at: <http://www.jsn.fi/sisalto/5374-sl-13/?search=totuudenmukaisuus>.

<sup>826</sup> Available in Finnish at: <http://www.jsn.fi/sisalto/4819-yle-12/?search=l%C3%A4hdesuoja>.

law meaning), such as freelancers, and even anonymous expression (§ 14(2) FEA).<sup>827</sup> Liability for damages can be assessed alongside or separate from criminal proceedings where crimes are concerned (Ch. 3 Criminal Procedure Act).

Cf. a ruling of the Supreme Court (KKO 2010:88) according to which journalists are deemed to have acted intentionally in publishing assertions if they must have considered this suited to cause harm, suffering, or contempt and sufficient grounds for the assertions cannot be presented.<sup>828</sup>

As noted above, the journalist or editor in chief may also be considered accessories to a crime (cf. KKO 2009:3 *supra*). Instigation and abetting are covered by Chapter 5 CC. Intentional persuasion to an intentional offence or a punishable attempt is considered incitement to the offence (5:5 CC). Abetting means that a person, before or during an offence, intentionally assists in an intentional act or in a punishable attempt or incites to punishable abetting (5:6 CC).<sup>829</sup> Moreover, criminalization of incitement to a false statement is included in Section 5 of Chapter 15 CC while public incitement to an offence is criminalized in 17:1 CC.

Publishers and program providers are to designate a responsible editor for periodicals, network publications, and programs to manage and supervise editorial work and to make decisions on the content (§ 4 FEA). Failing, in an essential manner, intentionally or negligently, to meet the requirements of the former duty may result in liability for editorial misconduct (§ 13 FEA) following the principles of criminal law. The failure must be apt to contribute to an offence due to the contents of the message, the crime is committed, and the editor is not the perpetrator or the accomplice. The punishment is fines. Editors in chief have also been convicted of crimes, such as defamation or dissemination of private information; in these cases they have acquainted themselves with the material and decided on their publication.<sup>830</sup>

Only a few convictions of editorial misconduct exist from the time the FEA has been in force. See, e.g., a District Court ruling (08/360) whereby the editor in chief was found guilty of editorial misconduct when allowing the

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<sup>827</sup> *Niiranen – Sotamaa – Tiilikka* 2014, 119–121; Tiilikka, 2008, 325 ff.; Government bill (HE 54/2002 vp), 72–73. See also Alén-Savikko - Korpisaari (forthcoming).

<sup>828</sup> For more, see *Niiranen – Sotamaa – Tiilikka* 2014, 99.

<sup>829</sup> Government bill on reforming legislation on the general principles of criminal law (Hallituksen esitys Eduskunnalle rikosoikeuden yleisiä oppeja koskevan lainsäädännön uudistamiseksi) (HE 44/2002 vp), 22, 154–158; for more, see *Alén-Savikko - Korpisaari* (forthcoming).

<sup>830</sup> Cf. *Tiilikka* 2007, 354–358; for more, see *Alén-Savikko – Korpisaari* (forthcoming).

publication of an offending notice. The underlying system was technically and otherwise uncertain and apt to lead into mistakes in press. No explicit guidance had been given to the employees on the matter. The editor in chief was aware of the uncertainties and problems.<sup>831</sup>

Joint and several liability prevails where damage has been caused by more than one person or where they otherwise have to compensate the same damage (6:2 TLA). The damages payable are to be allocated in a reasonable manner among those who are liable (6:3(1)). A person paying beyond their share may recover the amount from the other (6:3(2)). If a person is not rendered liable for full damages, they only carry the amount established (6:2). Regarding employees, only the amount not recoverable from the employer is covered as liability is channeled primarily to the latter, unless intent (cf. 6:2; Ch. 3; Ch. 4); the purpose with this provision is to direct initial recovery to the employer.<sup>832</sup> Provisions on employer liability establish that employers are vicariously liable for damages of damage caused by employees via error or negligence at work (3:1 TLA). This also applies to editors in chief. Employees are liable for damages in case of error or negligence to a reasonable amount; however, with slight negligence, no such liability exists (4:1(1) TLA). If damage is caused intentionally, full compensation applies unless reasons to the contrary exist (4:1(2)).<sup>833</sup> (Cf. KKO 1991:79 *infra* where the amount of employees' compensation was lowered) The employer may collect compensation from the employee (to the amount established). This hardly occurs. Indeed, too heavy an employee liability may be regarded as a disincentive for investigative and critical journalism.<sup>834</sup> No contracting to the increase employee liability is possible (7:1 TLA). Then again, liability of publishers and program providers pursuant to Section 14(2) FEA is not that of an employer within the labor law meaning. Eventual allocation of liability is determined by contracts between parties (freelancers, independent producers).<sup>835</sup>

See a ruling of the Supreme Court (KKO 2009:32) concerning damages in a criminal case where the editor in chief was convicted of dissemination of information violating privacy. Regarding employer liability, the employer had not been heard and the case was returned to the District Court.<sup>836</sup>

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<sup>831</sup> For more, see *Niiranen – Sotamaa – Tiilikka* 2014, 110.

<sup>832</sup> *Tiilikka* 2007, 386 with references.

<sup>833</sup> Intentional crime does not as such mean intention with regard to causing damage (*Niiranen – Sotamaa – Tiilikka* 2014, 121; *Tiilikka* 2007, 271 ff.).

<sup>834</sup> *Niiranen – Sotamaa – Tiilikka* 2014, 120–121; *Tiilikka* 2008, 333–337. Cf. Ch. 12 of the Employment Contracts Act contains provisions on liability where employees cause damage to the employer (1(3)).

<sup>835</sup> *Tiilikka* 2008, 330.

<sup>836</sup> For more, see *Niiranen – Sotamaa – Tiilikka* 2014, 121.

Cf. the following Supreme Court praxis dating back to previous legislation: one ruling (KKO 1997:185) concerned an article containing unverified information whereby the writer and editor in chief were found liable to pay compensation. Another case (KKO 2000:45) involved a TV program where a limited partnership company had been heavily criticized by false assertions on sales and terms. The editor in chief was deemed a co-perpetrator having allowed airing of the program while the accuracy of the content had been questioned. (NB: *infra* on defamation currently being applicable only to natural persons) See also KKO 2001:96 *infra* where the employer as well as an employee and the writer (intent) were held jointly liable for damages.

According to the Guidelines for Journalists, a journalist's primary responsibility is towards the public (Sec 1). Coverage of issues concerning one's own media should expressly clarify the context (Sec 2).

## 6. Conclusion and perspectives.

In Finland, the press and the media in general are certainly free to exercise their role as the public watchdog compared to some other countries in the world.<sup>837</sup> There is not much legislation providing explicit privileges for the (mass) media – as opposed to duties prescribed in FEA – rather, general rules apply; however, the role and functions of the media can be taken into account in concrete cases. Positive safeguards include, in particular, safeguards for anonymity, confidentiality of sources, and publicity laws.<sup>838</sup> As a general note to the legal state, must be noted that all provisions applied to the media (esp. those on coercive measures, etc.) must be interpreted so as to take duly into account the constitutional free speech.

Finnish professional media also relies on well-functional self-regulation the requirements of which are set high. Encounters of journalists with the law should be rare on a general level. Then again, especially the confidentiality of sources has constant frictions with the legal order (esp. criminal law) and this cannot be overcome but rather has to be tolerated.<sup>839</sup> Investigative journalism and resorting to confidentiality of sources arguably constitutes particular kind of activism on the part of the media.<sup>840</sup> Indeed, in Finland the protection for confidentiality of sources, recognized both in legislation and self-regulation, is allegedly among the cornerstones of free speech without which many societal defects would be left in the dark and the

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<sup>837</sup> Cf. <http://ifj-safety.org/en> (29.7.2015).

<sup>838</sup> *Tiilikka* 2011, 15.

<sup>839</sup> *Mörsä* 2011a, 8-9.

<sup>840</sup> *Mäntylä* 2011, 139.

exercise of power would be under less scrutiny.<sup>841</sup>

Regarding *substance*, in some regards Finnish legislation and interpretation has been quite recently adjusted to conform more to ECtHR praxis on free speech, the media, and dissemination of information: examples include readjusting the relationship of privacy and free speech as well as amending the criminalization of defamation. One important issue in these regards has been to abolish the threat of imprisonment where the media is concerned. All in all, the underlying trend has been towards strengthening freedom of expression and promoting more nuanced balancing. As a background, Finnish praxis had been under scrutiny by the ECtHR over the years. Signs of changes are arguably showing. Here, it must be noted that also more recent (forthcoming) ECtHR rulings target previous legislation and legal state, that is, prior to the 2014 reform and interpretative changes in the 2010s.<sup>842</sup> Regarding the *scope* of legislation, technological development and the online environment has been taken into account and neutrality has been pursued. The FEA was enacted along these lines already in 2003. Both legislative reforms and ECtHR praxis have arguably affected the legal state.

Finally, it must be noted that many of the current challenges facing the media and fears expressed for quality journalism, including investigative journalism, are not necessarily legal or juridical *per se*: they arguably result from the economic situation (esp. decline in advertising revenue) and changes induced by the online environment, This refers to the lack or decline in both time and financial resources, to general trends in the field, as well as to any turmoil in employment relations (unemployment, freelancing, etc.).<sup>843</sup>

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<sup>841</sup> Cf. *Tiilikka* 2011, 18; see also *Mäntylä – Mörä* 2011, 143. Cf., e.g., ECtHR *Sanoma v. Netherlands*. Indeed, in some interviews, confidentiality of sources was assessed even more crucial in a small country like Finland than in large countries where issues become less easily personalized (*Mäntylä – Mörä* 2011, 144).

<sup>842</sup> Cf. *Neuvonen* 2014, 241–242.

<sup>843</sup> News coverage on the eroding situation in the media field is frequent while statistics also show an ongoing decline in the value of the media market: cf., e.g., *Joukkoviestintä* 2013. Tilastokeskus: Helsinki 2014: [http://www.stat.fi/til/jvie/2013/jvie\\_2013\\_2014-11-25\\_fi.pdf](http://www.stat.fi/til/jvie/2013/jvie_2013_2014-11-25_fi.pdf) (20.7.2015). For coverage on cutting expenses, cooperation and decreases in the media employment force, see <http://www.journalisti.fi/tags/yt-neuvottelut/> (30.7.2015). See, however, also *Mörä* 2011b, 160 and *Väliverron* 2009 in toto on societal developments and journalism being intertwined.

## **11. France**

Pascal Kamina



## 1. Relevant Legislation and Case-law

French law does not regulate specifically investigative journalism. However, general principles derived from freedom of expression, together with specific regulation, may apply to certain activities or method associated with investigative journalism. It is therefore necessary to define, first, journalism.

French Law contains several, broad, definitions of the journalist, used of the purpose of specific labour law, administrative or intellectual property regulations.

Article L.7111-3 of the Labour Code defines professional journalist as ‘any person who has for principal, regular and paid activity, the exercise of its profession within one or several press businesses, daily and periodical publication or press agency, and who derives the main part of its income from it.’<sup>844</sup>

There is substantial case law on the definition of professional journalists under the provisions of the Labour Code, mainly associated with the possibility to claim the protective status applicable to journalists under employment law, and with litigation relation to the professional identity card. This professional identity card, regulated by the Labour Code,<sup>845</sup> is not a condition for access to the profession, and is only associated to the ascertainment, by a commission, of the conditions of exercise of the profession of journalist.

Another definition of the journalist is found in article 2 of the Law of 29 July 1881 on the Freedom of the Press, relating to the protection of the secret of the sources of journalists. For this purpose, journalists are defined as:

*“any person which, in exercising its profession within one or several press, online public communication, audiovisual communication businesses or press agencies, undertakes, on a regular and paid basis, the gathering of information and its diffusion to the public.”*

Subject to the rules on the protection of the sources of journalists, there exist no legal rule setting a specific regime for investigative journalism.

Specific ethical rules, however, apply to journalists. These are defined, in particular, in a ‘Charter of the duties of the journalist’, adopted in 1918 and modified in 2011. However, the charter is very short and contains only

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<sup>844</sup> Under article L.7111-5 of the same Code, journalists exercising their profession within one or several business of electronic communication to the public are professional journalists.

<sup>845</sup> Art. L. 7111-6 and R. 7111-1 to R. 7111-35. The card does not make a journalist, and a journalist may be considered so under the applicable regulations even if he does not have this card.

general principles.<sup>846</sup> The principles defined in the applicable national collective bargaining agreement do not concern information gathering and checking.

## 2. Obtaining of information and boundaries of law enforcement

Under French law, journalists are subject to the generally applicable rules regarding the use of illegally/improperly obtained information (such as secret state papers, business/trade secrets, using hidden camera or through breach of confidence) or to the infringement of certain rights of third parties (privacy, publicity, personal data, defamation...). These may give right to liability (including criminal liability) under the relevant regulations.

However, the French Court of Cassation has held that a journalist, sued for defamation, may produce in court documents covered by procedural secrets (*secret de l'enquête ou de l'instruction*) in order to establish his good faith or the truth of the information (exception of truth).<sup>847</sup> This

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<sup>846</sup> It provides : "a journalist worthy of this name: Takes responsibility for all its professional productions, even anonymous ones; Respect the dignity of the people and the presumption of innocence; Holds the critical spirit, the veracity, exactitude, the integrity, equity, the impartiality, for the pillars of the journalistic action; holds the charge without proof, the intention to harm, the deterioration of the documents, the deformation of the facts, the diversion of images, the lie, handling, the censure and the self-censorship, not checking of the facts, for the most serious professional drifts; Exert greatest vigilance before disseminating information whatever their source; Has the right to follow-up, which is also a duty, on the information which he disseminates and undertakes to quickly rectify any disseminated information which would appear inaccurate; Accept in matters of professional deontology and honor only the jurisdiction of its pars; answers in front of the justice of the offenses contemplated by the law; defends freedoms of expression, of opinion, of information, of comment and criticism; excludes unfair and venal means to obtain information. If its safety, that of its sources or the gravity of the facts oblige it to conceal its quality of journalist, he informs his hierarchy and gives explanation as soon as possible to the public; does not earn money in a public service, an institution or a private company where its quality of journalist, his influences, his relations would be likely to be exploited; does not use of freedom of the press in an interested intention; refuse and fights, as opposite to its professional ethic, any confusion between journalism and communication; quotes its fellow-journalists of which it uses the work, and does not make any plagiarism; do not request the position of a fellow-journalist while offering to work under lower financial conditions; keeps professional secrecy and protects the sources of its information; does not confuse its role with that of a police officer or a judge."

<sup>847</sup> Cass. crim., 11 juin 2002, n° 01-85.237 : Bull. crim. 2002, n° 132 ; JCP G 2003, II, 10061, note *E. Dreyer* ; *Dr. pén.* 2002, comm. 135, obs. *M. Véron* ; *Rev. sc. crim.* 2002, p. 881, obs. *J.-F. Renucci*. – Cass. crim. 11 févr. 2003, n° 01-86.696, 01-86.685 .

possibility has been consecrated by the French legislator, and extended to all “professional secrets” in article 35 of the Law of 29 July 1881 on defamation.<sup>848</sup>

Subject to this specific rule on defamation the generally applicable law on detention and/or use of illegally obtained information is applicable to journalists.

However, a limit to the application of these rules, and notably associated enforcement rules is found in the regulation of the protection of the secret of the sources of journalists.

The Law n°2010-1 of January 4, 2010, which amends the Law of 29 July 1881 on the Freedom of the Press, protects the secret of the sources of journalists and restricts the legally admissible limitations to this secret.<sup>849</sup>

The principle of the protection of the secret of the sources of journalists is enshrined in article 2 of the Law of 29 July 1881, which provides:

The secrecy of the sources of the journalists is protected in the exercise of their mission of information of the public. (...)

Direct or indirect attempts to the secrecy of the sources can be carried out only if one dominating requirement of public interest justifies it and if the considered measures are strictly necessary and are proportioned to the legitimate end pursued. This attempt cannot consist in an obligation for the journalist to reveal his sources.

Is regarded as an indirect attack to the secrecy of the sources within the meaning of the third subparagraph the fact to seek to discover the sources of a journalist by means of investigations relating to any person who, because of her usual relations with a journalist, may hold information allowing to identify these sources.

During a criminal procedure, to appreciate the need for the attempt, it is necessary to take into account the gravity of the crime or of the offense, the importance of the information sought for the repression or the prevention of this infringement and the fact that the measures of investigation considered are essential to the manifestation of the truth.`

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<sup>848</sup> The defendant can produce for the needs for his defense, without this production being able to cause proceedings for concealment, the elements coming from a violation of the secrecy of the investigation or instruction or any other professional secrecy if they are likely to establish his good faith or the truth of the defamatory facts.“

<sup>849</sup> This reform follows a Law n°93-2 of 4 January 1993, which amended the Criminal Code so as to include elements of protection of the sources of journalists, in order to comply with the requirement of the Council of Europe.

This article first consecrate the right for the journalist to remain silent on his or her sources. This right is applicable during at all stages of the criminal proceedings (investigations, pre-trial, trial...). The journalist can also chose to remain silent even when the law provides for a possibility to identify the source.

The law provides for limits the protection of the secret of the sources, which are carefully defined in conformity with the requirements of the ECHR.<sup>850</sup>

The first concern Concerning investigations in the context of legal proceedings, and is included in the fifth paragraph of article 2 of the Law of 1881, which provides:

During a criminal procedure, to appreciate the need for the attempt, it is necessary to take into account the gravity of the crime or of the offense, the importance of the information sought for the repression or the prevention of this infringement and the fact that the measures of investigation considered are essential to the manifestation of the truth.`

Although the text mentions criminal proceedings, the principle are certainly applicable to civil or administrative proceedings as well.

The second derives from the Law of n°2010-1 of January 4, 2010, and concerns the transcriptions of correspondances with a journalist. Article 100-5 of the Code of criminal procedure prohibits such transcription when they allow the identifacaiton of a source in violation of article 2 of the Law of 29 July 1881.

French law also contains specific rules concerning searches, included in article 56-2 of the Code of criminal procedure, which are similar to those applicale to attorneys (avocats). These consecrate the case law developed under the previous law, and include a specific opposition procedure. Article 56-2 provides:

*“The searches in the buildings of a press business, of an audiovisual communication business, of an online public communication business, of a press agency, in the professional vehicles of these companies or agencies or in the residence of a journalist when the investigations are related to its professional occupation can be carried out only by one magistrate.*

*These searches are carried out upon written and justified decision of the magistrate who indicates the nature of the infringement or the infringements to which the investigations relate, as well as the reasons justifying the search and the object of this search. The contents of this decision notified to the person present pursuant to*

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<sup>850</sup> ECHR 27 March 1996, Goodwin v. United Kingdom.

*article 57 [i.e. the journalist when the search is made at his residence, or his representative or two independent witnesses] at the beginning of the search.*

*The magistrate and the person present pursuant to article 57 are the only one who can consult the documents or the objects discovered at the time of the search prior to their possible seizure. No seizure can relate to documents or objects relative to other infringements that those mentioned in this decision.*

*These provisions are enacted upon nullity of the search.*

*The magistrate who carries out the search takes care that the led investigations respect the free exercise of the profession of journalist, do not attempt to the secrecy of the sources in violation of article 2 of the law of July 29th, 1881 on freedom of the press and do not constitute an obstacle or do not involve an unjustified delay to the dissemination of information.*

*The person present at the time of the search pursuant to article 57 of this code can opposed to the seizure of a document or any object if it estimates that this seizure is irregular under the provisions of the preceding subparagraph. The document or the object must then be placed under closed seal. These operations are the object of an official report mentioning the objections of the person, who is not joined to the file of the procedure. If other documents or objects were seized during the search without raising dispute, this official report is distinct from that envisaged by article 57. This official report as well as the document or the object placed under closed seal are transmitted without delay to the judge of freedoms and detention, with the original or a copy of the file of the procedure.*

*In the five days of the reception of these parts, the judge of freedoms and detention rule on the dispute by motivated, non-appealable, ordinance. (...)"*

In addition, the general right granted to police officers to require communication of documents interesting an investigation (including elements included in a computer) despite these being covered by professional secrecy can be exercised only with the agreement of the journalist.<sup>851</sup>

### **3. Reporting about on-going investigations**

Subject to the rules on the protection of the secret of the sources, journalists are subject to the general rules applicable not only the

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<sup>851</sup> Code of Criminal procedure, articles 60-1, 77-1-21 and 93-3.

obtaining, but also to the detention and publication of information. In particular, there exists no specific rules excluding and diminishing liability associated with the detention of illegal information, and (subject to specific procedural rules and to general vicarious liability principles),<sup>852</sup> and the specific incriminations of press law (e.g. defamation) apply to journalist in the same way as they apply to non-journalists.

For example, French law does not provide for a specific journalistic duty of care by reporting about on-going investigations, for instance criminal or political. The required level of care is defined by the relevant incrimination and legal prohibition applicable under press law.

In this respect, the Law of 29 July 1881 provides for several 'press offences', which can be applicable to the reporting of current procedures.

Under article 35ter of the Law of 29 July 1881:

*"I. When it is carried out without the agreement of the interested party, the diffusion, by any means and any media, of the image of an identified or identifiable person prosecuted at the occasion of a criminal procedure but not having been the object of a judgment of condemnation and revealing, either that this person carries handcuffs or bounds, or that this person is placed in custody pending trial, is punished by a fine of 15,000 euros.*

*II. – the same penalty applied to the fact:*

*Either to carry out, publish or comment on an opinion poll, or any other consultation, on the culpability of a person prosecuted at the occasion of a criminal procedure or on the penalty likely to be pronounced,*

*Or to publish indications allowing to have access to the above mentioned surveys or consultations."*

Under Article 35 quarter, any diffusion of the reproduction of the circumstances of a crime or an offense, when this reproduction seriously

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<sup>852</sup> French law does not provide for a general exclusion or limitation of liability for 'whistleblowers'. One provision in this respect is found in the Law n°2013-316 of 16 April 2013 relating 'to the independence and expertise in matter of health and environment and to the protection of whistleblowers', which provided in in article 1 that 'Any natural or legal person has the right to make public or to disseminate in good faith an information concerning a fact, a data or an action, if the ignorance so of this data or this action appears to him as creating a serious risk on the public health or the environment.' The same article provides that the information made public must not contain any defamatory or abusive charge. This principle is not repeated in relation to other classes of information.

attempts to the dignity of a victim and is carried out without the agreement of the latter, is punished by a fine of 15,000 euros.

Article 38 further prohibits the publication of the charges and all other acts of criminal procedure or correctional before they were read in public trial, and this, under penalty of a fine of 3,750 euros.

Article 38ter prohibits the use of recording devices in public trial, subject to specific and limited authorisations, and the publication of recording made in violation of such prohibition.

Article 39 prohibits the publication of debates and procedural documents concerning certain matters, such as privacy, filiation or divorce (subject to anonymization), and the publication of internal debates of jurisdictions (including juries).

Article 39bis prohibits, subject to exceptions, the diffusion, in any manner, of information relating to the identity or allowing the identification of minors in certain cases (including minors victims of a crime).

Article 39quinquies extends this prohibition to the publication of information on the identity of victims of sexual offences, and article 39 sexies to the identity of certain police, customs or military personnel.

Lastly, French law provides for a right of reply in the printed, audiovisual and online press.

#### **4. Due diligence guidelines for journalists**

There exists no official criteria, as for example guidelines for journalists, in order to present the “objective truth”.

However, case law, in assessing liability under various provisions, insist on the necessity for journalists to recoup their sources and information.

Also, several legal provisions prohibit certain form of behaviour which are prejudicial to the truth.

For example, article 27 of the Law of 29 July 1881 provides for an offence of false information. However, this offence is drafted in a restrictive way.<sup>853</sup>

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<sup>853</sup> It provides: “La publication, la diffusion ou la reproduction, par quelque moyen que ce soit, de nouvelles fausses, de pièces fabriquées, falsifiées ou mensongèrement attribuées à des tiers lorsque, faite de mauvaise foi, elle aura troublé la paix publique, ou aura été susceptible de la troubler, sera punie d'une amende de 45 000 euros. Les mêmes faits seront punis de 135 000 euros d'amende, lorsque la publication, la diffusion ou la reproduction faite de mauvaise foi sera de nature à ébranler la discipline ou le moral des armées ou à entraver l'effort de guerre de la Nation. »

The law on defamation (in a broad meaning, including various forms of insults) or the general principle of civil liability can also sanction the provision of false information.

In addition, the Law of 29 July 1881 contains many provisions prohibiting the publication of certain information, as described under point 2 above.

### **5. Liability in the editorial chain**

Yes. The Law of 289 July 1881 contains specific provisions on the liability for press offences. These, however, do not exclude the liability of the employed journalist.

Article 42 of the Law provides for an order in the chain of liability, by providing that the main authors of the press offences are, in the following order: 1° the director of publication or the publisher, 2° the authors and the printers and 3° the sellers and distributors.

However, under Article 43, when the directors of publication or the publisher are brought in the action, the authors are prosecuted as accomplices.

Outside the scope of the Law of 29 July 1881, general liability rules (including vicarious liability) apply.

### **6. Conclusion and perspectives.**

The protection of the sources of journalists has been reinforced to the standard of the ECHR by the Law n°2010-1 of January 4, 2010.

However, subject to limited provisions French law does not provide for a specific liability regime for investigative journalism. This question is currently debated in the context of the broader debate on the protection of whistleblowers.





## **12. Greece**

Petros Iosifidis

## 1. Questions 1.– 2.

### *Legislative Environment*

The Greek Constitution of 1975 guarantees freedom of expression. Article 14, paragraph 1 determines that “every individual is free to express and propagate their thoughts in oral or written form, and through the press, in accordance with the Law.” Article 14 also states that the press is free; censorship, as well as the seizure of newspapers and other publications before or after publication, is prohibited. In addition, Article 14 guarantees the right to reply to errors published in the press or broadcast.

At the same time, the Civil Code, based on Article 2, paragraph 1 and Article 5, paragraph 1, guarantees a right to respect of one’s person, as well as a right to the development of all aspects of one’s personality. Article 9A determines that “Everyone has the right to be protected against the collection, processing and deployment, particularly through electronic means, of private data, in accordance with the Law”.<sup>854</sup>

This background is relevant to cases of media exposure of one’s personal data against their will, as the rights protected by the above articles might conflict with each other. As the Constitution does not prioritize the right to freedom of speech over the right to protection of privacy, competing rights must be balanced ad hoc and in relation to the context of each case at hand.

In such cases, the notion of “justified public interest” is taken into consideration in assessing the balance between the two conflicting rights (right to expression and right to protection of one’s person, reputation, private life, and one’s personal data). Case law recognizes the interest (including in their personal data) that public figures attract, but only to the extent that this is linked with their public role. It also acknowledges that press journalists, in particular, have a justified professional interest in bringing to light aspects of the private life of such figures when these are linked with the political process or have a public role. At the same time, insult, libel, and slanderous defamation are considered criminal offenses (Articles 361–363 of the Criminal Code), which constitutes a significant constraint on journalistic freedom. Still, the journalists affected may be vindicated if the information published is true and “justified interest” is involved (Article 366, 367).<sup>855</sup>

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<sup>854</sup> Karakostas, I. and C. Vrettou. “Freedom of the Press and Private Data Protection,” *Nomiko Vima* 59 (2011), pp. 3–14 (in Greek).

<sup>855</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla. *Does Media Policy Promote Media Freedom and Independence? The Case of Greece*. Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP), 2011.

Law 2472/1997, which incorporates the European Directive 95/46/EC, and is based on Articles 2 (paragraph 1), 5 (paragraph 1), and 9 and 9A of the Constitution, attempts to address the above issue by stipulating that the processing<sup>856</sup> of simple personal data of public figures by the media and their employees is based on a judgment about the necessity to satisfy the right to inform and to be informed that the processing actor seeks; in the case of more sensitive data,<sup>857</sup> there must be an absolute necessity. Law 2472/1997 does not resolve the issue of competing rights, but seems to provide a slight advantage for the protection of personal data. The Authority for Protection of Personal Character Data (DPA), established with Law 2472/1997, investigates the legality of personal data processing on the basis of the above principles.<sup>858</sup>

Audiovisual media content is subject to state regulation. Regulation and self-regulation<sup>859</sup> apply to electronic editions of print media, as well as to broadcasting on the internet. The liberalization of broadcasting around 1989–1990 led to Law 2328/1995, which sought to define the legal rules and norms regulating the structure and content of private radio and television.<sup>860</sup> Law 2472/1997 also applies to audiovisual media, while

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<sup>856</sup> The law covers all activities in the context of journalism that can constitute data processing, from investigation and collection, maintenance of data in files or databases, linking with other data, exchange or publication of the data.

<sup>857</sup> Data “referring to racial or ethnic origin, political opinions, religious or philosophical beliefs, membership of a trade-union, health, social welfare and sexual life, criminal charges or convictions, as well as membership of societies dealing with the aforementioned areas.”

<sup>858</sup> *Karakostas, I. and C. Vrettou*. “Freedom of the Press and Private Data Protection,” *Nomiko Vima* 59 (2011), pp. 3–14 (in Greek).

<sup>859</sup> Law 2863/2000 provided for self-regulation mechanisms by instituting self-regulatory bodies in respect of radio and television services. Under this legislation, owners of public and private, free-to-air or encrypted channels must conclude multi-lateral contracts in which their parties define the rules and ethical principles governing the programs broadcast. In this context, several codes have been developed, namely the Code of Ethics of Greek journalists, the Code of Conduct for news and other political programs, as well as the advertising and communication code governing the content, presentation, and promotion of adverts. The development of self-regulatory mechanisms, and in particular the drafting of the above codes of conduct, has complemented governmental regulation.

<sup>860</sup> Laws 1178/1981 and 2328/1995 have determined significant monetary compensation for content violating one’s honor, esteem, or reputation. Depending on the intensity of the offense and the power and circulation of the outlet, minimal compensation ranges from 100 million drachmas (approx. €294,000) for national television stations to 30 million drachmas (approx. €88,000) for local television stations, and from 50 million drachmas (approx. €147,000) for networked radio stations, to 20 million drachmas (approx. €58,700) for non-networked radio stations.

Presidential Decree (PD) 77/2003 established a number of principles for journalists and media personnel that apply to all public and private television and radio: protection of political pluralism and diversity of views, prohibition of discrimination, respect for the person and private life, cross-checking of information, and the right to preserve the confidentiality of sources.<sup>861</sup> In addition, a recent anti-racist Law 4285/2014 criminalizes the public expression of hatred (through the press, broadcasting, or the internet) against persons or groups on the grounds of color, race, ethnic origin, religion, or sexual orientation.

Further, PD 131/2003 (which transposed the EU Directive on electronic commerce and implemented the EU provisions concerning the liability of internet intermediaries) regulates content on the basis of the freedom of expression and information in the online environment. Internet service providers (ISPs) are exempted from any liability regarding the information they transmit or store, but are obliged to promptly inform the relevant domestic authorities of any alleged illegal activities. However, Article 20(1) (b) stipulates that data protection rules are exempted from the scope of application of the PD.<sup>862</sup> Liability for content is a thorny issue, notably in the case of blogs. Generally speaking, responsibility for content lies with the author or blogger, who cannot be identified easily due to the confidentiality of communications (Article 19 of the Constitution). Bloggers are not liable for third-party content, but there is an ongoing discussion as to how to regulate this type of content, possibly by differentiating between content that is political or current affairs and other content.

Reviewing a number of recent cases, Karakostas and Vrettou<sup>863</sup> claim that Greek case law generally prioritizes private data protection over freedom of expression even where there is a justified public interest. Contrary to the jurisprudence in other European countries, and that of the European Court of Human Rights, Greek case law in this matter does not follow a fixed set of criteria, such as whether a public figure is involved, whether there is justified public interest, whether a journalist acted in good faith, whether the claims are based on sound research and investigation, or whether the value judgments are based on facts. Psychogiopoulou et al<sup>864</sup> argue that

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<sup>861</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla. Does Media Policy Promote Media Freedom and Independence? The Case of Greece. Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP), 2011.

<sup>862</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla. Does Media Policy Promote Media Freedom and Independence? The Case of Greece. Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP), 2011.

<sup>863</sup> Karakostas, I. and C. Vrettou. "Freedom of the Press and Private Data Protection," *Nomiko Vima* 59 (2011), pp. 3–14 (in Greek).

<sup>864</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla. Does Media Policy Promote Media Freedom and Independence? The Case of Greece. Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP), 2011.

Greek jurisprudence, as well as independent authorities like the media regulatory body NCRTV, have been inconsistent; they restrict journalistic freedom of expression when political figures are involved, while on the other hand they allow blatant violation of privacy.

In fact, the NCRTV operates in a very ambivalent way, endorsing conservative values, while often ignoring violation of privacy and racist and anti-immigrant broadcasts. On the social front, the NCRTV has fined networks, such as national coverage commercial channels MEGA and STAR, for showing homosexual relationships or airing the views of gay or transsexual individuals, often invoking the need to prevent corruption of the young. On the other hand, it has not used legal provisions that would let it protect minority groups that have become targets of physical attack, verbal abuse, mockery, or bullying. A characteristic example was the exposure in the 2012 pre-election period of a number of female prostitutes who were obliged to be tested for HIV following a pledge by two ministers to protect the male population (something that may have boosted their re-election chances). Photographs of these women were shown on all mainstream channels, clearly violating their dignity and medical confidentiality. When the NCRTV was asked to intervene, it refused to do so.<sup>865</sup>

The European Court of Human Rights (ECtHR) constitutes an alternative platform for journalists and individuals to seek correction for the infringement of their rights to freedom of expression and information in accordance with Article 10 of the European Convention on Human Rights (ECHR). Indeed, the ECtHR has challenged domestic courts' case law on a number of occasions. In a famous case, Nikitas Lionarakis, a journalist and television presenter, was brought to justice with defamation charges for statements made in his ERT program by a guest against another invitee who was a well-known lawyer involved in the case of Abdullah Ocalan. The domestic courts ordered Lionarakis to pay €161,408 for the damage sustained; after a settlement in the domestic courts the amount was reduced to €41,067.48. Lionarakis resorted to the ECtHR, which held unanimously that there had been a violation of Article 6 (right to a fair trial), paragraph 10 (right to freedom of speech) of the Convention, considering, in particular, that the journalist and coordinator could not be held liable in the same way as the person who had made remarks that were possibly controversial, insulting, or defamatory (ECtHR, *Lionarakis vs. Greece* (1131/2005)).

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<sup>865</sup> *Iosifidis, P. And D. Boucas* (2015) *Media Policy and Independent Journalism in Greece*, Open Society Foundations, at <http://www.opensocietyfoundations.org/reports/media-policy-and-independent-journalism-greece>.

### 3. Reporting about on-going investigations

Against the above described legal and regulatory background, journalists are often faced with accusations and lawsuits for defamation or violation of one's privacy and exposure of personal data. Large sums of compensation can be sought in cases of insult or libel and this is considered a serious hurdle to freedom of expression and in particular to investigative journalism.

In October 2011, investigative journalist Kostas Vaxevanis was arrested and charged with violation of privacy over the publication of the "Lagarde List," disclosing Greek tax evaders with Swiss bank accounts. Vaxevanis was tried and acquitted twice (the second time in November 2013). However, he has been constantly involved in lawsuit cases in recent years. In fact, he currently has over 40 pending court cases. This is a full-time job and it incurs large amounts of money even in order to be represented at Court.

Recently, growing violence and physical attacks against journalists have also been visible. A recent report highlighted the risks involved in reporting during demonstrations.<sup>866</sup> A number of journalists have been attacked and injured during protests against the country's austerity measures. In April 2012, Marios Lolos, president of the Union of Greek Photojournalists, was beaten by the police while covering a protest and had to undergo brain surgery. Journalists were also attacked by individuals affiliated with Golden Dawn neo-fascist party, such as the SKAI reporter Michael Tezaris who was beaten by members of Golden Dawn at an anti-immigrant demonstration.<sup>867</sup>

### 4. Due diligence guidelines for journalists

The promotion of the professional interests of journalists employed by newspapers and by the electronic media is ensured through the establishment of four regionally organized unions, of which two are the most prominent: the Journalists' Union of Athens Daily Newspapers (ESIEA) and the Journalists' Union of Macedonia-Thrace Daily Newspapers (ESIEMTH). The Periodical and Electronic Press Union (ESPIT) represents journalists who work for magazines and the online media. Grouped under the Pan-Hellenic Federation of Journalists' Unions (POESY), the unions' principal aim is to negotiate labor contracts, wages, employment conditions, and social security benefits with the state and the

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<sup>866</sup> Reporters without Borders. Is the Crisis in Greece a Chance for its Media?, 2011, at [http://en.rsf.org/IMG/pdf/rwb\\_greece\\_2011\\_bd2.pdf](http://en.rsf.org/IMG/pdf/rwb_greece_2011_bd2.pdf).

<sup>867</sup> Freedom House, Report on Greece, Washington, DC, 2012, at <https://www.freedomhouse.org/sites/default/files/Greece%20FOTF%202013%20final%20draft.pdf>.

employers. The unions are also tasked with supervising journalists' ethical performance, self-regulating journalists' professional behavior, and protecting the principles of journalistic autonomy and editorial independence.

The Code of Ethics for journalists and audiovisual programs was issued by the NCRTV and published in 1990 as part of a collective contract signed by JUADN and the management of ERT. The rules of the code apply to public broadcasting, both national and local, as well as to private radio and television stations. In terms of journalism, the code states that (details can be found at [Esiea.gr](http://Esiea.gr)):

- Journalism is a profession.
- Truth and its presentation constitute the main concern of the journalist.
- The journalist always defends the freedom of the press, the free and undisturbed propagation of ideas and news, as well as the right to opposition.
- Religious convictions, institutions, manners and customs of nations, people and races, as well as citizens' private and family life, are respected and inviolable.
- The primary task of the journalist is to protect people's liberties and democracy, as well as to advance social and state institutions.
- Respect for national and popular values and the protection of people's interests should inspire journalists in the practice of their profession.
- Journalists should reject any intervention aimed at concealing or distorting the truth.
- Access to sources of news is free and unhindered for journalists, who are not under any obligation to reveal their information sources.
- The profession of journalism may not be practiced for self-seeking purposes.
- Journalists do not accept any advantage, benefit, or promise of benefit in exchange for the restriction of the independence of their opinion while exercising their profession.

The disciplinary councils of the unions investigate alleged breaches of the code mainly on the basis of specific complaints (though this is not necessary), and have the power to penalize journalists (i.e. reprimands, suspension of membership, or expulsion) found guilty of breaches, such as defamation, distortion of facts, or anti-collegial behavior. Such penalties



apply only to members, which limits self-regulation through the code, as membership of a professional union is not mandatory for journalists.<sup>868</sup>

## 5. Liability in the editorial chain

Please see point 4 above.

## 6. Conclusion and perspectives

In this section we would like to hear your own assessment of the overall situation – as mainly characterised by the findings under A. above in view of the study's interest in learning about the state of play in the (pluralistic and diverse) provision of investigative journalism. When allocating elements of your description to either section please bear in mind that, on the one hand, your conclusion has sufficient grounding and textual framing and that, on the other hand, the assessment of perspectives is duly and understandably prepared for.

The triangle of power evident in Greece (media owners, politicians, banking sector) create circumstances that are unfavorable to objective and investigative journalism. Dealings between entrepreneurial interests (including the banking sector) and the state can take many shapes and forms, including often using legislation to accommodate particular business interests. Such dealings are often ignored in the mainstream media, which have developed a code of silence and portray the extensive cover-up of scandals.<sup>869</sup>

When exposed by alternative media these affairs generate confrontation between the individuals whose interests have been revealed (entrepreneurs and politicians) and the journalists involved. The magazines *Unfollow* and *HotDoc* have been on the receiving end of many lawsuits for exposing scandals or business deals.<sup>870</sup> Resorting to legal action against journalists is the most common reaction, but not the only one. More explicit practices have been followed, including blatantly false claims, direct threats against journalists' personal and family life, conspiratorial practices involving forgery, secret surveillance, or burglaries

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<sup>868</sup> *Psychogiopoulou, E., D. Anagnostou, and A. Kandyla. Does Media Policy Promote Media Freedom and Independence? The Case of Greece. Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP), 2011.*

<sup>869</sup> *Iosifidis, P. And D. Boucas (2015) Media Policy and Independent Journalism in Greece, Open Society Foundations, at <http://www.opensocietyfoundations.org/reports/media-policy-and-independent-journalism-greece>.*

<sup>870</sup> A current case involves an €800,000 lawsuit brought by businesswoman Gianna Angelopoulou against three Unfollow journalists for an article on the oil business deals of the Angelopoulos family.

and stealing of sensitive data. In most cases, these incidents have not been covered by the mainstream media at all.<sup>871</sup>

Media collectives, formed by students, bloggers, and online activists, have exposed social unease with government policy and have reported on police violence, but they have been confronted with authoritarian practices. In April 2013, Indymedia, an internet collective, was closed down by the government for exposing police brutality and the practices of Golden Dawn,<sup>872</sup> while in recent months police shut down student-run radio stations in Athens, Patra, and Xanthi.

A related problem has been the violation of the Code of Ethics of Greek journalists. Often alternative media violate the Code of Conduct and do not conform to professional rules. Before exposing somebody and possibly leading them to prison one has to communicate with them and confront them; this is something that is very rarely done".<sup>873</sup>

A prevalent phenomenon is the uncritical and unchecked reproduction of information by well-known journalists and radio and television reporters. The term *vaporakia* (little vessels) has been coined for journalists who, intentionally or unintentionally, serve a particular agenda without exercising their mental faculties or without employing ethical principles and abiding by the Code of Conduct. It may come as no surprise that violations of the code are becoming more pronounced under austerity and the current crisis of journalism.

The rise of the internet is of increasing significance, as it offers a platform for journalists who have been excluded, persecuted, or simply presented with no alternative. Nevertheless, it can also function in the opposite way: journalists who operate independently and bring affairs of public interest to light, but are subsequently prosecuted and brought to court on accusations of libel, often face humiliating exposure on anonymous blogs, which clearly violate any code of conduct.

Regarding its content, then, the internet is currently a space where regulation is uncertain and the following features seem to prevail:

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<sup>871</sup> Reuters. Security Firm Spies on Reuters Correspondent, 2012 at <http://www.reuters.com/article/2012/06/28/greece-reporters-surveillance-idUSL3E8HQ5Z820120628>.

<sup>872</sup> Syllas, C. "Greece: Freedom of Expression Takes a Beating," 2013, at <http://www.indexoncensorship.org/2013/12/greece-freedom-of-speech-in-a-critical-status>.

<sup>873</sup> *Iosifidis, P. and D. Boucas* (2015) *Media Policy and Independent Journalism in Greece*, Open Society Foundations, at <http://www.opensocietyfoundations.org/reports/media-policy-and-independent-journalism-greece>.

## Comparative Study on Investigative Journalism

- verbatim reproduction of the same news, with no editorial or other control, through unauthorized replication of intellectual property;
- content based on entertainment of the lowest quality and gossip;
- a platform where racist, xenophobic, or sexist messages can be produced and find an audience

## **13. Croatia**

Zrinjka Peruško

## 1. Relevant Legislation and Case-law

### Introduction

Academic attention to the issue of investigative journalism in Croatia is not extensive. The main academic journals database includes only 7 articles with key words including derivatives of "investigative journalism", and a few more that mention it in passing without focusing on the subject, out of 165 articles in which "journalism" appears. Several more articles appear on the issue of journalistic ethics, status of privacy and the media treatment of private issues (i.e. the privacy of medical patients). There are also a small number of articles with the topic of libel (4 articles), and 10 articles dealing with legal, journalistic or ethical issues of reporting or communication in relation to the crimes against honor and reputation.

The theme of the right to access to information, and the application of the Law on the right to the access to information seems to engage most academic interest with 27 articles, although only one or two mention the issue in relation to journalism and media.<sup>874</sup>

Legal analysis of journalism related issues is extremely rare, with only a few published articles, and none cover questions relevant in this analysis.<sup>875</sup>

In news accounts (available on the Internet), the phrase "investigative journalism" appears mainly in relation to prizes for investigative journalism given to Croatian journalists (who were eligible until Croatia joined EU in 2013), and recently in relation to the attack at his home on the investigative journalist Željko Peratović.<sup>876</sup>

Although the Croatian Journalists Association has a Section of investigative journalists, investigative journalism is generally seen to be non-existent in Croatia, probably because it is too expensive to media owners in the context of contracting newspaper markets, and may also be a consequence of the influence of business owners and advertisers on media content. The television program *Provjereno* on NOVA TV is among

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<sup>874</sup> Hrcak is an open access database of all Croatian academic journals. The search was performed in July 2015 on [www.hrcak.hr](http://www.hrcak.hr).

<sup>875</sup> To date, the only comprehensive legal analysis of the legal framework and judicial practice in issues of media law/journalism is the one by Vesna Alaburić, Emil Havkić, and Ranko Marijan published in 2000: *Zakon o javnom priopćavanju, Zakon o kaznenom postupku i Kazneni zakon (izvaci), Evropska konvencija za zaštitu ljudskih prava i temeljnih sloboda: komentar — praksa*, priredili Vesna Alaburić, Emil Havkić i Ranko Marijan, Zagreb, VIV-inženjering, 2000.

<sup>876</sup> Pretučen istraživački novinar Željko Peratović: <http://www.index.hr/vijesti/clanak/permalink/822578.aspx>.

the rare media that still attempt to pursue investigative stories.<sup>877</sup>

Gordana Vilović summarizes the few cases in which investigative journalism in Croatia tested the legal framework (focusing on the journalism and not on the legal aspects): the case (in 1998) of the publication of "business secrets" – a bank whistler (who lost her job) and the journalists who published her story (who didn't go to court), the case of several scandals in public utilities uncovered in 2009, with no consequences for the journalists, and the sting investigation (in 2008) "Index" against corruption in academia which was closely followed by the media (although the story was not broken as in investigative journalism piece, but by the police) in which "journalists did not abide by minimum of ethical standards"<sup>878</sup>. Vilović also evaluates the majority of the Croatian examples as "pseudo-investigative journalism", because they lack the rigorous and ethical principles in researching the topic including "publishing information from only one source, open speculation without credible evidence, obvious bias in the treatment of topics/phenomena/actors, journalists and editors linked with particular interest groups, interest of the media owners who clearly limit deeper investigation of a topic or a problem".<sup>879</sup>

While the first media regulation in post-socialist Croatia was passed already in the 1990s, the legislation relevant to the issue of journalistic freedoms was expanded in bursts and often changed – in the early 2000's by the center-left government, in 2011 by the outgoing center-right government and the last time in 2012-2015 by the center-left government.<sup>880</sup>

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<sup>877</sup> *Ivana Paradžiković*: Mi smo među posljednjim oazama istraživačkog novinarstva:

<http://www.slobodnadalmacija.hr/Prilozi/Reflektor/tabid/92/articleType/ArticleView/articleId/258486/Default.aspx>.

<sup>878</sup> *Gordana Vilović*, Pogled na istraživačko novinarstvo u Hrvatskoj. Korak naprijed, dva nazad. u Friedrich Ebert Stiftung, "Istraživačko novinarstvo". pp. 64-78. Sarajevo: FES, 2009. For an overview of the beginnings of the pseudo-investigative journalism in Croatia see Gordana Vilović, Istraživačko novinarstvo, tabloidizacija i etika. Društvena istraživanja, Vol. 12 (2003), No. 6 (68), pp. 957-974.

<sup>879</sup> Vilović 2009 *ibid*, p. 64-5.

<sup>880</sup> For more information on overall media legislation and media system in Croatia, see Peruško, Z. (2011). Assessment of Media Development in Croatia based on UNESCO Media Development Indicators. Paris: UNESCO; Peruško, Z. (2013). Rediscovering the Mediterranean characteristics of the Croatian media system. *East European Politics and Societies*. 27(4), 709-726. DOI: 10.1177/0888325413494770. Peruško, Z. (2013). Media pluralism policy in a post-socialist Mediterranean media system: The case of Croatia. *Central European Journal of Communication*, 6(2) 204-218.

In addition to the Constitution, which protects freedom of expression, two laws are in Croatia relevant to the issues of investigative journalism: the Law on the Media and the Penal Code.

The Law on the Media sets the standards for freedom of expression and journalistic standards, as well as for civil redress of published texts (including audiovisual).<sup>881</sup> The Penal Code includes incriminations of criminal libel and shaming, and also includes boundaries of legality in gathering information.<sup>882</sup>

Croatian Supreme Court practice is available on the internet<sup>883</sup>, but the practice of the courts in the matters pertaining to journalism and media has not been recently evaluated.

*Self-regulation of journalists.* The Croatian Council for the Media was established in 2011 with a view to implement standards of media ethics and the professional journalistic code, as a self-regulatory body composed of journalists and publishers. Croatian journalists association also has an Ethics board, but the publishers often ignore its decisions.

## **2. Obtaining of information and boundaries of law enforcement**

The Penal code includes the criminalization of divulging of privileged information (article 259), letters and other communication (article 142). Unauthorized recording and spying on telephone and other conversations, and publishing of information gained in this way is illegal (with prison sentence up to three years, or 5 years in case the perpetrator is an official); there is no criminal act if the act was perpetrated in pursuit of the public interest or other preponderant interest higher than the protection of privacy (article 143). The public interest etc. does not extend to photographs recorded in private or protected quarters (article 144).

No cases were reported regarding the use of illegally obtained information by journalists.

There is no information that describes or prescribes the boundaries of law enforcement in relation to documents and press material. Journalistic

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[http://ptks.pl/cejc/wp-content/uploads/2014/09/CEJC\\_Vol6\\_No2\\_Perusko.pdf](http://ptks.pl/cejc/wp-content/uploads/2014/09/CEJC_Vol6_No2_Perusko.pdf).

<sup>881</sup> Zakon o medijima, pročišćeni tekst zakona NN 59/04, 84/11, 81/13 <http://www.zakon.hr/z/38/Zakon-o-medijima>. The Law on the Media, Official Gazette 59/04, 84/11, 81/13.

<sup>882</sup> Kazneni zakon pročišćeni tekst zakona NN 125/11, 144/12, 56/15, 61/15 na snazi od 30.05.2015. <http://www.zakon.hr/z/98/Kazneni-zakon>. The Penal Code Official Gazette 125/11, 144/12, 56/15, 61/15.

<sup>883</sup> The web site where the Supreme Court practice can be found is <http://sudskapraksa.vsrh.hr/supra/>.

communication has the same protection as other communication, i.e. can only be surveyed if ordered by court. In case of national interest, health safety and territorial integrity, the state prosecutor can ask the court to order the journalists to divulge the source of information (Law on the Media, article 30)

In spite of this, in the mid 2000 a big scandal broke out when it was uncovered that Croatian counterintelligence illegally surveyed a number of journalists. The most well known is the case of Helena Puljiz, who sued the state for damages because of harassment and surveillance 2004, and won her case in 2014.<sup>884</sup>

### 3. Reporting about on-going investigations

"The right of the journalists to protect their sources was included in the first law dealing with media freedom after Croatia's transition to democracy. The Law on Public Information (1992), revised in 1996, expands the scope of this protection (also continued in the present Law on the Media) by including information not yet published, and extending it to editors, publisher, authors of books and other non-journalist authors. However, the Law on Criminal Procedure includes a possibility to obligate the journalist to give up the source in closed court, if the information is needed for the prevention of crime or in relation to a felony".<sup>885</sup>

The Law on the Media includes the basic standards of journalistic ethics, including the obligation of the media to protect the privacy, dignity, reputation and honor of the citizens, especially children; to protect the identity of the witnesses and victims of crime, and it is not allowed to divulge their identity without their consent (article 16). The same law defines circumstances in which the publisher is not eligible for the payment of damages – if the published information was uttered at a public meeting at any level of government or a public meeting; in an authorized interview; based in correct facts or if the author had reason to believe their truth and acted in good faith; photograph taken in a public place or with his knowledge and consent for publication, and the rights of publication were not limited; truthful/correct, and the journalist could conclude in good faith that the aggrieved party was in agreement about publication; was a value judgment and the publication of the information was in the public interest and given in good faith. These qualifications are not pertinent for personal information that is secret by law, information on minors, and information

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<sup>884</sup> Novinarki Puljiz država mora platiti 130.000 kn, <http://www.vecernji.hr/hrvatska/helena-puljiz-dobila-parnicu-protiv-drzave-za-naknadu-stete-931000>.

<sup>885</sup> *Peruško, Z.* (2011). Assessment of Media Development in Croatia based on UNESCO Media Development Indicators. Paris: UNESCO.



obtained illegally. The burden of proof of the exonerating qualifications is on the defendant.

The procedure for publishing the corrections, replies and the civil suit for damages is described in detail in the Law of the Media (articles 40-58)

The change to the Penal code has already in 2007 removed the possibility of a jail sentence for defamation (none were ever carried out). Truth is a defense against libel, and if no malicious intent, no libel will be found.

The Law on the Media allows for civil procedure where both material and non-material damages can be sought, includes truth, good faith and public interest as defenses in case of a libel suit. The same law defines the right of reply.

The Croatian journalists association, NGO's, and experts particularly negatively saw the 2011 changes to the Penal code, which introduced the "shaming" offence in addition to existing libel.<sup>886</sup> The changes to the Penal code in 2015 included also changes to the section on shaming.

Unlike libel, which pertains to the propagation of "untrue factual utterance which can harm the reputation and honor, knowing that it is not true", the new shaming incrimination from the 2011 change to the penal code includes the defense of truth only when the incrimination was not made with the intent of shaming and in the public interest. The very wide field of interpretation of intent and the public interest in relation to the protection of the rights of individuals was highlighted by the lawyer Vesna Alaburić<sup>887</sup>, with expectations of a negative impact on journalistic freedoms. Journalist Nataša Škaričić commented that "If it wasn't possible with the criminal libel or defamation, with the felony shaming, an open season was declared on every journalist who investigates crime."<sup>888</sup>

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<sup>886</sup> *Peruško, Zrinjka*. Medijski sustav i medijska politika u Hrvatskoj 2010-2011. prema UNESCO-ovim indikatorima medijskog razvoja. Monitoring medija (Media monitoring), 1/2012. [www.cim.fpzg.unizg.hr](http://www.cim.fpzg.unizg.hr). Vesna Alaburić in "IZMJENE ZAKONA: Vesna Alaburić: Novinarima su vrata zatvorena, mogu završiti u zatvoru ako preprodavača droge nazovu dilerom" <http://www.politikaplus.com/novost/75847/vesna-alaburic-novinarima-su-vrata-zatvorena-mogu-završiti-u-zatvoru-ako-preprodavaca-droge-nazovu-dilerom>; Gong "Pravo na istinu – izmjene kaznenog zakona. Sramoćenje i progon novinara - istina i batina, Hrvatska i Švicarska". <http://www.gong.hr/hr/dobra-vladavina/mediji/sramocenje-kaznenog-zakona-i-progon-novinarar-istin/>.

<sup>887</sup> *Andrea Žapčić*. «Hoće li novinari u Remetinec ili koliko je i za koga istina voda duboka». 4.1.2011. <http://www.tportal.hr/vijesti/hrvatska/104000/Hoce-li-i-novinari-u-Remetinec-ili-koliko-je-i-za-koga-istina-voda-duboka.html>. pristupljeno 19.siječnja 2012.

<sup>888</sup> Komentar *Nataše Škaričić*: Sramoćenje kao kazneno djelo je metak u novinarstvo:

So far, one sentence (in the first instance) was passed for shaming in relation to a journalistic text, against the reputable and well-known Croatian journalist Slavica Lukić. This caused a public outrage that contributed to the recent change to the shaming incrimination in the Penal code. The County court vacated the judgment and returned the case to lower court, because her commentary was a value judgment and not a statement of fact, and as such can't be incriminated as shaming.<sup>889</sup>

In the 2015 change to the Penal code<sup>890</sup> the "shaming" incrimination was modified, and presently only "grievous shaming" is penalized (article. 148, 148.a.), except if the "incriminated act was part of scientific, professional, literary, artistic work or public information, in the carrying out of duty prescribed by law, political or other public or social activity, in the journalistic work or in the defense of some right, and did so in the public interest or for other justifiable causes"

#### 4. Due diligence guidelines for journalists

There are no legally defined guidelines pertaining to presenting the "objective truth", either in general reporting or in relation to judiciary procedures or investigations.

The Code of Honor of Croatian journalists includes several points of relevance for investigative journalism: paying for information is only acceptable if it's the only way of obtaining information of exceptional public interest (article 7.), journalists should refrain from gathering information in ways contrary to the Code, "except when there are no other ways to obtain information of exceptional public interest. Attempts of getting information by threats, blackmail and other coercion is unacceptable" (article 9.), "Journalist honors the law on data secrecy and the embargo on publication of information, unless they are misused to stop the publication of information of exceptional public interest" (article 10).<sup>891</sup>

The journalists code also includes the need to be sensitive in reporting victims of crime, especially children, with special attention to their dignity

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<http://www.slobodnadalmacija.hr/Hrvatska/tabid/66/articleType/ArticleView/articleId/241527/Default.aspx>.

<sup>889</sup> "ŽUPANIJSKI SUD Ukinuta presuda novinarki Slavici Lukić za javno sramoćenje Medikola" <http://www.jutarnji.hr/zupanijski-sud-ukinuta-presuda-novinarki-slavici-lukic-za-javno-sramocenje-medikola/1209078/>.

<sup>890</sup> The Penal code and its recent changes: Official Gazette 125/11, 144/12, 56/15, 61/15 <http://www.zakon.hr/z/98/Kazneni-zakon>. The latest change is available at [http://narodne-novine.nn.hr/clanci/sluzbeni/2015\\_05\\_56\\_1095.html](http://narodne-novine.nn.hr/clanci/sluzbeni/2015_05_56_1095.html).

<sup>891</sup> Kodeks časti hrvatskih novinara (Code of honour of Croatian journalists), <http://www.hnd.hr/hr/dokumenti/>.

and reputation. In reporting court proceedings, the presumption of innocence and the right to dignity and integrity of all parties should be respected; the protection of the identity of the victims, whistleblowers and witnesses can't be divulged without their agreement, except in cases of "exceptional public interest".<sup>892</sup>

## **5. Liability in the editorial chain**

Editor in chief is responsible for all published information, and this extends to the editorial package of the text, choice of title, subtitles, text under photographs etc. (art. 24, Law on the media).

Editor can be sued if he refuses to publish the correction/reply, which is ensured by the Law on the media.

In the case of the damages for libel or slander, in the case of authorized interview including "obvious slander or libel" the authorization does not exclude the joint responsibility of the publisher and chief editor, if they did not act in good faith (article 21, para 7, Law on the media).

In the majority of cases against the media the publisher is sued for the material or non-material damages, but several prominent journalists have also been sued and fined (Uzelac, 2001). In a recent case where the publisher was found guilty for insult and plaintiffs awarded damages, the journalist who wrote the commentary in question was fired.<sup>893</sup>

## **6. Conclusion and perspectives.**

Overall, there are no direct legal barriers to investigative journalism, except the article on shaming in the Penal code, which has had, and might have in the future, a chilling effect on investigation of crime and corruption. The overall consensus in the journalistic profession, NGO's and experts, is that the introduction of this incrimination in the 2011 change to the Penal code was unnecessary as a protection of privacy, and only has a negative effect on the freedom of journalistic expression. The 2015 change to the incrimination is considered an improvement, but there is a consensus in the media and journalism circles that the incrimination itself is unnecessary and harmful.

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<sup>892</sup> *ibid.*

<sup>893</sup> Slobodna Dalmacija dala otkaz Borisu Dežuloviću, Ante Tomić i Jurica Pavičić otkazali suradnju <http://www.index.hr/vijesti/clanak/slobodna-dalmacija-dala-otkaz-boristu-dezulovicu-ante-tomic-i-jurica-pavicic-otkazali-suradnju-slobodnoj/825329.aspx>.

## **14. Hungary**

Gabor Polyak and Erik Uszkiewicz

## 1. Relevant Legislation and Case-law

### Freedom of information

By obtaining information, journalists can rely on the regulations on freedom of information and the legal practices associated therewith. Public data have been accessible to everyone since 1992. The conditions that apply to public information access were partially modified by the legislator in 2011 (Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information). The previous system governing freedom of information, which had worked well, was severely curtailed by Parliament in 2015.<sup>894</sup>

According to the effective statute, public data designates any type of data and information - irrespective of the method or format in which they were recorded - that is handled by and/or refers to the activities of anybody or person that discharges state or municipal government functions, or other public duties provided for by the relevant legislation, including data generated in the performance of their respective public duties, regardless of how these data are handled or of the way in which they were collected. This includes in particular data

*"regarding powers and competencies, organizational structures, professional activities and the evaluation of such activities covering various aspects thereof, such as efficiency, the types of data held and the regulations governing operations, as well as data relating to financial management and to contracts concluded."*

Public data are publicly available and may be accessed by anyone. The law specifies the data request procedure in detail, mindful of the interests of the person submitting the data request. A data request may be submitted in any form, even electronically, and the data manager is bound by a strict, 15+15 days deadline. The person requesting the data is not liable to pay for any costs related to accessing the data, with the potential exception of the costs related to producing copies thereof. In cases of failures to satisfy data requests, the law provides for judicial remedies; in practice, the greatest impediment to the freedom of information is that such legal actions can become excessively drawn out. In addition to providing for the possibility of data requests, the law also obligates those handling

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<sup>894</sup> The increasing severity of the relevant provisions applies in particular to the following issues: an end to anonymous data requests; the repayment for expenses that must be rendered in exchange for data provision will in the future also include the labour costs associated with the handling of the data; in case of works of protected by copyright, freedom of information requests may be satisfied by offering an examination of the documents rather than producing copies thereof data used in decision-making processes may not be disseminated if they "serve as the basis for future decision-making.

public information to make publicly available certain types of data on the internet.

Another way of accessing public data is the publication of the legally specified data on the internet. The data should be accessible by anyone, without a requirement of personal identification and completely devoid of any restrictions. It should be available for printing and for copying in all its details without any loss or distortion of data. Its downloading, printing, copying and network transmission should also be made possible free of charge. The data to be published is specified by the so-called publication lists. The general publication list applicable to all bodies that handle public data is contained in the act on freedom of information, and it includes organisational and personnel data, as well as data regarding the respective organisations' activities, operations and financial management.

The misuse of the public data is a crime.<sup>895</sup>

#### *Limits on the freedom of information*

The regulations offer some specified exceptions to the public availability of public data; these exceptions offer very little margin of appreciation in terms of what may or may not be withheld. These exceptions are state secrets (classified data), data connected to a decision-making process, personal data and business secrets. However, most of exceptions are not absolute limits on the freedom of information, the regulation ensures the possibility of considerations.

Classified data are regulated in the Act CLV of 2009 on the Protection of Classified Data. The law requires data, of which disclosure may cause a damage to the public interest, to be classified. The classification has to meet formal and substantive criteria.<sup>896</sup> The abuse of the classified data is a crime punished with imprisonment.<sup>897</sup> In 2015, the Hungarian

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<sup>895</sup> Act C of 2012 on the Criminal Code Section 220: (1) Any person who, in violation of the statutory provisions governing access to public information: a) withholds public information from the requesting party, or refuses to disclose public information in spite of being ordered to do so by final court ruling; b) falsifies or renders inaccessible any public information; or c) provides access to or publishes any public information that is untrue or has been falsified; is guilty of a misdemeanour punishable by imprisonment not exceeding two years. (2) The penalty shall be imprisonment not exceeding three years for a felony if the misuse of public information is committed for unlawful financial gain.

<sup>896</sup> See Act CLV of 2009 Sections 4-6.

<sup>897</sup> Act C of 2012 on the Criminal Code Section 265 (1) Any person who: a) obtains or uses any classified information; b) discloses any classified information to an unauthorized person, or withholds such information from a competent person; is guilty of criminal offences with classified information. (2) The penalty shall be: a) custodial arrest for a misdemeanour where the

Constitutional Court declared that

*“the process of classifying data needs to be subject to a substantive review that may be directly initiated and does not merely look at the effectuation of formal and procedural criteria, but also extends to an evaluation of the decision to classify a document as confidential; whether the decision is well-founded; and whether the limitation of the public sphere it gives rise to is both necessary and proportional.”<sup>898</sup>*

The proceedings of the Constitutional Court were initiated by the investigative portal Átlátszó.hu. The portal sought to obtain information on the names and positions of employees at the Ministry of Foreign Affairs, while the Ministry classified these data as confidential.<sup>899</sup>

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information is classified as restricted data; b) imprisonment for a felony not exceeding one year where the information is classified as confidential; c) imprisonment not exceeding three years where the information is classified as secret; d) imprisonment between one to five years where the information is classified as top secret. (3) Where criminal offences with classified information are committed by a person authorized for using classified information under the strength of law and it involves information classified as restricted, confidential, secret or top secret, such person is punishable by imprisonment not exceeding one year or two years, or between one to five years or two to eight years in accordance with the distinction made in Subsection (2). (4) Any person who engages in preparations for criminal offences with classified information as under Paragraphs c)-d) of Subsection (2), shall be punishable for a misdemeanour by imprisonment not exceeding two years, or for a felony by imprisonment not exceeding three years in accordance with the distinction made therein. (5) Where a person authorized for using classified information under the strength of law engages in preparations for criminal offenses with classified information as under Paragraphs c)-d) of Subsection (2), shall be punishable by imprisonment not exceeding three years or by imprisonment between one to five years in accordance with the distinction made therein. (6) Any person authorized for using classified information under the strength of law, who commits the criminal offense defined in Subsection (2) by way of negligence shall be punishable for misdemeanour by custodial arrest, or by imprisonment not exceeding one year, two years or three years in accordance with the distinction made therein. Section 266 (1) Protection under criminal liability shall also apply - for a period of thirty days from the time when classification is requested - to any data recommended for classification, where the classification procedure is pending at the time when the act was committed, and if the perpetrator is aware thereof. (2) Cases of criminal offenses with classified information may be prosecuted exclusively only on the basis of a motion by the body or person vested under the Act on the Protection of Classified Information with authority for the classification of the information involved.

<sup>898</sup> Decision of the Constitutional Court IV/26/2013.

<sup>899</sup> *Sepsi Tibor: Csátát veszítettünk, de háborút nyertünk az Alkotmánybíróságon a visszaélészerző titkosítókkal szemben [We lost a battle but won a war in*

Freedom of information is limited by the data connected to a decision-making process, as well. According to the law<sup>900</sup>, any information compiled or recorded by a body with public service functions as part of, and in support of, a decision-making process for which it is vested with powers and competence, shall not be made available to the public for ten years from the date it was compiled or recorded. Access to these information may be authorized by the head of the agency that controls the information in question upon weighing the public interest in allowing or disallowing access to such information. But a request for disclosure after the decision is adopted may be only rejected, if disclosure is likely to jeopardize the legal functioning of the body with public service functions or the discharging of its duties without any undue influence, such as in particular the freedom to express its position during the preliminary stages of the decision-making process on account of which the information was required in the first place.

In 2014, the Hungarian Constitutional Court decided that

*"it constitutes a serious violation of the right to freedom of information when the data manager only justifies its decision to restrict access to data by claiming the information is needed in the course of a decision-making process, without substantiating this claim."*

The publication of data used in decision-making processes may only be denied if

*"the data manager denies the provision of data on the basis of constitutionally justifiable reasons and only to an extent that may be considered essential for the realisation of the underlying objective."*<sup>901</sup>

In the proceedings concerning the freedom of information request submitted by Átlátszó.hu,<sup>902</sup> the Constitutional Court held that "in the interest of the assertion of the right to freedom of information, any limitation that withholds with definite effect a piece of data or an entire document from the public, or which comprehensively limits public access to entire documents, regardless of their content, must be regarded as incompatible

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the Constitutional Court against abusive classification practices], Átlátszó.hu, 15 February 2015, <http://blog.atlatszo.hu/2015/02/csatat-vesztettunk-de-haborut-nyertunk-az-alkotmanybirosagon-a-visszaelesszeru-titkositokkal-szemben/>.

<sup>900</sup> Act CXII of 2011 Section 27 (5)-(7).

<sup>901</sup> Decision of the Constitutional Court 5/2014. (II.14.).

<sup>902</sup> On the case see MagyarLeaks: Kehi-jelentés az Operaház korrupciógyanus ügyeiről [MagyarLeaks: The report of the Government Control Office (KEHI) on Opera-related cases that raise the suspicion of corruption], Átlátszó.hu, 14 October 2013, <http://atlatszo.hu/2013/10/14/magyarleaks-kehi-jelentes-az-operahaz-korrupciogyanus-ugyeirol/>.



with the Fundamental Law [the Hungarian constitution]. The entirety of a document may not be classified as data used in a decision-making process."

In its decision rendered in 2015, the court ordered the Prime Minister's Office to turn over the entire texts of studies it had ordered for 5 billion forints to the journalists who had submitted the corresponding freedom of information request. During the proceedings, the court rejected the argument of the Prime Minister's Office that the studies are data used in decision-making.<sup>903</sup>

Further limits on the freedom of information are the trade (business) secrets. According to the Civil Code, trade secrets shall include any fact, information and other data, or a compilation thereof, connected to economic activities, which are not publicly known or which are not easily accessible to other operators pursuing the same economic activities, and which, if obtained and/or used by unauthorized persons, or if published or disclosed to others are likely to imperil or jeopardize the rightful financial, economic or commercial interest of the owner of such secrets, provided the lawful owner is not subject to actionability in terms of keeping such information confidential.<sup>904</sup> The misuse of the trade secrets can be compensated by damages and other civil law sanctions<sup>905</sup>, and it is also can be punished by the Criminal Code.<sup>906</sup>

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<sup>903</sup> Hidvégi Fanny: TASZ siker: nem titkolhatóak a Századvég-tanulmányok [Success for TASZ: Studies by Századvég may not be classified], 19 June 2015, [ataszjelenti.blog.hu/2015/06/19/tasz\\_siker\\_nem\\_titolhatoak\\_a\\_szazadveg-tanulmanyok](http://ataszjelenti.blog.hu/2015/06/19/tasz_siker_nem_titolhatoak_a_szazadveg-tanulmanyok).

<sup>904</sup> Act V of 2013 on the Civil Code Section 2:47.

<sup>905</sup> Act V of 2013 on the Civil Code Section 2:51: (1) The right to the protection of privacy shall, in particular, cover the confidentiality of correspondence protection, professional secrecy and commercial secrecy. (2) Invasion of privacy shall, in particular, cover the unauthorized access to and use of private secrets, including publication and disclosure to unauthorized persons. (1) A person whose personality rights have been violated shall have the right to demand within the term of limitation - based on the infringement - as appropriate by reference to the circumstances of the case: a) a court ruling establishing that there has been an infringement of rights; b) to have the infringement discontinued and the perpetrator restrained from further infringement; c) that the perpetrator make appropriate restitution and that the perpetrator make an appropriate public disclosure for restitution at his own expense; d) the termination of the injurious situation and the restoration of the previous state, and to have the effects of the infringement nullified or deprived of their unlawful nature; e) that the perpetrator or his successor surrender the financial advantage acquired by the infringement according to the principle of unjust enrichment.

<sup>906</sup> Act C of 2012 on the Criminal Code Section 418. Any person who illegally

As of 2003, enterprises that use public funds or public assets may not invoke the business secret exception in the range of their activities connected to public funds or public assets. According to the law, data related to their use of public funds and public assets must be public available.<sup>907</sup> So the publishing of these does not violate the law.

In its legally binding decision of 2013, the court stated that based on the above, the contracts concluded between public service media and their sub-contractors cannot be classified as confidential business information, wherefore they have to be made accessible to the public.<sup>908</sup>

*Protection of personal data and privacy*

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acquires, uses, or discloses a business secret for financial gain or advantage, or makes it available to others or publishes such information, causing pecuniary injury to others is guilty of a felony punishable by imprisonment not exceeding three years.

<sup>907</sup> Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information Section 27: (3) Any data that is related to the central budget, the budget of a local government, the appropriation of European Union financial assistance, any subsidies and allowances in which the budget is involved, the management, control, use and appropriation and encumbrance of central and local government assets, and the acquisition of any rights in connection with such assets shall be deemed information of public interest, and as such shall not be deemed business secrets, nor shall any data that specific other legislation prescribes - in the public interest - as public information. Such publication, however, shall not include any data pertaining to protected know-how that, if made public, would be unreasonably detrimental for the business operation to which it is related, provided that withholding such information shall not interfere with the availability of, and access to, information of public interest. (3a) Any natural or legal person, or unincorporated business association entering into a financial or business relationship with a sub-system of the central budget shall, upon request, supply information for any member of the general public in connection with such relationship that is deemed public under Subsection (3). The obligation referred to above may be satisfied by the public disclosure of information of public interest, or, if the information requested had previously been made public electronically, by way of reference to the public source where the data is available. (3b) If the person referred to in Subsection (3a) refuses to comply with the request for information, the requesting party may initiate the proceedings of the authority delegated to exercise judicial oversight. (4) Access to public information may also be limited by European Union legislation with a view to any important economic or financial interests of the European Union, including monetary, fiscal and tax policies.

<sup>908</sup> Court Decision Nr. 2.Pf.21.460/2013/4.; See Jogerősen nyilvánosak az MTVA alvállalkozói szerződésai – közzétesszük őket [The contracts that the Media Support and Asset Management Fund (MTVA) concludes with subcontractors must be made public pursuant to legally binding judgment - we are publishing them], Átlátszó.hu, 22 January 2014, <http://atlatszo.hu/2014/01/22/jogerosen-nyilvanosak-az-mtva-allyalkozoi-szerzodesei-kozzetesszuk-oket/>.

Freedom of information is limited by the personal data. Personal data means any information relating to the data subject, in particular by reference to his name, an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity, and any reference drawn from such information pertaining to the data subject.<sup>909</sup> However, the name of the person acting on behalf of a body with public service functions shall be considered information of public interest, including his job description and responsibilities, title and other personal data that may be of interest relating to the public function, as well as all other personal data that is to be made public by law.<sup>910</sup>

A striking example of the conflict between personal data and the freedom of information in Hungarian jurisprudence is the requirement to obscure the faces of police officers depicted in the performance of their duties. For years, the consistent position in jurisprudence was that the face of a police officer performing official acts could only be presented in the media with the permission of the officer in question. According to Hungary's supreme court, the Curia, "the performance of official duties or work by a person in a public location or a public venue does not qualify as a public appearance, and hence any image or audio recording that makes the person uniquely identifiable may only be published with the consent of the person in question."<sup>911</sup> Several NGOs appealed the Curia's unity of the law decision before the Constitutional Court.<sup>912</sup> However, in 2014 the Constitutional Court adopted a position that ran counter to the established jurisprudence.<sup>913</sup> The Court held that "an image recorded in a public location may be published without express permission as long as it is part of a media coverage on an issue of public interest, and as long as it depicts the person in question objectively and without offending him/her." According to the decision, "the image recorded of police action may be published without the express consent of those depicted as long as the

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<sup>909</sup> Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information Section 3.

<sup>910</sup> Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information Section 26 (2).

<sup>911</sup> Court Decision Nr. 1/2012. BKMPJE.

<sup>912</sup> Ha a rendőrnek nincs arca, nincs felelőssége sem 2.0. - Az AB elé vittük az ügyet [If the police officer is without a face, then she is also without responsibility 2.0 - We took the issue to the Constitutional Court], Eötvös Károly Institute, <http://www.ekint.org/ekint/ekint.news.page?nodeid=603>; Az Alkotmánybíróságon támadjuk a rendőrök arcának kötelező kitakarását [The requirement to obscure the faces of police officers in reporting is before the Constitutional Court], [Átlátszó.hu](http://atlatzso.hu), 31 May 2013, <http://atlatzso.hu/2013/05/31/az-alkotmanybirosagon-tamadjuk-a-rendorok-arcanak-kotelezo-kitakarasat/>.

<sup>913</sup> Decision of Hungarian Constitutional Court 28/2014. (IX. 29.).

publication is not self-serving, in other words if in consideration of the circumstances of the case it may be deemed as visual coverage of current events or of the exercise of public power, which is an issue that the public has a legitimate interest in." The decision also holds that the deployment of police at demonstrations is always considered a current event, which is why images depicting the latter may be publicly disseminated without the consent of those whose image was recorded, as long as it does not violate the dignity of police officers. Based on the Constitutional Court's decision, the Curia set aside its previous unity of the law decision.<sup>914</sup>

Journalists may only process personal data with the consent of the data subject. The conditions for handling personal data are governed by Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information, which does not contain specific provisions concerning media. The consent of the data subject is valid if it was provided voluntarily and if it is unequivocal and, moreover, based on adequate prior information. Consent may also be given implicitly with behaviour that implies consent.<sup>915</sup> With regard to the public dissemination in the media of personal data, the Media Law makes the following additional stipulations concerning consent: Media content providers are required to show an interview made for public presentation to the person interviewed or participating in media content upon his/her request before publication; however, such may not be broadcast or published if the person affected refused consent for broadcasting or publication because the media content provider made changes in or distorted the interview as to substance, to the detriment of the person interviewed or participating in the media content.<sup>916</sup> According to the law, the media content provider may not conclude an agreement with a person participating in media content that contains any clause to violate the integrity and reputation of the person participating in media content or to restrict his/her right to privacy within the framework of the agreement, or to restrict his/her right to withdraw the interview or participation. Any such clause is null and void.

A violation of the rules concerning the handling of personal data may result

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<sup>914</sup> Sáriné Simkó Ágnes: Kell-e a rendőr hozzájárulása a róla szolgálat teljesítése során készült fotó nyilvánosságra hozatalához? [Does the police officer need to consent to the publication of her image recorded while she was discharging her duties?] PTK2013.hu, 17 February 2015, <http://ptk2013.hu/szakcikkek/kell-e-a-rendor-hozzajarulasa-a-rola-szolgalat-teljesitese-soran-keszult-foto-nyilvanossagra-hozatalahoz/4789>.

<sup>915</sup> Except for so-called special data, where the law requires written consent.

<sup>916</sup> Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content Section 15.

in an obligation to pay damages,<sup>917</sup> but it may also result in criminal law<sup>918</sup> consequences. Moreover, in such an instance the violation of media law provisions may lead to the application of media law sanctions as well.

## 2. Obtaining of information and boundaries of law enforcement

### *Illicit access to data*

Illicit access to confidential private information or the violation of the privacy of correspondence results in civil and criminal law sanctions.

According to the Civil Code, the right to the protection of private secret shall, in particular, cover the confidentiality of correspondence protection, professional secrecy and commercial secrecy. Invasion of privacy shall, in particular, cover the unauthorized access to and use of private secrets, including publication and disclosure to unauthorized persons.<sup>919</sup>

Illicit access to data is a crime according to the Criminal Code.<sup>920</sup> Any person who, for the purpose of unlawfully gaining access to personal data, private secrets, trade secrets or business secrets:

- covertly searches the home or other property, or the confines attached to such, of another person;
- monitors or records the events taking place in the home or other property, or the confines attached to such, of another person, by technical means;
- opens or obtains the sealed consignment containing communication which belongs to another, and records such by technical means;

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<sup>917</sup> Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content Section 23.

<sup>918</sup> Act C of 2012 on the Criminal Code Section 219 (1) Any person who, in violation of the statutory provisions governing the protection and processing of personal data: a) is engaged in the unauthorized and inappropriate processing of personal data; or b) fails to take measures to ensure the security of data; is guilty of a misdemeanour punishable by imprisonment not exceeding one year. (2) The penalty in accordance with Subsection (1) above shall also be imposed upon any person who, in violation of the statutory provisions governing the protection and processing of personal data, fails to notify the data subject as required, and thereby imposes significant injury to the interests of another person or persons. (3) Any misuse of personal data shall be punishable by imprisonment not exceeding two years if committed in connection with special data. (4) The penalty shall be imprisonment not exceeding three years for a felony if the misuse of personal data is committed by a public official or in the course of discharging a public duty.

<sup>919</sup> Act V of 2013 on the Civil Code Section 2:46.

<sup>920</sup> Act C of 2012 on the Criminal Code Section 422.

- captures correspondence forwarded by means of electronic communication networks - including information systems - to another person and records the contents of such by technical means

is punishable by imprisonment not exceeding three years. Disclosure or using of any personal data, private secret, trade secret or business secret obtained by these ways are also crime. Publishing the data in the media can cause a significant injury of interests what is a ground for a more serious punishment.

This section is applicable in all cases of hidden information obtaining, from interception of phone messages to the using of hidden camera. However, there is no case law on these sections.

Media law entitles the Hungarian media authority (Media Council) with broad competences to investigate the activity of media providers.<sup>921</sup> Lots of the original rules from 2010 were found unconstitutional by the Constitutional Court,<sup>922</sup> and the Media Council has not uses this means in the practice.

According to the media act, the Media Council is entitled to inspect, examine and make duplicates and extracts of any and all medium containing data, document and written instrument - even if containing business secrets - related to media services, publication of press products and/or broadcasting, in order to ascertain the relevant facts of the case. The Constitutional Court found this rule constitutional, because in its interpretation the law

*“does not endow the Authority with the investigative authority to conduct proceedings that require preliminary judicial or prosecutorial rulings. This is why the petitioner is wrong in claiming that the Authority is entitled to enter the official premises or other publishing premises of the client or other parties to the proceedings, and to examine documents there in the framework of investigative-type activities.”<sup>923</sup>*

Media Council may also order the client, and other parties to the proceedings to make a statement and to supply data and information, as well as other information either verbally or in writing. A witness may be heard on the business secret of the client even if he was not granted

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<sup>921</sup> Act CLXXXV of 2010 on Media Services and on the Mass Media Section 155-156.

<sup>922</sup> Constitutional Court Resolution No. 165/2011. (XII. 20.) AB. On the decision see Gábor Polyák, Krisztina Nagy, Hungarian Constitutional Court: New Media Regulation partly under Constitutional Scrutiny. Ruling No. 165/2011. (XII. 20.) AB, Vienna Journal on International Constitutional Law 2013/1. 110-116.

<sup>923</sup> Constitutional Court Resolution No. 165/2011. (XII. 20.) AB.

exemption from the obligation of confidentiality from the client.

In case of obstruction of the proceedings, Media Council may impose an administrative fine upon the client, and any other party to the proceedings if, they act or behave in such a manner as to prolong or obstruct the proceedings or to prevent the actual facts of the case from being established. The maximum amount of the administrative fine shall be twenty-five million forints, one million forints in the case of natural persons. In addition, in case of repeated offence a fine upon the infringer's executive officer can also be imposed, for any case of obstruction of the proceedings or for breaching or non-compliance with the obligation to data disclosure, in an amount up to three million forints.

As a limitation of the investigative competences, Media Council may not order media content providers and the persons they employ under contract of employment or some other form of employment relationship to supply information or to surrender any document, asset or written instrument, if this would expose the identity of any person from whom they receive information relating to the media content they provide. Further, any document, asset or written instrument obtained during or for the purpose of communications between the client and his legal representative, or that is a record of the contents of such communications, provided in all cases that the nature of these documents is readily apparent from the document, asset or written instrument itself, may not be admissible as evidence, they may not be examined or seized, and the holder of such document, asset or written instrument may not be compelled to produce them for the purpose of inspection.

In particularly justified cases, Media Council may resort to the written instruments, data, documents and other means of evidence generated in the course of its proceedings also for the purposes of another proceeding, where deemed necessary for reducing the procedural burden on clients or for proper and effective application of the law.

Further, media service provider has to retain the authentic documentation relating to their programs, including the full record of the output signal of the media services on the whole, for a period of sixty days from the date of broadcast or in case of on-demand media services, from the last date of accessibility of content. For the purposes of regulatory inspection, Media Council may order media service providers to make available said authentic documentation relating to their programs to the Authority without delay and free of charge within the time limit prescribed for retention.

#### *Confiscation, seizure of media products*

According to the Criminal Code, media products, in which a criminal act is

realized, shall be confiscated.<sup>924</sup> During the criminal process, media products can also be seized.<sup>925</sup>

### *Surveillance*

Conducting surveillance of journalists or other citizens is allowed only regarding law enforcement or crime prevention goals. Investigating authorities and national secret services can reach the contents without the target-person's knowledge only if it is allowed them by the judge upon request of the prosecutor. The target should be only the suspect or the potential perpetrator of a crime, or the person whose surveillance is unavoidable in respect of these circumstances. Surveillance can be ordered only if the committed or the preventable crime is punishable for more than 5 years in prison, or the law particularly specifies it (ie: abuse of authority, child-pornography, human trafficking etc.).<sup>926</sup> There is no evidence to date the state has conducted unlawful surveillance of its journalists.

### **3. Reporting about on-going investigations**

No such type of duty is expressly laid down in Hungarian law. *Act CIV of 2010 on the fundamental rules of press freedom and media contents* (Smtv.) – also referred to as the Media Constitution, which seeks to define fundamental principles that apply uniformly to all media, provides the following rules under the heading obligations of the press:

Art. 13. In their news shows, linear media services performing information activities are obliged to report in a balanced manner on local, national and European events that are of public interest, as well as on events and public debates that are of importance to Hungarian citizens and the members of the Hungarian nation. The detailed rules of this obligation must be laid down in law, in accordance with the principle of proportionality and the requirement of providing adequate conditions for democratic opinion-formation.

This rule does not give rise to a general obligation to provide information, it only lays down the fundamental requirements of balanced and objective information.

This rule is complemented by Article 12 (1) of *Act CLXXXV on media service and mass communication*, which mandates that the information activities of media services need to be in compliance with Article 13 of the Smtv.

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<sup>924</sup> Act C of 2012 on the Criminal Code Section 72.

<sup>925</sup> Act XIX. of 1998 on the Criminal Procedure Code 151.

<sup>926</sup> Act XIX. of 1998 on the Criminal Procedure Code Sections 200-204.



A frequently criticised element of the law is the obligation to provide balanced, unbiased information. At the recommendation of the European Commission, this obligation was originally extended by the legislature to also include on-demand media services. Since this failed to consider the difficulties of implementing the obligation in respect of on-demand services, however, its actual application was limited to radio and television media services. This obligation, in a similar form, was part of the previous media law as well. The extension of the regulation is still a cause for concern: The Constitutional Court stated in a 2007 opinion that balanced and unbiased information may only be required of public service media outlets and radio and television companies that "have a significant impact on the formation of public opinion".

According to the media laws, linear media services engaged in the pursuit of information activities are required to ensure that with respect to programmes on local and national events of interest to the public, as well as on European events and public debates which are of interest, the newscasts and news programmes they provide are diverse, factual, timely, objective and balanced. They must ensure balanced information in their coverage and, depending on the nature of the particular programmes, within the given programmes or as part of the series of programmes shown regularly. The implementation of balanced service is a special procedure according to which the media service provider and the complainant confer with each other and, as a result, the authority obliges the service provider to publish either specific information or the complainant's point of view.

The Council of Europe's expertise proposed to do away completely with the Media Council's right to proceed. As a result of an agreement between the Council of Europe and the government, the text of the law was amended, but this has no substantial impact on the application of the law. As a result of the amendment, the requirements of diversity, factuality, timelines and objectiveness were removed from the law, leaving only the balanced coverage requirement. The amendment was justified on the grounds that these characteristics impose vague requirements that television channels and radio stations would find difficult to meet. Given that in judicial case-law balanced coverage is construed as a comprehensive category that encompasses all these aforementioned requirements as well, in practice the amendment does not imply that the scope of the relevant provision becomes narrower.

According to the Media Council,

*"the only standard for assessing whether coverage is balanced is the proportion of opposing views it presents, the way these are conveyed and, based on an assessment of these factors, the quality of the information provided to the viewers and listeners."*

As opposed to previous official and judicial practices, the Media Council

does not apply diversity, factuality, timeliness and objectivity of information as distinct requirements. In many cases this otherwise moderate interpretation resulted in a decision – for example in the previously mentioned Cohn-Bendit case – that did not state the nature of the infringement committed in the context of obviously false information disseminated by the media. This interpretation provided the basis for the practice according to which complaints about public media – that is 80 percent of all complaints about the media – never result in condemnation.

Furthermore, according to the Authority's consistently applied point of view, the 'law protects diversity of opinions in order to bring about a democratic public opinion and help debate public affairs rather than protecting those the representatives of particular opinions'. This interpretation is a major instrument in preventing an extremist party, Jobbik – against which most complaints are filed –, from having too much leeway in shaping public opinion. All this shows that this legal institution has become ineffective and is incapable of contributing to the process of creating democratic public opinion; in fact, it may even serve to open up the possibility for extremist voices to be heard in the media.

#### **4. Due diligence guidelines for journalists**

In terms of the practice of how the law is applied in Hungary, Position Statement No. 14 PK of the Supreme Court's Civil Division is of pre-eminent importance. This mandates that

*"an incorrect claim of fact must be corrected even if the respective information is from an outside source. A correction may be required in the case of disseminating incorrect claims not only in the context of communicating information gathered through direct observation, but also based on information obtained through other sources, interview subjects, reporting on others' opinions, written statements and hearsay."*

Judicial practice construes the objective responsibility of the press broadly, yet in some cases that are relevant precisely in the context of the issue discussed here, there are instances when the press institution in question is exempt from such a responsibility. Hence there is no requirement to issue a correction and the press is exempt from responsibility if it disseminates accurate information concerning the contents of a bill of indictment, a public hearing or a non-binding judgment before the criminal proceedings reach a final decision. In such cases, a press correction is not required even if it subsequently emerges that the previously made statement was false. All the press outlet needs to show is that based on the information or documents available during the proceedings, the information disseminated was accurate and credible; the press' burden of proof does not extend to the veracity of the claims it has disseminated. At

the same time, the coverage may not state as a factual statement that a person is the perpetrator of a criminal offence as long as his/her trial as a defendant is still ongoing.

Judicial practice has extended the applicability of Position Statement No. 14, which originally only applied to criminal proceedings, to civil suits and disciplinary proceedings, if the press statement corresponds to the proceedings. The press is not obligated to verify the factual accuracy of factual claims stated at police press conferences. A press publication that accurately reports statements made by the police at a press conference does not violate the presumption of innocence or privacy rights.

The legislator has laid out the rules concerning the presence of the press at court hearings, and image and/or audio recordings made by the press in that context, in two separate procedural codices; the legislator intended for the two to be similar in how they regulate these issues. This legislative aspiration was not successfully implemented, however, since even though they originally sought to incorporate the rules that were enacted in the act on criminal procedure into the framework of civil procedure, this was not comprehensively realised. *Act V of 2013 on the Civil Code* makes provisions concerning the protection of recordings of one's image and voice.

*Art. 2:48. [The individual's right to recordings of one's image and voice]*

(1) It is necessary to obtain the consent of a person before making a recording of his/her image or voice, or to use the recordings.

(2) It is not necessary to obtain the consent of a person before making a recording of his/her image or voice, or to use these recordings, when the recording was made in the context of recording a mass scene or in the framework of recording public appearances.

It is necessary to obtain the consent of a person to record his/her image or voice. It is not necessary to obtain such consent, however, when the recording pertains to a mass scene or a public appearance. Hungarian law does not lay down specific requirements as to what form consent must take (in other words there is no requirement that it must be provided in writing), and consent may be provided orally or even implicitly through action that implies consent. One form of implicit consent according to Hungarian jurisprudence may be if someone is aware of the fact that a recording was made, as well as of its purpose, and does not protest against it. Nevertheless, the obligation to show that consent was given is always incumbent on whoever makes the recording or uses it, regardless of what form the recording takes. Any use without the consent of the person depicted, exceeding the scope of the consent provided, or a use that derogates from the authorised uses constitute a breach of the law, however. Images of public figures recorded in connection with public

appearances may be used without consent.

The relevant provisions of Act III of 1952 are as follows:

*Recordings of hearings*

Art. 134/A. (1) Visual and/or audio recordings of public hearings may be made – in the manner specified by the court – without temporal limitations.

(2) At a public hearing, the press may make recordings of the images and/or voices of the members of the court, the clerk and the prosecutor.

(3) With the exception of the prosecutor, visual or audio recordings of the parties and other persons involved in the trial; their representatives; witnesses; experts; the interpreter; or the owner of an object displayed during the proceedings may only be made with the consent of the person involved. If necessary, the court can ask the persons affected whether they consent to have their images and/or voice recorded; such a request must be recorded in the minutes, together with the contents of the statement made by the persons affected. In the absence of legal regulations stipulating otherwise, even without the consent of the persons affected, it is allowed to make visual and/or audio recordings of persons discharging central government or municipal government responsibilities, or persons discharging other public responsibilities laid down in law, if the persons involved are engaged in the performance of the aforementioned responsibilities.

(4) As part of his/her responsibility for maintaining public order at the hearing, in the course of the latter the presiding judge is responsible for ensuring the protection of the privacy rights of the persons specified in paragraph (3).

Act XIX of 1998 on criminal procedure, which came chronologically before the previously discussed provisions, regulates this issue in the following manner:

*Providing information and informing the public during criminal proceedings*

Art. 74/A (1) Until the conclusion of the investigation, information to the press may be conveyed by the following: a representative of the investigative authority who is authorised to perform such actions based on another law or by the prosecutor; until charges have been filed, the prosecutor or a person designated by the prosecutor; during the court proceedings, a person who is authorised to do so pursuant to the act on the legal status and remuneration of judges. (The relevant provisions are laid down in *Act CLXII of 2011 on the legal status and remuneration of judges*, under the heading *Statements*.)

(2) The press is authorised to disseminate information about the court's public proceedings.

(3) The dissemination of information to the press must be denied if it would violate the requirement to protect classified data (secret of the state), or if it would otherwise jeopardise the successful conduct of the proceedings.

Art. 74/B (1) In the interest of informing the public, audio and/or visual recordings of the court hearing may be made with the permission of the presiding judge, while recordings of persons who participate in the hearings may only be made with the consent of the affected individuals, with the exception of the members of the court, the clerk, the prosecutor or the defence lawyer. In the interest of ensuring the continuity of the hearings and their undisturbed conduct, the presiding judge may deny this permission, or may revoke it during any segment of the court proceedings.

(2) The press may not disseminate information about closed hearings or those segments of a hearing from which the court has excluded the public. Nor may information be provided to the press if the public was excluded pursuant to Article 245 (5).

(3) Unless the law provides for an exception, only a person properly authorised by law may be given access to review the documents pertaining to an ongoing or concluded criminal case.

(4) A document under paragraph (3) may be researched before its term of protection expires, in accordance with the rules established concerning research on public archives, which are laid down in the act on the protection of public documents and other materials in public archives and private archives.

(5) Apart from an instance as defined by Art. 74/A, information about a proceeding may be provided to persons with a legal interest in the conduct of the proceedings or their outcome. Until charges have been filed, the authorisation to review documents is issued by the prosecutor, and he/she also disseminates the necessary information; during court proceedings, the aforementioned actions are performed by the presiding judge – once the underlying legal interest of the party requesting information has been verified.

Act CLXII on the legal status and remuneration of judges devotes a separate section to the issue of who is authorised to issue statements and disseminate information.

#### *Statements*

Art. 43 A judge may not publicly comment outside his/her official capacities on proceedings before the court, especially in respect of cases that he/she is charged with adjudicating.

Art. 44 (1) A judge may not make a statement to the press, radio or television on cases he/she is charged with adjudicating.

(2) The presiding judge or a person commissioned by the latter may provide information to the press, radio or television about a case pending in court or a case previously concluded by the court.

While the principal rule in a criminal proceeding is that audio and/or visual recordings may be made with the authorisation of the presiding judge, in a civil proceeding there is no need for such an authorisation to make recordings, for here the court may only make a determination what method may be used to make an audio and/or visual recording, but it cannot make a decision on the possibility of making a recording. Naturally, this, too, only applies to public proceedings. It is obviously disallowed to make audio and/or visual recordings at closed hearings, for the press is not allowed to attend such hearings. Both statutes make audio and visual recordings contingent on the permission/consent of certain persons involved in the legal proceedings, but recordings of the judge, the prosecutor, the defence lawyer or the clerk are not subject to such conditions. There is also a difference in the two regulations in that in a civil proceeding the occurrence of a permission/consent must be noted in the minutes, while the rules on criminal procedure do not contain any provisions to regulate this issue. Nevertheless, it is obvious that the absence of provisions does not imply that a court may not order that such acts be recorded in the minutes. The civil procedure already refers to persons who hold public positions and who appear in public in the actual performance of their public responsibilities, laying down that these persons may be recorded without authorisation. Such a clause has not yet been included in the Code of Criminal Procedure. In instances when this would give rise to a disruption of the hearings, recordings may be prohibited according to either procedural code.

The presumption of innocence is one of the foundations of democratic constitutional regimes. The Hungarian legislator has laid out the relevant legal framework in several statutes:

Article XXVIII (2) of Hungary's Fundamental Law (the Hungarian constitution) stipulates that "[n]o one shall be considered guilty until his or her criminal liability has been established by the final decision of a court."

This is complemented by the relevant provisions of *Act XIX of 1998 on criminal proceedings*, above all the declaration on the presumption of innocence; but one might also mention the requirements concerning the burden of proof.

Article 7. No one shall be considered guilty until his/her criminal liability has been established by the final decision of a court.

§ (2) Any factual claim not proved beyond doubt may not be construed to the detriment of the defendant.

## 5. Liability in the editorial chain

There are no specific rules on the differentiated liability of the media players in the Hungarian (media) law. The media law declares only that media content providers are vested with independent decision-making rights within the framework of the law concerning the publication of media content, and they assume responsibility for abiding by the provisions of the law. Their liability does not affect the liability of persons supplying information to the media content provider, nor to the persons the media content providers employ under contract of employment or some other form of employment relationship involved in the preparation of the media content.<sup>927</sup>

In the practice it means that the liability can be established according to the general civil law and criminal law rules. Neither of them rule out the parallel liability of the journalist, the responsible editor and the interviewee. If the editor's behaviour fulfils the conditions of the civil<sup>928</sup> or criminal<sup>929</sup> liability, he/she also can be sentenced to damage or criminal law sanction. In a 2004 libel case the court sentenced both the journalist and the newspaper's editor-in-chief to suspended prison sentences "in light of the substantial gravity of the act which substantially exceeds" what might be considered the average gravity of such offences.<sup>930</sup>

Subjects of the media law sanctions<sup>931</sup> – applied by the Media Council – are the media providers (audiovisual and radio media service providers, providers of press products). They are responsible to fulfill the media law rules and they bear the consequences of the violations. As an exception, in case of repeat offenders, the Media Council is entitled to impose a fine upon the executive officer of the infringing entity in an amount up to two million forints, consistent with the gravity and nature of the infringement and the circumstances of the case.

There is a special limitation on the media provider's and journalist's liability in the media law<sup>932</sup>: media content providers and persons employed by media content providers under contract of employment or some other form of employment relationship cannot be held responsible for any

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<sup>927</sup> Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content Section 21.

<sup>928</sup> Act V of 2013 on the Civil Code Book Six Chapter Four.

<sup>929</sup> Act C of 2012 on the Criminal Chapter III.

<sup>930</sup> The judgment was rendered while the previous Criminal Code was still effective, but the underlying regulation remained unchanged under the new Criminal Code as well.

<sup>931</sup> See Act CLXXXV of 2010 on Media Services and on the Mass Media Section 187.

<sup>932</sup> Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content Section 8.

infringement committed with a view to obtaining information of common interest, where obtaining such information by other means would have been impossible for the journalist in question, or it would have entailed undue difficulties, provided that the infringement committed did not result in unreasonable or grave injury, and that the information obtained was not done so in violation of the Act on the Protection of Classified Information. This entitlement does not constitute an exemption from civil liability for actual damages resulting from the infringement. There is no case law available to this rule, but it ensures basically a broad exemption for the media players.

The Hungarian regulations define the internet responsibilities of intermediaries in accordance with the relevant European regulatory framework.<sup>933</sup> The service provider that relays the information provided by its users through a telecommunications network, or which provides access to this telecommunications network, is not liable for potential damages caused by the transmitted content, assuming that it has no actual influence over the contents of the data stream. The internet hosting service is not responsible for legal violations caused by the information it stores, as long as it has no knowledge of unlawful conduct associated with the information in question. As soon as the service provider learns about the legal violation or circumstances that render such a violation likely, it must immediately undertake to have the information in question removed. In one case a Hungarian court determined that a service provider that had provided the possibility of uploading song lyrics did not bear any civil law liability for users uploading the lyrics of a defamatory song to its service. Failing to remove infringing content can result in the internet hosting service's liability for the legal violations caused by the stored information.<sup>934</sup> The law regulates the legal liability of search engines in the same way.

One of the most important phenomena of the past years is the appearance of proceedings initiated in response to comments posted on the internet. In several cases such proceedings were initiated by politicians, and in fact not only against commenters, but also against those operating the websites where the impugned comments appeared.<sup>935</sup> A court established the liability of a website operator in a civil law suit, arguing that the content

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<sup>933</sup> Articles 7-12 of Act CVIII of 2001 on certain issues concerning electronic commerce services and information society services.

<sup>934</sup> See the previous chapter on the legal construction of internet comments.

<sup>935</sup> See *Attila Mong*: Várjuk Papcsák Ferencet a bejáratnál! [Ferenc Papcsák please report at the entrance!] <http://mertek.hvg.hu/2012/11/17/varjuk-papcsak-ferencet-a-bejaratnal/>; *Mong Attila*: Rágalmazni csak pontosan, szépen...[When slandering, please be accurate and elegant] <http://mertek.hvg.hu/2013/04/12/ragalmazni-csak-pontosan-szepen/>.



provider disseminates the commenter's communication. Nevertheless, the court did not require the service provider to pay damages. Those would only be assessed if the service provider failed to proceed in a way that complies with its professional duties as they apply to the given situation. In 2014, the Constitutional Court dismissed the constitutional complaint of the Association of Hungarian Content Providers and concluded that websites are responsible for the content of comments posted on them, regardless whether they moderate comments or not, whether they actively remove the harmful content or not, and whether the user is identified or not.<sup>936</sup>

## **6. Conclusion and perspectives**

The changes of the legal framework have made the work of the investigative journalists less predictable since 2010. The new media law, the new law on freedom of information, as well as the new Civil Code contain some new and unclear restrictions. Moreover, the legislation reacts to any supposed or real problem really vehement with new rules. However, the legal frame do not make the investigative journalism impossible. There was no (published) case on illegal interception of journalists or perquisition of editorial offices, and there was no serious punishment against journalists, either by the media authority or the court.

Indeed, there are some legal instruments that provide better conditions for investigative journalism, first of all in connection with the disclosure of the source of information (what was not an issue of this analysis). There is also a general exemption from journalist's responsibility in the law, regarding the infringements committed with a view to obtaining information of common interest.

The legal frames of the freedom of information have ensured effective means for obtaining (public) information until the latest amendment of the law. The amendment from 2015 made the data requests more complicate, costly and risky.

According to the Constitutional Court, the process of classifying data as an exception from the freedom of information needs to be subject to a substantive review. The amendment of the act on freedom of information made it clear, that the National Authority for Data Protection and Freedom of Information is authorized to initiate the termination of the classification by the classifier.

The Constitutional Court made it clear that the publishing of the faces of police officers depicted in the performance of their duties does not offend the personality rights. With its decision, the Court finished an uncertain

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<sup>936</sup> Decision of the Constitutional Court Nr 19/2014. (V. 30.) AB.

legal situation.

The media law entitles the Hungarian media authority with broad competences to investigate the activity of media providers. These competences can have a chilling effect on the journalism even if they are practically not applied.

Taking into consideration that the rules of video recording during the trials are determined differently by the civil procedure and criminal procedure, some uncertain situations may develop. A separate problem which may occur occasionally is the enumeration of the members of the audience especially the press staff by the judicial personnel. However, the liability for damages is clearly regulated by the below mentioned case law.

Related to the balanced press coverage - as the Venice Commission stated - "it is questionable whether 'balance' should become an enforceable legal obligation of every particular media taken alone. The norms under consideration create a very complex obligation on the media and lack precision." This is why the Commission recommends to the Hungarian authorities to approve new policy guidelines on the application of this provision in order to secure an easier way of law enforcement.



## **15. Ireland**

Ronan Fahy

## 1. Questions 1. – 2.

The law regulating the disclosure, publication or possession of secret or confidential government information is contained in three main pieces of legislation: the Official Secrets Act 1963, the Freedom of Information Act 2014, and the Protected Disclosure Act 2014.

### *Official Secrets Act 1963*

The main legislation on secret or confidential government information is the Official Secrets Act 1963. The statute criminalises the communication of any 'official information',<sup>937</sup> which includes any 'secret or confidential' information held by a holder of public office.<sup>938</sup> The offence carries a possible punishment of six months' imprisonment.<sup>939</sup> Second, the statute also makes it an offence to 'obtain' official information,<sup>940</sup> an offence which also carries a possible punishment of six months' imprisonment. Third, the statute criminalises 'retention' of any official documents, or a document which contains official information.<sup>941</sup> Finally, the act also makes it an offence to publish or possess 'any other matter whatsoever' that might be 'prejudicial to the safety or preservation of the state'.<sup>942</sup> This offence carries a possible punishment of two years' imprisonment.<sup>943</sup>

### *Freedom of Information Act 2014*

In 1997, the first freedom of information law was enacted, the Freedom of Information Act 1997, which gave individuals a right of access to information held by certain public bodies,<sup>944</sup> subject to exceptions. While there is no right of access to information covered by the Official Secrets Act, the 1997 Act created a new defence for individuals prosecuted under the Official Secrets Act: a person who 'reasonably believes' they are 'authorised by this Act to communicate official information to another person shall be deemed for the purposes of [the] Official Secrets Act, 1963, to be duly authorised to communicate that information'.<sup>945</sup> The Freedom of

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<sup>937</sup> Official Secrets Act 1963, section 4(1) (All legislation referenced below is available at <http://www.irishstatutebook.ie/eli/acts.html>, most case law is available at <http://www.bailii.org/databases.html#ie>, and all websites were last accessed 31 July 2015).

<sup>938</sup> Official Secrets Act 1963, section 2(1).

<sup>939</sup> Official Secrets Act 1963, section 13(2).

<sup>940</sup> Official Secrets Act 1963, section 4(3).

<sup>941</sup> Official Secrets Act 1963, section 6(1).

<sup>942</sup> Official Secrets Act 1963, section 9(1)(v).

<sup>943</sup> Official Secrets Act 1963, section 13(3).

<sup>944</sup> Freedom of Information Act 1997, section 6 (replaced by the Freedom of Information Act 2014).

<sup>945</sup> Freedom of Information Act 1997, section 48 (replaced by the Freedom of Information Act 2014, section 51).

Information 2014 replaced the 1997 Act, and retained the defence.<sup>946</sup> Further, the 2014 Act extended access to information held by most public bodies, including law enforcement.<sup>947</sup>

#### *Protected Disclosure Act 2014*

In 2014, the first whistleblower protection law was enacted, the Protected Disclosure Act 2014, which protects employees, both private and government officials, from penalisation for disclosing information of 'wrongdoing'.<sup>948</sup> The law provides protection to employees who disclose information externally, such as to the media, in certain circumstances.<sup>949</sup> Importantly, the law also protects individuals from criminal prosecution where they can show 'the disclosure was, or was reasonably believed by the person to be, a protected disclosure'.<sup>950</sup>

#### *Garda Síochána Act 2005*

The Garda Síochána Act 2005 makes it a criminal offence for law enforcement officials to disclose 'any information obtained in the course of carrying out duties of that person's office' if the official knows the disclosure is 'likely to have a harmful effect'. In May 2015, the first law enforcement official, a senior police officer, was arrested under the law, for disclosures to the media, and was later released without charged. The public prosecutor is currently deciding on whether to prosecute the officer. Further, in July 2015, *The Irish Times* newspaper reported that 'journalists' text messages and call-details have been accessed' from the arrested officer's phone.<sup>951</sup>

In a related 2012 case, *Walsh v. News Group Newspapers*, the High Court held that *The Sun* newspaper must disclose any leaked documents it received from law enforcement officials relating to certain sexual assault complaints made to the police. The Court held journalistic privilege did not attach to such disclosures. However, the Court did hold that if any document 'could lead to the identification of [other] sources', then the Court would 'inspect any of these documents to ascertain whether or not journalistic privilege should apply in respect of them'.<sup>952</sup>

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<sup>946</sup> Freedom of Information Act 2014, section 51.

<sup>947</sup> Freedom of Information Act 2014 (the 2014 Act also replaced the Freedom of Information (Amendment) Act 2003).

<sup>948</sup> Protected Disclosures Act 2014.

<sup>949</sup> Protection Disclosures Act 2014, section 10.

<sup>950</sup> Protected Disclosure Act 2014, section 15.

<sup>951</sup> *Conor Lally*, 'Journalists' texts form part of Garda leak inquiry' *The Irish Times* (25 July 2015).

<sup>952</sup> *Walsh v. News Group Newspapers* [2012] IEHC 353.

*Tribunal of Inquiry (Evidence) Acts 1979 - 2004*

The Irish parliament has established a number of statutory tribunals of inquiry into corruption over the past few decades, and there have been many leaks to the press of confidential information from within these tribunals. The law regulating disclosure of such information is contained in the Tribunal of Inquiry (Evidence) Acts 1979 - 2004. Two notable judgments are: first, *Mahon v. Post Publications*, where a tribunal attempted to obtain an injunction banning the *Sunday Business Post* newspaper from publishing leaked information from the tribunal. However, both the High Court,<sup>953</sup> and the Supreme Court ruled that the injunction should not be granted.<sup>954</sup>

Second, in *Mahon Tribunal v. Keena*, a tribunal successfully obtained an order from the High Court to compel *The Irish Times* newspaper to answer questions about a leaked document it had received from an anonymous source.<sup>955</sup> However, the Supreme Court later set aside the order,<sup>956</sup> but ordered the newspaper to pay nearly 400,000 euro in costs to the tribunal (the newspaper decided to destroy the source's document before the court proceedings).<sup>957</sup> The European Court of Human Rights later held that this imposition of costs on the newspaper did not violate Article 10 of the European Convention of Human Rights.<sup>958</sup>

*Confidential banking information*

There have been a number of banking scandals, and many leaks to the press of confidential banking information. The law regulating confidential banking information is found in case law, with the most important case being *National Irish Bank v. RTÉ*, where the Supreme Court overturned an injunction that had been granted by the High Court which had banned the public broadcaster RTÉ from publishing confidential banking information it had been leaked.<sup>959</sup> Further, in *McKillen v. Times Newspapers Limited* a businessman sought an injunction preventing *The Sunday Times* newspaper from publishing certain confidential banking information it had obtained. The High Court refused to grant the injunction in respect of certain information, but granted an injunction concerning other information.<sup>960</sup> Most recently, in *O'Brien v RTÉ*, the High Court granted an

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<sup>953</sup> *Mahon & Ors v. Post Publications Ltd.* [2005] IEHC 307.

<sup>954</sup> *Mahon v. Post Publications* [2007] IESC 15.

<sup>955</sup> *Judge Mahon v. Keena & Anor* [2007] IEHC 348.

<sup>956</sup> *Mahon Tribunal v. Keena & Anor* [2009] IESC 64.

<sup>957</sup> *Mahon Tribunal v. Keena & Anor* [2009] IESC 78.

<sup>958</sup> *Keena and Kennedy v. Ireland* (App. No. 29804/10) 30 September 2014 (admissibility decision).

<sup>959</sup> *National Irish Bank Ltd. v. RTÉ* [1998] 2 IR 465.

<sup>960</sup> *McKillen & Anor v. Times Newspapers Limited & Ors* [2013] IEHC 150.

injunction banning the public broadcaster RTÉ from broadcasting a programme based on confidential banking documentation concerning a public figure.<sup>961</sup>

#### *The 'Anglo Tapes'*

In June 2013, the *Irish Independent* and *Sunday Independent* newspapers began publishing transcripts and recordings of telephone calls from a bank's internal telephone system, which had been leaked to the newspaper. And in the 2015 case, *DPP v. Independent News and Media*, a High Court judge found the *Irish Independent* newspaper in contempt of court for publishing leaked tape recordings of certain bank officials 'after an accused person had been charged and returned for trial'. The public prosecutor had claimed the material had interfered with the criminal process. The judge also ruled 'no details of her order could be published yet'.

#### Use of hidden cameras

The law regulating the use of hidden camera by the press is mainly contained in case law, with the *Cogley v. RTÉ* case being the most significant. A private retirement home attempted to obtain an injunction preventing the broadcaster RTÉ from using footage it had obtained from inside the retirement home using hidden cameras. The High Court refused to grant the injunction.<sup>962</sup> Further, in 2013, the RTÉ broadcast an investigative programme on standards of childcare in Ireland, and used hidden camera footage of children 'subjected to emotional abuse' in a crèche.<sup>963</sup> Two crèche employees subsequently sued RTÉ for defamation, and sought access to earlier versions of the programme held by RTÉ. In 2014, the Supreme Court held that RTÉ was required to hand over copies of the early versions of the programme to the plaintiffs.<sup>964</sup> The defamation proceedings are ongoing.

Moreover, the Broadcasting Act 2009 also contains provisions applicable to the use of hidden cameras, including a duty on broadcasters 'in the means employed to make' programmes, 'the privacy of any individual is not unreasonably encroached upon'.<sup>965</sup> The Broadcasting Authority of Ireland's code on fairness in news and current affairs, has detailed ruled on the use of hidden cameras, which should only be used 'in exceptional

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<sup>961</sup> O'Brien v. RTÉ [2015] IEHC 379 and O'Brien v. RTÉ [2015] IEHC 397.

<sup>962</sup> Cogley v. RTÉ [2005] IEHC 180.

<sup>963</sup> *Steven Carroll*, 'RTÉ crèche documentary exposes "emotional abuse"' The Irish Times (29 May 2013).

<sup>964</sup> Craddock v. RTÉ and Kavanagh v. RTÉ [2014] IESC 32.

<sup>965</sup> Broadcasting Act 2009, section 39(1)(e).



circumstances'.<sup>966</sup> Notably, in 2012, the Authority found the public broadcaster RTÉ had breached various provisions of the Broadcasting Act 2009 over an investigative programme alleging an Irish priest had fathered a child with a teenage girl in the 1980s. One such breach was 'secret filming' of the priest, which the Authority found 'unreasonably encroached' upon the priest's 'privacy'.<sup>967</sup> RTÉ was fined € 200,000 over various breaches of the Broadcast Act 2009 in the broadcasting and making of this investigative programme.

#### *Police search and seizure*

The law on search and seizure is contained in many statutes, depending on the suspected offence. The 'most commonly used'<sup>968</sup> statute for issuing search warrants is the Criminal Justice Act (Miscellaneous Provisions) Act 1997,<sup>969</sup> which applies to gathering evidence in relation to 'arrestable offences' (offences carrying a punishment of five year imprisonment or more).<sup>970</sup> Only a district court judge may issue such a search warrant where there are 'reasonable grounds' for suspecting evidence may be found at a certain place.<sup>971</sup> The act has no specific provisions on the search of editorial offices, or on the seizure of journalistic material. Similarly, under the Official Secrets Act 1963, law enforcement officials must obtain a warrant from a district court judge to seize any documents which 'might be prejudicial to the safety or preservation of the State'.<sup>972</sup> However, in certain circumstances, a police officer of 'chief superintendent' rank, may issue a search warrant.<sup>973</sup> Finally, under the Defamation Act 2009, where an individual is convicted of publishing blasphemous material, the court may issue a warrant allowing law enforcement officials to search any premises

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<sup>966</sup> Broadcasting Authority of Ireland, Code of Fairness, Objectivity & Impartiality in News and Current Affairs (2013), Rules 12 and 13 (available at <http://www.bai.ie/index.php/code-of-fairness-objectivity-and-impartiality-in-news-and-current-affairs/>).

<sup>967</sup> Broadcasting Authority of Ireland, Statement of Findings issued pursuant to Section 55(2) of the Broadcasting Act 2009, 29 February 2012 (available at <http://www.bai.ie/index.php/2012/05/bai-publishes-statement-of-findings-and-report-of-investigating-officer/>).

<sup>968</sup> Law Reform Commission, Issues Paper on Search Warrants (LRC IP 4-2015), para. 1.07 (available at [http://www.lawreform.ie/\\_fileupload/Issues%20Papers/Issues%20Paper%20on%20Search%20Warrants%2031%20Jan%202013%20final.pdf](http://www.lawreform.ie/_fileupload/Issues%20Papers/Issues%20Paper%20on%20Search%20Warrants%2031%20Jan%202013%20final.pdf)).

<sup>969</sup> Criminal Justice (Miscellaneous Provisions) Act 1997, section 10 (as amended by the Criminal Justice Act 2006, section 6).

<sup>970</sup> Criminal Justice (Miscellaneous Provisions) Act 1997, section 10(6) (as amended by the Criminal Justice Act 2006, section 6).

<sup>971</sup> Criminal Justice (Miscellaneous Provisions) Act 1997, section 10(1) (as amended by the Criminal Justice Act 2006, section 6).

<sup>972</sup> Official Secrets Act 193, section 16 (1).

<sup>973</sup> Official Secrets Act 1963, section 16 (2).

and seize blasphemous material.<sup>974</sup>

It does not appear that any statutes regulating search and seizure contain provisions relating to the searching of editorial offices, or the seizure of journalistic material. Notably, a number of such statutes have provisions relating to 'legal professional privilege', providing that legally privileged material generally may not be seized during a search.<sup>975</sup> Finally, in February 2015, it was reported by the National Union of Journalists that police secured a warrant to seize images of a protest from a photojournalist. The journalist had refused to voluntarily hand over the images.<sup>976</sup>

#### *Government wiretapping and surveillance*

Government wiretapping of the press came to a head in 1987, when the High Court ruled in *Kennedy v. Ireland* that the wiretapping of two journalists had violated their constitutional right to privacy.<sup>977</sup> This led to the enactment of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. The act provides that interception of telecommunication messages<sup>978</sup> by law enforcement or the military may only occur with prior-authorisation from the justice minister.<sup>979</sup> There are no specific provisions on journalistic communication.

The law on government surveillance is set out in the Criminal Justice (Surveillance) Act 2009, and provides that law enforcement, intelligence, military and tax agencies may usually only conduct surveillance<sup>980</sup> with

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<sup>974</sup> Defamation Act 2009, section 37.

<sup>975</sup> See, for example, the Criminal Justice (Theft and Fraud Offences) Act 2001, section 48 ('Where a member of the Garda Síochána has entered premises in the execution of a warrant issued under this section, he may seize and retain any material, other than items subject to legal privilege, which is likely to be of substantial value'). See Law Reform Commission, Search Warrants and Bench Warrants: Consultation Paper (LRC CP 58-2009), para. 6.21 (available at [http://www.lawreform.ie/\\_fileupload/consultation%20papers/cpSearchWarrantsandBenchWarrants.pdf](http://www.lawreform.ie/_fileupload/consultation%20papers/cpSearchWarrantsandBenchWarrants.pdf)).

<sup>976</sup> National Union of Journalists, 'NUJ condemns Garda order against Photocall Ireland' (17 February 2015) (available at <https://www.nuj.org.uk/news/nuj-condemns-garda-order-against-photocall-ireland/>).

<sup>977</sup> *Kennedy v. Ireland* [1987] IR 587.

<sup>978</sup> Interception is defined as including 'listening or attempted listening to, or the recording or attempted recording, by any means, in the course of its transmission, of a telecommunications message'(Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993, section 1).

<sup>979</sup> Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993, section 2.

<sup>980</sup> Surveillance is defined as 'monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements,

prior-authorisation from a district court judge.<sup>981</sup> Notably, the Act provides that a judge 'shall not issue authorisation' if the surveillance 'is likely to relate primarily to communications protected by privilege'. The Act does not define 'privilege', and arguably covers legal professional privilege, but it is not clear whether it covers journalistic privilege. Further, there are no specific provisions in the Act on journalists. Further, the Act also allows surveillance in 'cases of urgency', without the prior-authorisation of a judge, but instead with the prior authorisation of senior<sup>982</sup> law enforcement, military or tax agency official.<sup>983</sup>

Finally, in December 2014,<sup>984</sup> the government commenced operation of Part 3 of the Criminal Justice (Mutual Assistance) Act 2008, which regulates wiretapping requests from foreign governments. The act provides that where a request is made to the Irish government, the justice minister may give authorisation for interception of telecommunications messages, under certain circumstances.<sup>985</sup> There are no provisions on journalistic communication.

#### *Government access to communication data*

The law on government access to communication data is set out in the Communications (Retention of Data) Act 2011, which replaced earlier legislation on communication data.<sup>986</sup> The act regulates government access to communication 'traffic data', 'location data', and 'identity' data,<sup>987</sup> but does not apply to the 'content of communications'.<sup>988</sup> The law places an obligation on electronic communication providers to retain certain communication data for a defined period.<sup>989</sup> The act allows senior law enforcement, military, and tax agency officials,<sup>990</sup> to request an electronic communications provider to disclose data to the official for certain law enforcement or national security reasons.<sup>991</sup> There are no provisions in the

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activities and communications, or monitoring or making a recording of places or things' (Criminal Justice (Surveillance) Act 2009, section 1).

<sup>981</sup> Criminal Justice (Surveillance) Act 2009, section 5.

<sup>982</sup> See definition of 'superior officer' in the Criminal Justice (Surveillance) Act 2009, section 1.

<sup>983</sup> Criminal Justice (Surveillance) Act 2009, section 7.

<sup>984</sup> Criminal Justice (Mutual Assistance) Act 2008 (Commencement) Order 2014, S.I. No. 541/2014.

<sup>985</sup> Criminal Justice (Mutual Assistance) Act 2008, section 25.

<sup>986</sup> Criminal Justice (Terrorist Offences) Act 2005, Part 7.

<sup>987</sup> Communications (Retention of Data) Act 2011, section 1.

<sup>988</sup> Communications (Retention of Data) Act 2011, section 2.

<sup>989</sup> Communications (Retention of Data) Act 2011, section 3.

<sup>990</sup> Communications (Retention of Data) Act 2011, section 6 (as amended by the Competition and Consumer Protection Act 2014, section 89).

<sup>991</sup> Communications (Retention of Data) Act 2011, section 6.

law on journalistic communication data.

Notably, in 2010 an Irish civil rights organisation filed a claim against the government in the High Court,<sup>992</sup> seeking to have the previous law<sup>993</sup> on data retention declared unconstitutional, and challenging the legality of the EU's data retention directive. The High Court referred the data-retention-directive question to the EU Court of Justice, and in its 2014 judgment, *Digital Rights Ireland Ltd v. Minister for Communications*, the Court held that the directive was invalid.<sup>994</sup> However, while question marks now hang over the current Communications (Retention of Data) Act 2011, the act is arguably still valid until there are further legal challenges.<sup>995</sup>

### 3. Reporting about on-going investigations

The law on press reporting of criminal proceedings and trials is contained in case law, and generally covered by the law known as contempt of court.<sup>996</sup> The Law Reform Commission, a statutory agency which examines law reform, recommended in 1994 that contempt of court law should be codified in legislation.<sup>997</sup> There have also been calls from the judiciary for the government to enact legislation.<sup>998</sup> This has not yet happened.

#### *"Sub judice" rule*

The "sub judice" rule basically means the point in criminal proceedings when the media cannot publish information that might be in contempt of court. The High Court has ruled in *DPP v. Independent Newspapers Ireland Limited*,<sup>999</sup> that proceedings for contempt of court may only be initiated when a 'court has actually had seisin of the case in respect of which contempt is alleged', or in other words, when a suspect is formally

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<sup>992</sup> *Digital Rights Ireland Ltd v. Minister for Communications & Ors* [2010] IEHC 221.

<sup>993</sup> Criminal Justice (Terrorist Offences) Act 2005, Part 7 (repealed by the Communications (Retention of Data) Act 2011).

<sup>994</sup> *Digital Rights Ireland Ltd v. Minister for Communications* [2014] EUECJ C-293/12.

<sup>995</sup> *Rob Corbet et al*, 'Data Retention Directive Declared Invalid by EU Court of Justice', Arthur Cox Group Briefing (16 April 2014) (available at <http://www.arthurcox.com/publications/data-retention-directive-declared-invalid-eu-court-justice/>).

<sup>996</sup> See generally Law Reform Commission, Report on Contempt of Court (LRC 47-1994) (available at [http://www.lawreform.ie/\\_fileupload/Reports/rContempt.htm](http://www.lawreform.ie/_fileupload/Reports/rContempt.htm)).

<sup>997</sup> Law Reform Commission, Report on Contempt of Court (LRC 47-1994), para. (available at [http://www.lawreform.ie/\\_fileupload/Reports/rContempt.htm](http://www.lawreform.ie/_fileupload/Reports/rContempt.htm)).

<sup>998</sup> See, for example, *D.P.P v. Independent Newspapers Ireland Ltd. & Ors* [2003] IEHC 624 ('I add my voice in support of the need for legislative intervention in hope rather than expectation').

<sup>999</sup> *D.P.P v. Independent Newspapers Ireland Ltd. & Ors* [2003] IEHC 624.

charged with an offence.<sup>1000</sup>

*Suspect charged with an offence, and awaiting trial*

The most recent case on press reporting on criminal suspects who have been charged with an offence is the 2015 case of *DPP v. Independent News and Media*.<sup>1001</sup> The High Court found the *Irish Independent* newspaper had committed the offence of contempt of court by publishing articles 'after the accused had been charged' and 'gratuitously identified and associated the accused person with particular types of behaviour relevant to the charges to be considered by the jury'.<sup>1002</sup> The Court acknowledged that there was 'no evidence of intention' to commit the offence by the newspaper, but 'on the law as it stands there is no requirement to prove intent for this offence'. The Court also ruled that most of its judgment could 'not be reported upon' until a further order after the trial. The sanctions for contempt of court are fines or prison sentences, at the discretion of the courts, and the Court is yet to impose a sanction.

*Defendant convicted, and awaiting sentencing*

One of the main recent authorities on contempt of court by the media is *DPP. v. Independent Newspapers*,<sup>1003</sup> where the High Court held that a newspaper had committed contempt of court by publishing articles following a defendant's guilty plea, but before he had been sentenced. This was because 'they were highly prejudicial to the [defendant] thus interfering in the administration of justice'.<sup>1004</sup> The test was whether an article created a 'real and serious risk that an accused does not have a fair trial', and must be proven 'beyond a reasonable doubt'.

*Defamation Act 2009*

Under the Defamation Act 2009, the press enjoy an absolute privilege (i.e. a full defence to defamation proceedings) for a 'fair and accurate report' of court proceedings held in public, proceedings in parliament, and a number of other circumstances.<sup>1005</sup> The act also provides a further defence of 'qualified privilege' to the press for publishing 'fair and accurate reports' of

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<sup>1000</sup> D.P.P. v. Independent Newspapers (Ireland) Ltd. & Ors [2005] IEHC 128 (approving D.P.P v. Independent Newspapers Ireland Ltd. & Ors [2003] IEHC 624).

<sup>1001</sup> D.P.P. v. Independent News and Media Plc & Ors [2015] IEHC 336. See also Kelly v. O'Neill [1999] IESC 81.

<sup>1002</sup> D.P.P. v. Independent News and Media Plc & Ors [2015] IEHC 336.

<sup>1003</sup> D.P.P. v. Independent Newspapers (Ireland) Limited [2005] IEHC 353.

<sup>1004</sup> D.P.P. v. Independent Newspapers (Ireland) Limited [2005] IEHC 353.

<sup>1005</sup> Defamation Act 2009, section 17.

other proceedings, provided no malice is proven.<sup>1006</sup>

#### **4. Due diligence guidelines for journalists**

##### *Defence of truth*

The Defamation Act 2009 sets out the defence of truth in defamation proceedings,<sup>1007</sup> and provides that two or more allegations are made against an individual, 'the defence of truth shall not fail by reason only of the truth of every allegation not being proved, if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining allegations'.<sup>1008</sup>

##### *Defence of honest opinion*

Under the Defamation Act 2009, the press enjoy a defence of honest opinion, where the defendant believed the truth of the opinion, and was based on allegations of facts specified in an article, or facts that 'might reasonably be expected to have been known' by readers.<sup>1009</sup> The act also sets out criteria for distinguishing between opinion and allegations of fact.<sup>1010</sup>

##### *Defence of fair and reasonable publication on a matter of public interest*

The Defamation Act 2009 also provides for a defence of 'fair and reasonable publication', where allegations are made on a subject of public interest. The act lays down a number of criteria for a court to consider when ruling on whether the defence applies to a defamatory publication.<sup>1011</sup> Notably, if the defamation proceedings are being determined with a jury, the question of whether the defence of fair and reasonable publication applies is a question for the jury, not the judge.<sup>1012</sup>

#### **5. Liability in the editorial chain**

The Defamation Act 2009 provides that a person is not to be considered the 'author, editor or publisher' of a statement if they are only responsible for the 'printing, production, distribution or selling' of printed material, or the 'processing, copying, distribution, exhibition' of film or sound recording, or through an electronic medium.<sup>1013</sup> Moreover, the act provides that a person

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<sup>1006</sup> Defamation Act 2009, sections 18 and 19.

<sup>1007</sup> Defamation Act 2009, sections 16.

<sup>1008</sup> Defamation Act 2009, section 16(2).

<sup>1009</sup> Defamation Act 2009, section 20.

<sup>1010</sup> Defamation Act 2009, section 21.

<sup>1011</sup> Defamation Act 2009, section 26.

<sup>1012</sup> Defamation Act 2009, section 26 (4).

<sup>1013</sup> Defamation Act 2009, section 27.

only has 'one cause of action in respect of a multiple publication', unless a court rules otherwise.<sup>1014</sup>

## 6. Conclusion and perspectives

A number of notable current issues concerning press freedom would be the following:

### *Law enforcement officials leaking to the press*

In May 2015, the first law enforcement official, a senior police officer, was arrested under the law, for disclosures to the media, and was later released without charge. The public prosecutor is currently deciding on whether to prosecute the officer. Of particular concern, in July 2015, *The Irish Times* newspaper reported that 'journalists' text messages and call-details have been accessed' from the arrested officer's phone.<sup>1015</sup>

### *Law enforcement officials and journalistic sources*

The *Guardian* newspaper has reported the concerns of a number of Irish journalists of being 'questioned them about police contacts, threatened them with arrest and has been checking their mobile phone calls to suspected sources'.<sup>1016</sup> The deputy editor of the *Evening Herald* newspaper described police attempts at discovering journalists' sources as 'Stasi-like'.<sup>1017</sup>

Moreover, a recent National Union of Journalists conference, delegates adopted a motion noting with concern at "the growing tendency of An Garda Síochána to seize images, including unpublished photographs taken by NUJ members in the course of their work".<sup>1018</sup>

### *Defamation*

While the government has decriminalised defamation, and enacted the Defamation Act 2009, public officials continue to successfully sue the press

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<sup>1014</sup> Defamation Act 2009, section 11.

<sup>1015</sup> *Conor Lally*, 'Journalists' texts form part of Garda leak inquiry' *The Irish Times* (25 July 2015).

<sup>1016</sup> *Henry McDonald*, "Irish journalists accuse police of 'Stasi-like' monitoring", *The Guardian* (11 May 2012).

<sup>1017</sup> *Henry McDonald*, "Irish journalists accuse police of 'Stasi-like' monitoring", *The Guardian* (11 May 2012).

<sup>1018</sup> National Union of Journalists, 'Irish BDC condemns cuts and seizure of journalistic materials', 10 October 2011 (available at <https://www.nuj.org.uk/news/irish-bdc-condemns-cuts-and-seizure-of-journalistic-materials/>). See also National Union of Journalists Biennial Delegate Conference, 'Media Matters Serving the Public Interest', Motion 3, 8 October 2011 (available at <C:\Users\rfahy1\Downloads\crokeparkfinalagenda.pdf>).

over publications concerning matters of public interest. Many newspapers settle cases before reaching trial. Some recent examples include the following:

(a) In 2015, the *Irish Examiner* newspaper settled a defamation action taken by two parliamentarians, paying €100,000 in damages, and publishing an apology.<sup>1019</sup> The articles were an editorial and op-ed concerning the two elected public officials and on matters of public interest.

(b) In 2015, the *Irish Mail on Sunday* newspaper settled a defamation action taken by a government minister over an article on the minister entitled 'Reilly link to developer of second clinic - he sold land for luxury homes'. The newspaper settled the High Court case, paying undisclosed damages, legal costs, and issuing an apology.<sup>1020</sup>

(c) In 2014, the *Evening Herald* newspaper was ordered to pay €1.25 million in damages to a public official over a number of articles published in 2004, which suggested the official might have had an extramarital affair with a government minister.<sup>1021</sup> A jury had originally awarded €1.8 million in damages, which the Supreme Court reduced to €1.25 million.

(d) In 2014, a senator sued the *Daily Mail* newspaper for defamation over an article which claimed she personally gained from voluntary work in Africa, with the newspaper paying undisclosed damages and costs, and reading an apology.<sup>1022</sup>

Further, the issues of damages and costs in defamation proceedings continues: in July 2015, Independent Newspapers filed an application with the European Court of Human Rights, seeking to have the Supreme Court's €1.25 million award against it declared disproportionate under Article 10 of the European Convention of Human Rights.<sup>1023</sup> Moreover, the Sunday World newspaper filed an appeal with the Court of Appeal over a €900,000 damages award imposed by a jury on the newspaper over a defamatory article.<sup>1024</sup>

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<sup>1019</sup> *Justine McCarthy*, 'Irish Examiner pays Sinn Fein due over libel', *The Sunday Times* (17 May 2015).

<sup>1020</sup> 'Apology for James Reilly over "Irish Mail on Sunday" article', *The Irish Times* (13 July 2015).

<sup>1021</sup> *Leech v. Independent Newspapers (Ireland) Limited* [2014] IESC 79.

<sup>1022</sup> "Senator Healy-Eames gets apology over 'Mail' article", *The Irish Times* (28 July 2014).

<sup>1023</sup> *Ruadhán Mac Cormaic*, "Media group takes European action over Monica Leech case", *The Irish Times* (22 July 2015).

<sup>1024</sup> *Dearbhail McDonald*, 'Newspaper asks court to overturn €900,000 libel award', *Irish Independent* (28 July 2015).



*Contempt of court*

Of note, the public prosecutor has made a recent statement that the media 'have a high degree of responsibility to ensure that not only do they not commit a contempt of court by publishing or broadcasting prejudicial material but also that such publicity is not the cause of a trial being postponed for a long period, or even indefinitely'.<sup>1025</sup>

*Legal costs*

The legal costs for the press of defending legal proceedings are a persistent problem. One recent example is The Irish Times newspaper defending itself against a government tribunal seeking to compel the newspaper to answer questions about a leaked document it had received from an anonymous source.<sup>1026</sup> The Supreme Court ordered the newspaper to pay the tribunal's costs of €400,000, in addition to the newspaper's own costs.

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<sup>1025</sup> Office of the Director of Public Prosecutions, Annual Report 2012 (2013), p. 5 (available at: [https://www.dppireland.ie/filestore/documents/AR\\_2012\\_%5Beng%5D.pdf](https://www.dppireland.ie/filestore/documents/AR_2012_%5Beng%5D.pdf)).

<sup>1026</sup> Judge Mahon v. Keena & Anor [2007] IEHC 348.

## **16. Italy**

Amedeo Arena

## 1. Relevant Legislation and Case-law

Investigative journalism, according to the Italian Supreme Court of Cassation, constitutes the “highest and most noble expression of the freedom of information”<sup>1027</sup> because it promotes public awareness of facts and circumstances of public relevance acquired by journalists directly, rather than relying upon other sources.

Freedom of information has a threefold dimension: active (the right to inform others), passive (the right to be informed), and reflexive (the right to gain access to undisclosed information). Although Article 21 of the Italian Constitution expressly protects only the active form, that is, the freedom to inform others,<sup>1028</sup> the Italian Constitutional Court,<sup>1029</sup> following the pattern of Article 10 of the ECHR, has accorded constitutional protection also to the passive and reflexive dimensions of the freedom of information, insofar as both the reception of information and access to undisclosed information are essential for the proper functioning of a democratic society and for the development of an open political debate.

Just like other freedoms enshrined in the Constitution, freedom of information must be balanced against constitutional values of equal importance.<sup>1030</sup> Although Article 21 of the Constitution only envisages one express limit upon the freedom of information, that of ‘public morality’ (*buon costume*),<sup>1031</sup> the Constitutional Court has ruled that other limits on that freedom are ‘implied’ in the Constitution,<sup>1032</sup> such as the right to privacy and personal identity, the honour and reputation of the natural and legal persons involved in journalistic activity, and national security.

The constitutional constraints on the freedom of information are of particular relevance to investigative journalism, as the latter may concern undisclosed information that has been classified by public authorities on national security grounds. Moreover, investigative journalism may involve the acquisition of information using hidden camera or through breach of confidence, thus encroaching upon the privacy and reputation of the

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<sup>1027</sup> Court of Cassation, 3rd Chamber, Judgment of 9 July 2010, no. 16236.

<sup>1028</sup> See G. *Gardini*, *Le Regole dell'Informazione. Principi giuridici, strumenti, casi* (Milan: Bruno Mondadori, 2009), 34.

<sup>1029</sup> Constitutional Court, Judgment no. 25 of 1965; no. 18 of 1966; no. 122 of 1970; no. 175 of 1971; no. 105 of 1972; no. 113 of 1974; no. 16 of 1981; no. 18 of 1981; no. 225 of 1975; no. 231 of 1975; no. 826 of 1988; no. 420 of 1994; no. 112 of 1993; no. 466 of 2002.

<sup>1030</sup> See A. *Pace* & M. *Manetti*, ‘Art. 21: la libertà di manifestazione del proprio pensiero’, in *Commentario della Costituzione*, ed. G. Branca & A. Pizzorusso (Bologna: Zanichelli, 2006), 39 et seq.

<sup>1031</sup> Constitutional Court, Judgment no. 120 of 1968.

<sup>1032</sup> Constitutional Court, Judgment no. 1 of 1956.

persons concerned.

## 2. a) Obtaining of information

### *Classified information / information covered by the “secret of State”*

As to the use by journalists of documents covered by the so-called “secret of State”, the Italian Constitutional Court has ruled that keeping certain information secret is not incompatible with the freedom of expression, insofar doing so is necessary to protect national security as per Article 126 of the Constitution.<sup>1033</sup> Law no. 124 of 2007 has recently redefined the boundaries of the secret of State.<sup>1034</sup> According to Article 39 thereof, the secret of State covers all acts, documents, facts, and activities whose disclosure may undermine the integrity, independence and defence of the State, its relations with other States, or the functioning of State institutions and bodies of constitutional relevance. Some scholars have argued that that definition oversteps the boundaries set by the Constitutional Court as to the permissible scope of the secret of State.<sup>1035</sup>

Article 261 of the Penal Code provides that the disclosure of information covered by the secret of State is punishable by imprisonment of at least five years. The penalty is increased if the disclosure takes place during wartime, if it hinders the military power of the State, and if it is carried out with political or military espionage purposes. Those penalties also apply to those who obtain such information. Article 262 of the Penal Code criminalizes the disclosure of news that the competent authority required not to be made public. Disclosing and obtaining such news are punishable by at least three years of imprisonment.

The open-ended wording of these provisions could be construed as granting public authorities a boundless power to prohibit the disclosure of news. The Constitutional Court, however, clarified that the news covered by Article 262 of the Penal Code are akin to those covered by the secret of State, in that: (i) they must concern a State interest of compelling importance; and (ii) their disclosure must be such as to appreciably undermine that interest. The characterization of a given piece of information as ‘classified’ by public authority does not automatically trigger Article 262 of the Penal Code: it is for courts to determine on a case-by-case basis whether the two requirements above are met.<sup>1036</sup>

Article 202 of the Code of Penal Procedure requires public servants not to

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<sup>1033</sup> See Constitutional Court, Order no. 49 of 1977; Judgment no. 82 of 1977; no. 86/1977.

<sup>1034</sup> Law 3 Aug. 2007, no. 124, OJIR 13 Aug. 2007, no. 187.

<sup>1035</sup> P. Pisa, *Le premesse ‘sostanziali’ della normativa sul segreto di Stato*, 37.

<sup>1036</sup> See Constitutional Court, Judgment nos 282/1990, 333/1991 and 295/2002.

testify about circumstances covered by the secret of State. It is for the relevant Court to seek confirmation from the President of the Council of Ministers as to whether a given matter is covered by the secret of State. If the President provides such confirmation and the classified matter is essential for proving the crime being investigated, the defendant must be acquitted due to the existence of a secret of State. If the President does not provide such confirmation within sixty days, the Court requires the witness to testify over the relevant matter.

*Information acquired via hidden cameras / breach of trust*

Investigative journalism often involves the acquisition of information through hidden cameras or breach of trust (e.g. the use of “undercover” journalists, the provision of bogus data, etc.). These activities may encroach upon the privacy of the persons involved in the journalistic activity and may harm their honour and reputation. Yet, these means have allowed journalist to expose a number of irregularities in both the private and public sector, thus carrying out a praiseworthy social function.

Accordingly, over the last ten years, courts have strived to strike a balance between the interests of the persons concerned and the social function served by investigative journalism. In this connection, regard must be had to two leading cases: the *Le Iene* ruling by the Trial Court of Bari in 2005 and the *Il Tempo* ruling by the Supreme Court of Cassation in 2010.

The *Le Iene* ruling concerns an episode of the eponymous TV show, which, through the use of hidden cameras by undercover journalist, unearthed certain irregular practices in the market of vocational courses for private security agents. On that occasion, the Trial Court of Bari ruled that although the use of those deceptive means may be objectionable in principle, a reasonable use of those methods may warranted by the importance of the uncovered information and the difficulty of gathering that information through traditional means (e.g. interviews, direct observation, etc.). Accordingly, the Court of Bari upheld the legality of the episode in question.

Investigative journalism hit the docket again in 2010, when the Italian Supreme Court of Cassation handed down a comprehensive opinion on the permissible boundaries of that activity and the legality of its methods. On that occasion, the Court had been requested to rule on the legality of a series of articles published in the daily newspaper “Il Tempo” on certain medical laboratories in Italy. Journalists from that newspaper had submitted tea samples in urine containers to those medical laboratories and, as the laboratories failed to detect the nature of the samples, had called into question the dependability of the test results returned by those laboratories.<sup>1037</sup> The Court, in particular, rejected the contention that the

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<sup>1037</sup> Court of Cassation, 3rd Chamber, Judgment of 9 July 2010, no. 16236.

journalists had willingly deceived the laboratories to publish a scoop and held that the journalists were quite within their rights to comment on the accuracy of the tests results returned by the laboratories, which had mistaken a beverage for a bodily fluid.

Most recently, the Judicial Affairs Committee of the Italian Chamber of Deputies introduced an extremely controversial amendment to the bill on the modernization of criminal procedure criminalizing the use of hidden cameras for non-judicial purposes.<sup>1038</sup> This is the wording of the amendment in question:

*“Whoever discloses, so as to harm the reputation or image of someone else, video or audio recordings of conversations held in his or her presence obtained in breach of trust, shall be punishable by imprisonment for a term between six months and four years. That punishment shall not apply if the recordings are submitted as evidence in the course of a judicial procedure or are used to exercise one’s right of defense.”*

That amendment has given rise to a heated political debate. Several politicians have announced that they will strongly oppose that amendment in the plenary. Other politicians have suggested the amendment may be acceptable provided that a derogation is introduced so as to allow professional journalists to use those recordings in the context of their reporting activity.

## **2. b) Boundaries of law enforcement**

As mentioned above, investigative journalism is instrumental to the freedom of information and as such is protected by Article 21 of the Italian Constitution. That article consists of six paragraphs. The first paragraph contains a broad statement that everyone has the right to express his or her thoughts through any media. The following paragraphs unravel a set of guarantees protecting the means of communication that, at the time the Constitution was drafted, appeared as the most relevant one: the press. In particular, the Constitution provides that press may not be subjected to authorization or censorship; seizure of press is permitted only for offences expressly set out by the law and on the basis of a reasoned Court order, except in cases of urgency where the timely intervention of the judicial authority is not possible; the law may establish that the financial sources of the periodical publications be disclosed. Paragraph 7 sets out the only express derogation from the freedom of expression affirmed in paragraph

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<sup>1038</sup> See <http://www.ilfattoquotidiano.it/2015/07/24/ddl-penale-emendamento-ncd-carcere-per-registrazioni-rubate-proteste-m5s-commissione-giustizia/1902353/>.

1: public morals. Printed publications and shows contrary to public morals are prohibited and punished in accordance with the law.

Seizure of press is permitted only for printed materials that have already been published, only in connection with criminal offences for which the Press Law expressly requires seizure (the so-called *riserva di legge*), and only in the presence of a Court order (the so-called *riserva di giurisdizione*).<sup>1039</sup> Prior authorization regimes entailing the discretionary power of political and administrative bodies and preventive censorship are unconstitutional.<sup>1040</sup> In cases of urgency, when obtaining a Court order is unfeasible, law enforcement agencies can autonomously seize printed publications, but must notify the Court having jurisdiction of the seizure.<sup>1041</sup> That Court must uphold the seizure within twenty-four hours, otherwise the seizure becomes ineffective.<sup>1042</sup>

In a recent judgment, the Court of Cassation ruled that newsletters, blogs, fora, newsgroups, mailing lists, chat conversations, and instant messaging cannot be subsumed *en bloc* under the concept of 'press' within the meaning of Article 21 of the Constitution without having regard to their distinctive features. In particular, the Court took the view that messages posted on an online forum (which can be public or restricted to members) are similar to handwritten notes pinned to a message board (placed in a public or a private place) which are means of communication but cannot be regarded as 'press' and accordingly are not covered by the safeguards against seizure set out in Article 21, paragraph 3, of the Constitution.<sup>1043</sup>

### 3. Reporting about on-going investigations

Investigative journalism sometimes involves the publication of court documents concerning on-going investigations. That calls for a careful balancing exercise between, on the one hand, citizens' right to be informed about court cases and the journalists' role as watchdogs of society and, on the other hand, the imperative that the course of justice must not be perverted by undue information leaks.

In this connection, the Constitutional Court has ruled that some Court documents can be subject to investigative secrecy (*segreto istruttorio*) and

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<sup>1039</sup> See Art. 21, para. 3 of the Constitution.

<sup>1040</sup> See Art. 21, para. 2 of the Constitution; see also Constitutional Court, Judgment no. 1 of 1956. On the notion of censorship, see Constitutional Court, Judgment no. 159 of 1970. As to the ban on prior authorization and censorship, see Constitutional Court, Judgment no. 1 of 1956; no. 11 of 1974; no. 115 of 1957; no. 31 of 1957; no. 38 of 1961.

<sup>1041</sup> See Art. 21, para. 4 of the Constitution.

<sup>1042</sup> See Art. 21, para. 5 of the Constitution.

<sup>1043</sup> Court of Cassation, Judgment of 10 Mar. 2009, no. 10535.

that it is up to the legislature to strike a balance between the freedom of expression and the administration of justice.<sup>1044</sup> The relevant statutory provision is Article 329 of the Code of Penal Procedure, according to which documents and reports by the Public Prosecutor or by law enforcement agencies are subject to investigative secrecy until the defendant is entitled to access those documents and, in any case, until the completion of pre-trial investigations.<sup>1045</sup> For investigative purposes, the Public Prosecutor may consent to the publication of specific documents covered by investigative secrecy<sup>1046</sup> and may forbid the publication of documents not subject to investigative secrecy.<sup>1047</sup>

The rules concerning the publication of Court documents are set out in Article 114 of the Code of Penal Procedure. Paragraph 1 thereof proscribes the publication, also in part or in summary form, of investigation documents covered by investigative secrecy as well as of their contents. Investigation documents not subject to investigative secrecy can be published only after the completion of pre-trial investigation. Their contents, instead, can be published at all times. If the trial reaches the hearing stage, Court documents can only be published, in whole or in part, after the judgment is delivered. In the case of closed-door hearings,<sup>1048</sup> instead, Court documents can only be published ten years after the final judgment is rendered and upon authorization by the Minister of Justice. The identity and image of minors involved in criminal proceedings as witnesses or victims cannot be disclosed until they reach the age of eighteen. It is also forbidden to publish images depicting the defendant in handcuffs or other restraints, unless the defendant consents to the publication.

In 2009 the Press Council, the National Federation of Italian Journalists, and a number of major national and local broadcasters signed a Self-Regulation Code concerning the representation of Court proceedings in television broadcasting.<sup>1049</sup> The enforcement of that Code has been entrusted to an *ad hoc* Committee and to the Press Council.

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<sup>1044</sup> See Constitutional Court, Judgment no. 25 of 1965. For commentaries, See V. Crisafulli, In tema di limiti alla cronaca giudiziaria (Giurisprudenza costituzionale, 1965), 245; V. Barosio, Il divieto di pubblicare atti o documenti relativi ad una istruzione penale e la sua compatibilità con gli artt. 3 e 21 Cost. (Giurisprudenza costituzionale, 1966), 176. More recently L. Garlati, G.E. Vigevani (eds.), *Processo e informazione*, Milano: Giuffrè 2012.

<sup>1045</sup> Article 329, para. 1, of the Code of Penal Procedure.

<sup>1046</sup> Article 329, para. 2, of the Code of Penal Procedure.

<sup>1047</sup> Article 329, para. 3, of the Code of Penal Procedure.

<sup>1048</sup> See Art. 472, paras 1 and 2, of the Code of Penal Procedure.

<sup>1049</sup> Available at: [www.odg.it/files/codice%20di%20autoregolamentazione.pdf](http://www.odg.it/files/codice%20di%20autoregolamentazione.pdf).



The publication of wiretap transcripts has recently given rise to a lively political and legal debate. The Constitutional Court has cautioned against the reckless publication of wiretap transcripts involving elected officials as undue means of political pressure.<sup>1050</sup> The Italian Data Protection Authority has repeatedly urged journalists to adopt a more cautious approach in publishing wiretap transcripts of famous people or elected officials as doing so could significantly undermine their right to privacy.<sup>1051</sup>

The Government in 2008 proposed an outright ban on the publication of wiretap transcripts (the so-called Alfano Bill),<sup>1052</sup> but the bill was eventually dropped in view of the strong opposition of the public opinion and of the concerns raised by some academic commentators as to the consistency of the bill with the Constitution and the European Convention on Human Rights.<sup>1053</sup>

Absent specific statutory provisions on the publication of wiretap transcripts, regard must be had to the principles set out in Article 6 of the Code of Practice Concerning the Processing of Personal Data in the Exercise of Journalistic Activities.<sup>1054</sup> According to that provision, the disclosure of information of substantial public or social interest is consistent with the right to privacy so long as such piece of information is indispensable in view of the originality of the relevant event or of the status of the person(s) involved. Accordingly, the right to privacy of famous persons and persons holding public offices must be respected if the disclosed information is not relevant to their public role.

Law 281 of 2006 grants a remedy to people harmed by the publication of

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<sup>1050</sup> Judgment no. 390 of 2007.

<sup>1051</sup> See Personal Data Protection Authority, Decision of 21 Jun. 2006, 'Publishing Transcripts of Tapping Records', OJIR 21 Jun. 2006, no. 147, available in English at: [www.garanteprivacy.it/garante/doc.jsp?ID=1301195](http://www.garanteprivacy.it/garante/doc.jsp?ID=1301195).

<sup>1052</sup> Chamber of Deputies, Legislative Proposal no. 1415, submitted by the Minister of Justice Mr Angelino Alfano on 30 Jun. 2008, available at: [www.camera.it/\\_dati/leg16/lavori/stampati/pdf/16PDL0005770.pdf](http://www.camera.it/_dati/leg16/lavori/stampati/pdf/16PDL0005770.pdf).

<sup>1053</sup> See *D. Gallo*, La riforma delle intercettazioni nel d.d.l. Alfano (Costituzionalismo.it, 2009), 25 et seq., available at: [www.costituzionalismo.it/articolo.asp?id=325](http://www.costituzionalismo.it/articolo.asp?id=325); F. Ruggieri, Il disegno di legge governativo sulle intercettazioni: poche note positive e molte perplessità (Cassazione penale, 2008), 2239 et seq.; L. Della Corte, R. Paudice & I. Vozzo, La disciplina delle intercettazioni (DDL Alfano) alla luce del principio della libertà di espressione garantita dalla Carta Costituzionale e dalla Convenzione Europea dei Diritti dell'Uomo, report of the research group directed by Prof. R. Mastroianni presented on 15 Jul. 2009, available at: [www.odg.it/files/Rapporto%20contro%20Alfano.pdf](http://www.odg.it/files/Rapporto%20contro%20Alfano.pdf).

<sup>1054</sup> See *R. Zaccaria & A. Valastro*, Diritto dell'informazione e della comunicazione (Padua: Cedam, 2010), 157; *D. Piccione*, Diritto di cronaca giornalistica dei parlamentari e pubblicazioni delle intercettazioni telefoniche a loro carico (Giurisprudenza costituzionale, 2008), 1573 et seq.

the contents of illegal wiretapping (i.e. carried out in the absence of a Court order): the publisher and the responsible editor are jointly and severally liable up to 50 euro cents for each printed copy of the offending article or up to EUR 1 million if the transcripts were disclosed through radio, television, or the internet.<sup>1055</sup>

Most recently, the Judicial Affairs Committee of the Italian Chamber of Deputies has introduced a controversial amendment seeking to protect the privacy of “unrelated third parties” who are nonetheless the subject of wiretapping as well as to safeguard conversations that are “not related to the subject of the investigation”.<sup>1056</sup> It is to be expected that such an amendment will be the subject of a heated debate when it reaches the plenary in the fall.

#### 4. Due diligence guidelines for journalists

Although no comprehensive set of guidelines exists that investigative journalists can follow in order to present “objective truth” without incurring in liability for encroaching upon the privacy or harming the reputation of the persons concerned, some guiding principles can be drawn from the case-law, the legislation in force, and self-regulatory instruments.

As far as privacy is concerned, according to the Personal Data Protection Code (PDPC),<sup>1057</sup> journalists are allowed to process personal data, including sensitive data, without the consent of the person concerned or prior authorization by the Data Protection Authority,<sup>1058</sup> so long as the information disclosed is directly related to facts of public interest.<sup>1059</sup> Moreover, the Data Protection Authority and the Press Council drafted an Ethics Code on the processing of personal data in the exercise of the journalistic profession.<sup>1060</sup> A number of additional self-regulation codes govern specific aspects of the interaction between privacy and the freedom of press.<sup>1061</sup>

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<sup>1055</sup> Article 4 of Law 20 Nov. 2006, no. 281, OJIR 21 Nov. 2006, no. 271.

<sup>1056</sup> See <http://www.ilfattoquotidiano.it/2015/07/24/ddl-penale-emendamento-ncd-carcere-per-registrazioni-rubate-pro-teste-m5s-commissione-giustizia/1902353/>.

<sup>1057</sup> Legislative Decree 30 Jun. 2003, no. 196, the ‘Personal Data Protection Code’, OJIR 29 Jul. 2003, no. 174.

<sup>1058</sup> Article 137 of the Personal Data Protection Code.

<sup>1059</sup> Article 137, para. 3, of the Personal Data Protection Code. See also *P. Caretti*, *Diritto dell’informazione e della Comunicazione* (Bologna: Il Mulino, 2009), 66.

<sup>1060</sup> Data Protection Authority, Decision of 29 Jul. 1998, ‘Ethics Code Concerning the Processing of Personal Data in the Exercise of the Journalistic Profession’, OJIR 3 Aug. 1998, no. 179.

<sup>1061</sup> See, for example, the ‘Media and Sport’ Self-regulation code for sport

With specific regard to investigative journalism, the Court of Cassation ruled that the right of information underpinning that journalistic activity “clearly takes precedence” over the right to privacy of individuals, which may only constitute a constraint on that activity in specific circumstances.<sup>1062</sup> Moreover, the Data Protection Authority in 2009 took the view that the gathering of personal data through hidden cameras, the concealment of the identity of the journalist, and the failure to disclose the purpose of the processing of the acquired data can be regarded as legal if they are carried out in a way that minimizes the impact on the privacy of the persons concerned (i.e. blurring their faces, altering their voices, covering their name-tags, etc.).<sup>1063</sup>

Moreover, Italian courts have endeavoured to strike a balance between the protection of honour / reputation and the exercise of the freedom of expression in its various forms: the right to report (*diritto di cronaca*), the right to criticize (*diritto di critica*), and the right of satire (*diritto di satira*). As investigative journalism often consists of a combination of those three forms of expression,<sup>1064</sup> regard must be had to the three criteria set by Italian courts to assess their legality: the social utility criterion, the truthfulness criterion, and the fair representation / comment criterion.

It is well-established that reporting facts liable to damage one’s honour or reputation is not punishable as long as: (i) there is a public interest underlying the dissemination of those facts (social utility criterion); (ii) the reported facts are true (truthfulness criterion); and (iii) the facts are reported in an appropriate and accurate fashion (fair representation and comment criterion). Similarly, courts have upheld the legality of critiques and opinions that: (i) may be of interest to the public (social utility criterion);<sup>1065</sup> (ii) are based on true facts (truthfulness criterion);<sup>1066</sup> (iii) are expressed in a suitable and decent manner (fair representation and comment criterion).<sup>1067</sup> The right of satire, which involves an exaggerated

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journalism, available at: [www.agcom.it/default.aspx?message=viewdocument&DocID=3101](http://www.agcom.it/default.aspx?message=viewdocument&DocID=3101); the Code Concerning the Reporting of Court Proceedings in Television Broadcasts, available at: [www.agcom.it/default.aspx?message=viewdocument&DocID=3090](http://www.agcom.it/default.aspx?message=viewdocument&DocID=3090).

<sup>1062</sup> Court of Cassation, Third Chamber, Judgment of 9 July 2010, no. 16236, headnote no. 8.

<sup>1063</sup> Data Protection Authority, Decision of 3 February 2009, no. 1597566.

<sup>1064</sup> Trial court of Bari, Order of 5 May 2005 (describing investigative journalism as a “complex form of televised communication” encompassing elements of reporting, critique, and satire).

<sup>1065</sup> See Court of Cassation, Judgment of 3 Jul. 1993, no. 6493.

<sup>1066</sup> Court of Cassation, Judgment of 18 Sep. 2008, no. 35646; Trial Court of Rome, Judgment of 3 Feb. 1998.

<sup>1067</sup> See Court of Cassation, Judgment of 15 Jan. 2002, no. 370; Judgment of 20

or surreal representation of reality seeking to stigmatize immoral conduct, in turn, can be regarded as legal if it: (i) concerns a person of interest to the public (social utility criterion);<sup>1068</sup> (ii) does not contain false statements about the person who is the subject of satire (truthfulness criterion);<sup>1069</sup> (iii) does not result in an unrestrained disparagement of the person concerned (fair representation and comment criterion).<sup>1070</sup>

Courts have claimed that those criteria also apply to investigative journalism, although they might need to be adapted due to the novelty of that journalistic activity, the praiseworthiness of its goals, and the specificity of it means (e.g. hidden cameras, undercover journalists, etc.).<sup>1071</sup>

The social utility criterion implies that the right to report and comment can only lawfully encroach upon other rights, such as the right to privacy, if it can contribute to the formation of public opinion about facts of objective relevance for the society as a whole.<sup>1072</sup> With specific regard to investigative journalism, in the *Le Iene* case, the Bari Trial Court noted that exposing possible unfair practices into which employers engaged in to the detriment of young jobseekers in the market for private security agents “without any doubt” met the social utility criterion.<sup>1073</sup>

Law no. 69/63 expressly recognizes truthfulness as one of the basic duties of the journalistic profession.<sup>1074</sup> The notion of ‘truthfulness’ requires correspondence between events as they are reported by the journalist and events as they actually occurred.<sup>1075</sup> Mere verisimilitude does not meet the truthfulness requirement.<sup>1076</sup> Accordingly, journalists are under an obligation to carefully and diligently check their sources.<sup>1077</sup> In this connection, in the *Il Tempo* case of 2010, the Court of Cassation ruled that such a source-checking obligation does not apply as such to investigative journalism, where fact-finding is carried out directly by the journalist. Yet,

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Nov. 2000, no. 10119.

<sup>1068</sup> Trial Court of Rome Judgment of 13 Feb. 1992. See also M. Mantovani, ‘Profili penalistici del diritto di satira’, *Diritto dell’ Informazione e dell’informatica* (1992): 295.

<sup>1069</sup> See Court of Cassation, Judgment no. 13563 of 1998.

<sup>1070</sup> Trial Court of Rome, Judgment of 26 Jun. 1993; Trial Court of Trento 26 Jan. 1999.

<sup>1071</sup> *Ibid.*

<sup>1072</sup> See Court of Cassation, Judgment no. 1473 of 1998.

<sup>1073</sup> Trial Court of Bari, Judgment no 5 May 2005.

<sup>1074</sup> See Art. 2 of Law no. 69 of 1963.

<sup>1075</sup> See Court of Cassation, Judgment no. 5491 of 2000.

<sup>1076</sup> See Court of Cassation, Judgment no. 8848 of 1997.

<sup>1077</sup> See, for example, Court of Cassation, Judgment no. 2173 of 1993; no. 5259 of 1984; no. 7747 of 1997.

the Court also held that, in carrying out their activities, investigative journalists must comply with the ethical and professional standards set out, *inter alia*, in the Charter of the Duties of the Journalist (signed in Rome on 8 July 1993).

The fair representation and comment criterion implies that the exercise of the freedom of information must neither go beyond the goal to inform the audience nor cause harm to the reputation of the persons concerned. The Court of Cassation, in particular, took the view that this criterion is not met when journalists employ subterfuges such as skillful innuendos, evocative juxtapositions or a disproportionately outraged tone.<sup>1078</sup> Instead, with respect to investigative journalism, the Trial Court of Bari in the *Le Iene* case noted that significant steps had been taken (e.g. the blurring the faces of the persons concerned) so as to prevent any harm to the reputation of the persons concerned or any undue usage of their image.

## 5. Liability in the editorial chain

The criteria analyzed in the previous paragraphs concern the liability of journalists for articles or television features of which they are authors. However, according to the Italian Press Law, the author of a libelous newspaper article and the editor under whose supervision the article was written are jointly and severally liable to provide compensation.<sup>1079</sup> In addition to the ordinary civil liability, the Press Law provides that journalists convicted of libel must also make financial reparation to the victim in accordance with the seriousness of the insult and the diffusion of the offending article.<sup>1080</sup> Courts are divided over the issue whether also newspaper editors must provide such additional reparation.<sup>1081</sup>

From the perspective of Italian criminal law, libel (*diffamazione a mezzo stampa*) is a felony punishable by imprisonment from one to six years and a fine.<sup>1082</sup> The criminal responsibility rests both on the author of the offending article and on the responsible editor if the latter failed to carry out

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<sup>1078</sup> See Court of Cassation, Judgment no. 5259 of 1984.

<sup>1079</sup> Article 11 of the Press Law.

<sup>1080</sup> Article 12 of the Press Law.

<sup>1081</sup> See Court of Cassation, Judgment of 5 Mar. 2010, no. 13198 (holding that not only the author of the offending article, but also anyone who contributed to the libel or failed to prevent it must provide the victim with the additional reparation set out in the Press Law); But see Trial Court of Rome, Judgment of 6 Jul. 2004 (holding that the responsible editor of a newspaper must not provide the victim with the additional reparation set out in the Press Law unless it is established that he or she aided and abetted the author of the offending article).

<sup>1082</sup> Article 13 of the Press Law.

the necessary supervision to prevent the libel.<sup>1083</sup> Accordingly, all newspapers and periodicals are required to appoint a responsible editor.<sup>1084</sup>

It has been alleged that the responsible editor's duty of supervision could lead to a form of censorship contrary to Article 21 of the Constitution. The Constitutional Court, however, rejected that claim. According to the Court, the notion of 'censorship' only includes powers of *ex ante* control entrusted to public authorities, not the supervision tasks carried out by editors. Those tasks, indeed, constitute the very essence of an editor's profession, not only a legal requirement to avoid criminal responsibility in libel cases.<sup>1085</sup>

## 6. Conclusion and perspectives

Over the last few years, investigative journalism in Italy has played an undeniable role as watchdog of society, by exposing malpractice and irregularities by entrepreneurs, politicians, and public servants. Moreover, it has actively contributed to the political process: to provide just one example of its importance, suffice it to say that a single feature of the popular television broadcast "Report" on the handling of campaign reimbursement funds by the leader of the "Italia dei Valori" party (the former deputy prosecutor Mr. Antonio Di Pietro) caused a sudden and complete eradication of that party from the Italian political landscape. Italy's economy, politics, industry, etc. would just not be the same without investigative journalism.

At the same time, however, concerns have been voiced about the spectacularization of investigative journalism. Hidden camera footages are usually presented with strong satirical overtones. The targets of those features are hardly given any opportunity to account for their alleged misconduct. Their responses are heavily edited and their right of reply is not always respected. Those people, thus, are convicted by public opinion without appeal – regardless of an actual verdict in a court of law, which may be handed down, if ever, several years after the conclusion of such summary "trials by media".

It is noteworthy that both Italian courts and the Data Protection Authority have tried to strike a balance between those conflicting instances. On the one hand, they have expressly recognised the social function played by investigative journalism and its contribution to the freedom of expression and the democratic political process. On the other hand, they have

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<sup>1083</sup> See Article 57 of the Penal Code (stating that the editor is subject to the penalty imposed on the author of the article reduced up to one third).

<sup>1084</sup> Article 3, para. 1 of the Press Law.

<sup>1085</sup> Constitutional Court, Judgment no. 44 of 1960, para. 3.

endeavoured to curb the most controversial aspects of investigative journalism, by insisting on proportionality between the means of fact-gathering and information disclosure chosen by journalists and the social utility of the message they seek to convey.

Wondering whether courts have been successful in striking such a balance, arguably, is asking the wrong question. Courts only deal with individual cases and their rulings set no precedent, as the Italian legal system has no formal *stare decisis* doctrine. Rather, the task of balancing the conflicting interests at stake should, as in every other democratic polity, rest with Italy's elected officials, who, however, also happen to be a frequent target of investigative journalism. Unsurprisingly, the Italian Government has hitherto failed to address the issue in a satisfactory and comprehensive manner. In fact, most of the times Italian lawmakers have decided to give a whirl at regulating investigative journalism, their suggested solution, albeit under different guises, was one and the same: censorship. Luckily, those attempts have been largely unsuccessful, thanks to the prompt reaction of certain academics, judges, journalists, and politicians. It is thus to be hoped that a more mature and informed political debate on the topic of investigative journalism will emerge in the future.

## **17. Lithuania**

Renata Beržanskienė and Monika Depkutė



## 1. Relevant Legislation and Case-law

Below are examples of cases that may help to better understand how the rights and obligations of journalists are interpreted by Lithuanian courts:

a) The Constitutional Court was asked to decide whether the prohibition to advertise pharmaceuticals limits the Constitutional freedom of speech. The Constitutional Court expressed that the list of virtues that Constitution is defending (constitutional system, morality, health, honour, dignity and private life) cannot be understood as exhaustive. In case of necessity, any court might decide that the specific virtue may be basis to limit the freedom of speech and expression.<sup>1086</sup>

b) The Constitutional Court analysed the question whether provision of the Information Law establishing protection of the source on information is in line with the Constitution. The Constitutional Court stated that no one can guarantee the confidentiality of the source of information if there is a need to reveal the source in order to protect constitutional system, and if the confidentiality of the source may cause more damage to society otherwise. Decision to disclose the source can only be made by the court. The Constitutional Court also stated that legislator has a duty to ensure such regulation in case the information is published without a permission damage caused to a person must be compensated. Also the distinction between public and private person must be made.<sup>1087</sup>

c) The Supreme Court examined the case where a party has expressed its thoughts that a member of the Parliament was involved in illegal activity for profit. The Supreme Court ruled that in case of conflict of two virtues, one will always be limited to a wider extent than the other. Thus the duty of the court is to find the right balance and limit one of the virtues in a way that will not cause an extreme damage to the other. The Supreme Court overruled decisions of the courts of lower instances stating that a publication that does not comply with the actual circumstances should not be considered as a distortion by default. To constitute an infringement, the court must find that a person was seeking to damage a reputation of another person and was doing it on purpose. If a person was sure that the information was true and had no intention to harm someone – it is not an infringement.<sup>1088</sup>

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<sup>1086</sup> The Constitutional Court of Lithuania. 29 September 2005, <http://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta246/content>.

<sup>1087</sup> The Constitutional Court of Lithuania. 23 October 2002, <http://lrkt.lt/lt/teismo-aktai/paieska/135/ta311/content>.

<sup>1088</sup> Supreme Court of Lithuania ruling No. 2A-3/2012; 24 April 2012, [http://www2.lat.lt/lat\\_web\\_test/getdocument.aspx?id=d2f05366-ad82-4182-b85d-ecde8844a06c](http://www2.lat.lt/lat_web_test/getdocument.aspx?id=d2f05366-ad82-4182-b85d-ecde8844a06c).

d) The Supreme Court analysed the case where photography and personal information of a celebrity was published in a newspaper. The court was addressed with a claim for breach of honour of an individual. The court ruled that celebrities are public persons and therefore photographing them in public does not require permission.<sup>1089</sup>

e) The Supreme Court examined the case where the journalist has illegally obtained health information of a person, including the cause of death – an overdose of drugs and published it after 3 years term. Supreme Court ruled that such publication was illegal and made distinction between legitimate social interest and curiosity of public. In this case information was published with the aim to attract attention and not with a purpose to inform.<sup>1090</sup>

f) The Supreme Court decided a case where two journalists published information of a car accident. The Supreme Court ruled that although a person was liable for disturbing public order, the journalists were not allowed to investigate the accident by filming people while they were helpless. Such instance cannot be considered as investigative journalism.<sup>1091</sup>

## 2. a) Obtaining of information

Under Lithuanian law, the constitutional freedom of speech and the right to seek, receive and disseminate information<sup>1092</sup>, are considered essential for the proper functioning of a democratic society and can only be limited under certain circumstances. In Lithuania, such limitations must satisfy a two-prong test. The right to collect, obtain and disseminate information may only be restricted (i) by law (ii) where it is necessary to protect the

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<sup>1089</sup> Supreme Court of Lithuania ruling No. 3K-3-41; 13 January 2013, [http://www2.lat.lt/lat\\_web\\_test/3\\_nutartys/senos/nutartis.aspx?id=8729](http://www2.lat.lt/lat_web_test/3_nutartys/senos/nutartis.aspx?id=8729).

<sup>1090</sup> Supreme Court of Lithuania ruling No. 3K-7-2/2008; 2 January 2008, [http://www2.lat.lt/lat\\_web\\_test/getdocument.aspx?id=3d3d9fac-0124-4736-8b1d-facc4703f782](http://www2.lat.lt/lat_web_test/getdocument.aspx?id=3d3d9fac-0124-4736-8b1d-facc4703f782).

<sup>1091</sup> Supreme Court of Lithuania ruling No. 2K-490/2009; 15 December 2009, [http://www2.lat.lt/lat\\_web\\_test/getdocument.aspx?id=437b43b1-5e58-4d70-92f4-c52009e81858](http://www2.lat.lt/lat_web_test/getdocument.aspx?id=437b43b1-5e58-4d70-92f4-c52009e81858).

<sup>1092</sup> Article 25 of the Constitution of the Republic of Lithuania, Official Gazette No. 33-1014, further the “Constitution”; Articles 4 and 5 of the Law on the Provision of Information to the Public of the Republic of Lithuania, Official Gazette No. 71-1706, further the “Information Law”.

constitutional system<sup>1093</sup>, morality<sup>1094</sup>, person's health, honour, dignity and private life<sup>1095</sup>.

Failure to comply with the requirements for collection and use of certain information may result in civil as well as criminal liability. The Code of Ethics of Journalists and Publishers (further the "Code of Ethics"<sup>1096</sup>) also indicates requirement that information shall be gathered in ethical and lawful way<sup>1097</sup>.

For example, under the civil laws, a natural/legal person has the right to compensation of damages incurred due to illegitimate acquisition of proprietary information considered to be commercial (industrial) secret<sup>1098</sup>, irrespective of how such information was obtained, through breach of confidence, security breach, or otherwise. The same is true with respect to violation of privacy rights or honour and dignity<sup>1099</sup> of a private individual<sup>1100</sup>. The right to claim violation of honour and dignity, however, is limited to dissemination of false information. The individual whose rights have been violated has the right to claim both economic and moral damages.

As regards privacy rights as well as honour and dignity of private individual the Information Law establishes a general prohibition to collect and publish

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<sup>1093</sup> Information that is published must meet the criteria of legitimate social interest. It cannot be published in order to satisfy only the curiosity (Supreme Court of Lithuania ruling No. 3K-7-2/2008; 2 January 2008).

<sup>1094</sup> Picture that depicts a dead man, or him/her being alive must be published only if agreement by person while being alive, or his/her family was expressed (Supreme Court of Lithuania ruling No. 3K-7-2/2008; 2 January 2008).

<sup>1095</sup> Article 25 of the Constitution; Article 4.1 of the Information Law.

<sup>1096</sup> Although the Code of Ethics in its essence may be considered as the soft law applicable to journalists, the direct reference to application of the Code of Ethics is specified in Article 3(2) of the Information Law. It provides that producers and disseminators of public information as well as journalists and publishers in their activities shall be governed by the Constitution, laws and treaties of the Republic of Lithuania, also by the principles of humanism, equality, tolerance and respect for every human being; they shall respect freedom of speech, creativity, religion and conscience, and the diversity of opinion, adhere to the norms of professional ethics and the provisions of the Code of Ethics, contribute to the development of democracy and public openness, promote civil society and state progress, enhance the state independence and nurture the state language, national culture and morality.

<sup>1097</sup> Article 8 of the Code of Ethics.

<sup>1098</sup> Article 1.116 of the Civil Code of the Republic of Lithuania, Official Gazette, No. 74-2262, further the "Civil Code".

<sup>1099</sup> Articles 2.24 and 2.25 of the Civil Code.

<sup>1100</sup> Any information considering private life can only be published if the person expresses agreement to publish it (Supreme Court of Lithuania ruling No. 3K-7-2/2008; 2 January 2008).

certain information, without the consent of a person, in order to avoid violation of that person's right to protection of privacy, honour and dignity<sup>1101</sup>. However, the exception to such prohibition applies in cases when information is related to recording of violations of law or where it contributes to revealing violations of law or criminal acts, also where such information is presented at the open court proceedings. Furthermore, information about the private life or personal characteristics of a public figure may be published without such person's consent if the disclosed information is of public importance. Accordingly, certain exceptions to requirements for collection and disclosure of information about an individual are allowed by laws in specific cases where public interests to be informed overrule limitations set to constitutional rights of freedom of speech and the right to seek, receive and disseminate information.

The criminal laws provide a rather elaborate list of limitations related to collection and utilization of information. For example, under the Criminal Code of the Republic of Lithuania<sup>1102</sup> it is prohibited to:

- Intercept private communications<sup>1103</sup>, including unlawful interception, recording or observation of mail or electronic communication, or recording, wiretapping or observation of a person's conversations transmitted by electronic communications networks or otherwise violation of inviolability of personal. Criminal liability applies to both natural and legal persons;
- Collect information about personal private life<sup>1104</sup>. The prohibition applies to any information that might be considered as personal. Liability applies to both natural and legal persons;
- Disclose or use information about private life<sup>1105</sup>. Publication or utilization of information about another person's private life is criminal offense if such information was obtained through service or professional occupation, or in the course of performance of a temporary assignment, or in violation of legal acts. "Utilization" includes both use of information for personal as well as somebody else's interests. Liability applies to both natural and legal persons;

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<sup>1101</sup> Articles 13 and 14 of the Information Law. It is prohibited to film, photograph, make audio and video recordings without a person's consent in the residential premises of private domain of the natural person, during non-public events, etc.

<sup>1102</sup> Criminal Code of the Republic of Lithuania, Official Gazette, No. 89-2741, further the "Criminal Code".

<sup>1103</sup> Article 166 of the Criminal Code.

<sup>1104</sup> Article 167 of the Criminal Code.

<sup>1105</sup> Article 168 of the Criminal Code.

- Unlawfully intercept and use electronic data<sup>1106</sup>. The following acts constitute an offense: observation, recording, interception, acquisition, storage, appropriation, distribution or any other usage of non-public information. The same acts carried out with respect to information of strategic importance for national security or of major importance for state government, the economy or the financial system constitutes a graver crime and is punishable by longer prison sentence. Liability applies to both natural and legal persons;
- Unlawfully possess<sup>1107</sup> and/or disclose<sup>1108</sup> information constituting a state secret. Liability applies only to natural persons;
- Etc.

Violation of the above prohibitions may constitute a criminal offense and a prima facie ground to limit the constitutional freedom of speech and the right to seek, receive and disseminate information. It can be argued that there is no two-prong test and the statutory limitations are, in fact, what the legislator thought necessary to protect the constitutional system, morality, person's health, honour, dignity and private life. On the other hand, the freedom of speech and the right to information derives from the Constitution and any legal provision, including those of the Criminal Code, can be challenged as unconstitutional. We therefore believe that any attempt to limit the freedom of speech or the right to information, even where based on statutory grounds, can further be challenged as against the Constitution because the interest to protect the constitutional system, morality, health, honour, dignity and private life is not overriding.

## 2. b) Boundaries of law enforcement

The boundaries of law enforcement: search of editorial offices, seizure of documents or (press) material (including the printed press), and surveillance of journalistic communication;

The Information Law establishes the right of producer, disseminator of public information, or a journalist to keep the confidentiality of the source of information and not to disclose it.<sup>1109</sup> Accordingly, the use of law enforcement measures that could be taken against journalists in order to reveal the source of information is of the limited scope.

The exception from the general rule guaranteeing protection of the source of information is provided only in the cases where, under a court's decision, it is necessary to disclose the source of information for vitally important or

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<sup>1106</sup> Article 198 of the Criminal Code.

<sup>1107</sup> Article 124 of the Criminal Code.

<sup>1108</sup> Article 125 of the Criminal Code.

<sup>1109</sup> Article 8(1) of the Information Law.

otherwise significant public interests, also in order to ensure protection of persons' constitutional rights and freedoms, and the administration of justice. Furthermore, there should be no possibility to reveal the source of information by other means or such means should have been already exhausted. Accordingly, disclosure of the source of information of the journalist can be justified if both of the conditions are satisfied: (i) there is fundamentally important public interest and (ii) other possible means to gather required information have been exhausted.

To reveal the source of information, the court can adopt order authorising the following enforcement measures: search and seizure in the workplace, residential premises, auxiliary facilities, and vehicles of public information producers, disseminators or journalists. It is required that an authorised representative of journalists' and publishers' organizations or a person invited by the owner or user of such premises or vehicle must be present during the search or seizure. The procedure of the application of these enforcement measures is regulated by the Criminal Procedure Code of the Republic of Lithuania<sup>1110, 1111</sup>

The Criminal Procedure Code provides that compliance with the guaranties of protection of source of information must be ensured, and the participation of the abovementioned third persons is always obligatory<sup>1112</sup>. The person requested to disclose the source of information has the procedural right not to be questioned as a witness about the details that constitute the protected source of information, unless such person agrees to testify or there is a court's decision to disclose the source of information<sup>1113</sup>.

The decision to disclose the source of information can be taken by the pre-trial judge based on the request of the prosecutor or by a judge if the case is already being examined in court<sup>1114</sup>. The Criminal Procedure Code also establishes requirements for the content of court's decision. For instance, it is necessary to identify particular data and arguments proving the necessity to secure vitally important or otherwise significant public interests. It means that decision to disclose the source of information must be sufficiently substantiated and cannot be based on merely formal grounds.

The specific regulation of the Criminal Procedure Code regarding enforcement measures that may be taken in case there is a necessity to

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<sup>1110</sup> Criminal Procedure Code of the Republic of Lithuania. Official Gazette, No. 37-1341, further the "Criminal Procedure Code".

<sup>1111</sup> Article 8(2) and 8(3) of the Information Law.

<sup>1112</sup> Article 150<sup>1</sup> of the Criminal Procedure Code.

<sup>1113</sup> Article 80<sup>1</sup>(5) of the Criminal Procedure Code.

<sup>1114</sup> Article 149 of the Criminal Procedure Code.

disclose the source of information was introduced only in July 2014. The amendments of the Criminal Procedure Code were aimed at ensuring more protection for journalistic freedom of expression, which is reflected by the guarantee of protection of the source of information as a fundamental value of democratic society.

The amendments to the regulation were influenced by one particular case involving highly criticized actions of the Special Investigative Service. The officers took measures to disclose the person who leaked a secret service report containing information potentially damaging the reputation of the President of Lithuania. In this case law enforcement measures were taken against reporters of Baltic News Service (further the “BNS”), the largest pan-Baltic news agency of Lithuania, in 2013. Lithuanian court ordered the BNS to reveal its source of information of the secret service report. The news agency refused to comply and defended the right to keep its source anonymous. The Special Investigative Service searched the BNS editor’s house, interrogated six reporters and seized several computers from the BNS premises. On 17 July 2014 Vilnius Regional Court as a higher instance court decided that the order to reveal the source of information and the permit that allowed the search of the journalist’s residential premises were illegal and disproportionate.<sup>1115</sup>

Except from the law enforcement measures that may be used in case there is necessity to reveal the source of information as indicated above, there are no legal acts of Lithuania providing any guaranties related to surveillance of journalistic communication. Accordingly, general requirements for surveillance apply – it must be authorized by the court under the general regulation applicable for the surveillance of any person.

### **3. Reporting about on-going investigations**

Limitations on reporting about on-going investigation as well as sanctions imposed for related violations are quite strict in Lithuania due to high level of protection guaranteed for the honour and dignity of a person.

The Information Law provides general prohibition not to disseminate information, which violates the presumption of innocence and which impedes the impartiality of judicial authorities<sup>1116</sup>. More detailed limitations are established by the Code of Ethics.

Under the Code of Ethics journalist are required to uphold the presumption

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<sup>1115</sup> More information at: [http://www.rebaltica.lv/en/investigations/press\\_intimidation\\_in\\_the\\_baltic\\_states/a/994/to\\_reveal\\_or\\_not\\_to\\_reveal.html](http://www.rebaltica.lv/en/investigations/press_intimidation_in_the_baltic_states/a/994/to_reveal_or_not_to_reveal.html).

<sup>1116</sup> Article 19 of the Law on Information.

of innocence. Groundless, unverified accusations not supported by facts may not be published. An individual may be only accused exclusively on the basis of an effective judgment or ruling of a court<sup>1117</sup>.

It is prohibited to publish personal data of a suspect if the identity of the suspect may be established from such data. Also, the data on pre-trial investigation may not be published unless the publishing of such information is in the public interest<sup>1118</sup>. If needed, the prosecutor may provide warning to persons participating in the pre-trial investigation of obligation not to publish any of the information received throughout the pre-trial investigation. After signing of such notice a person may be held liable under the Criminal Code, which provides that the one who published information about the on-going investigation without an authorization of the prosecutor is sanctioned with community services, fine, restriction of liberty or arrest.<sup>1119</sup> Accordingly, only the person who signed the notice regarding confidentiality of pre-trial investigation data is subject to such restriction; however, this does not apply to journalists, who are subject to general requirement not to publish such information, unless there is a public interest.

If the name of a person suspected of having committed a crime, the accused or the offender is published because of public interest; and the crime is not proven afterwards, the public must be immediately informed of the innocence of this person<sup>1120</sup>.

The Code of Ethics also establishes that old crimes committed by an individual who has served his/her sentence should not be recalled. It means that public interest must be based on the relevance of the events and not only on the curiosity of the public. This rule does not apply if such individual continues his/her work that is related to the criminal acts committed by him/her in past or aspires to a high position in society.<sup>1121</sup>

Although the provisions of laws as well as requirements of the Code of Ethics are quite strict as regards restrictions on information about on-going investigations that may be published, in practice, Lithuanian media usually provides quite broad scope of information related to on-going pre-trial investigations, including accusations that may breach the presumption of innocence of a person. One of the recent examples may be the case of two Lithuanians suspected of a murder of a girl in Sweden. The Swedish and the Lithuanian media approached the case significantly different. Swedish media provided limited information about the case avoiding any

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<sup>1117</sup> Articles 37 and 38 of the Code of Ethics.

<sup>1118</sup> Articles 39 of the Code of Ethics.

<sup>1119</sup> Articles 177 and 247 of the Criminal Code.

<sup>1120</sup> Article 40 of the Code of Ethics.

<sup>1121</sup> Article 45 of the Code of Ethics.



references to the nationality of the suspects; whereas Lithuanian journalists disclosed even the names of the suspected persons, although afterwards one of them was released as innocent of crime.

#### **4. Due diligence guidelines for journalists**

The first step in the analysis of how to present the “objective truth” is distinguishing the “news” and “opinion”. The Code of Ethics requires journalists to ensure that news and opinions are clearly identified as such. Although opinion should be based on facts or substantiated arguments, it is usually subjective; therefore, it is not subject to the criteria of truth and accuracy. Obligation of journalist is to ensure that opinion is presented fairly and ethically, without any distortion of facts or data.<sup>1122</sup>

Information Law defines “opinion” as a view, understanding, perception, notion, thoughts or comments on ideas of general nature, judgements of facts and data, phenomena or events, conclusions or remarks regarding the news related to real events published in the media..<sup>1123</sup> The Supreme Court of Lithuania has also stressed the importance of the distinction between “news” and “opinion” in a case related to infringements of honour and dignity of a person, where different criteria apply to information published as objective “news” or as subjective “opinion”.<sup>1124</sup>

Requirements of the Rules of Resolution 1003 (1993) on Ethics of Journalism adopted by the Parliamentary Assembly of the Council of Europe are also applicable for the journalists with respect to presentation of the “objective truth”. It also provides basic principle that a clear distinction must be drawn between news and opinions, making it impossible to confuse them. News broadcasting should be based on truthfulness, ensured by the appropriate means of verification and proof, and impartiality in presentation, description and narration. Rumour must not be confused with news. News headlines and summaries must reflect as closely as possible the substance of the facts and data presented.

Information Law requires producers and disseminators of public information to present in the media as many opinions that are independent of each other as possible, so as to respect the diversity of opinion.<sup>1125</sup> Both the Code of Ethics as well as the Law on Information requires that the journalists and public information organizers assess their information sources in a critical way, scrutinize facts with due diligence on the basis of several sources. If verification of the information source is not possible, this

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<sup>1122</sup> Article 4 of the Code of Ethics.

<sup>1123</sup> Article 2(36) of the Information Law.

<sup>1124</sup> Supreme Court of Lithuania ruling No. 3K-3-1-219/2015; 27 January 2015.

<sup>1125</sup> Article 16 of the Information Law.

should be indicated in the published information.<sup>1126</sup> Accordingly, if the journalist has put reasonable and fair efforts to verify the source of information, non-essential inaccuracies should not be held as violating the abovementioned requirements.<sup>1127</sup>

While requesting information, the journalist has no right to use pressure or offer any compensation to the source of information in exchange for information, or to abuse his/her public status and professional opportunities. Before publishing the information obtained from an individual under stress, shock or in a helpless position, the journalist and public information organizer must ensure that publishing of such information will not violate the rights of such individual and make efforts to foresee any likely negative impact on him/her.<sup>1128</sup>

## 5. Liability in the editorial chain

The Information Law provides that “editorial responsibility” falls on the producer and/or disseminator of public information for the exercise of control over the production of public information, preparation and dissemination of such information<sup>1129</sup>. Producers and/or disseminators of public information include editorial offices, managers of the information society media, independent producers, journalists or any other persons producing public information or submitting it for dissemination<sup>1130</sup>. Producer and/or disseminator of public information is held responsible for violation of the regulation applicable to production of public information<sup>1131</sup>. Also, Information Law provides that for the content of the media is responsible the manager of the media<sup>1132</sup>.

Accordingly, liability under the “editorial responsibility” is asserted to the person who is free to decide on and control the information, which is being published, i.e. the journalistic product. This means that for various types of infringements and due to various relevant circumstances, liability (civil, administrative or criminal) may fall for different persons (legal or natural) depending on which of these persons hold control on the publishing of information.<sup>1133</sup> Therefore, the journalist may also be held liable if he

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<sup>1126</sup> Article 6 of the Code of Ethics and Article 41 of the Law on Information.

<sup>1127</sup> A.Šindeikis. Freedom of Expression v. Honour and Dignity: Is the Practice by Lithuania’s Courts Constitutional?, *Jurisprudencija*, 2010, 2(120), p. 121–157.

<sup>1128</sup> Articles 11 and 12 of the Code of Ethics.

<sup>1129</sup> Article 2(53) of the Information Law.

<sup>1130</sup> Article 2(75) of the Information Law.

<sup>1131</sup> Article 51(1) of Information Law.

<sup>1132</sup> Article 51(2) of Information Law.

<sup>1133</sup> Annual Report of Inspector of Journalist Ethics (2010). Available at:

publishes information solely under his discretions and control, i.e. there is no other responsible person at the higher level of “editorial chain” (for e.g., bloggers).

There are cases, however, in which “editorial responsibility” is not applicable and the first person to publish the information is responsible for it. Namely, where information is<sup>1134</sup>:

- provided in official or publicly available documents of state and municipal institutions and agencies, political parties, trade unions and associations or other persons;
- publicly stated in open meetings, sessions, press conferences, demonstrations and other events, and the producer of public information has not distorted the statements made. In this case, all responsibility falls on the organisers of the aforementioned events and persons who have made the information public;
- published earlier in other media if the information has not been refuted in the media where it has been published;
- published by participants of live programmes and internet conferences, viewers of interactive television or users of information society media who are not related to the producer of public information;
- published in a special election campaign programme which has not been produced by the producer of public information;
- presented in non-anonymous advertising announcements;
- presented in the form of an opinion, commentary or evaluation.

Damages caused to a person for the related infringements are awarded by the procedure established in the Civil Code.

## **6. Conclusion and perspectives**

To conclude it may be stated that within more than two decades of independence, Lithuania has consistently continued to implement democratic principles of freedom of expression as well as to set legal limitations necessary for protection of the constitutional system, morality, person’s health, honour, dignity and private life.

Currently, investigative journalism has only started to develop and to fulfil the so-called “watchdog” function of journalism. Accordingly, the presence of high quality investigative journalism in Lithuania is relatively low and the

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<http://www3.lrs.lt/docs2/HKZRVEXM.PDF>.

<sup>1134</sup> Article 54 of Information Law.

related practice as well as interpretation and application of legal requirements are not completely settled yet.

There are a number of open questions that are still unclear. Potential violations can be identified both from the side of the journalists as well as the state. The journalists do not always present the “objective truth” and comply with the obligation to uphold presumption of innocence or collection of information within legal means. On the other hand, actions of the state authorities, for instance, in application of law enforcement measures are also not always compliant with the constitutional and democratic rights of freedom of expression.

However, the legal regulation as well as the case law of the Constitutional Court and the Supreme Court of Lithuania have been continuously developing towards the higher compliance with the main principles of freedom of speech and the right to seek, receive and disseminate information, as well as related limitations, entrenched in the European Convention on Human Rights and related jurisprudence of the European Court of Human Rights.

Key points are:

- collection or utilisation of illegally/improperly obtained information may result in civil as well as criminal liability;
- law enforcement means that may be taken against journalists in order to reveal the source of information are limited in scope; significant amendments to Criminal Procedure Code were adopted in 2014;
- it is important to distinguish “news” and “opinion”, which are subject to different objectivity criteria. Guidelines on requirements of variety of sources or their evaluation when seeking for “objective truth” derive both from laws and soft law;
- liability to different persons within the “editorial chain” of a journalistic product is asserted by principle of “editorial responsibility”. It means that liability falls on the producer and/or disseminator that exercises final control on publishing of information. Only in specific cases “editorial responsibility” is not applicable and the first person to publish the information is held liable.



## **18. Luxembourg**

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\*The authors thank Julia Hamm for assistance in preparation of this report.

## 1. Relevant Legislation and Case-law

- Code civil en vigueur dans le Grand-Duché de Luxembourg, found on [http://www.legilux.public.lu/leg/textescoordonnes/codes/code\\_civil/CodeCivil\\_PageAccueil.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/code_civil/CodeCivil_PageAccueil.pdf). (hereinafter 'Civil Code')
- Code de déontologie, Mémorial A - N°69, 30 avril 2010, p 1339. <http://www.legilux.public.lu/leg/a/archives/2010/0069/a069.pdf> (hereinafter 'Deontology Code').
- Code d'instruction criminelle en vigueur dans le Grand-Duché de Luxembourg, found on [http://www.legilux.public.lu/leg/textescoordonnes/codes/code\\_instruction\\_criminelle/cic.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/code_instruction_criminelle/cic.pdf). (hereinafter 'Code of Criminal Procedure').
- Code pénal en vigueur dans le Grand-Duché du Luxembourg, found on [http://www.legilux.public.lu/leg/textescoordonnes/codes/code\\_penal/codepenal.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/code_penal/codepenal.pdf) (hereinafter 'Criminal Code')
- Constitution du Grand-Duché de Luxembourg, coordinated text updated 1 August 2013, available at [http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/constitution\\_gdl.pdf](http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/constitution_gdl.pdf), Unofficial translation available at [https://www.constituteproject.org/constitution/Luxembourg\\_2009?lang=en](https://www.constituteproject.org/constitution/Luxembourg_2009?lang=en) accessed 20 June 2015. (hereinafter 'Constitution of Luxembourg')
- Loi du 11 août 1982 concernant la protection de la vie privée, Mémorial A – N°86, p 1840. <http://www.legilux.public.lu/leg/a/archives/1982/0086/a086.pdf#page=2> (hereinafter 'Law of 11 August 1982 on the Protection of Private Life').
- Loi du 10 août 1991 sur la profession d'avocat, Mémorial A – N°58, p 1110. <http://www.legilux.public.lu/leg/a/archives/1991/0058/a058.pdf#page=2>. (hereinafter 'Lawyer Act of 10 August 1991').
- Loi du 10 août 1992 relative à la protection de la jeunesse, Mémorial A – N°70, p 2196. <http://www.legilux.public.lu/leg/a/archives/1992/0070/a070.pdf#page=2>. (hereinafter 'Law of 10 August 1992 on Youth Protection').
- Loi du 18 avril 2001 sur les droits d'auteurs, les droits voisins et les bases de données, Mémorial A – N°50, p 1042. <http://www.legilux.public.lu/leg/a/archives/2001/0050/a050.pdf#page=2>. (hereinafter 'Law of 18 April on Copyright, Neighbouring Rights and Databases')

- Loi du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel, Mémorial A – N°91, p 1836.  
<http://www.legilux.public.lu/leg/a/archives/2002/0091/a091.pdf#page=2>, unofficial translation to be found at  
<http://www.cnpd.public.lu/fr/legislation/droit-lux/index.html>  
 (hereinafter 'Law of 2 August 2002 on the Protection of Individuals regarding the Processing of Personal Data').
- Loi du 15 juin 2004 concernant l'organisation du Service de Renseignement de l'État, Mémorial A – N°113, p 1738,  
<http://www.legilux.public.lu/leg/a/archives/2004/0113/a113.pdf>.  
 (hereinafter 'Law of 15 June 2004 on the Organisation of the State Intelligence Service').
- Règlement grand-ducal du 9 janvier 1961 relatif aux trois recueils du Mémorial, Mémorial A – N°1, p 1,  
<http://www.legilux.public.lu/leg/a/archives/1961/0001/a001.pdf#page=1> (hereinafter 'Grand-Ducal regulation of 9 January 1961 concerning the three parts of the Memorial').
- Règlement grand-ducal du 15 janvier 2001 sur la consultation des fonds d'archives aux Archives Nationales, Mémorial A – N°11, p 612,  
<http://www.legilux.public.lu/leg/a/archives/2001/0011/a011.pdf#page=6>. (hereinafter Grand-Ducal Regulation of 15 January 2001 on the Consultation of the National Archive')
- Texte coordonné du 30 avril 2010 de la loi du 8 juin 2004 sur la liberté d'expression dans les médias, Mémorial A – N°69, 30 Avril 2010, p 1325, found on  
<http://www.legilux.public.lu/leg/a/archives/2010/0069/a069.pdf>,  
 unofficial translation to be found at  
[http://www.wen.uni.lu/recherche/fdef/droit\\_des\\_medias/texts](http://www.wen.uni.lu/recherche/fdef/droit_des_medias/texts)  
 (hereinafter 'Law of 8 June 2004 on the Freedom of Expression in the Media').

## 2. a) Obtaining of information

Freedom of expression and freedom of the press are enshrined in Article 24 of the Constitution of Luxembourg.<sup>1135</sup> This fundamental freedom is however not an absolute freedom, it applies – as the Constitution puts it – “*save the repression of offenses committed on the occasion of the exercise*

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<sup>1135</sup> See on the constitutional basis Gaston Vogel, *Le droit de la presse* (Promoculture-Larcier 2012) 11.



of these freedoms". The freedom of expression of citizens is more concretely limited by articles 1382 and 1383 of the Civil Code, which provide for the obligation to repair all harm caused to someone else through wrongful conduct, carelessness ('imprudence') or negligence.<sup>1136</sup> The journalist is not exempted from the application of the principles of fault liability expressed in articles 1382 and 1383 of the Civil Code; there are no particular limits to this liability with regards to matters of the press.<sup>1137</sup> This means that a journalist is held to the same standard of responsible behaviour as any other citizen. A journalist, having committed a fault in the sense of Articles 1382 and 1383 of the Civil Code whilst exercising his freedom of expression, can therefore be held liable for this fault. Offenses committed on the occasion of the exercise of the freedom of the press are thus not excused by the law, since under the fault liability provisions of Articles 1382 and 1383, even a light fault (*'la faute même la plus légère'*) will lead to liability.<sup>1138</sup> This principle was incorporated in Article 21 of the Law of 8 June 2004 on the Freedom of Expression in the Media, according to which

*"The collaborator if known, or otherwise the publisher, or otherwise the distributor shall be liable in civil or criminal law for all violations committed by means of any media."*<sup>1139</sup>

Related to this is the principle of 'irresponsibility of the source' (*'irresponsabilité de principe de la source'*) which was developed through jurisprudence, as a corollary of the principle of the protection of sources: in the event of incompatibility of the published information with the presumption of innocence or with the right to honour and reputation of the person in question, it is for the journalist to assert liability for the information that he was made aware of by his source.<sup>1140</sup>

Article 6 (1) of the Law of 8 June 2004 on the Freedom of Expression in the Media specifies that in the freedom of expression in the meaning of Article 1 of this law, "*the right to receive and seek information, to decide how to communicate it to the public using a freely selected form and method and to comment and criticise it*" are included.<sup>1141</sup>

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<sup>1136</sup> Civil code, art 1382 & art 1383 ; Gaston Vogel, *Le droit de la presse* (Promoculture-Larcier 2012) 87.

<sup>1137</sup> *Gaston Vogel, Le droit de la presse* (Promoculture-Larcier 2012) 12 ; see also Cass., 15.07.1993, rôle n° PAS. L. T. 29. 225; Cass. 20.03.1997, rôle n° PAS. L. T. 30. 387 ; Cass. 19.06.2003, arrêt n°35/03.

<sup>1138</sup> Cass. 19.06.2003, arrêt n°35/03.

<sup>1139</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 21.

<sup>1140</sup> *Gaston Vogel, Le droit de la presse* (Promoculture-Larcier 2012) 38 ; see also C.A. Lux., 09.01.2008, rôle n°32292.

<sup>1141</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 6(1).

This provision originates from the right of every citizen to information.<sup>1142</sup> This is not an absolute right, it is a 'public freedom' which is intended to cater to the informational needs of a democratic society, and which cannot be invoked if its only goal is to challenge the right to intellectual property (Article 9 of the Law of 8 June 2004 on the Freedom of Expression in the Media) or the protection of private life (Article 14 of the Law of 8 June 2004 on the Freedom of Expression in the Media).<sup>1143</sup> The right to information is not a superior right and knows many legal constraints, such as those contained in the Law of 11 August 1982 on the Protection of Private Life, the Law of 18 April 2001 on Copyright, Neighbouring Rights and Databases, and the Law of 2 August 2002 on the Protection of Individuals regarding the Processing of Personal Data. Journalists also have to respect the right to honour and reputation of persons when publishing certain information (Article 16 of the Law of 8 June 2004 on the Freedom of Expression in the Media).

(1) The use of information obtained through breach of professional confidence

The limits to investigative journalism in Luxembourg have recently been demonstrated when the Luxembourgish Public Prosecutor's Office ("*Le Parquet de Luxembourg*") charged a French journalist in the "*Luxleaks*" case with being a co-perpetrator, or else accomplice, to the infractions perpetrated by ex-employees of a consultancy firm.<sup>1144</sup> In doing so, the Luxembourgish Public Prosecutor's office did not wish to challenge the freedom of expression of the press and the role of the press in informing citizens on matters of general interest: the journalist was not charged for having published the content of the documents which were removed from the consultancy firm, but was charged for the active role he played in perpetrating the infractions, that is the illegal removal of these documents.<sup>1145</sup> The Public Prosecutor's Office held that the role of the journalist was not limited to receiving information offered to him by the culprit, but was a more active role, the journalist directed the culprit in

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<sup>1142</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 45.

<sup>1143</sup> *Nathalie Mallet-Poujol*, *Le double langage du droit à l'information* (Daloz 2002) 2427, cité dans *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 45.

<sup>1144</sup> 'Inculpation d'un journaliste français' (Parquet de Luxembourg, 23 Avril 2015), <http://www.justice.public.lu/fr/actualites/2015/04/inculpation-journaliste-francais/index.html>, accessed 20/06/2015.

<sup>1145</sup> 'Prise de position du Parquet de Luxembourg dans le cadre de l'inculpation d'un journaliste français' (Parquet de Luxembourg, 27 Avril 2015), <http://www.justice.public.lu/fr/actualites/2015/04/prise-position-parquet-inculpation-journaliste/index.html>, accessed 20/06/2015.

searching for those documents that were of particular interest to him.<sup>1146</sup> From this it can be concluded that it was not the publication in itself of the illegally obtained information, but rather the active contribution of the journalist to the perpetration of infractions in order to obtain this information, which is contrary to the law and incompatible with the lawful exercise of the freedom of expression.

Despite the Public Prosecutor's Office's wish not to challenge the freedom of expression and the role of the press in the *Luxleaks* case, the actions of a journalist disclosing information obtained through breach of professional confidence, which is a punishable offense under Article 458 of the Criminal Code, can nevertheless fall within the ambit of the provisions of the Criminal Code concerning handling according to its Article 505. In two orders of 9 December 1998 the District Court (*'Tribunal d'Arrondissement'*) held that Article 505 of the Criminal Code on handling could be applicable to anyone, including journalists, "*who, by whatever means, knowingly benefited from the proceeds of a serious crime or other major offence*", and extends to "*intangible property, such as claims, but also manufacturing secrets or material covered by professional privilege*"<sup>1147</sup>, on penalty of imprisonment from 15 days to 5 years and a fine from 251 to 5 000 euros.

#### (2) The use of covert means for obtaining information

Further, the Law of 8 June 2004 on the Freedom of Expression in the Media contains no specific provisions concerning the use of covert means for obtaining information by journalists. It does however empower the Press Council to emit recommendations and directives regarding matters of journalistic work in its Article 23 (3). Concerning the use of covert means, the Press Council thus emphasised that in principle journalists must reveal their identity when conducting investigations and must not use such unconventional means, but that this is not an absolute prohibition: a journalist may nonetheless have recourse to covert means when this is required by the public interest.<sup>1148</sup>

#### (3) The use of State secrets

Concerning the publication of State secrets by the press, the Criminal Code provides in its Article 119 that anyone who knowingly reproduces, publishes or divulges objects, plans, writings, documents or information of

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<sup>1146</sup> 'Prise de position du Parquet de Luxembourg dans le cadre de l'inculpation d'un journaliste français' (Parquet de Luxembourg, 27 Avril 2015), <http://www.justice.public.lu/fr/actualites/2015/04/prise-position-parquet-inculpation-journaliste/index.html> accessed 20/06/2015.

<sup>1147</sup> Roemen and Schmit v Luxembourg App no 51772/99 (ECtHR, 25 February 2003) para 20.

<sup>1148</sup> Deontology Code, ad art 7(c).

which the secrecy is in the interest of the defense of the territory or the external security of the Grand-Duchy of Luxembourg is subject to imprisonment of a duration from 6 months to 5 years and the payment of a fine ranging from 251 to 125 000 euros. Although this provision does not specifically target the press, there is no apparent reason to exclude the press from its scope of application since the Law of 8 June 2004 on the Freedom of Expression in the Media contains no specific provisions concerning the use of state secrets.

Similarly, Article 16 of the Law of 15 June 2004 on the Organisation of the State Intelligence Service provides that any person having knowingly communicated intelligence or secrets relating to the functioning and activities of the State Intelligence Service to persons unqualified to have knowledge of such information, as well as the persons having gained knowledge of such information without being qualified to do so, are subject to a penalty of imprisonment of a duration of 6 months to 5 years and the payment of a fine ranging from 251 to 125 000 euros.

Article 2 of the Law of 15 June 2004 on the Organisation of the State Intelligence Service further delimits what falls under the definition of 'intelligence or secrets relating to the functioning and activities of the State Intelligence Service' by providing that the Intelligence Service gathers intelligence concerning any activity endangering, or with the potential of endangering, the security of Luxembourg, of its allies, or of international organisations with their seat or with operations on the territory of the Grand-Duchy of Luxembourg, its international relations or its scientific and economic well-being.<sup>1149</sup> This includes any activity on or outside of Luxembourgish soil relating to espionage, any interference by another State with Luxembourgish internal affairs, terrorism, the proliferation of non-conventional weapons systems and technology, and related organised crime.<sup>1150</sup> Also included within this definition is any activity threatening national territorial integrity, sovereignty and independence, security and functioning of the State and of the rule of law, and threatening the safety of its population.<sup>1151</sup> Consequently, the publication of state secrets by journalists of which it is in the interest of the defense of the territory or the external safety of the Grand-Duchy of Luxembourg that they be kept secret, as well as the mere knowledge, let alone the publication of state intelligence relating to a wide spectrum of matters ranging from

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<sup>1149</sup> Law of 15 June 2004 on the Organisation of the State Intelligence Service, art 2(1).

<sup>1150</sup> Law of 15 June 2004 on the Organisation of the State Intelligence Service, art 2(2).

<sup>1151</sup> Law of 15 June 2004 on the Organisation of the State Intelligence Service, art 2(2).

national territorial integrity and sovereignty to terrorism, non-conventional weapons trade and organised crime, is criminally punishable.

#### (4) Access to information

Luxembourgish law so far provides no general right of access to information as such<sup>1152</sup>, the legislator however emphasised in its legislative proposal of 2013 concerning the granting of such a general right of access to administrative documents, that Luxembourgish administrations and services today already communicate their documents in an informal manner.<sup>1153</sup> Further, based on the Law of 1 December 1978 regulating the Non-Contentious Administrative Procedure<sup>1154</sup> citizens can be involved in the administrative decision-making process and can obtain access to documents and information, under the condition that the citizen can show that he is individually affected by the administrative decision at hand.<sup>1155</sup> Access to administrative information in Luxembourg can be described as a restricted access limited to specific domains and sectors (such as urban planning<sup>1156</sup>), subject to the condition of being individually affected, and with the primary aim of protecting the rights of the citizen in question, rather than offering a general right to information.<sup>1157</sup>

After the negative opinions of several parliamentary advisory bodies, the legislative proposal concerning the general right to access to administrative information never materialised into law and was officially retracted on May 5<sup>th</sup> 2015.<sup>1158</sup> Criticism mostly concerned the lack of coordination and coherence of the legislative proposal with the existing

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<sup>1152</sup> Projet de loi relative à l'accès des citoyens aux documents détenus par l'administration, N° 6540, session ordinaire 2012-2013, Exposé des motifs, 2.

<sup>1153</sup> Projet de loi relative à l'accès des citoyens aux documents détenus par l'administration, N° 6540, session ordinaire 2012-2013, Exposé des motifs, 2.

<sup>1154</sup> Loi du 1 décembre 1978 réglementant la procédure administrative non contentieuse, Mémorial A – N°87, p 2486. <http://www.legilux.public.lu/leg/a/archives/1978/0087/a087.pdf>.

<sup>1155</sup> Projet de loi relative à l'accès des citoyens aux documents détenus par l'administration, N° 6540, session ordinaire 2012-2013, Exposé des motifs, 2.

<sup>1156</sup> Projet de loi relative à l'accès des citoyens aux documents détenus par l'administration, N° 6540, session ordinaire 2012-2013, Exposé des motifs, 2-3.

<sup>1157</sup> Projet de loi relative à l'accès des citoyens aux documents détenus par l'administration, N° 6540, session ordinaire 2012-2013, Exposé des motifs, 3.

<sup>1158</sup> Arrêté Grand-Ducal de retrait du rôle des affaires de la Chambre des Députés (5.5.2015), Document 6540/05, [http://www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/132/495/143914.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/132/495/143914.pdf).

laws concerning access to information in the field of the non-contentious administrative procedure and the various sectoral access to information laws such as in the field of urban planning, which would leave the right of access to administrative documents fragmented.<sup>1159</sup> All state documents of which the access was unrestricted may however be consulted in the National Archives as soon as they have been deposited there. For state documents subject to state secret however, such as those affecting national security, a delay of 50 years is applicable before their release to the public.<sup>1160</sup>

## 2. b) Boundaries of law enforcement

### *The right to the protection of sources*

According to Article 7 (1) of the Law of 8 June 2004 on the Freedom of Expression in the Media the journalist during administrative or legal proceedings has the right to refuse to reveal sources and the content of obtained or collected information to the authorities. A judgement by the Criminal Chamber of the Luxembourg District Court (*Tribunal d'Arrondissement à Luxembourg*) clarifies that this right does not go as far as permitting journalists to refuse to give a testimony before a Court when he has been summoned to appear as a witness.<sup>1161</sup>

The right to the protection of sources is an important limit to the power of public authorities (police, judicial or administrative authorities). According to Article 7 (3) of the aforementioned law public authorities must refrain from giving orders or undertaking measures, which have the object or effect of circumventing this right. In this respect the law refers more specifically to “*searches of, or confiscations from, the workplace or home of the professional journalist*”.<sup>1162</sup> But measures for intercepting journalistic communication and correspondence and surveillance measures are also

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<sup>1159</sup> Avis de la Chambre des Métiers (28.8.2013), Document 6540/04, p 2, [http://www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/153/202/125021.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/153/202/125021.pdf); Avis du Conseil d'État, 16 décembre 2011, No 45.164, p 3, [http://www.conseil-etat.public.lu/content/dam/conseil\\_etat/fr/avis/2011/12/45\\_164/45164.pdf](http://www.conseil-etat.public.lu/content/dam/conseil_etat/fr/avis/2011/12/45_164/45164.pdf).

<sup>1160</sup> Règlement grand-ducal du 15 janvier 2001 sur la consultation des fonds d'archives aux Archives Nationales, Mémorial A – N°11, p 612, <http://www.legilux.public.lu/leg/a/archives/2001/0011/a011.pdf#page=6>, art 5.

<sup>1161</sup> T.A. Lux. 09.12.2013, rôle n° 55/2013 ; see also C.A. Lux. 08.02.1915, rôle n° PAS. L. 9. 576 ; Cass., 21.03.1957, rôle n° PAS. L. 17.43.

<sup>1162</sup> Unofficial translation of the Law of 8 June 2004 on the Freedom of Expression in the Media to be found on [http://www.en.uni.lu/recherche/fdef/droit\\_des\\_medias/texts](http://www.en.uni.lu/recherche/fdef/droit_des_medias/texts).

included.<sup>1163</sup> Article 7 (3) thereby follows the jurisprudence of the European Court of Human Rights (ECtHR) in the *Roemen and Schmit v Luxembourg* case according to which searches and confiscations from the workplace or home of the journalist are more severe violations of the right to confidentiality of journalistic sources because of the element of surprise involved in these practices.<sup>1164</sup> A Court order for the disclosure of the identity of the source would constitute a less severe violation.<sup>1165</sup> This jurisprudence was inspired by a Recommendation of the Committee of Ministers of the Council of Europe on 8 March 2000 (R.2000-7).<sup>1166</sup> The *Roemen and Schmit v Luxembourg* case concerned searches and confiscations conducted by the authorities at the firm of the lawyer of a journalist with the aim of revealing the source of a leak of information.<sup>1167</sup> From this case the principle arises that the freedom of the press in the meaning of the ECHR must be interpreted as awarding lawyers an extension of the protection of sources awarded to journalists, since the journalist's lawyer will also know the identity of the journalist's sources.<sup>1168</sup> The protection of sources would thereby also fall within the scope of protection of attorney-client privilege, guaranteed under Article 35 (3) of the Lawyer Act of 10 August 1991, since this protects all communications between a lawyer and his client. The protection of sources awarded to journalists in Article 7 (1) of the Law of 8 June 2004 on the Freedom of Expression in the Media has therefore been extended in Article 7 (2) to

*“other persons who have obtained information identifying a source through the collection, editing or dissemination of said information during their professional dealings with a professional journalist”.*<sup>1169</sup>

The jurisprudence of the ECtHR in the *Saint-Paul SA v Luxembourg* case helps to delimit the scope of legally acceptable searches and confiscations conducted by the authorities. From this case arises the principle that the search order must contain a strict mandate for police investigators, limited to the precise aim of the search, which in the case at hand was the revealing of the identity of the journalist, and must not give a large mandate which would allow police investigators to circumvent the right to the protection of sources and allow them to also search for journalistic

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<sup>1163</sup> Pol Urbany, 'Vive les informateurs des médias! La protection des sources des journalistes' (2011) 310 Forum 20, 22.

<sup>1164</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 51.

<sup>1165</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 51.

<sup>1166</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 51.

<sup>1167</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 52.

<sup>1168</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 52.

<sup>1169</sup> See further on this *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 53.

sources.<sup>1170</sup> A further guarantee of the right to the protection of sources during search and seizure measures by the authorities is the presence of the President or Vice-President of the Luxembourgish Press Council (*Conseil de Presse*), who is assigned to ensure that the right to protection of sources of journalists is upheld.<sup>1171</sup>

Article 7 (4) emphasises that information identifying a source can only be obtained legally by the authorities through measures which did not have the aim or purpose of discovering the identity of the source. But even if obtained legally, this information cannot be used as proof in subsequent judicial proceedings. Article 8 of the Law of 8 June 2004 on the Freedom of Expression in the Media however contains exceptions in which a journalist cannot rely on his right not to reveal his sources when confronted with the authorities: police, judicial or administrative authorities can order measures with the aim or effect of obtaining information identifying sources, can proceed to searches or confiscations in the workplace or home of the journalist in question<sup>1172</sup> within the framework of the

*“prevention, pursuit or repression of crimes against persons, drugs trafficking, money laundering, terrorism or attacks on the security of the State”.*

This is a limitative list of cases in which the right to the protection of sources does not apply, since due to their severity, prosecuting these infractions is considered to have a superior interest to the freedom of the press and the protection of sources.<sup>1173</sup>

From the controversy surrounding the attitude towards press freedom sparked by the remark of the president of the political party CSV, Michel Wolter, in June 2013, it can be concluded that the protection of sources remains the foundation of the freedom of the press and cannot be brushed aside on the simple request of a political party. He had sought to do away with the protection of sources with regard to CSV members in a specific context. The intention of this was to still the rumours that out of discontent with the reopening of the “Bommeleeër”-investigations, a member of the CSV had revealed the existence of an investigation on charges of paedophilia against the Prosecutor-General (*procureur-général*).<sup>1174</sup> The

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<sup>1170</sup> Saint-Paul Luxembourg SA v Luxembourg App no 26419/10 (ECtHR, 14 April 2013) para 61.

<sup>1171</sup> Deontology Code, ad art 7(a).

<sup>1172</sup> Law of 8 June 2004 on the Freedom of Expression in the Media art 7(3).

<sup>1173</sup> *Pol Urbany*, ‘Vive les informateurs des médias! La protection des sources des journalistes’ (2011) 310 Forum 20, 22.

<sup>1174</sup> ‘Michel Wolter-Je n’ai jamais violé la liberté de la presse’ (L’Essentiel Online, 17 juin 2013), <http://www.lesessentiel.lu/fr/news/luxembourg/story/Je-n-ai-jamais-viole-la-liberte-de-la-presse--1050468>, accessed 20/06/2015.



Luxembourgish Press Council reaffirmed in an official communication on 23 June 2013 that freedom of the press and the right to the protection of sources are inalienable.<sup>1175</sup> Fernand Weides, at that time President of the Press Council, specified that the right to the protection of sources is a right bestowed upon all journalists by Article 7 of the Law of 8 June 2004 on the Freedom of Expression in the Media, a political party therefore does not have the right to demand that the protection awarded by this right be lifted since it is not the beneficiary of this right.<sup>1176</sup>

### 3. Reporting about on-going investigations

If a dispute surrounding a journalist's publication goes to trial, in view of the duties laid down in the Law on the Freedom of Expression in the Media, namely the duty of accuracy and truth (Article 10) and the duty of due diligence (Article 20), a journalist will only be exempted from liability if he can show the existence of a superior general interest of the public in being informed on the contentious information.<sup>1177</sup> Crime reporters must report the facts in an objective manner.<sup>1178</sup> Journalists can be held liable for violations of the principles of impartiality and of the presumption of innocence.<sup>1179</sup>

#### (1) The presumption of innocence

The presumption of innocence is a fundamental principle of the Luxembourgish criminal legal system.<sup>1180</sup> The obligation to respect the presumption of innocence was integrated in the Law of 8 June 2004 on the Freedom of Expression in the Media in its Article 12. Article 12 (2) specifies that when

*“a person is publicly presented as being guilty of something that is still under investigation or enquiry by the courts and for which no final judgment has yet been made”*

the judge can order any measure to end the violation of the presumption of innocence,

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<sup>1175</sup> 'Conseil de Presse: Entsat iwwert Menacë vum Michel Wolter' (RTL.lu, 26 octobre 2013), <http://www.rtl.lu/themen/bommeleer/446623.html>, accessed 20/06/2015.

<sup>1176</sup> 'Wolter n'a jamais voulu contester la protection des sources.' (RTL.lu, 17 juin 2013), <http://5minutes.rtl.lu/fr/actualite/luxembourg/444512.html>, accessed 20/06/2015.

<sup>1177</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 59.

<sup>1178</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 92 ; see also T.A. Lux., 13.07.1988.

<sup>1179</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 93.

<sup>1180</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 90.

*“at the expense of the person liable for the violation”, and “without prejudice to any compensation that may be sought for harm suffered”.*

Article 12 (2) is only applicable in the event of on-going judicial proceedings and implies the duty of journalists not to publicly portray the accused as guilty of the charges against him in the media before the conclusion of the proceedings by a guilty verdict.<sup>1181</sup>

In order to assess whether or not a journalist violated the presumption of innocence, Luxembourgish courts will examine whether or not it can be derived from the circumstances that the publication contained conclusive remarks demonstrating the author’s prejudice in taking for granted the guilt of the person concerned.<sup>1182</sup> The attribution of criminal acts to a person, before a final judgement has been reached, will consequently also be considered a violation of the honour and reputation of the person concerned.<sup>1183</sup> In the event where no judicial proceedings were started and a person was publicly suspected of having committed crimes in the media by a journalist, this will likewise be considered a violation of the honour and reputation of that person, if not, a violation of his right to private life, and will be sanctioned as such.<sup>1184</sup>

## (2) The protection of private life

Even after judicial proceedings have been concluded, the law imposes limits to the freedom of expression in the media when it comes to reporting on affairs in which a person has been convicted, most notably when it comes to the protection of the right to private life: depending on the case, information identifying the convicted may not be published.<sup>1185</sup> The interest of the public in knowing this information will be balanced with the right to the protection of private life of the person in question. If this information concerns a person exercising a public function and an act committed during the exercise of this function, citizens have the right to be informed on the subject, this will not constitute a violation of the right to private life.<sup>1186</sup> In the event where the case does not concern a public figure, the publication of this information may be considered a violation of the right to private life.<sup>1187</sup>

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<sup>1181</sup> *Gaston Vogel, Le droit de la presse (Promoculture-Larcier 2012) 90.*

<sup>1182</sup> T.A.Lux, 17.03.2010, rôle n° 121781, 83/2010.

<sup>1183</sup> T.A. Lux, 17.03.2010, rôle n° 121781, 83/2010.

<sup>1184</sup> Exposé des motifs, document parlementaire n°4910, 41 cited in Gaston Vogel, *Le droit de la presse (Promoculture-Larcier 2012) 90.*

<sup>1185</sup> Exposé des motifs, document parlementaire n°4910, 41 cited in Gaston Vogel, *Le droit de la presse (Promoculture-Larcier 2012) 90.*

<sup>1186</sup> Exposé des motifs, document parlementaire n°4910, 41 cited in Gaston Vogel, *Le droit de la presse (Promoculture-Larcier 2012) 90.*

<sup>1187</sup> Exposé des motifs, document parlementaire n°4910, 41 cited in Gaston Vogel, *Le droit de la presse (Promoculture-Larcier 2012) 91.*

According to the jurisprudence of the Luxembourg District Court, crimes ('*crimes*') and offences ('*délits*') have such a troubling impact on the public order that the facts, as well as the identity of the perpetrators, must be within what can be communicated to the public by the journalist. The District Court held that by committing these acts against the public order, the perpetrators have acted outside of the scope of what is to be considered their private sphere and therefore no longer benefit from the right to protection of private life for this information. Where infractions ('*contraventions*') and minor offenses are concerned, there is no general interest in knowing the identity of the perpetrators, this would be a disproportionate violation of their right to private life compared to the severity of the facts.<sup>1188</sup>

For cases still under investigation, the journalist has a duty of truth additional to the obligation to respect the right to private life of the individual, if guilt is legally proven afterwards the journalist will not be committing an offense by publishing information when the case concerns crimes or severe offenses. Again, this is not the case for infractions and minor offenses which form part of the private sphere, in this case the publishing of information will be regarded an offense on the part of the journalist for which he can be held liable, despite the truthfulness of the allegations.<sup>1189</sup> Publishing information concerning on-going criminal proceedings and thereby mentioning the identity of the accused will also be regarded an offense for which the journalist can be held liable if the case is concluded by an acquittal. In such a case, it is assumed that the journalist failed to comply either with the duty of truth by publishing false accusations, or with the obligation of discretion by connecting the person in question to criminally reprehensible facts.<sup>1190</sup> Additionally, in such a case, the individual, mentioned by name or referred to in an implicit manner,<sup>1191</sup> who had been wrongfully accused has the right to a subsequent information ('*droit d'information postérieure*') in accordance with Article 51 of the Law of 8 June 2004 on the Freedom of Expression in

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<sup>1188</sup> T.A. Lux. Aff. Schuch c/ Les Editions Nuit et Jour et Pradier, 30.10.1989, rôle n° 41.579 et T.A. Lux Aff. Zanen c/ Lahure et Editions Revue, 18.12.1991, rôle n° 42.383 cited in Gaston Vogel, *Le droit de la presse* (Promoculture-Larcier 2012) 91.

<sup>1189</sup> T.A. Lux. Aff. Schuch c/ Les Editions Nuit et Jour et Pradier, 30.10.1989, rôle n° 41.579 et T.A. Lux Aff. Zanen c/ Lahure et Editions Revue, 18.12.1991, rôle n° 42.383 cited in Gaston Vogel, *Le droit de la presse* (Promoculture-Larcier 2012) 91.

<sup>1190</sup> T.A. Lux. Aff. Schuch c/ Les Editions Nuit et Jour et Pradier, 30.10.1989, rôle n° 41.579 et T.A. Lux Aff. Zanen c/ Lahure et Editions Revue, 18.12.1991, rôle n° 42.383 dans Gaston Vogel, *Le droit de la presse* (Promoculture-Larcier 2012) 91.

<sup>1191</sup> *Gaston Vogel, Le droit de la presse* (Promoculture-Larcier 2012) 194.

the Media. This right foresees that

*“persons who have been acquitted or discharged by the courts shall have the right to demand free publication or broadcast of information that wrongful charges were brought against them”.*

### (3) Malicious intent

Another limit to press freedom when it comes to reporting about on-going criminal procedures is that of malicious intent (*l'intention méchante*).<sup>1192</sup> This occurs when facts are represented in a manner such as to discredit the person concerned<sup>1193</sup> or through the use of contemptuous language.<sup>1194</sup>

### (4) The secrecy of the criminal procedure

Article 8 of the Code of Criminal Procedure enshrines the principle of the secrecy of the criminal procedure during the investigation as well as during the instruction phase. Article 8 (3) attempts to reconcile the secrecy of the criminal procedure with the right to information of the public by allowing the prosecutor to publish information on the development of proceedings, as long as the presumption of innocence, the rights of the defence, the right to protection of private life and dignity of person, as well as the needs for the good conduct of the criminal proceeding itself are safeguarded.<sup>1195</sup> A judgement of the Luxembourg Court of Appeals clarified that a journalist that publishes information protected by the secrecy of the criminal procedure commits an offense for which he can be held liable. This liability stems from two reasons. Firstly, because acts of procedure need to be kept secret for the good conduct of justice, the journalist commits a grave act of carelessness by communicating this information to the public. Secondly, by doing so the journalist violates the presumption of innocence and the defence rights of the accused.<sup>1196</sup>

A journalist can however publish summaries of testimonies of witnesses heard in court, these will not be considered a violation of the presumption of innocence as long as they are truthful and exact and the reader can clearly distinguish between a simple testimony and a verdict.<sup>1197</sup>

Similarly, Article 38 of the Law of 10 August 1992 on Youth Protection

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<sup>1192</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 93.

<sup>1193</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 93 ; see also T.A. Lux., 13.07.1988 ; Trib. Corr. Lux., 25.09.1992 ; C.A. Lux., 23.11.1993.

<sup>1194</sup> C.A. Lux., 23.11.1993, rôle n° 276/93 V.

<sup>1195</sup> See further on this *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 94.

<sup>1196</sup> C.A. Lux., 13.11.1989 cited in *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 94.

<sup>1197</sup> T.A. Lux. 10.06.2004, rôle n° 80723 ; 175/2004.

prohibits the publishing of proceedings before the youth court and of publishing information, which could lead to disclosing the identity or personality of the prosecuted minors.

#### (5) Exceptions

Article 13 of the Law of 8 June 2004 on the Freedom of Expression in the Media nevertheless contains exceptional circumstances in which the journalist is exempt from liability when portraying a person as guilty of facts even during judicial or criminal investigations or proceedings. The law mentions four such cases.

The most obvious case of exemption is when the person concerned has authorised the journalist to publish the information. In that case, the proof of existence of this authorisation can take any form, but needs to be presented by the journalist seeking to rely on it.<sup>1198</sup>

The second case of exception is when the authorities have requested the publication of the information within the framework of an on-going judicial investigation or instruction, for example the publication of a search warrant.<sup>1199</sup>

Thirdly, in case of a live broadcast, as long as the journalist has complied with due diligence to avoid a violation of the presumption of innocence, because in that case there is a time-element which limits the amount of research that can be done in advance.

Fourthly, in case of a truthful citation of a third person as long as the content was of public interest, the quoting journalist is also not held liable according to Article 13.

## 4. Due diligence guidelines for journalists

### (1) Overview of fundamental provisions

First of all and as mentioned above, it has to be noted that Article 24 of the Constitution, protecting the freedom of press, limits this freedom by prohibiting offenses committed while applying the freedom.

According to the European Court of Human Rights (ECtHR) in Strasbourg, the interpretation of Article 10 (2) of the European Convention on Human Rights (ECHR) puts a strong emphasis on the limitation of the freedom of expression by the objective to protect the presumption of innocence. This

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<sup>1198</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 97.

<sup>1199</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 97.

limit, as described, also needs to be respected in Luxembourg and is part of the framework.<sup>1200</sup>

Furthermore, the ECtHR clarified that Article 10 ECHR protects the right of journalists to communicate information of general interest to the public, but that this right needs to be exercised in good faith by basing the reporting on information that are accurate facts and by giving “reliable and precise” information.<sup>1201</sup> The Court clearly underscores that journalists have a duty to thoroughly investigate the information they use for their work and they have to make sure that that information is accurate.

Especially with regard to the criteria for photo journalism, it is to be noted that journalists are not allowed to take photographs of persons at their home, place of habitual residence, working place or place of establishment of the company or in a hospital room as long as the person did not authorize this.<sup>1202</sup> This also reflects jurisprudence of the ECtHR. In domestic law the photography restrictions also derive from Article 544 of the Civil Code protecting ownership. Luxembourg courts interpret this provision as including the right of a person to his own image. Consequently, the publication of such images is subject to the authorization of the person concerned.<sup>1203</sup> Such authorization can however be “circumvented” if pixelation is used for those parts of the photographs, because the condition for the authorization requirement is that the depicted person is clearly identifiable.<sup>1204</sup>

When determining the meaning of offenses committed as a result of the exercise of the freedom of expression (*délits de presse*) under Article 24 of the Constitution, Luxembourg courts ruled that public actions may indeed form an important part of public debate and the criticism of those actions by journalists, no matter how scathing, usually cannot lead to a lawsuit. Under certain circumstances such publication may nonetheless constitute an offense, if such a publication harms the reputation of the person concerned.<sup>1205</sup>

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<sup>1200</sup> *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) paras 7 & 32 ; *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 21.

<sup>1201</sup> *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999) para 54 ; *Éditions Plon v France* App no 58148/00 (ECtHR, 18 May 2004).

<sup>1202</sup> *Paul Schmit*, *Précis de droit constitutionnel – Commentaire de la Constitution luxembourgeoise* (Editions Saint Paul 2009) p. 128. Cf. on the legal framework concerning photography the country report on Luxembourg: *Mark D. Cole / Bernd Justin Jütte*, *Länderbericht Luxemburg*, in: Ory/Cole (eds.), *Fotografien in der Großregion / Photographie dans la Grande Région*, Saarbrücken 2016, pp. 193 et seq.

<sup>1203</sup> T.A. Lux., 20.11.1978.

<sup>1204</sup> C.A. Lux., 10.07.2013, rôle n° 39634.

<sup>1205</sup> Cour, 22.07.1899, rôle n° PAS.T. 5. 160.

(2) Guidelines for professional journalists in Luxembourg

There are two main texts in Luxembourg concerning the duties of journalists, one being the main legal text applicable to journalists, the other an instrument of self-regulation. It was evidently the intention of the Luxembourgish legislator to provide with the Law of 8 June 2004 on the Freedom of Expression in the Media a framework legislation (*'loi-cadre'*) for this field, whilst encouraging a self-regulatory detailing code. Therefore, the exact description of duties and obligations of journalists which are laid down in principle in the law is to be found in the Deontology Code as the instrument of self-regulation of the journalistic profession.<sup>1206</sup>

In order to give a complete view of the applicable rules in Luxembourg in the following not only the duties and obligations of journalists as they were enshrined in the Law of 8 June 2004 on the Freedom of Expression in the Media, but also the meaning given to them in the Deontology Code will be presented. First, the relationship between the Deontology Code and the Law of 8 June 2004 on the Freedom of Expression in the Media will be explored, in a second step the actual duties of journalists contained in both instruments will be examined:

(3) The relationship between the Deontology Code and the Law

Article 23 of the Law of 8 June 2004 on the Freedom of Expression in the Media foresees that the Press Council (*'Conseil de Presse'*) must devise and publish a deontology code (*'code de déontologie'*) containing the rights and duties of journalists, and must put in place a Complaints Commission which is charged with the treatment of complaints concerning information published in the media. This obligation was realized in the form of the *Code luxembourgeois de déontologie*, which was adopted by the plenary of the Press Council on 28 March 2006.<sup>1207</sup>

In the view of the Press Council the Deontology Code has to be easily accessible to the members of the profession and the wide public, therefore trying to avoid it to become too voluminous, whilst covering all important aspects summing up the framework for the work of the media journalists. The Code has three parts, one being the substantive provisions, the other an overview of additional guidance and recommendations passed by the Press Council and a final part which is a commentary on all provisions of

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<sup>1206</sup> 63e séance Chambre des députés, jeudi, 13 mai 2004, p 802, [http://www.chd.lu/wps/wcm/connect/f1f60c80487edba0b908ff79ee257095/CR018.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=f1f60c80487edba0b908ff79ee257095](http://www.chd.lu/wps/wcm/connect/f1f60c80487edba0b908ff79ee257095/CR018.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=f1f60c80487edba0b908ff79ee257095).

<sup>1207</sup> Code de déontologie, Mémorial A – N°69, p 1339; also to be found at <http://www.press.lu/upload/manager/files/codedeontologie1.pdf>. See further on this *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 163.

the Code. In addition, the mentioned Complaints Commission deals with issues brought to it that clarify the actual application of the provisions of the Code.<sup>1208</sup> However, the legal nature of the Deontology Code is unclear.

According to one author, Gaston Vogel, in practice this deontological code has no binding force, and there is no disciplinary body which is competent for directly sanctioning professional faults committed by journalists or infringements of the Deontology Code.<sup>1209</sup> He regards an efficient sanction system to be non-existent.<sup>1210</sup> However, the Complaints Commission can issue decisions directed at journalists and e.g. declare a reprimand for wrongful behavior and order its publication in the concerned press title.<sup>1211</sup> It has the power to retract the press card of the journalist even though these measures remain below the level of sanctions as implied by the law.

The Code has also been published in the official reports of Luxembourg, in the *Mémorial A* – N°69 on April 30<sup>th</sup> 2010 together with the newly published amended Law on the Freedom of Expression in the Media<sup>1212</sup>. This may have been done by the Luxembourgish legislator with the intention of emphasising the legal value of the Code.<sup>1213</sup> According to Article 3 of the *Règlement grand-ducal du 9 janvier 1961 relatif aux trois recueils du Mémorial*, *Mémorial A* contains legislative and regulatory acts.<sup>1214</sup> Even if one regards the publication as not giving additional legal value, it certainly has a significant symbolic value that the the Deontology Code was published in the *Mémorial A* alongside with the laws.

The preliminary explanations at the beginning of the Code de déontologie on the other hand underline that the Press Council acts as a self-regulatory body based on this code. The Code shall serve as guidance (*'ligne de conduite'*) for the Luxembourgish press, but there is no reference made to whether or not it has or is regarded to have binding nature.<sup>1215</sup> Accordingly,

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<sup>1208</sup> Overview of decisions at [http://www.press.lu/informations/commission\\_plaintes\\_arrets/](http://www.press.lu/informations/commission_plaintes_arrets/).

<sup>1209</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 163. However, the publication does not yet take into account in more detail the Code de déontologie and the Complaints Commission's work.

<sup>1210</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 196.

<sup>1211</sup> Details on the procedure in the internal rules : *Règlement d'ordre intérieur de la Commission des plaintes* passed by the Press Council on 21 February 2006, to be found at [http://www.press.lu/informations/commission\\_plaintes/](http://www.press.lu/informations/commission_plaintes/).

<sup>1212</sup> Code de déontologie, *Mémorial A* – N°69, p 1339.

<sup>1213</sup> See in this direction 'Réception de Nouvel An pour la presse luxembourgeoise', [https://www.gouvernement.lu, 07/01/2008, https://www.gouvernement.lu/750471/08-pm-schiltz-presse?context=971552](https://www.gouvernement.lu/750471/08-pm-schiltz-presse?context=971552).

<sup>1214</sup> Grand-Ducal regulation of 9 January 1961 concerning the three parts of the *Memorial*.

<sup>1215</sup> Code de déontologie, *Mémorial A* – N°69, p 1339.



in Article 14 of the Deontology Code, the Press Council itself suggested publication of the Deontology Code in *Mémorial C*, which is the '*recueil special des sociétés et associations*'.<sup>1216</sup> Given the nature of the Deontology Code as an instrument developed to regulate the conduct of a specific professional group, this place for publication would have seemed more obvious. In fact, the current Article 36 of the Constitution of Luxembourg precludes the legally binding force of regulatory instruments of professional orders<sup>1217</sup>, since all regulatory powers belong to the Grand Duke.<sup>1218</sup> Professional Orders, such as the Press Council, can nonetheless be attributed regulatory powers by law<sup>1219</sup>, such as in the case at hand with the Law of 8 June 2004 on the Freedom of Expression in the Media in its Article 23. The legislator's intention seems to have been to provide the Deontology Code with legally binding force in the future, since the possible reform of Article 36 of the Constitution of Luxembourg was discussed already at the time of the passing of the law with a view of enabling this in the future.<sup>1220</sup> Given that the constitutional reform has to date not materialised, for the current situation it has to be concluded that journalists and press titles have bound themselves by the provisions in the Deontology Code as members of the professional order of journalists, but not due to any formal legally binding force.<sup>1221</sup> Full legal authority remains with the Law of 8 June 2004 on the Freedom of Expression in the Media.

#### (4) The duties of journalists

Gaston Vogel identifies the obligations of prudence (meaning duty of care) and of truthfulness as the main pillars of journalism.<sup>1222</sup> The Law of 8 June 2004 on the Freedom of Expression in the Media imposes five obligations on journalists: First, the duty of accuracy and truth (Article 10 and 11);

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<sup>1216</sup> Grand-Ducal regulation of 9 January 1961 concerning the three parts of the Memorial.

<sup>1217</sup> 63e séance Chambre des députés, jeudi, 13 mai 2004, p 810, [http://www.chd.lu/wps/wcm/connect/f1f60c80487edba0b908ff79ee257095/CR018.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=f1f60c80487edba0b908ff79ee257095](http://www.chd.lu/wps/wcm/connect/f1f60c80487edba0b908ff79ee257095/CR018.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=f1f60c80487edba0b908ff79ee257095).

<sup>1218</sup> Constitution of Luxembourg, art 36.

<sup>1219</sup> See on this *Jörg Gerkrath*, 'La jurisprudence de la Cour constitutionnelle du Luxembourg 1997-2007' *Pasicrisie luxembourgeoise* 2008, p 64, <https://orbilu.uni.lu/bitstream/10993/3102/1/Jurisprudence%20PUBLICATIO%20PAS.pdf> accessed 24/03/2016.

<sup>1220</sup> 63e séance Chambre des députés, jeudi, 13 mai 2004, p 802, found on [http://www.chd.lu/wps/wcm/connect/f1f60c80487edba0b908ff79ee257095/CR018.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=f1f60c80487edba0b908ff79ee257095](http://www.chd.lu/wps/wcm/connect/f1f60c80487edba0b908ff79ee257095/CR018.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=f1f60c80487edba0b908ff79ee257095).

<sup>1221</sup> In the same sense *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 162.

<sup>1222</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 58.

second, the presumption of innocence (Articles 12 and 13); third, the protection of private life (Articles 14 and 15); fourth, the protection of reputation and honour (Articles 16 and 17); and fifth, the duty of care and loyalty, which can be deduced from Articles 13, 15 and 17.<sup>1223</sup> Some of these have already been mentioned and dealt with above.

(a) The duty of accuracy and truth

Regarding the duty of accuracy and truth, Article 10 of the Law of 8 June 2004 on the Freedom of Expression in the Media provides that in order to ensure the accuracy and truth of their publications, journalists must “*check the truth, content and origin of those facts before communicating them*” to the extent which is reasonable. The criteria to establish what is reasonable are the availability of resources and the circumstances of each case.<sup>1224</sup> This duty refers to the factual basis used by the journalist, but not to his comments and opinions.<sup>1225</sup> It does not imply an obligation to come to a specific result in each research (*‘obligation de résultat’*), but an obligation to use all possible and appropriate means to fulfil this duty (*‘obligation de moyens’*), thereby referring to the procedure in reaching a decision on whether and how to publish.<sup>1226</sup>

If this procedural requirement is respected, the journalist cannot be punished for not achieving the result, as long as he tried everything to achieve it. This duty includes however more than a simple action in good faith; in order to comply with his obligation it is not sufficient that a journalist is personally convinced of the accuracy and truth of his publication, he must also be able to objectively prove that his behaviour leading up to the establishment of the facts was indeed diligent and prudent.<sup>1227</sup> It is true that this is often difficult to establish since the press aims to publish information as promptly as possible, often leading to the publication of information that has not yet been officially confirmed. The fulfilment of the journalist’s duty is thus appreciated by taking into account those circumstances<sup>1228</sup>, and by taking into account the often limited means of journalists for investigating the facts.<sup>1229</sup> Part of this duty is to publish the complete information and not to manipulate public opinion by only

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<sup>1223</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 59.

<sup>1224</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 10.

<sup>1225</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 67 ; *De Haes and Gijssels v Belgium* App no 19983/92 (ECtHR, 27 January 1992) para 42.

<sup>1226</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 67.

<sup>1227</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 67-68 ; see also C.A. Lux., 11.03.2009, rôle n° 32949.

<sup>1228</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 68.

<sup>1229</sup> C.A. Lux., 31.01.2007, rôle n° 30500.

publishing a part of the known information.<sup>1230</sup> A journalist will be considered to have acted in bad faith when he had reasons to doubt the truthfulness of the facts or the possibility of proving them.<sup>1231</sup>

Furthermore, Article 10 also requires the journalist to check “*the origin of [the] facts*”, i.e. to check his sources. The obligations of journalists under Article 10 to “*check the truth, content and origin of those facts before communicating them*” are reinforced by Article 20 of the Law of 8 June 2004 on Freedom of Expression in the Media, which enshrines the duty of due diligence, implying the duty to proceed with the verification of information before publication.<sup>1232</sup> It “*requires that before publication is made, the checks specified under Article 10 above are carried out*”.<sup>1233</sup> The duty of care is another important duty, which is constantly confirmed by the courts.<sup>1234</sup> Consequently, already the mere publication of an article containing inexact or untrue information constitutes a negligence and carelessness. This in turn in the first place triggers liability of the journalist, but also that of the publisher, since the publisher also has to take care of the question of whether or not sources were properly checked before publication.<sup>1235</sup>

Article 11 of the Law of 8 June 2004 on the Freedom of Expression in the Media establishes the principle of the duty of rectification of a fact in case its inaccuracy is discovered. The provision demands that such rectification happens immediately by journalists and publishers regardless of whether the journalist and publisher discovered the inaccuracy themselves or whether they were made aware of it by a third person.<sup>1236</sup>

Article 4 of the Deontology Code confirms and reinforces Articles 10 and 11 of the Law of 2004 by emphasising that journalists must conduct their research with the greatest professional rigour, they must verify the truthfulness of the facts and in case of doubt express sufficient reservations when this information is presented to the public.<sup>1237</sup> Article 11 further provides that a rectification must be published, independently from the question of reparation of the harm caused by the publication of the

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<sup>1230</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 69.

<sup>1231</sup> C.A. Lux., 30.01.1996, rôle n° 15876 ; T.A. Lux., 30.01.1996, rôle n° 15824 ; T.A. Lux. 14.01.1990, rôle n°100/90 ; T.A. Lux., 30.10.1989, rôle n° 532/89 ; T.A. Lux., 13.07.1988, rôle n° 425/88 ; PAS.L.27.368.

<sup>1232</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 75.

<sup>1233</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 20.

<sup>1234</sup> See overview at *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 81. See specifically C.A. Lux., 30.06.1998, rôle n° 20767.

<sup>1235</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 74. See also C.A. Lux., 30.06.1998, rôle n° 20767.

<sup>1236</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 71.

<sup>1237</sup> Deontology Code, art 4(a).

inaccuracy.<sup>1238</sup> If the fact is not rectified, the journalist's liability is engaged according to the Civil Code provisions and the liability of responsible persons according to Article 21 of the Law of 8 June 2004 on the Freedom of Expression in the Media.<sup>1239</sup>

(b) The duty to respect the presumption of innocence

Articles 12 and 13 of the Law of 8 June 2004 on the Freedom of Expression in the Media require the journalist to respect the presumption of innocence, or the principle that “*everyone shall be presumed innocent until proven guilty*”.<sup>1240</sup> When a journalist portrays a person as being guilty of a crime, before the conclusion of a trial, in violation of the presumption of innocence, Article 12 provides that a court can order that a rectification be published or a statement be issued to end the violation of the presumption of innocence, subject to a penalty in accordance with Articles 2059-2066 of the Civil Code. Article 13 lists the exceptional cases in which journalists or publishers are exempt from liability albeit a possible infringement of the presumption of innocence.<sup>1241</sup>

Article 5 (e) of the Deontology Code affirms the principle to respect the presumption of innocence. In the comments on Article 5 (e) the Deontology Code notes that the press may at times discuss cases, which are not subject to a judicial procedure, but are nevertheless in the interest of the public and therefore they can be informed about them.<sup>1242</sup> In such cases, the press must take all necessary precautions not to jeopardise the presumption of innocence and must not portray an individual as guilty of criminal charges before official confirmation. A journalist must also take all necessary care not to reveal the identity of the suspected persons. The Deontology Code however also emphasises that this does not apply for very rigorous investigative journalism which aims to expose certain socially reprehensible facts; in these cases the identity of the suspected persons can potentially be revealed.<sup>1243</sup>

(c) The duty to respect the right to protection of private life

Articles 14 and 15 of the Law of 8 June 2004 on the Freedom of Expression in the Media protect private life, ensuring that in the press' task of communicating information to the public at large, private information of individuals remain protected. This protection is a duty that does not merely concern the procedure of research but the actual result that absolutely has

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<sup>1238</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 11.

<sup>1239</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 71.

<sup>1240</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 12.

<sup>1241</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 96.

<sup>1242</sup> Deontology Code, ad art 5(e).

<sup>1243</sup> Deontology Code, ad art 5(e).

to be achieved; it therefore constitutes an obligation of a certain result.<sup>1244</sup> Consequently, the proof of a fault is significantly facilitated. In a case where both the interests of private life and of liberty of the press collide, one has to apply a balancing of interests. According to domestic case law, personal information can only be published by the press if one of the following three conditions is fulfilled: personal data are already published or made accessible to the public by the concerned person, the data is directly linked to the public character of the concerned person or the data is directly linked to the public character of the event to which the concerned person is connected.<sup>1245</sup> The protection of private life includes the protection of the publication of images displaying persons.<sup>1246</sup> The District Court interprets this provision in a way that it also includes the right to one's own image.<sup>1247</sup> Article 15 again lists five exceptions, some of which are already discussed above: first the authorisation by the concerned person,<sup>1248</sup> second, publication requested by judicial authorities,<sup>1249</sup> third, the publication relates directly to the public life of the person concerned;<sup>1250</sup> fourth, publication was part of a "*direct communication to the public*"<sup>1251</sup> fifth, the truthful citation of a third person.<sup>1252</sup> Article 5 of the Deontology Code goes into more detail and requires journalists not to discriminate, not to glorify crimes, terrorism and other violent acts, not to violate but in the contrary defend human dignity, as well as to protect private life.<sup>1253</sup>

(d) The duty to respect the right to protection of reputation and honour

Articles 16 and 17 of the Law of 8 June 2004 on the Freedom of Expression in the Media concern the protection of reputation and honour. Article 17 provides the conditions under which journalists will escape liability for having published information that damages an individuals' honour and reputation in the meaning of Article 21.<sup>1254</sup> A journalist may provide proof either that the allegations damaging the honour and reputation of the person in question were true<sup>1255</sup> or that by complying with his professional duties of care and due diligence, he took care to avoid damage to the

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<sup>1244</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 103.

<sup>1245</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 107. See also: *T.A. Lux.*, 11.10.2007, rôle n° 2656/2007.

<sup>1246</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 119.

<sup>1247</sup> *T.A. Lux.*, 09.01.2013, decision no. 8/2013, rôle n°144831. See also above.

<sup>1248</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 15(1).

<sup>1249</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 15(2).

<sup>1250</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 15(3).

<sup>1251</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 15(4).

<sup>1252</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 15(5).

<sup>1253</sup> Deontology Code, arts 5(a), 5(b), 5(c).

<sup>1254</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 17.

<sup>1255</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 17(1)(a).

reputation of the person or had sufficient reason to believe the facts were true and that their disclosure was of significant public interest.<sup>1256</sup> Luxembourgish Courts have confirmed that this principle is interpreted less restrictively in case of politicians.<sup>1257</sup>

(e) Other duties and sources of obligations

Moreover, there are self-regulatory acts of international associations such as an early declaration on journalist's duties by the Fédération Internationale des Journalistes of 1954<sup>1258</sup> or the Charter of Munich, adopted in 1971 by the European Federation of Journalists, which set out duties and rights of journalists and contain directing principles. The Luxembourgish Association of Journalists has been member of the FIJ and has referred to international documents for its own work.<sup>1259</sup> Some of these principles are either explicitly or implicitly also to be found in the Luxembourgish framework. Journalists have to respect certain principles regarding commercial information according to the Deontology Code. For example, they clearly have to identify advertisements as such and shall not mix advertisements with "pure" journalistic content.<sup>1260</sup> With regard to the collection of information, the Deontology Code makes clear that journalists are obliged to respect professional secrecy.<sup>1261</sup> Concerning the use of pictures, this also has to respect to the duty of truth. Therefore, journalists are obliged to verify if they reflect the truth. Journalists are obliged to use the pictures in their real context, they shall not fake this context by using e.g. a title or description that leads to a false interpretation by viewers and readers.

Furthermore, the reproduction of documents shall be done in good faith. If the photograph has a mere symbolic use, journalists are obliged to make this clear. Rumours and information that has not been confirmed shall clearly be identified as such.<sup>1262</sup>

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<sup>1256</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 17(1)(b).

<sup>1257</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 135. See also: Trib. Corr. Lux., 25.09.1992 and C.A. Lux., 16.06.1913, rôle n° PAS. L. 9. 333.

<sup>1258</sup> Later amended, see <http://www.ifj.org/fr/la-fij/code-de-principe-de-la-fij-sur-la-conduite-des-journalistes/>.

<sup>1259</sup> According to *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 162, each person taking on the profession of journalist in Luxembourg obliges himself to respect these general principles.

<sup>1260</sup> Deontology Code, art 11.

<sup>1261</sup> Deontology Code, art 7 (and commentary), p. 9 of the Code.

<sup>1262</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 158-159.

## 5. Liability in the editorial chain

First of all, it is important to emphasise again that the Court of Cassation of Luxembourg (*Cour de cassation*) clearly emphasised that Article 24 of the Constitution, which grants the liberty of expression of opinions and the liberty of the press, does not limit the scope of the obligations deriving from the civil liability dispositions (Articles 1382 and 1383 Code Civil).<sup>1263</sup>

The liability of journalists, publishers and distributors is based on the general private law rules, which are Articles 1382 and 1383 of the Civil Code. In the context of media and journalists it is however not required that there was a fault, but a simple carelessness is enough to engage liability. Journalists and publishers are subject to the general duty of care and diligence.<sup>1264</sup> The liability of journalists and publishers is assessed without taking into consideration the gravity of the error.<sup>1265</sup>

The fault liability regime established by Article 21 of the Law of 8 June 2004 on the Freedom of Expression in the Media, is described as a system of cascade liability. It is applicable for the assessment of civil and criminal liability in case of faults or offenses committed during the exercise of the freedom of expression.<sup>1266</sup> This type of liability can be described as “*successive and isolated*”.<sup>1267</sup> It thus provides for a primary liability of the collaborator (journalist) if he is known, in any other case a secondary liability of the publisher, and if this one is not known either, as a final step the distributor can be held liable. The original government proposal gave preference to a system of joint and limited liability of the publisher and the author, this was however rejected by the Commission des Médias.<sup>1268</sup> This refusal was based on the reasoning that in case of such joint liability, there is a high risk that the economically most powerful person, most likely the publisher, would be addressed. In the opinion of the Commission, this would lead to a higher dependence of the journalist from the publisher, because the publisher would most probably exert a higher degree of control on the content of the journalists' contributions if he is likely to be

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<sup>1263</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 12. See also: Cass., 15.07.1993, rôle n° PAS. L. T. 29. 225; Cass., 20.03.1997, rôle n° PAS. L. T. 30. 387; Cass., 19.06.2003, arrêt n° 35/03.

<sup>1264</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 168.

<sup>1265</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 168 ; Cass., 19.06.2013, no. 1980 of the registry.

<sup>1266</sup> Law of 8 June 2004 on the Freedom of Expression in the Media, art 21.

<sup>1267</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 176 ; see also T.A. Lux. 27.01.2010, rôle n° 120025 ; 31/2010.

<sup>1268</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 175. See also: Conclusions du M.P. before the Cour de cassation (1<sup>re</sup> chambre), 31.05.1996, J. T. 1996 of the 29.01.2004.

held liable for all content published by him.<sup>1269</sup> The aim of the Luxembourgish legislator through this system of cascade liability was therefore to enable the editor to make journalists aware of their responsibility for the content of their publications by making them identifiable.<sup>1270</sup> Hence, if a publisher identifies the journalist who wrote an article, there is a preference that this journalist is held liable. If he does not do so, he assumes in that very moment the liability for the written and published content.<sup>1271</sup> The publisher is not allowed to circumvent his liability by later identifying the journalist having written the content. The liability for the fault is established at the moment of publication of the contentious article, if in that moment the name of the author of the article is not known, the publisher will be held liable.<sup>1272</sup> The publisher could disclose the name of the author, for example in case of an enquiry, but he can not do this with the sole intention of escaping liability, the publisher will still be held liable even if he discloses the name. He may however have recourse to civil remedies against the journalist, but vis-à-vis the third person injured, the publisher remains liable.<sup>1273</sup>

Nevertheless, journalists are exempted from liability if they can prove that they took all necessary precautions and provide legal evidence that they had sufficient grounds to come to the conclusion that the facts and information of the contested article were true.<sup>1274</sup> In addition it is necessary to refer to the exempted situations under Articles 13, 15, 17 and 19 of the Law of 8 June 2004 on the Freedom of Expression in the Media when assessing a journalist's liability.

## 6. Conclusion and perspectives

In this section we would like to hear your own assessment of the overall situation – as mainly characterised by the findings under A. above in view of the study's interest in learning about the state of play in the (pluralistic and diverse) provision of investigative journalism. When allocating elements of your description to either section please bear in mind that, on the one hand, your conclusion has sufficient grounding and textual framing and that, on the other hand, the assessment of perspectives is duly and

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<sup>1269</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 175. Parliamentary documents, „projet de révision de l'article 24 de la Constitution“, no. 3924-4, 29.01.2004.

<sup>1270</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 166.

<sup>1271</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 166.

<sup>1272</sup> *T.A. Lux.*, 18.11.2008, rôle n° 3268/2008.

<sup>1273</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 166. ; *T.A. Lux.*, 18.11.2008, no. 3268/2008.

<sup>1274</sup> *Gaston Vogel*, *Le droit de la presse* (Promoculture-Larcier 2012) 59. See also above.



understandably prepared for.

In general terms, through the constitutional protection of the freedom of expression also of the media and more significantly through the specifically created Law of 8 June 2004 on the Freedom of Expression in the Media there is a robust protection of the fundamental aspects of journalistic work in Luxembourg. Also, national courts follow in their decisions the jurisprudence of the ECtHR in the interpretation of Article 10 ECHR and thereby contribute to a strong protection of the most important elements contributing to investigative journalism. On the other hand there is not a large body of case law concerning such issues and more significantly the Press Council's Complaints Commission has – in more than a decade since its establishment – only dealt with a limited amount of cases which could have further clarified the application of the Deontology Code. It is noteworthy that two significant cases concerning the protection of journalistic sources were subject of a decision by the ECtHR stemming from Luxembourgish prosecutions or investigations affecting the position of journalists and both were held as violations of the rights of the journalists concerned.

Also, when evaluating the situation of the media in Luxembourg it is important to consider both the small size of the country and the nonetheless numerous different media on offer. The pluralist media landscape may in some instances be countered as far as investigative journalism is concerned by the fact that there is a relative closeness between actors of the political, economic and societal sphere and the reporting journalists simply due to the limited number of "players".

However, this more general observations leaves the evaluation of the legal framework for investigative journalism untouched which – as the overview in this report has shown – covers all major topics in line with international standards although the application in practice also by the self-regulatory instances as well as by employing courts in cases of disputes could be further increased in the future.

## **19. Latvia**

Ieva Andersone

## 1. Relevant Legislation and Case-law

Fundamentally, the rights of journalists are derived from *Satversme*, the Constitution of Latvia. Article 100 of the *Satversme* provides: "Everyone has the right to freedom of expression, which includes the right to freely receive, keep and distribute information and to express his or her views. Censorship is prohibited".<sup>1275</sup> Other legal acts regulating the journalistic field must be interpreted in conformity with this fundamental provision.

The main legal act regulating the journalistic field in Latvia is the Law on Press and Other Means of Mass Communication (1990)<sup>1276</sup> (hereinafter: the Press Law). The Press Law regulates the main rights and duties of journalists, editors and mass media. The Press Law identifies what kind of information may not be published, the rights to keep the journalistic source secret, as well as liability of journalists and mass media.

In addition, there is a special law with respect to electronic mass media: the Electronic Mass Media Law (2010)<sup>1277</sup> (hereinafter: the EMML). The EMML is applicable in addition to the Press Law to journalists operating in electronic mass media. It prescribes additional rules with respect to the contents of programmes and fundamental rules applicable to all broadcasts.

Both the Press Law and the EMML enshrine the editorial independence principle.

## 2. a) Obtaining of information

The Press Law provides that mass media have rights to receive information from state and public organizations, and officials of state and public organizations may refuse to provide the information only if it is non-publishable (Articles 5 to 7).

The specific rights of journalists include the rights to gather information in any way not prohibited by law and from any information source not prohibited by law (Article 24, paragraph 1). The journalist has rights to be present in locations of publicly important events and make reporting from

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<sup>1275</sup> *Satversme*, adopted on 15 February 1922, available: <http://likumi.lv/doc.php?id=57980> (in Latvian).

<sup>1276</sup> In Latvian: Likums „Par presi un citiem masu informācijas līdzekļiem“; adopted on 20 December 1990, last amendments on 13 February 2014; available in <http://likumi.lv/doc.php?id=64879> (in Latvian).

<sup>1277</sup> In Latvian: Elektronisko plašsaziņas līdzekļu likums; adopted on 12 July 2010, last amendments on 12 November 2014; available in <http://likumi.lv/doc.php?id=214039> (in Latvian); unofficial, but updated translation into English available at: <http://nepļpadome.lv/en/assets/documents/anglu/Electronic%20Mass%20Media%20Law%202012.2014.pdf>.

there (Article 24, paragraph 3).

Article 7 of the Press Law provides regulation on the so called non-publishable information. The article includes a list of information, which is subject to the prohibition to publish. The list provides:

- “State secret of other secret especially protected by law that promotes violence and the overthrow of the prevailing order, advocates war, cruelty, racial, national or religious superiority and intolerance, and incites to the commission of some other crime;
- Materials from pre-trial investigations shall not be published without the written permission of the prosecutor or the investigator. Publication of materials that violate the presumption of innocence shall not be permitted in the reporting of judicial proceedings. During open court sittings journalists may make recordings by means of technical devices if these do not hinder the course of judicial procedures.
- It is prohibited to publish the content of correspondence, telephone calls and telegraph messages of citizens without the consent of the person addressed and the author or their heirs.
- The use of mass media to interfere in the private life of citizens is prohibited and shall be punished in accordance with the law.
- It is prohibited to publish information that injures the honour and dignity of natural persons and legal persons or slanders them.
- It is prohibited to publish information concerning the state of health of citizens without their consent.
- It is prohibited to publish business secrets and patent secrets without the consent of their owners.
- It is prohibited to publish without the consent of the persons and institutions mentioned in the Law on Protection of Rights of Children:
  1. Information, which may endanger interests of children harmed in illegal activities (privacy, identity, reputation);
  2. Picture of a child suffered in illegal activity;
  3. Information, which allows to identify minor age violator of law or witness.
- It is prohibited to publish child pornography and materials, which demonstrate violence against children.
- It is prohibited to publish erotic and pornographic materials if it violates the order provided in legal acts, which regulate the circulation of erotic and pornographic materials.”

However, although the regulation *prima facie* seems quite strict, it is not fully applied in practice. Article 27 of the Press Law provides that for the

publication of the information provided in Article 7 the guilty persons are responsible as provided in the law. However, there is no law providing special responsibility for the violations of the Article 7 of the Press Law. Certain liability clauses may be derived from other special laws, however, the liability is not clear and evident.

The Latvian Code on Administrative Violations<sup>1278</sup> does not provide any penalties for the breach of Article 7 of the Press Law. Also, the Criminal Law<sup>1279</sup> does not provide such general liability, although there is liability for a disclosure of state secret, but this liability applies only to persons who had the duty to guard such a secret, and the journalists do not have such a legal duty.

Therefore the general practice is that mass media sometimes do use information, which has been obtained in potentially improper ways. Especially, the use of a hidden camera is quite common in broadcasts of investigative journalism. There is no liability provided in law for the use of the hidden camera as such.

## **2. b) Boundaries of law enforcement**

As mentioned above, the enforcement of the Article 7 of the Press Law is not effective in practice.

Any search of editorial offices, seizure of documents or other materials, and surveillance of journalistic communication is possible only within the procedure provided in the Criminal Procedure Law<sup>1280</sup>, i.e., if there is a grounded assumption that a violation of the Criminal Law has occurred. Any decisions on such matters are taken by the investigation judge at the court after an application by investigation or prosecution authorities. The judge would review the evidence presented by the police investigators and the prosecutor, and would decide whether there are grounds to issue a search warrant.

As established in Nagla case<sup>1281</sup>, the judge has to consider also the fundamental freedoms of the journalists enshrined in the article 100 of Satversme and in the Article 10 of the European Convention of Fundamental Rights. In that case the investigation judge granted the search of the private apartment of Ms Nagla, a journalist in a popular public

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<sup>1278</sup> In Latvian: Latvijas Administratīvo pārkāpumu kodekss, available at: <http://likumi.lv/doc.php?id=89648> (in Latvian).

<sup>1279</sup> In Latvian: Krimināllikums, available at: <http://likumi.lv/doc.php?id=88966> (in Latvian).

<sup>1280</sup> In Latvian: Kriminālprocesa likums, adopted on 21 April 2005, available at: <http://likumi.lv/doc.php?id=107820> (in Latvian).

<sup>1281</sup> Judgment of the European Court of Human Rights, Case of Nagla v Latvia, Judgment of 16 July 2013, No.73469/10.

broadcasting program “De Facto”. The decision on allowing the search was very general, allowing the investigators to search and seize “any information”, which relates to the investigated crime, which was potentially performed by the source of information of the journalist. During the search the police seized also the computer of Ms Nagla, which contained information also on other information sourced, not only on the suspect in the relevant case. The European Court of Human Rights established a breach of Article 10, indicating inter alia that the reasoning provided in the decision of the investigation judge was not “sufficient” and “relevant”, and did not correspond to an urgent public need.

Article 22 of the Press Law provides that the mass medium is entitled not to reveal the source of information. However, the court may request to indicate this source in order to protect substantial interests of a person or public.

### **3. Reporting about on-going investigations**

As described above, Article 7 of the Press Law lists the un-publishable information, but there is no specific liability provided for making such information public. Any potential liability would be established on case-by-case basis, weighing the alleged violation and the rights of public to obtain the information. I am not aware of any case where a journalist or editor of mass medium would be made subject of any liability for the breach of Article 7 of the Press Law (as there is no publicly available data base of all judicial decisions in Latvia, this information may be incomplete or inaccurate).

Part 2 of the Article 7 of the Press Law provides a general principle that “materials from pre-trial investigations shall not be published without the written permission of the prosecutor or the investigator. Publication of materials that violate the presumption of innocence shall not be permitted in the reporting of judicial proceedings.”

However, in practice it is quite common that Latvian media publish certain materials or information on on-ongoing pre-trial investigations, when the information is leaked to media by some participants of the case (e.g., witnesses) or from undisclosed sources.

I am not aware that any journalist or medium would have been subject to actual penalties in this regard, but there has been public information that some journalists have been questioned by the investigation authorities on the source of their information.<sup>1282</sup> In a related case, according to publicly

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<sup>1282</sup> Article in Reporters Sans Frontiers: Two journalists have been questioned by the Security Police, published on 1 May 2015, available at:

available information<sup>1283</sup>, one journalist has recently been recognised a suspect in criminal proceedings for the violation of Article 144, part 1 of the Latvian Criminal Law (intentional violation of a personal correspondence secret). According to the publicly available information, the journalist is held suspect for publication of electronic mail correspondence of another journalist in his book. The suspect allegedly had obtained the personal e-mail correspondence without the permission of the author, the sender and the addressees, and has published the contents of the correspondence in his book. The case is pending.

In January 2015 the Latvian Ministry of Justice suggested to make amendments to the Press Law, providing stricter provisions how the journalists may report on criminal matters. The amendments provided a prohibition to publish any materials of the criminal procedure until the finishing of the criminal procedure and until the moment when the final judgment comes into force. Also, no materials of pre-trial criminal procedure may be published.<sup>1284</sup> However, after protests of mass media and public the suggested amendments did not progress.

#### **4. Due diligence guidelines for journalists**

Article 25, paragraph 1 of the Press Law provides a general duty of the journalist to render truthful information. Paragraph 5 of the same article provides a duty to observe rights and legal interests of the state, public organizations, companies, and persons.

The EMLL, Article 24, part 4, provides a more specific duty for electronic mass media: the media have to ensure that facts and events in the broadcasts are reflected truthfully, objectively, by facilitating exchange of opinions, and in conformity with general principles of journalism and ethics. Part 5 of the same article provides that electronic media have to publish their Code of Actions, where they must inter alia indicate their principle of ethics.

The Latvian Association of Journalists has adopted its own Code of Ethics, the latest version approved on 14 March 2014<sup>1285</sup>. Paragraph 1.3 of the

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<http://fr.rsf.org/lettonie-deux-journalistes-d-investigation-01-05-2015,47845.html>.

<sup>1283</sup> E.g., article in [www.kasjauns.lv](http://www.kasjauns.lv) on 29 April 2015, „Security Police detains journalist Lato Lapsa”, available at: <http://www.kasjauns.lv/lv/zinas/192600/par-nepaklausanos-dp-prasibam-aiztur-lato-lapsa>.

<sup>1284</sup> Article in Latvian in Delfi.lv: <http://www.delfi.lv/news/national/politics/tm-griberobezot-masu-mediju-iespejas-publikot-informaciju-par-kriminalprocesiem.d?id=45464216>.

<sup>1285</sup> Available in Latvian at: <http://www.latvijaszurnalisti.lv/etikas-komisija/etikas-kodekss/>.

Code provides that “the journalists have to ensure that the public receives full information on processes and events. Journalists have to facilitate multilateral exchange of opinions, analytical and critical approach towards the political, economic and judicial power, and to protect the rights of public and individuals”.

The Code provides also for more specific rights and duties of journalists. For example, paragraph 3.6. provides that “In interaction with sources of information the journalist has a duty to identify himself. Exceptions are permissible if information important to public cannot be acquired by other means or a journalistic experiment is performed”.

However, the Code is not legally binding. It is binding only to the members of the association. The violations of the Code are reviewed by the Committee of Ethics of the association. The most severe penalty the Committee can apply is the exclusion of the person from the association.

## 5. Liability in the editorial chain

According to Article 16, part 3 of the Press Law the editor (editor in chief) is liable for the contents of materials published in the relevant mass medium.

However, the Press Law does not provide any more detailed provisions on the division of the liability for a journalistic product. The Latvian Code of Administrative Violations provides two specific violations, for which the responsibility of the editor in chief may be established: failure to publish the revocation of false information, if such duty has been imposed by the court (Article 201.<sup>7</sup>) and revealing of the source of information, if the editor had promised in writing to ensure the secrecy of the source (Article 201.<sup>8</sup>).

However, according to publicly available information, also a journalist has been penalised for refusing to reveal the source of information after the court judgment.<sup>1286</sup>

According to the EMLL, the responsible person for any violations of the EMLL, is the broadcaster (as the legal person / company), i.e., the person who has received the broadcasting permit.

## 6. Conclusion and perspectives

Generally, the Latvian laws provide a sufficient legal framework for the operation of investigative journalism. However, the Press Law is quite

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<sup>1286</sup> *Anda Rožukalne*. Is Latvia facing the dawn of investigative journalism? Published at delfi.lv, 24 October 2007, in Latvian, available at: <http://www.delfi.lv/news/comment/comment/anda-rozukalne-vai-latvija-ir-petnieciskas-zurnalistikas-noriets.d?id=19318111>.



outdated and does not address the contemporary reality of media and journalism. Also, the Press Law is not very specific with respect to the rights and duties of journalists, therefore journalists sometimes face insecurity of what exactly they can and cannot do.

As evidenced by Nagla case, criminal investigation and prosecution authorities sometimes lack a complete understanding how to apply the criminal procedure with respect to journalists and in order not to violate freedom of speech. More detailed and precise guidelines would be desirable in this regard.

A related problem is that there is no single and binding code of conduct or code of ethics, which would be applicable to all journalists. Such a code would be a proper place to address ethical and practical standards of investigative journalism, which would be too casuistic for inclusion in the law.

## **20 Macedonia**

Borce Manevski

## 1. Relevant Legislation and Case-law

The practical implementation of journalists' duties to inform the public all topics, which are of a general interest and to guarantee citizens' rights to be informed in a professional and unbiased manner, derives from Art. 16 of the Constitution of the Republic of Macedonia, where the censorship is forbidden and the speech freedom, meaning the media freedom is guaranteed.

The media sector is further directly regulated with the Media Law and the Law on Audio and Audio-visual Media Services. Other relevant laws, which indirectly refer to the media sector, are: the Criminal Code, the Law on Electronic Communications, the Law on Competition Protection, the Law on Personal Data Protection, the Law on Protection of Author's and Related Rights etc. including the secondary legislation acts etc.

Based on the will to protect journalists' professional standards the Association of Journalists of Macedonia (AJM) developed a Journalists' Code of Ethics<sup>1287</sup> (with an explanatory Handbook on Journalists' Ethics). In this Code of Ethics the journalists are urged to respect the basic professional standards, like to respect the truthfulness of the information they would like to publish. Art. 1 of the Code gives the Journalists the right to a free access to all information, which is of a public interest: The journalists have right to free access to all sources of information that are of public interest. The journalists shall publish correct, verified information and will not conceal essential information or forge documents. If given information cannot be confirmed or if it is a matter of assumption, i.e. speculation, that should be noted and published. Correctness of the information ought to be verified as much as possible.

Art. 5 of the Journalists' Code reminds the journalists on one hand to respect the laws, however on the other had it urges them to reveal the information, which is of a public interest: The journalist shall respect the rule of law and will publish nothing that is on the contrary with the public interest.

It is more than sure that the media interest could be attracted especially by the activities of the political officials and societal leaders, who manage public resources, like governmental officials, members of the Parliament, the country President, state and public institutions etc. Some of their potentially unlawful activities might hide in documents, which have been ranked as confidential, or as administrative or state secrets. The matter of creation and utilization of illegal / improper information gathering and

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<sup>1287</sup> Code of Journalists of Macedonia (available in English language): <http://www.znm.org.mk/drupal-7.7/en/node/441>.

disclosure of a secret is regulated in the Criminal Code, articles 150, 151 and 152.

Article 150 'Disclosure of a Secret' reads:

*“(1) A lawyer, notary, defense counsel, doctor, midwife or some other health worker, psychologist, religious confessor, social worker or some other person who, unauthorized, discloses a secret he discovered while performing his profession, shall be punished with a fine, or with imprisonment of up to one year.*

*(2) The crime from item 1 does not exist if the secret was disclosed in general interest, or in the interest of some other person, when this has higher priority than the interest of keeping the secret.*

*(3) The prosecution is undertaken upon private suit.”*

This article gives the media and the journalists a general freedom to create and/or utilize secrets, private information etc. only if this information is in a general interest. The intention is good, however, in the court practice it sometimes difficult to define the “general interest” of the public.

## **2. Obtaining of information**

On 3<sup>rd</sup> February, 2015 the Public Prosecutor of the Republic of Macedonia issued a press release<sup>1288</sup> reminding the media not to publish any video and/or audio materials, which might be used in the future as evidences in potential court cases of organized crime and corruption, since this was “forbidden and punishable by Law”. The Public Prosecutor’s Office in this case neither provided more concrete legal grounds, nor mentioned the possibility that the journalists have to make such materials public, only if the general interest is higher than the revealed secret of illegally obtained information.

This press release came as a reaction to the publishing of wiretapped conversations, recorded – according to the Prime minister, Nikola Gruevski, by foreign intelligence services and according to the opposition’s leader Zoran Zaev, by illegal wiretapping activities of the Macedonian Secret Police (UBK). From 9 February 2015 to the present date, the opposition party SDSM (Social-democratic Union of Macedonia) has released about 40 packages of audio tapes of recorded telephone conversations of among others the Prime Minister, government Ministers, senior public officials, Mayors, Members of Parliament, the Speaker of the Parliament, opposition leaders, judges, the State Prosecutor, civil servants, foreign diplomats, journalists, editors and media owners into the public domain. The amount of material contained in these releases so far

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<sup>1288</sup> <http://jorm.gov.mk/?p=1166> (available in Macedonian language).

has reached around 500 pages of transcript conversations. The oppositional party SDSM claims that it has access to over 20,000 such recorded conversations in total, and that these recordings have been made by the national intelligence services. The making of these recordings is generally acknowledged to have been illegal, to have taken place over a number of years and not to have been part of any legitimate court-sanctioned operations. The recordings are also of a quality, scale and number to be generally acknowledged to have been made inside the national intelligence service's facilities. The content of many of the recordings provide indications of unlawful activities and abuse of power by senior government officials. The head of the intelligence service and two senior government Ministers have resigned since the start of the interception scandal in January 2015.<sup>1289</sup>

According to the Criminal Code, Article 151, the unauthorized tapping and audio recording is a criminal act:

*“(1) A person who by using special appliances taps or records on audio a conversation or a statement which is not intended for him, shall be punished with a fine, or with imprisonment of up to one year.*

*(2) The punishment from item 1 shall apply to a person who enables an unauthorized person to become informed about a conversation or a statement which is tapped or recorded on audio.*

*(3) The punishment from item 1 shall also apply to a person who records on audio a statement that is intended for him, without the knowledge of the person giving the statement, with the intention of misusing it or to pass it on to third persons, or to the person who directly passes such a statement on to third parties.*

*(4) If the crime from items 1, 2 and 3 is committed by an official person while performing his duty, he shall be punished with imprisonment of three months to three years.*

*(5) The prosecution of the crime from items 1, 2 and 3 is undertaken upon private suit.”*

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<sup>1289</sup> The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015: [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAAahUKEwjS-O6HiN3GAhXHwBQKHT0ADOK&url=http%3A%2F%2Fec.europa.eu%2Fenlargement%2Fnews\\_corner%2Fnews%2Fnews-files%2F20150619\\_recommendations\\_of\\_the\\_senior\\_experts\\_group.pdf&ei=DkimVdK5EMeBU72AsMgO&usg=AFQjCNHvu2XJA4w2LXza4anAp\\_jJN1F\\_Fw&bvm=bv.97653015,d.d24](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAAahUKEwjS-O6HiN3GAhXHwBQKHT0ADOK&url=http%3A%2F%2Fec.europa.eu%2Fenlargement%2Fnews_corner%2Fnews%2Fnews-files%2F20150619_recommendations_of_the_senior_experts_group.pdf&ei=DkimVdK5EMeBU72AsMgO&usg=AFQjCNHvu2XJA4w2LXza4anAp_jJN1F_Fw&bvm=bv.97653015,d.d24).

Following the Public Prosecutor's instruction the media landscape was practically divided into two groups: those media outlets, which see a general interest in making the recordings public, where unlawful activities (including election fraud, imprisonment of political opponents, corruption, misuse of public funds, ordering murders, cover up of murders etc.) are conducted by highest state and Government officials and the so called 'pro-governmental' including the PBS -MRT, which have been following the order of the Public Prosecutor, namely Art. 151, par. 2.

Although the Public Prosecutor stated that the publication of these illegally wiretapped phone conversations "is publishable by law", so far no media outlet has publically informed that the Public Prosecutor or any other law implementation agency had initiated a criminal or a misdemeanor procedure against it.

A reaction on the Public Prosecutor's instruction also came from the US Embassy to Skopje, urging the Public Prosecutor to provide a clear legal justification for its instruction given to the journalists and the media not to publish materials, which reveal unlawful behaviour and might be used in potential future court proceedings: "We urge authorities to provide a clear legal justification for the February 3 statement, specifying the narrow circumstances where information must be treated as an official secret, and explaining how journalists will know when such narrow circumstances apply."<sup>1290</sup>

## **2. b) Boundaries of law enforcement**

There are no special provisions in the Macedonian legislation framework, which set different standards for the journalists and media than the regular ones in conducting search of editorial offices, seizure of documents or goods, including press materials and surveillance of journalistic communication. The before mentioned case of illegal wiretapping, showed that about 100 journalists have been wiretapped during the last few years, most of them with no court order or in any other legal procedure.

In the case with the closure of the critical TV Stations A1 and A2 in 2011, whose owner was accused for tax evasion, the media outlets were closed due to seizure of the TV production and broadcasting equipment and the seizure of their premises<sup>1291</sup>. The closure of these TV stations along with number of critical dallies created an atmosphere of fear among the media

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<sup>1290</sup> US Embassy to Skopje, full Press Release (in English language): <http://macedonia.usembassy.gov/https/macedonia2/https/macedonia2/news-events2/press-releases2015/pr02062015.html>.

<sup>1291</sup> More information from the media is available here: <http://www.balkaninsight.com/en/article/bankruptcy-for-macedonia-s-most-prominent-tv>.

and journalist community, which led to increased self-censorship and biased reporting. Due to the political influence in the judicial system many believe that high political figures had influenced the court decisions in these cases.

As noted by the EU Commission in the Country's Progress Report for 2014<sup>1292</sup> the commercial classic media (TV and radio), including the public service MRT, are favourable towards the Government:

*“There is indirect state control of media output through government advertising and government-favoured (and favourable) media outlets. The public broadcaster does not fully play its role as the provider of balanced and informative media content, and its political bias was noted by OSCE/ODIHR during both this year's and last year's elections. This results in a scarcity of truly independent reporting and a lack of accurate and objective information being made available to the public by the mainstream media.”*

Recent cases of implicit and explicit political repression on media and journalists:

Cases Plusinfo and Dokaz: As a contrast to the classic media, some internet sites are critical against the ruling political party and often are victims of unidentified attacker gangs, rather of direct legal state institutions, as it was the case of TV A1. During June and July, 2015 the offices of [www.plusinfo.mk](http://www.plusinfo.mk)<sup>1293</sup> were demolished, computer equipment, video and photo cameras were stolen and the owner of the news portal [www.dokaz.mk](http://www.dokaz.mk)<sup>1294</sup> fell a victim of a harsh physical attack.

Case Kezarovski: Another case, which shows the explicit repression of the state institutions on the investigative journalists is the “Kezarovski Case”. Kezarovski, a journalist of Skopje-based daily Nova Makedonija, was suddenly arrested in May 2013 on the grounds that he revealed the identity of a protected witness. The charge relates to an article published in 2008 in the Reporter 92 newspaper in which Kezarovski had quoted from an internal police report that had been leaked to him. However, the witness

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<sup>1292</sup>

[<sup>1293</sup> \[<sup>1294</sup> \\[402\\]\\(http://www.dokaz.mk/vaka-tepa-vlasta/.”</a></p></div><div data-bbox=\\)\]\(http://plusinfo.mk/vest/31058/redakcijata-na-plusinfo-obiena-i-ograbena-preturano-i-po-dokumenti-%28galerija%29.”</a></p></div><div data-bbox=\)](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCEQFjAAahUKEwib-ICVkoZGAhXFyRQKHd9rD2k&url=http%3A%2F%2Fec.europa.eu%2Fenlargement%2Fpdf%2Fkey_documents%2F2014%2F20141008-the-former-yugoslav-republic-of-macedonia-progress-report_en.pdf&ei=0S2uVdvLF8WTU9_XvcgG&usg=AFQjCNGp_GC2h2-FMTx0TthCHn2wVm8V_g&bvm=bv.98197061,d.d24.”</a></p></div><div data-bbox=)

had not yet been given protection at the time the article was written and anyway admitted in 2013 having given a false statement under pressure from the police. Kezarovski believes the real reason for his arrest was to make him reveal the identity of the person who leaked him the police report. At the time of his well-publicized arrest by special police forces, the journalist was also investigating the case of Nikola Mladenov, the publisher of independent political weekly magazine Fokus who had been killed in a mysterious car accident about two months earlier. Many international institutions, like OSCE<sup>1295</sup> and the International Federation of Journalists<sup>1296</sup> condemned Kezarovski's imprisonment.

**Case Jovanovski:** In April, 2015 a critical journalist received a death threat from so far unknown person. The threat took the form of a wreath with the message "Final Greetings" that was delivered to Jovanovski's home in his absence and was received by his wife.<sup>1297</sup>

**Case Ivanovski:** In July, 2015 the Vice Prime Minister, Vladimir Peshevski attacked the journalist, Sashe Ivanovski (known as Sashe Politiko), because the Vice Prime Minister didn't like the question, which Ivanovski asked<sup>1298</sup>. A reaction came from the European Federation of Journalists<sup>1299</sup>.

**Case Trickovski:** In May, 2015 a pro-oppositional columnist, Branko Trickovski, was also verbally threatened with death after which his car was set on fire.<sup>1300</sup>

**Case Bozinovski:** The investigative journalist in exile Zoran Bozinovski was accused and sentenced with imprisonment by the Macedonian authorities for performing "espionage activities for foreign governments" after he had published reports on his website "Burevesnik" about corruptive activities of high governmental officials. Bozinovski has been detained in Serbia and he is still waiting for extradition to Macedonia.<sup>1301</sup>

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<sup>1295</sup> OSCE Freedom of Media Representative's reaction: <http://www.osce.org/node/107265>.

<sup>1296</sup> International Federation of Journalists: <http://www.ifj.org/nc/news-single-view/backpid/1/article/justice-and-freedom-must-prevail-for-macedonian-journalist-tomislav-kezarovski/>.

<sup>1297</sup> Reporters without Borders Reaction: <http://en.rsf.org/macedonia-sinister-threat-to-macedonian-22-04-2015,47798.htm>.

<sup>1298</sup> More information (in English language) with the original video of the attack is available here: <http://meta.mk/en/vitsepremierot-peshevski-so-klotsi-i-sotupanitsi-go-napadna-sashe-politiko/>.

<sup>1299</sup> EFJ' reaction: <http://europeanjournalists.org/blog/2015/07/16/efj-condemns-attack-on-macedonia-journalist-by-government-official/>.

<sup>1300</sup> Reporters without Borders Reaction on Trickovski's case: <http://en.rsf.org/macedonia-outspoken-columnist-threatened-his-22-05-2015,47928.html>.

<sup>1301</sup> IFEX Report: [https://www.ifex.org/macedonia/2013/11/20/critical\\_media/](https://www.ifex.org/macedonia/2013/11/20/critical_media/).



With an exception of the Bozinovski case, where the Courts have issued a sentence to the accused journalist, in all other cases there is no breakthrough in the investigations, which would reveal the perpetrators and end with an effective Court decision. In the Ivanovski case the local Police Office stated that it could not proceed against the Vice Prime Minister, since he has political immunity.

### **3. Reporting about on-going investigations**

The journalistic duty on reporting about on-going criminal and/or political investigations is embedded in the Journalistic Code, Article 8:

The manner of informing in case of accident, elementary disaster, war, family tragedy, sickness, court procedures must be free from sensationalism.

The principle of presumption of innocence, reporting for all involved parties in the legal dispute without suggesting verdict, will be applied when reporting on court procedures.

The Handbook on Journalistic Ethics provides more explanation in this regard, how the journalists should protect the private lives of the suspected criminals.

The practical implementation of these journalists' rights and duties faces political repressions, as elaborated and illustrated in the cases before.

### **4. Due diligence guidelines for journalists**

The Journalistic Code in its Art. 1 sets the standards on presenting the "objective truth":

The journalists have right to free access to all sources of information that are of public interest.

The journalists shall publish correct, verified information and will not conceal essential information or forge documents.

If given information cannot be confirmed or if it is a matter of assumption, i.e. speculation, that should be noted and published.

Correctness of the information ought to be verified as much as possible.

The Handbook on Journalistic Standards provides more explanation about the practical implementation of these standards. "If the journalists estimates that the unconfirmed information is of a public interest, he/she is obliged to publish it with a clear emphasis that this information has not been confirmed."

In those cases, where the source of certain information requests to be hidden, then the journalist has the right not to reveal his/her source – in accordance with Art. 4 of the Journalistic Code. In this way certain

information on suspicion can be published with restricted access to source's personal data (blurred face, dubbed/modulated voice etc.):

*Journalistic Code, Art. 4:*

The journalist shall point out the source of information, but if the source demands to remain anonymous the journalist shall protect him.

However this right is partially limited with the Law on Media, where it is stipulated that if the journalist wants to disclose a source of information, he/she is obliged to inform the Editor in Chief in the first place:

*Law on Media: Protection of sources of information*

Article 12

*(1) The journalist has the right not to disclose the source of information or information which might disclose the source in accordance with the international law and the Constitution of the Republic of Macedonia.*

*(2) The right referred to in paragraph (1) of this Article shall also apply to other persons who due to their relations with the journalist have been informed about the data that may reveal the source, by way of collection, editing and dissemination of said information.*

*(3) Prior to publishing information for which the source is not disclosed, the journalist shall be obliged to inform the Editor-in-Chief in a manner stipulated in Article 10 paragraph (1) of this.*

## **5. Liability in the editorial chain**

Legal Perspective: The Media Law and the Law on Civil Responsibility for Libel and Defamation are modern legal acts, which incorporate the highest international standards. According to the Media Law each media publisher must have an Editor-in-Chief, who is a journalist and who gets appointed and dismissed by the media publisher. The Editor-in-Chief is responsible for the realization of the content which is published, i.e. broadcasted and he/she is responsible for all published information in the media.

According to the Law on Civil Responsibility for Libel and Defamation<sup>1302</sup> (articles 6 and 8) the author of information – in which there is untruthful or/and insulting content – as well as the editor in chief and the publisher may be held responsible for libel or/and defamation according to the “editorial chain”. The journalists cannot be fined more than 2.000 EUR, the editors in chief not more than 10.000 EUR, and the media publisher not more than 15.000 EUR.

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<sup>1302</sup> Law on Civil Protection from Libel and Defamation is available (in Macedonian) here: <http://www.znm.org.mk/drupal-7.7/>.

**PRACTICAL PERSPECTIVE:** The de-criminalisation of the libel and defamation initiated no positive effects in the freedom of expression and freedom of media. The political antagonisms, the strong dependence of the commercial media from the government's advertising – which also resulted into collapse of the advertising market - and the selective justice of the judiciary made the situation even worse. The EU Country's Progress Report for 2014 noted: "Defamation actions continued to be raised by journalists against other journalists (highlighting the low level of solidarity within the profession), by politicians against journalists (creating a chilling effect on the freedom of expression) and by politicians against other politicians (in the place of open public debate). Court judgments upholding claims of defamation have been relatively low in number and have been relatively conservative in their award of damages; however there are exceptions, including cases involving public figures. This sends a damaging message, both as regards the freedom of expression and the impartiality of the courts."

## **6. Conclusion and perspectives**

The country has ratified the relevant European and international legal instruments guaranteeing and regulating the protection of freedom of expression such as the European Convention on Human Rights and the UN Covenant on Civil and Political Rights. Some positive steps have been taken, e.g. the de-criminalisation of libel and defamation, alignment with the Audiovisual Media Services Directive and establishment of a self-regulatory body (Council of Ethics, established in December, 2013) within the Association of Journalists of Macedonia. In general the country has a good media legislation system, which can be improved in some areas, like restriction of excessive state funded advertising, increase of the independence of the media regulation authority and the PBS.

However, the pretty solid media legal framework on one hand does not mirror a well-developed media landscape in the practice. The situation with the media freedom in the country has become gradually worse over the last couple of years. In the recent index of press freedoms of Reporters without Borders 2014, the country has dropped to its lowest ranking ever and is now ranked as number 123 in the world. Freedom House ranks it as "partly free" in terms of freedom of press but with a declining score over the recent years 31. In the IREX's 2014 Media Sustainability Index (MSI) it is rated with an overall score of 1.40.32 MSI observed the country's "prospects for media sustainability further deteriorated... The low scores reflect the media community's pessimism about the prospects of escaping the trends toward greater state control, politicization, and economic degradation of the media." The latest revelations from the wiretapped conversations showed not only financial dependence from the state and public funds, but a great and explicit editorial dependence from the

country's intelligent services and from the leading political figures. "The recent interception revelations confirm the existence of an unhealthy relationship between the mainstream media and top government officials, with the former seemingly taking direct orders from the latter on both basic and fundamental issues of editorial policy. This practice harms the public's right to receive information from a variety of sources and expressing a variety of views, and reduces the scope for objective and balanced reporting of facts."<sup>1303</sup>

When the journalists are threatened, intimidated and brutally attacked on a daily basis, there is no room for practicing investigative journalism, especially not in the sphere of fighting organized crime and corruption. The governmental institutions introduced a mechanism of issuing licenses for journalists to attend press conferences. In this way only those journalists who are favourable to the Government can attend its press conferences. Those who ask unwanted questions may fall victims of the state repression.

The level of media freedom depends on the overall level of democracy in the society. The Macedonian society shows at the moment high deficits in practicing democratic standards, like rule of law, free and fair elections, equal justice, mechanisms for check and balances in the state and public institutions, effective fight against organized crime and corruption and effective control over the intelligence services etc. A basic pre-condition for functional freedom of expression is a democratic environment. At the moment the four biggest political parties negotiate on how to improve the rule of law in the country, which would set a ground for democratization. The first step is to set conditions for the opposition to come back to the Parliament after it was brutally thrown out of the Parliament's building<sup>1304</sup> along with the media representatives<sup>1305</sup> by the special police forces on 24 December 2012. The process is heavily supported by the international community, the EU Commission, represented by the Enlargement Commissioner Johannes Hahn<sup>1306</sup> and the US diplomacy.

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<sup>1303</sup> Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015.

<sup>1304</sup> Video: Special police forces throw out oppositional MPs from the National Parliament in Skopje: <https://www.youtube.com/watch?v=EXFJSqUCCg&index=2&list=PLBfGn0BK5N1Gyeytk3EBvsXxerjmFRRmn>.

<sup>1305</sup> Video: Special police forces throw out media representatives from the National Parliament in Skopje: <https://www.youtube.com/watch?v=SgtQj3AOU5I>.

<sup>1306</sup> EU-Verhandlungserfolg auf dem Balkan: Neustart in Mazedonien (available in German language): <http://www.euractiv.de/sections/eu-aussenpolitik/eu-verhandlungserfolg-auf-dem-balkan-neustart-mazedonien-316356>.



## **21. Malta**

Tonia Borg

## 1. Questions 1. – 5.

The rights and duties of the media are mainly governed by the Press Act. The Act provides for civil and criminal actions against members of the media for particular offences and wrongs. The Act is mainly used in practice as regards civil and criminal proceedings against authors of articles reports and the editor of the paper or publishing house. The publisher is only liable if the editor or author are not identified.

In criminal proceedings no imprisonment can be awarded unless the accused pleads the truth of the matters reported and then fails to prove them substantially. The fine awarded may not exceed 1164 euro. For the purpose of criminal proceedings under the Press Act, no arrests can be made by the Police nor searches made in any premises. In civil proceedings the maximum damages that can be awarded is 11, 600 euro.

In libel proceedings the editor and author can always plead the truth of the matter reported but only if the aggrieved person is a person acting in a public function, or takes active part in politics, or is a candidate to public office or occupies a position of trust in a matter of general interest. Besides the inquiry into the truth of the matter reported cannot refer to the domestic life of the aggrieved party. Even then no punishment will be awarded only if the Court is satisfied that the proof of the truth has been for the public benefit, and only if no unnecessary insults imputations or allegations were contained in the report.

It shall be a defence for a member of the media to prove that the information published consisted of an accurate report of a speech made at an important public event by an identified person who knew or could have reasonably known or expected that the content of that speech was to be published in a newspaper or a broadcasting medium and the publication or broadcast was reasonably justifiable in a democratic society.

The jurisprudence of the Court has accepted that politicians and prominent civil servants are subject to wider limits of acceptable criticism and have also generally accepted the distinction between facts and comments and has developed the doctrine of *fair comment*. (*Cachia Caruana vs Bartolo :Magistrates `Civil Courts 11th May 2015*) and *Galea vs St John 30 th April 2015 Magistrates `Civil Court* )

*“ The Court notes that civil servants acting in an official capacity are, similarly to politicians albeit not to the same extent, subject to wider limits of acceptable criticism than a private individual ”*

In developing the *fair comment* doctrine the Courts have stated that to succeed in a defence of fair comment the defendant must show that the words are comment, and not a statement of fact. He must also show that there is a basis of fact for the comment, contained or referred to in the matter complained of.

Finally, he must show that the comment is on a matter of public interest, one which has expressly or implicitly put before the public for judgment or is otherwise a matter with which the public has a legitimate concern.

The Press Act guarantees certain journalistic freedoms including the right for a member of the media not to disclose - not even in legal proceedings- the source of information contained in a newspaper or broadcast, except in the interests of national security, territorial integrity or public safety or for prevention of crime and disorder, AND the interests of investigation by the court outweigh the need of the media to protect its sources, due regard being had to the role of the media in a democratic society ( art 46 Press Act).

As regards the use of bugging devices or illicit recording of conversations the Security Service Act (Cap 391), is clear that any interception of communications including recording which are not authorized by the person concerned or by a competent legal authority is illegal and subject to fine or imprisonment. Of course such authorization may be tacit or implicit. Hidden cameras of occurrences happening in public and recording of conversations in a public place do not amount to illegal interception.

#### *Making Information Public*

However the use by the media of such illegally acquired information is not a criminal offence. The only exception is when such information amounts to an official secret under the Official Secrets Act (Cap 50). An official secret means any document or information relating to security or defence, international relations, or crime investigation which is in the possession of a public servant or government contractor. Under that Act, any person- including members of the media- who discloses an official secret which he receives, knowing, or having reasonable cause to believe, that such information is protected, is liable to fine or imprisonment. However the disclosure must be ``damaging ``and the accused must have predicted such damage. Arrests can be made of any person under the Official Secrets Act if there is a reasonable suspicion of a commission of an offence under the Act, provided that as a rule a judicial warrant is obtained by the Police. Search warrants can also be issued by a Magistrate.

#### *Requesting Information: Freedom of Information Act*

A member of the media can request information – without giving any reasons – from a public authority under the Freedom of Information Act (Cap 496). A decision has to be taken by the public authority within 20 days. A request can be acceded to by giving a copy or giving the person making a request an opportunity to inspect the document. Exempt documents include those whose disclosure would cause damage to the security, defence or international relations of Malta, or if disclosed would divulge information communicated in confidence between governments.



Exempt documents are also Cabinet papers, official cabinet records, documents which would be covered by privilege in legal proceedings or papers which if disclosed may prejudice an investigation relating to a breach of the law. Covered by such exemption are also personal data, documents already accessible to the public, those relating to a public commercial partnership regarding commercial matters or request which require a disproportionate amount of time and resources to accede to . A general exemption is finally given to documents which would disclose opinions, advices and recommendations made internally within the government structure, when the public interest that is served by non-disclosure outweighs the public interest in disclosure.

Any refusal – which has to be supported by reasons – may be challenged before the Commissioner for Data Protection who can issue an enforcement notice to which an administrative fine is applicable if not complied with. Such notice however may be blocked by the Prime Minister who may issue a certificate that the requested document is exempt. Such certificate has to be laid on the Table of the House of Representatives. Decisions of the Commissioner may be appealed by both parties to a Tribunal presided over by a legally qualified person with at least twelve years' experience, and a further appeal to the Court of Appeal on a point of law only.

The Malta Press Club issued a Code of Ethics in July 2001 wherein it is provided that sources should always be identified provided identification does not create a conflict with the need to protect these sources. Confidentiality of sources should be respected when requested. All information given or received should as far as possible be scrutinized for veracity and accuracy.<sup>1307</sup> At all times a clear distinction should be made between fact, conjecture and comment. The use of hidden cameras /microphones or false identity leading to entrapment is only permissible if it is the only possible way to uncover cases of essential importance to society. A person aggrieved by any media report in his regard may request the Press Ethics Commission to decide whether there was any breach of the Code in his regard. Sanctions consist of (a) disapproval, or (b) censure or (c) grave censure. Such decision may be made public and in all cases is communicated to the employer of the journalist concerned.

## **6. Conclusion and perspectives**

Main Complaints by media on Current situation.

Most journalists criticize the current Libel laws, and the ease with which

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<sup>1307</sup> There is no legal provision on this point, although it is expected that the due diligence criterion would be applied by the Courts.

allegedly injured parties can initiate proceedings, put undue stress on newspaper organizations which have to pay to file counter-claims, apart from the time-consuming and expensive legal procedures. On the other hand most persons in public life think that the capping of 11,600 for civil damages is unduly restrictive. Limited circulation opportunities also mean advertisers are an important source of revenue, widening their power to limit their budgets when news reports are detrimental to businesses' interests.



## **22. Netherlands**

Nico van Eijk

## 1. Relevant Legislation and Case-law

### *General remarks*

It is good to start by pointing out that Dutch civil law does not contain any sector specific provisions regulating the journalistic field. In contrast, the Dutch journalistic field is mainly regulated by general provisions of civil and European law: article 6:162 of the Dutch Civil Code (general tort) and article 10 European Convention of Human Rights (freedom of speech), respectively.

Furthermore, the Netherlands does have non-binding self-regulation, which is primarily constituted by the so-called 'Guideline for Journalism' (*Leidraad voor de Journalistiek*).<sup>1308</sup> This guideline contains principles that describe what it means to conduct proper journalism and is, in some respects, somewhat reminiscent of the international Bordeaux Code. Although the document is not legally binding, its principles are sometimes used in case law.

Dutch criminal law does not differentiate between journalists and 'regular citizens', either. That means that journalists and regular citizens are both equally liable to punishment for criminal acts, such as defamation and forgery of documents. However, despite this theoretical equal position, practice shows that generally more is tolerated from journalists, given their unique position as a 'public watchdog' of society.<sup>1309</sup>

Answering the question whether or not the way in information was gathered is ultimately lawful or unlawful requires taking into account all relevant aspects of the case. As shall become readily apparent in the examples given below, there are several often reoccurring factors, such as the principles of proportionality and subsidiarity.

## 2. Obtaining of information

### *Forgery of documents*

A landmark case with regards to the unlawful gathering of information – and forgery of documents in specific – is the case of Dutch journalist Alberto Stegeman. In the television show 'Undercover', Stegeman demonstrated that the security at the east wing of Amsterdam's Schiphol

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<sup>1308</sup> Leidraad voor de Journalistiek, Raad voor de Journalistiek, 2015, <http://www.rvdj.nl/leidraad>.

<sup>1309</sup> A. Engelfriet, Wanneer is iemand (burger)journalist, [iusmentis.com, http://www.iusmentis.com/meningsuiting/nieuws-journalistiek/wanneer-burgerjournalist/#strafbaar](http://www.iusmentis.com/meningsuiting/nieuws-journalistiek/wanneer-burgerjournalist/#strafbaar).

Airport was lacklustre by entering that wing using a forged KLM pass.<sup>1310</sup>

The Court of Appeals of Amsterdam discharged Stegeman from further prosecution, as a conviction would be contrary to the freedom of the press. The Dutch Supreme Court agreed with the basic assumption of the Amsterdam Court of Appeals. It finds that, as a principle, journalists have to comply with the Dutch Criminal Code despite their vital role in a democratic society. However, the freedom to receive and impart information enshrined in Article 10 ECHR requires that exceptions to this principle can be made under special circumstances.<sup>1311</sup> First, the journalist has to have acted in good faith. Second, there needs to be an accurate factual base for the journalist's acts. Third, reliable and precise information has to be given in accordance with journalistic ethics. One of the main factors taken into account in the context of the latter requirement is whether or not the situation at hand could be brought to light using less far-reaching means.

The Supreme Court found that the Amsterdam Court of Appeal had not researched well enough if such was the case and referred the case to the Court of Appeal of The Hague. Because Stegeman could have sufficed with the recorded material that showed that multiple persons entered the terrain without a security check, the Court of Appeal of The Hague found that Stegeman had not had to forge the KLM pass.

People using the Dutch public transport make use of the so-called *OV-chipkaart* (public transport chip pass), which is an electronic pass equipped with a NFC chip used to pay the fee you owe to public transport operator. In 2011, a journalist use a hacked version of the card to show the vulnerabilities of it. The public prosecutor decide not to start a case against the journalist because of the public interest involved:<sup>1312</sup> "Given the public interest, (his) meticulous work and the minimal damage caused, the prosecutor stated that the importance of freedom of information in this case outweighs (claims of fraud) and decided to close the case."<sup>1313</sup>

#### *Business and trade secrets*

In the *Scientology v. Spaink* case, publicist Karin Spaink uploaded internal

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<sup>1310</sup> *G.A.I. Schuijt and O.M.B.J. Volgenant*, *Persvrijheidsmonitor Nederland 2013*, Villamedia, <https://www.villamedia.nl/thema/persvrijheidsmonitor/persvrijheidsmonitor-2013>.

<sup>1311</sup> Dutch Supreme Court 26 March 2013 (*Stegeman v. Public Prosecution Service*), ECLI:NL:PHR:2013:BY3752.

<sup>1312</sup> <http://www.wobbing.eu/news/police-investigates-dutch-journalist-showing-weakness-payment-system>:

<sup>1313</sup> <http://www.cnet.com/news/dutch-reporter-wont-be-charged-for-transit-card-fraud/>.

documents of the infamous Scientology Church.<sup>1314</sup> The Scientology Church, presumably worried that the content of the documents would cause negative publicity, invoked their copyright, hoping to force Spaink to take down the content. Thus, the legal question became which right prevails in the current case: copyright or the freedom to receive and impart information. Ultimately, the Court of Appeals of The Hague found in favour of Spaink. In its decision, the Court took into account that Spaink contributed to the public debate by publicizing the documents, that Spaink did not have any commercial intentions with her publication, that the documents had already been in the public domain for a short amount of time before Spaink's publication had taken place and that Scientology did show proper conduct towards Spaink's Internet service provider.

#### *Hidden camera and/or microphones*

Using hidden means to record certain information constitutes a severe infringement on one's privacy. However, under certain circumstances, using such means can be justified. This is primarily the case when these means are used to expose a dire situation and the journalist had no other, less far-reaching means to expose that situation.<sup>1315</sup> Extra caution should be exercised. This is illustrated well by two cases: *Peter R. de Vries v. Koos H* and *Albert Verlinde v. BNN*. The former of which pertains to covertly obtained (audio)visual material using a hidden camera, whilst the latter pertains to audio material using a hidden microphone.

First, the *Peter R. de Vries v. Koos H* case, which pertains to covertly obtained visual material.<sup>1316</sup> Dutch crime reporter Peter R. de Vries covertly made audiovisual recordings of convicted criminal Koos H., who was under hospital order at the time. Amsterdam's District Court prohibited De Vries and his team to broadcast the material in summary proceedings, contingent on a €15.000 penalty. Initially, De Vries and his team broadcasted anyway. Only after the Court raised the penalty to €1.000.000, the desired effect was reached.

The case is a 'classic clash' between De Vries c.s.' right of freedom to receive and impart information (Article 10 ECHR) and Koos H.'s right to respect for private life (Article 8 ECHR). The Dutch Supreme Court reiterates that both rights are equal and, in order to determine which right prevails in a concrete case, all relevant circumstances should be taken into

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<sup>1314</sup> Court of Appeals The Hague 4 September 2003, ECLI:NL:GHSGR:2003:AI5638 (Scientology v. Spaink).

<sup>1315</sup> *B. Brouwer*, "Advocate Berber Brouwer: ' Onno Hoes heft goede zaak tegen Pownews'", <http://www.quotenet.nl>.

<sup>1316</sup> Court of Appeals of Amsterdam, ECLI:NL:GHAMS:2011:BP6989 (Peter R. de Vries v. Koos H.) and Dutch Supreme Court, ECLI:NL:HR:2012:BW9230 (Peter R. de Vries v. Koos H.).

account. Factors taken into account by the Dutch Supreme Court in the current case are: (i) the material was covertly obtained in a forensic institution in which Koos H. had a reasonable expectation of privacy, (ii) actually broadcasting the material would only increase the infringement on Koos H.'s rights, (iii) less far-reaching means were available to bring situation at hand to light, (iv) the severity of the situation was not proportionate to the means used.

Second, the *Albert Verlinde v. BNN* case, pertaining to covertly obtained audio material.<sup>1317</sup> Sophie Hilbrand and Filemon Wesselink, presenters at the Dutch public broadcaster BNN, awarded gossip journalist Albert Verlinde with a prize made-up by themselves: 'The Golden Ear' (*Het Gouden Oor*). Unbeknownst to Verlinde, the prize contained a bugging device that could be remotely activated, tapped and recorded by the BNN presenters. The resulting recordings from Verlinde's prize were meant to give him a dose of his own medicine, as he is known to sometimes seek the boundaries of gossip journalism. Ultimately, the District Court of Amsterdam prohibited the broadcast of the contested recordings, because neither did Verlinde give his permission for such a broadcast, nor did the recordings pertain to a dire situation that justified that broadcast.

## 2. b) Boundaries of law enforcement

### *General remarks*

The boundaries of law enforcement with regards to journalists and the journalistic profession has been a point of attention for the Netherlands for quite some time now, as is evidenced by the fact that the Netherlands has been corrected in this respect by the European Court of Human Rights in three major cases since 2007.<sup>1318</sup> The most important cases with regards to these issues are *Sanoma* and *De Telegraaf*. These shall be discussed below.

### *Search of editorial offices & seizure of (press) material*

The leading case with regards to search of editorial offices and seizure of (press) material is the *Sanoma v. the Netherlands* case of the European Court of Human Rights ('the Court'). In this case, the Dutch police and prosecuting authorities ordered Sanoma, inter alia publisher of the magazine *Autoweek*, to surrender press material that contained information capable of identifying journalistic sources.<sup>1319</sup> In the

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<sup>1317</sup> District Court of Amsterdam 17 July 2009, ECLI:NL:RBAMS:2009:BJ4470 (*Albert Verlinde v. BNN*).

<sup>1318</sup> *O.M.B.J. Volgenant*, *Journalistieke bronbescherming blijft een aandachtspunt*, 2 May 2015, <http://www.villamedia.nl>.

<sup>1319</sup> ECHR 14 September 2010 (*Sanoma v. the Netherlands*).



Netherlands, the decision to order surrender of press material is entrusted to the public prosecutor. In other words, there had been no *ex ante* review of that order by a judge or another independent and impartial decision-making body. Consequently, Sanoma submitted a complaint which stated that the Dutch state had breached Article 10 ECHR.

First, the Court finds that the contested order constitutes an interference with Sanoma's freedom to receive and impart information under Article 10 paragraph 1 ECHR.

Second, although Article 96a of the Dutch Code of Criminal Procedure provided a statutory basis for such an interference, the Court finds that the interference complained of was not 'prescribed by law'. Taking into account the vital importance of the protection of journalistic sources, the Court stresses that any interference with the right to protection of such sources must be attended with legal procedural safeguards. According to the Court, the most important safeguard in this context is the guarantee of *ex ante* review by a judge or another independent and impartial decision-making body. The judge or other independent and impartial body should be in the position to assess whether or not there is an overriding public interest in disclosure of the information outweighing the interest of source protection. Furthermore, the decision to be taken should be governed by clear criteria.

Although *Sanoma* requested permission for the intervention from the investigating judge, the order remains not 'prescribed by law' because of two reasons. In short, because of the lack of legal basis for the involvement of the investigating judge and because of his mere advisory role due to him having no legal authority on the matter. The *ex post* review of the Regional Court cannot cure the Court's decision.

As can be seen in the *Sanoma* case, the protection of journalistic sources is often closely connected to the boundaries of law enforcement. In the Netherlands, a journalist has – in principle – been entitled to non-disclosure of an information source under Article 10 ECHR since the *Goodwin v. the United Kingdom* case.<sup>1320</sup> However, that right has not been consolidated in Dutch law – even to this day. That is not to say that attempts at regulation have not been made. On the contrary, the discussion about the legal implementation of a 'journalistic privilege' has been going on for 25 years.<sup>1321</sup> Quite recently, the then Minister of Justice declared in a press release of 15 September 2010 that a legislative proposal concerning the issue had been prepared.<sup>1322</sup> Amongst others, this proposal was aimed at

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<sup>1320</sup> ECtHR 11 July 2002 (*Goodwin v. the United Kingdom*).

<sup>1321</sup> *T. Bruning*, 25 jaar wachten op bronbescherming, <http://www.villamedia.nl>.

<sup>1322</sup> Press release ministry of Justice 15 September 2009, <http://www.rijksoverheid.nl>.

regulating the right to protection of journalistic sources more clearly and would have explicitly included that right in the Dutch Code of Criminal Procedure. At this moment it is suspiciously quiet concerning the legislative proposal.<sup>1323</sup>

The main issue with the lack of proper legislation concerning the protection of journalistic sources in Dutch law, is that the procedural safeguards, as required per the *Sanoma* case and as described above, are currently lacking in Dutch legislation. However, the Dutch parliament is discussing a proposal to introduce the protection of sources in the context of criminal cases<sup>1324</sup>

#### *Surveillance of journalistic communication*

In terms of importance, the *De Telegraaf* case is to surveillance of journalistic communication, what the *Sanoma v. the Netherlands* case is to seizure of press material.<sup>1325</sup> Acting on an article in daily Dutch newspaper *De Telegraaf* that stated that state secrets circulated in the criminal circuit of Amsterdam, the AIVD (*Algemene Inlichtingen- en Veiligheidsdienst*, General Intelligence and Security Service) tapped telephone communications of the two Dutch journalists who wrote that article. The use of these so-called 'special powers' was not authorized by a judge or another independent and impartial decision-making body. An *ex post* review was conducted by the Supervisory Board, that was, however, not in the position to undo the interference.

Even though the subject matter differs from the *Sanoma* case, the current case revolves around the same question of law: whether or not the quality of the Dutch legislation was sufficient to meet the threshold of the 'prescribed by law' test. In this case, the Court seems to take the position that compulsory measures taken against journalists that can interfere with the right to protect journalistic sources, cannot be taken without prior review by a judge or another independent and impartial decision-making body.<sup>1326</sup> As the authorization to tap the journalists' communication was given without meeting these requirements, the law did not provide safeguards appropriate to the use of powers of surveillance with a view to discovering their journalistic sources.

Dutch politician Plasterk, Minister of the Interior and Kingdom Relations, announced that the Dutch Intelligence and Security Services Act (*Wet op*

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<sup>1323</sup> *O.M.B.J. Volgenant*. Journalistieke bronbescherming blijft een aandachtspunt, 2 May 2015, <http://www.villamedia.nl>

<sup>1324</sup> Kamerstukken II, 2014/15, 34032.

<sup>1325</sup> ECtHR 22 November 2012 (*De Telegraaf v. the Netherlands*).

<sup>1326</sup> *E.J. Dommering*, annotation to ECtHR 22 November 2012 (*De Telegraaf v. the Netherlands*), <http://www.ivir.nl/publicaties/download/1165>.

*de inlichtingen- en veiligheidsdiensten*), which regulates inter alia the AIVD, will be adjusted in such a way that *ex ante* review by the District Court of The Hague is needed for the authorization of special powers. A proposal has been sent to parliament to amend the Intelligence and Security Services Act.<sup>1327</sup>

### 3. Reporting about on-going investigations

#### *General*

The Netherlands does not have specific rules regarding the duty of care in reporting about on-going investigations. However, again, the Guideline for Journalism provides some handles to hold onto. According to the principles set out in the Guideline, journalist should make a clear distinction between facts, claims and opinion at all times.<sup>1328</sup> Furthermore, allegations should only be published when there is a sound basis in the available facts of evidence at the time of publication.<sup>1329</sup> It deserves to be mentioned that the threshold for 'a sound basis' differs depending on whether certain information is fact or value-judgement. Because, in the words of the European Court for Human Rights in the *Lingens* case:

*"The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof."*<sup>1330</sup>

Considering the overlap between this question and question number three with regards to criteria for presenting the 'objective truth', this and more shall be discussed more thoroughly below, illustrated by the *Gemeenteraadslid, Lingens, Maffiamaatje* and *Hiddema v. Oppenheimer* cases.

We note that this issue is partly covered by privacy law, more in particular through the journalistic exception as formulated in article 9 of the European Data Protection Directive<sup>1331</sup>

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<sup>1327</sup> Kamerstukken II, 2014/15, 34027.

<sup>1328</sup> Guideline for Journalism 2015 (Leidraad voor de Journalistiek 2015), Board for Journalism (Raad voor de Journalistiek), <http://www.rvdj.nl/leidraad>, first paragraph under 'C. Publicatie'.

<sup>1329</sup> Guideline for Journalism 2015 (Leidraad voor de Journalistiek 2015), Board for Journalism (Raad voor de Journalistiek), <http://www.rvdj.nl/leidraad>, fourth paragraph under 'C. Publicatie'.

<sup>1330</sup> ECtHR 8 July 1986 (*Lingens v. Austria*), par. 46.

<sup>1331</sup> Article 9 (Processing of personal data and freedom of expression): 'Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the

#### 4. Due diligence guidelines for journalists

##### *General*

Before the European Court of Human Rights rendered judgement in the well-known *Lingens* case, the Dutch Supreme Court judged a case that also relates to the way in which the 'objective truth' should be presented: the landmark *Gemeenteraadslid* ('municipal council member') case.<sup>1332 1333</sup>

In the *Gemeenteraadslid* case, a municipal council member made suggestive remarks in a regional newspaper about the financial integrity of a local foundation's officer. The Dutch Supreme Court phrased a set of factors that should be taken into account in cases like this one: (i) the nature of the suspicions published, (ii) the severity of the consequences to be expected, (iii) the severity of the situation that the publication wishes to address, (iv) the degree in which the suspicions were supported by the available facts of evidence at the time of publication, (v) the wording used to express the suspicions, (vi) whether the writer's purpose could have been reached by other, less far-reaching means than publication with a reasonable chance of early success and (vii) the chance that the suspicions would have ended up in publicity anyway, assuming that the writer at hand did not write or publish the suspicions.<sup>1334</sup>

Later, in the *Lingens* case, the European Court of Human Rights phrased factors that should be taken into account that were new or were more elaborately discussed than to those already phrased in the *Gemeenteraadslid* case. The two most important are: (i) the distinction between a private individual and a public figure as to the limits of acceptable criticism and (ii) the distinction between facts and value-judgements.<sup>1335</sup>

Together, these two cases form the standard jurisprudence on the way in which the 'objective truth' should be presented, for journalists and others alike in the Netherlands. It is also worth mentioning that, in cases where these criteria have not been met, there is a right to rectify. The Netherlands' legislation does not recognize an official right of reply. However, the earlier-mentioned 'Guideline for Journalism' does state as a principle that, when one plans to publicize severe accusations, the accused should have the

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rules governing freedom of expression."

<sup>1332</sup> ECtHR 8 July 1986 (*Lingens v. Austria*).

<sup>1333</sup> Dutch Supreme Court 24 June 1983, NJ (Nederlandse Jurisprudentie, 'Dutch Jurisprudence') 1984, 801 (*Gemeenteraadslid*).

<sup>1334</sup> Dutch Supreme Court 24 June 1983, NJ (Nederlandse Jurisprudentie, 'Dutch Jurisprudence') 1984, 801 (*Gemeenteraadslid*), par. 3.4.

<sup>1335</sup> ECtHR 8 July 1986 (*Lingens v. Austria*), par. 42 & 46 respectively.

opportunity to reply before the actual publication of the accusations.<sup>1336</sup>

A last observation with regards to this subject: although the Dutch Courts have – to our knowledge – never explicitly stated this as a factor that is taken into account in this context, the Courts do seem to pay heed to the plaintiff's own conduct towards the defendant. In both the, soon to be discussed, *Maffiamaatje* and *Hiddema v. Oppenheimer* cases, the respective Courts take into account that the plaintiffs in these cases had expressed themselves in less than favourable ways about the opposing party – before and after the publication of the material respectively.<sup>1337</sup>

*Minimum level of facts of evidence and indication of 'suspicion' without prejudice*

One case in which the minimum level of facts of evidence and the indication of suspicion without prejudice plays a big role is the *Maffiamaatje* ('Mafia pal') case.<sup>1338</sup> During a radio show, journalist Jort Kelder used the term *maffiamaatje* to describe the relationship between then criminal lawyer Bram Moszkowicz – he was later struck off the roll - and his client Willem Holleeder. However, that was not the only accusation made by Kelder which was directed towards Moszkowicz.

The District Court of Amsterdam deemed none of Kelder's statements unlawful. Amsterdam's Court of Appeals would later agree with that judgement on all but one point: it found that Kelder took it too far when he qualified Moszkowicz as a *maffiamaatje* and that this statement was, thus, unlawful. To come to that conclusion, the Court most importantly considered that such an allegation would likely have severe consequences for Moszkowicz' professional practice as a criminal lawyer and that the allegations did not find sufficient support in the available facts of evidence at that time.

Another striking example in the same vein is the very recent case of *Hiddema v. Oppenheimer*.<sup>1339</sup> After someone accused well-known Dutch criminal lawyer Theo Hiddema of bribery, cartoonist Ruben Oppenheimer drew and published a cartoon in which he qualified Hiddema as a 'shady

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<sup>1336</sup> Guideline for Journalism 2015 (Leidraad voor de Journalistiek 2015), Board for Journalism (Raad voor de Journalistiek), <http://www.rvdj.nl/leidraad>, fourth paragraph under 'D. Verantwoording/Achteraf'.

<sup>1337</sup> Court of Appeals Amsterdam 24 May 2007, ECLI:NL:GHAMS:2007:BA5599 (*Maffiamaatje*), par. 4.13 and Court of Appeals 's-Hertogenbosch 14 July 2015, ECLI:NL:GHSHE:2015:2624 (*Hiddema v. Oppenheimer*), par. 3.13.4.

<sup>1338</sup> District Court of Amsterdam 15 February 2007, ECLI:NL:RBAMS:2007:AZ8671 (*Maffiamaatje*) and Court of Appeals Amsterdam 24 May 2007, ECLI:NL:GHAMS:2007:BA5599 (*Maffiamaatje*).

<sup>1339</sup> District Court of Maastricht 31 October 2014, ECLI:NL:RBLIM:2014:9244 (*Hiddema v. Oppenheimer*) and Court of Appeals 's-Hertogenbosch 14 July 2015, ECLI:NL:GHSHE:2015:2624 (*Hiddema v. Oppenheimer*).

lawyer' (*louche advocaat*).

Although the District Court judge in summary proceedings found otherwise, the Court of Appeals of 's-Hertogenbosch did not find Oppenheimer's qualification unlawful. Seeing as that the qualification of Hiddema as a 'shady lawyer' was made in the context of a satirical cartoon, it was sufficiently clear that it concerned a value-judgement that was made in a mockingly manner. As such, in this context, the allegations found sufficient support in the available facts of evidence at that time.

*Requirements to apply for the legitimacy of text and/or pictorial reporting*

As a general rule, journalists need to respect the privacy of the persons they are reporting about. In other words, publications shall not go further than what is reasonably necessary for the publication's coverage and a potential infringement on a person's privacy shall be commensurate to the general interest that is served with publication.<sup>1340</sup> Furthermore, journalists should prevent that information or visual material is published that allows the general public to easily identify suspects or convicts of a crime.<sup>1341</sup>

A practice often seen in reports concerning criminals whose proceedings are currently pending, is the way they are denominated: whereas their full first name is displayed, only the first letter of their last name is given. For example, the serial killer 'Koos Hertogs' was always called 'Koos H.' during his proceedings.<sup>1342</sup>

In terms of pictorial reporting, an often-used practice is the blurring or pixelating of an individual's face. An alternative to this practice is placing a black rectangle in the area that surrounds the individual's eyes.

It deserves a short note how these techniques are usually deployed in legal practice. The degree in which the publication's subject's privacy is warranted is rarely the main subject in legal disputes, rather, such textual and pictorial adjustments are mostly used as 'bargaining chips' in the court room. That is to say, when a certain publication is claimed to be unlawful, offering the publication's subject more privacy in one way or another can, in some cases, act as a bargaining chip to make the publication lawful.

This is nicely illustrated by what happened in the *Peter R. de Vries v. Koos H.* case. The Court prohibited De Vries from using the audiovisual

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<sup>1340</sup> Guideline for Journalism 2015 (Leidraad voor de Journalistiek 2015), Board for Journalism (Raad voor de Journalistiek), <http://www.rvdj.nl/leidraad>, first paragraph under 'C.1 Privacy'.

<sup>1341</sup> Guideline for Journalism 2015 (Leidraad voor de Journalistiek 2015), Board for Journalism (Raad voor de Journalistiek), <http://www.rvdj.nl/leidraad>, fifth paragraph under 'C.1 Privacy'.

<sup>1342</sup> See for example the earlier-mentioned *Peter R. de Vries v. Koos H.* case.

recordings he made using a hidden camera, as the recordings were made in an institution in which Koos H. had a reasonable expectation of privacy. In his judgement, the judge states that broadcasting the actual audiovisual recordings is much more privacy invasive than, for example, broadcasting certain quotes in text.<sup>1343</sup> When De Vries eventually submitted to the Court's judgement by not broadcasting the actual audiovisual recordings, he decided to broadcast quotes in text instead. This practice was not opposed. Thus, the degree in which Koos H.'s privacy was honoured in the show was indirectly used as a bargaining chip for the legitimacy of the report.

## 5. Liability in the editorial chain

In principle, in cases where damage arises from a tort caused by more than one person or legal person is, each person can be held jointly and severally liable for that damage. The majority of Dutch legal scholars agree that both the author and the publisher can be jointly and severally held liable for damage on the basis of this provision. What the position of the editor is, is somewhat more controversial.<sup>1344</sup> However, the trend seems to be that the editor is personally jointly and severally liable for the damage arising from a tort, alongside the author and the publisher.<sup>1345</sup>

Editorial rules have rarely played a role in the distribution of liability.<sup>1346</sup>

## 6. Conclusion and perspectives

To conclude, the position of the investigative journalist in the Netherlands is currently characterized by quite a rigid dichotomy between the gathering phase and the publishing phase of the journalistic process.

On the one hand, the gathering phase still lacks clear legal procedural safeguards for the protection of journalistic sources although proposals are pending in parliament. It should be noted that these proposals mainly deal with source-protection and not with journalistic activities in general. The Netherlands' lacklustre regulation in this respect became abundantly clear in the *Sanoma* and *De Telegraaf* cases and can primarily be attributed to the lack of proper rules on *ex ante* review by a judge or another

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<sup>1343</sup> Court of Appeals of Amsterdam, ECLI:NL:GHAMS:2011:BP6989 (Peter R. de Vries v. Koos H.), par. 3.3 (iii).

<sup>1344</sup> *G.A.I. Schuijt, Wekers van het Woord – media en arbeidsverhoudingen in de journalistiek*, Kluwer, Deventer, 1987, p. 171.

<sup>1345</sup> See inter alia: Court of Appeals of Leeuwarden 3 February 1988, ECLI:NL:GHLEE:1988:AB294, NJ 1989/314 and Court of Appeals of Arnhem 31 October 1989, 669/88 KG.

<sup>1346</sup> *G.A.I. Schuijt, Wekers van het Woord – media en arbeidsverhoudingen in de journalistiek*, Kluwer, Deventer, 1987, p. 175.

independent and impartial decision-making body.

To end on a more positive note, we end on the other hand: the actual publishing phase. Fortunately, the legal framework regarding the actual publishing phase is quite clear due to the general provisions in both Dutch and European law (Article 6:162 Dutch Civil Code and Article 10 ECHR), the combination of Dutch and European case law (the *Gemeenteraadslid* and *Lingens* cases) and the non-binding, but guiding Guideline for Journalism. Together, these sources form quite a cohesive framework that provides sufficiently clear handles to be able to predict with reasonable certainty what can and cannot be condoned in a particular publication.

The Netherlands holds a strong position in the press freedom index of Freedom House.<sup>1347</sup>

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<sup>1347</sup> <https://freedomhouse.org/report/freedom-press/2015/netherlands#.VbzyNG8w9aQ>.





## **23. Poland**

Krzysztof Kowalczyk

## 1. Questions 1. – 2.

The utilization of illegally/improperly obtained information is regulated in the Criminal Code and in the civil law i.e. the Civil Code, the Press Law, Law on Copyright and Related Rights and the Act on Combating Unfair Competition. Utilization of illegally/improperly obtained information is also regulated by self-regulatory act i.e. in Journalist Ethical Code. There are no exceptions, therefore, all the above mentioned regulations also apply to journalists. Depending on the situation, a journalist may be accused under the criminal law of defamation or illegal access to documentation, usage of secret state papers and therefor a case in the civil court may be brought against him for protection of personal rights and compensation.

The Criminal Code states that anyone who, without being authorized to do so, acquires information not intended for him or her, by opening a sealed letter, connecting to a cable transmitted information or by breaching electronic, magnetic or other special protection means intended for that information, is liable to a fine, restriction of liberty or imprisonment for up to two years.<sup>1348</sup> The prosecution takes place at the motion of the aggrieved party. Utilization of the secret state papers is also penalized under the Criminal Code.<sup>1349</sup> Disclosure or, usage of information that constitute a state secret in violation of the law is penalized under imprisonment for three months to five years.

Under the civil law, a responsibility for usage of improperly obtained information is regulated in article 23 and 24 of the Civil Code and refers to protection of personal interest.<sup>1350</sup> The person whose right to protection of

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<sup>1348</sup> Criminal Code, dated 6 June 1997, Journal of Laws No 88 item 553, art. 267.

<sup>1349</sup> Criminal Code art. 265.

<sup>1350</sup> Civil Code, dated 23 April 1964, Journal of Laws No 2015 item 397, art.23:“The personal interests of a human being, in particular health, freedom, dignity, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of home, and scientific, artistic, inventive or improvement achievements are protected by civil law, independently of protection under other regulations.” and art.: 24. § 1. Any person whose personal interests are threatened by another person's actions may demand that the actions be ceased unless they are not unlawful. In the case of infringement he may also demand that the person committing the infringement perform the actions necessary to remove its effects, in particular that the person make a declaration of the appropriate form and substance. On the terms provided for in this Code, he may also demand monetary recompense or that an appropriate amount of money be paid to a specific public cause. § 2. If, as a result of infringement of a personal interest, financial damage is caused, the aggrieved party may demand that the damage be remedied in accordance with general principles. § 3. The above provisions do not prejudice any rights provided by other regulations, in particular by copyright law and the law on inventions.”

personal interest was infringed may bring an action against the journalist and claim for compensation.

The Press Law states that the consent of a person who was recorded is required in order to publish or disseminate any press materials which include sound or voice of that person.<sup>1351</sup> Journalists, who breach this regulation, are liable to a fine or restriction of liberty.<sup>1352</sup> The burden of proof lies on the journalist, who in case of a court dispute is obliged to evidence that he obtained the consent of the recorded person.

According to the Journalist Ethical Code, journalists while collecting information, are not allowed to use methods which are against the law and ethically reprehensible. Hidden camera, wiretapping are allowed only in case of investigative journalism i.e. tracking in the name of public good, with acknowledgement of the superior – crimes, corruptions or abuse of authority. The Ethical Code was drafted by voluntary association of Polish Journalists<sup>1353</sup>. Under art. 10 of the Press Law journalists are obliged to act in accordance with the Journalist Ethical Code, the principles of community life, and within the boundaries restricted by law.

The Act on Combating Unfair Competition regulates the protection of business/ trade secrets. Under this act every person, who had illegally acquired a business secret and disclosed it to another person shall be liable to a fine, probation or imprisonment for up to 2 years.<sup>1354</sup>

Recording private persons and dissemination of those recordings is also against the law, a statute guaranteed in the Constitution of the Republic of Poland.<sup>1355</sup> If a journalist is accused of breach of right for privacy he may prove, that his action was undertaken in the public interest, therefore it wasn't illegal. The Supreme Court stated in its judgement that it is the right and journalist's duty to describe certain information crucial for the society. Therefore, in each case the court should assess if the public interest, in a particular case, was more important than the breach of privacy.<sup>1356</sup>

The only exception refers to public persons in respect of their image distribution. According to the Press Law the distribution of an image

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<sup>1351</sup> Press law, dated 7 February 1984, Journal of Laws No 2013 item 771, art. 14.

<sup>1352</sup> Press law, art. 49.

<sup>1353</sup> <http://sdp.pl/s/kodeks-etyki-dziennikarskiej-sdp>.

<sup>1354</sup> Act on combating unfair competition dated 16 April 1993, as published in Journal of Laws No.153 item 1503, art. 23.

<sup>1355</sup> Constitution of the Republic of Poland of 2<sup>nd</sup> April, 1997, as published in Journal of Laws No. 78, item 483, art. 49: "The freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by statute".

<sup>1356</sup> Supreme Court judgement dated 2 September 2003 no IV KK 197/2003.

requires the permission of the person shown in the image. Permission to distribute an image of a public person is not required if the image was made in connection with the performance of public functions, especially political, social or professional by this person <sup>1357</sup>.

Recently, a journalist who was accused of breach of the Press Law was found guilty by the Regional Court in Kalisz. The journalist stated in court that she was acting for the common good, therefore she used methods typical for investigative journalism. The journalist obtained information while pretending to be a therapist. The person, teacher in the local school, who was misled by the journalist confessed to her, that she is in relationship with a 14 year old boy, a pupil from her school, who is the father of her child.<sup>1358</sup> Disapproval for this journalist's action was expressed by the Association of Polish Journalists. It was indicated, that by pretending to be a therapist, who by law is obliged to keep all information related to a patient confidential, and then publishing them in the media is a blameworthy action.<sup>1359</sup>

Another controversial case, where a journalist was found guilty by the Regional Court in Białystok for the breach of law, refers to an action taken by a journalist while gathering information for a TV program on a refugee centre in Białystok treating refugees therein. The journalist broke the law while pretending to be a refugee. He testified in court, that he was a refugee from the Republic of Cuba who had lost his ID and crossed the green border between Poland and Belarus. He was found guilty of false testimony (he testified in court that he pretended to be a refugee in order to get in to the refugee camp), forgery (he was using someone else's identity and signed various documents) and sentenced for a fine amounting to PLN 2000 (EUR 500). The court stated in its judgement that the information acquired through journalist investigation did not add any new information to the public debate on refugee camps in Poland and didn't change the situation of the refugees in the camp itself. It also indicated that the journalist's investigation was of no significance to the society and most of all undermined the dignity of the court.<sup>1360</sup> After the

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<sup>1357</sup> Law on Copyright and Related Rights dated 17 May 2006, Journal of Laws No.90 item 631, art. 81.

<sup>1358</sup> <http://www.press.pl/newsy/prasa/pokaz/49222,Sad-umorzyl-spraweprowokacji-dziennikarskiej-7-Dni-Kalisza>.

<sup>1359</sup> <http://www.sdp.pl/informacje/9065,nominacja-do-hieny-roku-dla-ewy-bakowskiej,1387285550>.

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[http://www.obserwatorium.org/index.php?option=com\\_content&view=article&id=4672:sensacja-czy-prowokacja-wy-rok-so-w-sprawie-red-endyego-gsiny-torresa&catid=40:zkraju&Itemid=34](http://www.obserwatorium.org/index.php?option=com_content&view=article&id=4672:sensacja-czy-prowokacja-wy-rok-so-w-sprawie-red-endyego-gsiny-torresa&catid=40:zkraju&Itemid=34).

judgement was announced the Centre for Monitoring the Freedom of Press, expressed its concern regarding sentencing the journalist for a fine, as well as a concern for the condition of the freedom of press.<sup>1361</sup>

The boundaries which must be respected by law enforcement officers are stated in the Code of Criminal Procedure where the reporter's privilege is defined. A journalist may be questioned with regard to the facts covered by this privilege only when it is indispensable for the interest of the administration of justice and such facts cannot be established on the basis of any other evidence. In preparatory proceedings, a deposition or a permission to take a deposition is decided upon by the court in a hearing, without the attendance of the parties. The reporter's privilege may not be suspended with respect to information enabling the identification of the author of press material, a letter to the editor or of any other material of that nature, or the identification of persons supplying information published or designated for publication, if those persons requested that the source of the above information should be kept secret<sup>1362</sup>. The reporter's privilege with respect to information enabling the identification of the author of press material, a letter to the editor or of any other material of that nature, or the identification of persons supplying information published or designated for publication refers to everyone who is employed in press agency, newspaper, editorial office.<sup>1363</sup>

The Press Law also guarantees that a journalist has a right to keep confidential information enabling the identification of the author of the press material, a letter to the editor or of any other material of that nature, or the identification of persons supplying information published or designated for publication, if those persons requested that the source of the above information should be kept secret.<sup>1364</sup>

The search of editorial office is not banned by law. The restriction only refers to information enabling the identification of persons supplying information published or designated for publication, if those persons requested that the above information should be kept secret. Therefore all documents, data storage devices which may have been used to identify the "journalist source" may not be used by law enforcement officers without a court order. According to the Code of Criminal Procedure such proof should be placed in a sealed package and passed on to the court which in turn will decide whether the proof enables for the journalist's source

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<sup>1361</sup> [http://www.freepress.org.pl/show\\_news.php?id=508](http://www.freepress.org.pl/show_news.php?id=508).

<sup>1362</sup> Code of Criminal Procedure, art. 180§ 2 § 3.

<sup>1363</sup> Press law of 26 January 1984, as published in Journal of Laws dated 7 February 1984, art. 15 §2.

<sup>1364</sup> Press law, art. 15.

identification. Until such decision is issued the proof cannot be used<sup>1365</sup>.

In 2014 the District Court in Warsaw stated that chief editor of the one weekly magazine in Poland was obliged by law to hand over the data storage devices even though those devices included the journalists' sources. Law enforcement officers were obliged to place those data storage devices in a sealed package and hand them over to the court.<sup>1366</sup>

Surveillance of journalistic communication is guaranteed generally by the Constitution of the Republic of Poland.<sup>1367</sup> The Code of Criminal Procedure, regulates an exception from the general rules and applies to surveillance of journalistic communication as well. The reporters' privilege also refers to e-mail communication, hence that kind of "journalistic source" is also protected. The Code of Criminal Procedure defines the procedure which refers to the surveillance and recording of the content of telephone conversations by way of telephone wiretapping.<sup>1368</sup>

The Constitutional Tribunal in its judgement no K 23/11 ruled that there is no need to create a legal exception according to which certain occupations (i.e. journalist, doctors, lawyers) could be listed as a group of people whose surveillance and recordings of the content of telephone conversations by way of telephone wiretapping is not allowed.

In the Constitutional Tribunal's opinion a reporters' privilege (as well as doctors', lawyers' privilege) should be considered as at least equally valuable as a wellbeing of a large group of people, therefore in some cases surveillance and recording of the content of telephone conversations should be allowed even in cases where the reporter's privilege (as well as doctors', lawyers' privilege) will be infringed.<sup>1369</sup> The Constitutional Tribunal stated that the Code of Criminal Procedure provides adequate legal protection to the journalists' sources from their illegal usage by other parties. However, in this judgement the Constitutional Tribunal also stated

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<sup>1365</sup> Code of Criminal Procedure of 6 June 1997, as published in Journal of Laws No 89 item 555, art. 225, art. 226.

<sup>1366</sup> District Court in Warsaw Praga –Północ, decision no III Kp 1158/14 dated as of 21<sup>st</sup> July 2014.

<sup>1367</sup> Constitution of the Republic of Poland of 2<sup>nd</sup> April, 1997, as published in Journal of Laws No. 78, item 483, art. 49; „The freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by statute.”

<sup>1368</sup> Code of Criminal Procedure of 6 June 1997, as published in Journal of Laws No 89 item 555, art. 237. Surveillance and recording of the content of telephone conversations by way of telephone tapping refers to certain crimes listed therein. Surveillance and the telephone tapping is permissible with regard to a person suspected of an offence, an accused person, an aggrieved party or any other person whom the accused may contact or who may be connected with the offender or with the potential offence.

<sup>1369</sup> Constitutional Tribunal in Court judgement no K 23/1.

that some other legal regulations (e.g. the Police Law) need to be adjusted in order to protect the journalists' privilege. In the Constitutional Tribunal's opinion, for example, some of the provisions of the Police Law are against the Polish Constitution, due to the fact that they do not guarantee immediate annihilation of the materials which include journalists' source. However still under discussion, the government has begun drafting new wording of the provisions in question. Notwithstanding the fact that the present draft is very controversial as well.

## 2. Reporting about on-going investigations

Investigative journalism refers to cases, which mostly were not an object of interest of the police or other law enforcement officers. Rarely, journalist who runs his own investigation reports to the police about his findings before the article is published. It is recommended to inform the police or other adequate law enforcement officer when there is a threat to someone's life, health or property.<sup>1370</sup> According to the Code of Criminal Procedures anyone who has knowledge that an offence prosecuted *ex officio* was committed has a citizen's duty to notify thereof the public prosecutor or the Police.<sup>1371</sup> The Criminal Code also regulates the duty to report a crime and states that anyone who has reliable information concerning a punishable preparation or attempt, or the commission of a prohibited act itemized therein, but does not promptly inform an agency responsible for prosecuting such offences is liable to imprisonment for up to three years.<sup>1372</sup>

Civil jurisprudence points out, that there shouldn't be any legal duty for journalists obliging them to report about suspicions of someone committing a crime, before the press material is published. The report duty is fulfilled by the press material publication, because the publication is made as soon as the journalist became convinced the crime was committed. The publication is an effective method of informing the police about a suspicion of a committed crime hence documentation and publication of these information should be the privilege of free and independent press.<sup>1373</sup> Therefore, by means of press publication the law enforcement officers are informed about the commitment of a crime and therefor the provisions of the Criminal Code and the Code of Criminal Procedures are not infringed.

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<sup>1370</sup> *M. Kędzierska*, *Prawo i prokuratura* 4, 2007 s. 46.

<sup>1371</sup> Criminal Code, art. 240.

<sup>1372</sup> Code of Criminal Procedure, art. 303.

<sup>1373</sup> *P. Biedziak*, *Prawo do śledztwa*, *Gazeta Wyborcza* 13 lutego 2003 r., nr. 37, p. 13.



### 3. Due diligence guidelines for journalists

The Press Law states that journalists are obliged to truly describe on-going situations<sup>1374</sup> and that they are obliged to act with special care and reliability while gathering and using information, especially to verify accuracy of the information or to reveal the source. The Supreme Court in the judgement dated 27 April 2004 no II CK 204/03 stated that journalists while gathering and using information are obliged to act with special care (qualified care). This qualified care means that there are higher expectations towards journalists with respect to verification of the truthfulness of the information.<sup>1375</sup>

The Supreme Court also stated that: „at the stage of usage of the press materials it is important that everything is vastly and carefully verified and that the information are not selectively passed on. Providing all aspects of the case and not acting “under previously made assumptions” as well as consideration of the accusation proportion, significance of the information from a public justified interest and necessity (urgently) of publication”.<sup>1376</sup>

The journalist must take into consideration, that publishing not true information (information that was improperly verified) may result in the accusation for slander based on the Criminal Code<sup>1377</sup>.

The Press Law also states that journalists are not allowed to express personal opinion on the case before the judgement announcement. Personal data and the image of the person against whom the court proceedings are running or a person to whom the accusation was formally stated is under protection, as well as personal data and the images of witnesses and the injured party.<sup>1378</sup> Therefore, in press articles where information about court cases are included the image of the accused person and other aforementioned person, are as a rule blurred or pixelated. However an adequate prosecutor or court, having in mind the important public interest, may grant permission for the publication of the accused persons' image or personal data.<sup>1379</sup> The Supreme court stated

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<sup>1374</sup> Press Law art.6.

<sup>1375</sup> Supreme Court in the judgement dated 5 April 2002, no II CKN1095/99.

<sup>1376</sup> Supreme Court in the judgement dated 30 April 2008, no I ACa 425/08.

<sup>1377</sup> Criminal code, art. 212 : “Anyone who slanders another person, a group of people, a business entity or an organizational unit without the status of a business entity, about conduct, or characteristics that may discredit them in the face of public opinion, or result in a loss of confidence necessary to perform in a given position, occupation or type of activity is liable to a fine, the restriction of liberty and if the offender commits the act specified above through the mass media, he or she is liable to a fine, the restriction of liberty or imprisonment for up to 1 year.”

<sup>1378</sup> Press Law art.13.

<sup>1379</sup> Press Law art.13 point 3.

that the permission granted to one journalist or editorial office is effective towards all journalists and editorial offices.<sup>1380</sup>

#### 4. Liability in the editorial chain

The Press Law states that the chief editor is responsible for the content of press materials.<sup>1381</sup> The author of the press publication also bears joint and several liability. In practice, the court actions are brought against the chief editor and the author of the publication, but only if the author is possible to identify.<sup>1382</sup>

Civil responsibility for the breach of law resulting from press publication is borne by the author, editor or other person whose action led to press publication, not excluding the publishers responsibility. Regarding the financial responsibility all abovementioned persons bear joint and several liability.<sup>1383</sup>

The author of the article has a right to be anonymous.<sup>1384</sup> Therefore, in case of a court case only the publisher or the editor may be sued or accused.<sup>1385</sup> The editor or the publisher is not allowed by law to disclose the authors' personal data.

Referring to criminal liability it may be borne by a natural person, however not a legal person/company. Therefore, in case of a criminal accusation only the person who decided to publish information i.e. the editor or the publisher, or the author of the press article may be accused.

#### 5. Conclusion and perspectives

The utilization of improperly obtained information is regulated by the Polish lawas well as in the self-regulatory act i.e. Journalist Ethical Code. The regulation is mostly dedicated to protect the right for privacy, both private and public person or secret state papers and business secrets. At present, journalists are rarely accused successfully of utilization of illegally obtained information (the most controversial recent case was described in the first part of the report – Kalisz case. In this particular court case, the judgement of the court for the journalist who breached the law was very favorable). In my opinion most of the cases refer to breach of right for privacy. Unclear situations referred mostly to the private life of a public person. As it was mentioned in the first part of the report, the usage of an image or a

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<sup>1380</sup> Supreme Court in the judgement dated 29 April 2011, No I CSK 509/10.

<sup>1381</sup> Press Law art. 25 point 3.

<sup>1382</sup> [www.freepress.org.pl/moduly.doc](http://www.freepress.org.pl/moduly.doc).

<sup>1383</sup> Press Law art. 38.

<sup>1384</sup> Press Law art.15

<sup>1385</sup> Court judgement dated 13 February 2009, no II Sa/Wa 1570/08.

recording of the voice of the public person when related to his public duty does not require any additional consent of the public person. However, there were some ambiguities which related to the usage of some information regarding the public persons' private life. Nevertheless, the investigative journalism in Poland on the odd occasion refers to private life of public persons. Strict regulation, in order to ensure right for privacy and to protect secret state papers, as well as trade secrets, prevents from illegal gathering of information. If the journalist in fact used illegally gathered information the civil case against him is run in court.

Whereas, the boundaries for the law enforcement officers are widely discussed. The journalists' privilege which refers to confidentiality of the identity of the source of information is often breached by law enforcement officers. Therefore, some regulations were questioned and controlled by the Constitutional Tribunal. Due to the fact, that in the Constitutional Tribunal's opinion some regulations were against the law,<sup>1386</sup> currently the government is drafting new regulations which will refer, among others issues, to the possibility of surveillance and recording the content of journalists telephone conversations by way of telephone wiretapping. This regulation may be a threat to the journalists' privilege which refers to keeping in secret the journalists' source.

The duty of care by reporting ongoing investigation is fulfilled by publication of a press article. It is treated as a formal information which should lead to commencing an investigation. The problems mostly arise when the law enforcement officers make efforts to determine the source of journalist's information. Such a situation was described in the first part of the report.

There are plenty of disputes regarding the necessity of presenting the objective truth by journalists. Even though legal regulations are clear in this matter it often happens that in order to sell a press title or a TV program journalists breach the law in this respect. It is well known, that thrilling news are well sold, therefore some information prepared by journalists are not fully objective or well verified. There are plenty of court judgements where the court stated that the obligation of presenting objective truth was broken. The same refers to presenting an image or personal data of a person who was accused or who was not yet accused. Journalists often present information about the accused person in the way that it is easy to recognize its identity (for example by adding information on the husband of the accused) or they present an image of the person not accused with blurred or pixelated photographs even though there are no legal grounds for such action. Publications of someone's image with blurred or pixelated photographs in an article which results from investigative journalism may

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<sup>1386</sup> Constitutional Tribunal judgement dated 30 July 2014, no K 23/11.

lead to the assumption that the accusation was made even though the police finds no grounds for formal charges. Nevertheless, in case of investigative journalism the problem of blurred or pixelated photographs should rarely appear, due to the fact that according to the Polish law, the images of the accused person (witnesses and injured persons) is restricted. In case of investigative journalist the information mostly refers to crimes to which the accusations were not expressed. Therefore the image is not restricted yet.

Journalists who undertake actions to obtain information illegally or improperly, may bear criminal or civil liability. On the other hand, granting journalists the same rights as law enforcement officers would blur the difference between those occupations. In our opinion relevant polish regulations guarantee adequate protection for journalists as well as people who attract their attention, leaving some discretionary powers to the courts.



## **24. Portugal**

Joaquim Fidalgo

## 1. Relevant Legislation and Case-law

1.1. The issues of media freedom and freedom of speech – which also imply the attention to, and regulation of, the journalistic field -- are highly valued by the Portuguese laws. Actually, the Constitution of the Portuguese Republic itself devotes 4 (four) articles to these issues: Article 37 (Freedom of expression and information), Article 38 (Freedom of the press and the media), Article 39 (Regulation of the media) and Article 40 (Rights to broadcasting time, of reply and of political response).<sup>1387</sup>

Most of the items are rather general, as it is expectable from a Constitution, (for example, in article 37:

*“1. Everyone has the right to freely express and divulge his thoughts in words, images or by any other means, as well as the right to inform others, inform himself and be informed without hindrance or discrimination”, or*

*“2. Exercise of these rights may not be hindered or limited by any type or form of censorship”).*

These are not just rhetorical considerations, because Portugal suffered, for near 50 years in the 20<sup>th</sup> century (from 1926 to 1974) a fierce political dictatorship, which had as one of its cornerstones a regime of censorship to all the media; the Constitution we are referring here was firstly adopted in April 1976, two years after the (peaceful) revolution of 25<sup>th</sup> April 1974, freedom and democracy were recovered for the country.

But not all the constitutional articles have a rather general approach. On the contrary, some of them deal with very concrete and specific issues, as it is the case for the guarantee of the “right of reply”: “Every natural and legal person shall be equally and effectively ensured the right of reply and to make corrections, as well as the right to compensation for damages suffered” (art. 37, nr. 4).

The article devoted to freedom of the press and of the media (art. 38) also has some general principles (“Freedom of the press is guaranteed”), but goes into some detail when pointing that freedom of the press implies, for example,

*“freedom of expression and creativity on the part of journalists and other staff, as well as journalists’ freedom to take part in deciding the editorial policy of their media entity” (nr. 2 a)), or implies*

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<sup>1387</sup> See Constitution of the Portuguese Republic (7th revision, Constitutional Law nr. 1/2005, of 12 August), official translation into English under the responsibility of the Portuguese Parliament. <http://www.en.parlamento.pt/Legislation/index.html>. Or <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf>.

*“that journalists have the right, as laid down by law, of access to sources of information, and to the protection of professional independence and secrecy, as well as the right to elect newsroom councils” (nr. 2, b)).*

In this same article, the existence of a public service of television and radio is formally established – with the guarantee that it must be “independent from Government” and open to “all different currents of opinion” – as well as some specific obligations in what means non-concentration and transparency of media ownership:

*“The state shall ensure freedom and independence of media entities from political power and economic power by imposing the principle of specialization on enterprises that own general information media entities, treating and supporting them in a non-discriminatory manner and preventing their concentration, particularly by means of multiple or interlocking interests” (nr. 4).*

The next article (39) is dedicated to media regulation, establishing that “an independent administrative entity” shall be responsible for it, namely ensuring in the media the right to information and the freedom of the press, the non-concentration of ownership, independence from political power and economic power, respect for the personal rights, freedoms and guarantees, respect for the norms that regulate the work of the media, that all different currents of opinion are able to express themselves and confront one another and the exercise of the rights to broadcasting time, of reply and of political response, just to quote the most relevant.<sup>1388</sup>

Still in what concerns pluralism of opinions and access to the media, the next article (40), devoted to “rights to broadcasting time, of reply and of political response”, establishes:

*“Political parties, trade union and professional organizations and organizations that represent economic activities, and other social organizations with a national scope, have the right to broadcasting time on the public radio and television service, in accordance with their prominence and representativity and with objective criteria that shall be defined by law”.*

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<sup>1388</sup> Presently, and since 2006, media regulation is carried on under the responsibility of ERC (Entidade Reguladora para a Comunicação Social, an entity composed by five (5) members, four of them elected by the Parliament with a qualified majority of votes and the fifth one (usually the president) co-opted by the other four. Before 2006, media regulation was in the hands of the High Authority for the Media (AACs), a larger entity, also with some members elected by the Parliament but with others appointed directly by the Government, which was a motive for multiple controversies (Further information at <http://www.erc.pt/pt>).



As we can see, some major rights of journalists are also clearly inscribed in the constitutional text (and more detailed in subsequent regular laws), as it is the case of their right of “access to sources of information, and to the protection of professional independence and secrecy” (art. 38), or their right to “take part in deciding the editorial policy of their media entity”, or their right to elect newsroom councils, all of them regarded as a kind of pre-requisites for a real freedom of the press.

1.2. On a second level, specifically regarding the media as a whole, the journalistic work is also present in a number of sectorial laws – the Press Law,<sup>1389</sup> the Radio Law,<sup>1390</sup> the Television and On-Demand Audiovisual Services Law,<sup>1391</sup> and, to a smaller extent, the Law of Electronic Communications.<sup>1392</sup>

The most relevant law for our purpose is the Press Law, since it applies to journalistic work in any media (in spite of the name “Press” on the title). Its main points to this context are as follows:

- Article 1 guarantees press freedom in the exact same terms of the Constitution (see above).
- Article 2 details that press freedom implies:
  - a) the acknowledgment of freedom and of the fundamental rights of journalists;
  - b) the right to freely launch newspapers and other publications;
  - c) the right to freely print and distribute publications.
- As for the right of the citizens to be informed, it is guaranteed namely by means of
  - a) rules preventing ownership concentration that may harm pluralism;
  - b) the publication of every newspaper’s Editorial Statute;
  - c) the acknowledgement of the rights of reply and of rectification;

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<sup>1389</sup> Law Nr. 2/99, of 13 January, as amended by the Rectification Declaration nr. 9/99, of 18 February, and altered by the laws nr. n. 18/2003, of 11 June and nr. 19/2012, of 8 May. Available at <http://www.gmcs.pt/pt/lei-n-299-de-13-de-janeiro-lei-de-imprensa> (Portuguese version, consolidated text).

<sup>1390</sup> Law Nr. 54/2010, of 24 December, as altered by the Law Nr. 38/2014, of 9 July. Available at <http://www.gmcs.pt/pt/lei-n-542010-de-24-de-dezembro> (Portuguese version, consolidated text). An unofficial translation into English is available at <http://www.anacom.pt/render.jsp?contentId=1074024>.

<sup>1391</sup> Law Nr. 27/2007, of 30 July, as amended by the Rectification Declaration n.º 82/2007 and altered by the laws nr. 8/2011, of 11 April and nr. 40/2014, of 9 July. Available at <http://www.gmcs.pt/pt/lei-n-272007-de-30-de-julho-lei-da-televisao-e-dos-servicos-audiovisuais-a-pedido> (Portuguese version, consolidated text). An unofficial translation into English is available at <http://www.anacom.pt/render.jsp?contentId=1105582#.VZpHvE3bLcc>.

<sup>1392</sup> Law Nr. 5/2004, of 10 February, as amended by the Law Nr. 51/2011, of 13 September. Available at <https://dre.pt/application/dir/pdf1sdip/2011/09/17600/0438304461.pdf>.

- d) the identification and veracity of advertisement;
- e) the right of access to the Regulatory Entity for the Media;
- f) the respect for ethical norms in the journalistic activity.

- Article 3 emphasizes that the only limits to press freedom are those pointed out in the Constitution and the law, in order to safeguard accuracy and objectivity of information, to guarantee everyone's rights to honour and to privacy, to image and to word, and in order to defend the public interest and the democratic order.
- Article 22 lists a series of rights for journalists. Among others, the right to free expression and creation, the right of free access to information sources, the right to professional secrecy, and the right to participate in the editorial orientation of the medium they work for.
- Article 24 details, still following the Constitution, everyone's right of reply, whenever one is the subject of references that may harm his/her honour and reputation, and everyone's right of rectification, whenever one is the subject of untruth or mistaken references.
- Article 30 states that the publication, in the press, of texts or images that may offend the fundamental rights of any citizen shall be punished in the terms of the penal laws, in the sequence of processes to be run by a court of law.

Both the Radio Law and the Television Law define their main purposes in exactly the same terms, stressing the issues of freedom and autonomy:

- a) To contribute towards public information, education and entertainment;
- b) To promote the right to inform and to be informed accurately and independently, without impediments or discrimination;
- c) To promote citizenship and democratic participation as well as to respect political, social and cultural pluralism; (...)

The "autonomy of operators" is also guaranteed in both laws in the same terms:

The freedom of expression of opinion through the radio broadcasting activity / through television integrates the fundamental right of citizens to free and pluralistic information, essential to democracy and to the social and economic development of the country.

Save for cases provided for herein, the radio broadcasting activity / television broadcasting is based on programming freedom and neither the Public Administration nor any sovereign body, with the exception of the courts of law, shall prevent, limit or impose the broadcast of any programs".

1.3. On a third level of this legal building, we have the regulatory framework

for the media, detailed in the Statutes of ERC<sup>1393</sup>, the Regulatory Entity for the Media, which takes charge of all the media (press, radio, television, and even some situations of digital media). It is a statutory entity, created by law in 2005, and with its members elected by the Parliament with a qualified majority of votes.

The main responsibilities of ERC, as defined in its Statute (Article 8), are precisely

- “To guarantee the free exercise of the right to information and the freedom of the mass media”,
- “To ensure that entities pursuing mass media activities are independent from political and economic powers”,
- “To ensure respect for rights, freedoms and guarantees”,
- “To guarantee an actual expression and comparison of different trends of thought, with respect for the principle of pluralism and for the editorial policy of each mass media entity”,
- “To guarantee the exercise of the right to broadcast, the right of reply and of political response”,
- “To ensure compliance with rules governing mass media activities”.

More specifically in what concerns journalism and journalists – issues of independence, autonomy, protection, etc. – ERC’s powers include, among others,

- “To issue a prior and binding opinion on the appointment and removal from office of directors and deputy directors of mass media entities owned by the State and other public entities responsible for the programming and information areas”;
- “To monitor and promote compliance of editorial statutes of mass media entities (...) with the corresponding legal requirements”;
- “To assess, on request from an interested party, serious alterations in the approach or nature of mass media entities, where journalists’ conscience clause is under consideration”.

1.4. On a fourth level, we have in Portugal – contrary to what happens in many other countries – a specific law (approved by the Parliament) concerning professional journalists and their activity: the Journalist

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<sup>1393</sup> ERC’s regulatory scope, powers and competences are defined in ERC’s Statute, published in an annex of the Law nr. 53/2005, from 8 November, which created the Portuguese Regulatory Entity. Available at <http://www.erc.pt/documentos/legislacao/site/lei53.pdf>.

Statute<sup>1394</sup>. It is actually the legal text that most comprehensively deals with this profession: it defines who is and who isn't a journalist, the conditions to become one (a kind of license – the Professional Journalist Card – is required to anyone who wants to work in this activity), the main rights and duties attached (right/duty to keep information sources confidential, right to a 'consciousness clause', right/duty of Independence, right of access to public documents and to public places, duty to respect a set of professional incompatibilities, etc.).

These are the five “fundamental rights” of journalists, as pointed in the Statute (Art. 6):

- a) Freedom of speech and of creation;
- b) Freedom of access to the information sources;
- c) Guarantee of their professional secrecy;
- d) Guarantee of their independence;
- e) Participation in the editorial orientation of the medium they work for.<sup>1395</sup>

The journalists' duties are also detailed in the Statute (duty to inform accurately, to respect the professional ethics, to reject any form of censorship, to listen to the different parts involved in a case, to protect the information sources, to correct quickly any wrong information published, to respect everyone's right to privacy, etc.). Most of this duties are nowadays scrutinized and judged by the “Commission for the Journalists' Professional Chart”<sup>1396</sup>, a mechanism that is previewed in the Journalists' Statute since its last revision (back in 2007). This commission is presided by a judge but includes some representatives of the journalists themselves and of the media industry, reason why some opinions tend to regard it as a self-regulatory instrument (while others prefer to regard it as an example of 'regulated self-regulation', since it was created by law and functions according to a law). A “Journalists Disciplinary Statute”<sup>1397</sup> was also approved by that Commission in 2008, defining in detail the duties journalists must respect and the sanctions they may suffer if they don't.

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<sup>1394</sup> Law nr. 1/99, of 13 January, as amended by the Law nr. 64/2007, of 6 November. Available at <http://www.gmcs.pt/pt/lei-n-199-de-13-de-janeiro-aprova-o-estatuto-do-jornalista>.

<sup>1395</sup> These five “fundamental rights” correspond word by word to the five “fundamental rights” granted to the journalists in the Press Law (Article 22).

<sup>1396</sup> See <http://www.ccpj.pt/>. This Commission, with the disciplinary powers it has now, was regulated by the Law nr. 70/2008, of 15 April (available at [http://www.ccpj.pt/legisdata/lg\\_dl\\_70\\_08\\_15\\_04.htm](http://www.ccpj.pt/legisdata/lg_dl_70_08_15_04.htm)).

<sup>1397</sup> Available at <http://www.ccpj.pt/legisdata/RegulamentoDisciplinarJornalistas.htm>.

1.5. Finally, still in the context of the legal and regulatory instruments that somehow define and rule the journalistic activity, there is a fifth level to be considered: the level of the profession itself and of the instruments adopted autonomously by the organizations of the professional group, in order to achieve a common understanding of what to do and how to do it, in terms of principles, values, standards and norms. This is clearly the domain of self-regulation and it led to the elaboration and adoption of an Ethics Code<sup>1398</sup> (its last version having been voted in 1993).

This Code synthesizes in only 10 (ten) points – as if it were the “Ten Commandments” – the main ethical duties of journalists: to be accurate and independent, to clearly distinguish facts from opinions, to fight against any form of censorship, to treat everybody equally, regardless of nationality, colour of skin, gender, social status or political affiliation, to respect citizens privacy, to keep information sources confidential even before a court of law (unless they used him/her to disseminate false information), etc.

The Code was prepared, developed and adopted under the responsibility of the Journalists Union (*SJ -- Sindicato dos Jornalistas*), an association that gathers a fairly large number of Portuguese journalists, but not all (less than a half, according to the last unofficial estimations<sup>1399</sup>). Although it is intended to apply to all journalists, the Ethics Code (and a corresponding Ethics Commission) is often ‘too much’ associated to the Union and, therefore, less valued by the journalists who are not its members. But most of the Code items are also somehow present in the Journalists Statute – which is a law – and they may give place to disciplinary sanctions decided by the Commission of the Journalists Professional Chart (in the limit, the journalist may have his/her professional license suspended for a period of 12 months).

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<sup>1398</sup> It is called “Código Deontológico do Jornalista” and had already a couple of different versions, the first one having been adopted after the revolution that brought democracy back to Portugal, in 25th April 1974. Available at <http://www.jornalistas.eu/?n=24> (Portuguese version).

<sup>1399</sup> According to the last public information (December 2013), the Journalists Union had nearly 3.000 members (see <http://portocanal.sapo.pt/noticia/46566/>). This means a little more than 50 % of the total number of journalists in Portugal: according to the Commission of the Professional Chart, as quoted by the European Journalism Observatory (see <http://pt.ejo.ch/jornalismo/portugal-perde-1218-jornalistas-em-7-ano>), in December 2014 there were in Portugal 5.621 journalists (it should be noticed that seven years earlier, in 2007, the total number of journalists was 6.839, which means a very important decrease, due mainly to the economic and financial crisis that led many media companies to downsize their newsrooms or even to close some outlets).

## 2. Obtaining of information and boundaries of law enforcement

2.1. The most controversial problem here concerns, apparently, the protection of information sources – or, to put it clearer, the legal protection for a journalist who must keep an information source confidential, because he/she committed him/herself to that.

As seen above, the laws apparently grant that protection, but some exceptions are also in place, and have already put journalists in prison (even just for a couple of hours...). The Journalist Statute says (Article 11) that “journalists are not obliged to disclose their information sources”, unless – and this is the critical point – the criminal laws say otherwise. And, as a matter of fact, the criminal laws (the ‘Code of Criminal Procedure’ – Article 135<sup>1400</sup>) say that journalists (as well as priests, doctors and lawyers) are allowed not to testify in a court of law about matters that have come to their knowledge in the context of their professional activity – that’s the right/duty to *professional secrecy*. But it goes further: in the next point of the same article, the law adds that the judge may decide that their testimony is essential to the discovery of the truth and, thus, may oblige them to breach their professional secrecy. In the case of a journalist, it means, in most situations, to disclose the identity of an information source that was supposed to be confidential.

If the journalist decides to keep silent – following what his/her Code of Ethics demands –, then he/she may be accused of contempt to the court and brought to the justice. It happened twice in Portugal, a couple of years ago:

a) Manso Preto, a freelance journalist working for the weekly Expresso, was arrested for a couple of hours, in 20-9-2002<sup>1401</sup>, in the sequence of being asked by the legal authorities to reveal his information source(s) in a case of policemen working undercover that he had been investigating. He refused to reveal his confidential sources (a decision that was totally supported by the Journalists Union and by the Union’s Ethics Council) and, according to the criminal laws, he was accused of refusal to testify and of disobedience to the court. For these ‘crimes’, the sanctions go from one to two years in prison. Two years after this accusation, the journalist was declared guilty in a court of law and sentenced (in December 2004) to 11 months in prison, although with the sanction suspended for three years.

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<sup>1400</sup> See <http://www.jornalistas.eu/?n=77>). There is an unofficial translation of this Code available at [http://www.gddc.pt/codigos/code\\_criminal\\_procedure.html](http://www.gddc.pt/codigos/code_criminal_procedure.html).

<sup>1401</sup> See <http://www.publico.pt/media/noticia/jornalista-manso-preto-foi-constituído-arguido-179056>.

He appealed to a higher court and one year later (December 2005) he was declared not guilty by that higher court.

b) Paula Martinheira, a journalist working for the daily *Diário de Notícias*, was brought to court in December 2005 and asked to reveal her confidential source(s) of information in a case of corruption she had investigated and published two years before. Since she refused to reveal her source(s), she was accused of the crime of disobedience to the court. The legal process went on for nearly four years, and in April 2009 she was acquitted of the accusation.

These court cases, although rare and with a fairly 'happy ending', have been strongly discussed in Portugal, because journalists are challenged by two contradictory demands: on one side, the laws grant them the *right* to keep the information sources confidential (starting with the Constitution<sup>1402</sup> itself, following with the Press Law<sup>1403</sup>, and with the Journalists Statute<sup>1404</sup>, as well as with their Ethics Code that imposes him/her the *duty* of not revealing those sources<sup>1405</sup>); on the other side, the criminal laws put in the hands of a judge the decision to oblige a journalist to disclose a confidential information source, and may put him/her in prison (or at least sentence him/her in court) if he/she doesn't obey that order. Legal responsibility or ethical duty? Which one is stronger?

The Journalists Union, in a formal statement published in 2004 under the title "*Journalistic secrecy is a duty, not a privilege of a class*"<sup>1406</sup>, evoked

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<sup>1402</sup> See Article 38, point 2-b): "Freedom of the press implies (...) that journalists have the right, as laid down by law (...), to the protection of professional independence and secrecy (...)".

<sup>1403</sup> See Article 22, which also refers the "right to professional secrecy" as one of the five "fundamental rights" of journalists.

<sup>1404</sup> See Article 6, which also points the "guarantee for professional secrecy" as one of the five "fundamental rights" of journalists, and article 11, nr. 1, saying that "journalists are not obliged to reveal their information sources and their silence may not lead to any kind of direct or indirect sanction". Still, this article of the law opens the gate to the controversy we are discussing here, because it also says, as told above, that this will happen only if the criminal laws don't define a different obligation. The previous version of the Journalist Statute, which was in force until 1999, didn't have this exception. In the Journalists Statute, this issue is also referred in the chapter devoted to the duties of Journalists: article 14, nr. 2-a) explicitly points, as one of their main professional duties, the duty to "protect the confidentiality of the information sources (...), except if those sources try to use them to obtain illegitimate benefits or to disseminate false information".

<sup>1405</sup> See Article 6 of the Journalists Ethics Code: "Journalist should not reveal, not even in a court of law, his/her confidential sources of information, nor should he/she disrespect previous commitments made with the sources, except if they try to use him/her to diffuse false information".

<sup>1406</sup> See <http://www.jornalistas.eu/?n=1694>.

the cases of Manso Preto and Paula Martinheira to stress the importance of respecting this “*sacred duty*” of source confidentiality. Defining it as a “*pact of loyalty*” between journalists and society, the Union referred to the professional secrecy as an essential value for media freedom and a cornerstone for the democratic regime. Suggesting that journalists mustn’t be transformed into auxiliary instruments of judicial or police investigation, who have their own means and logics, this statement also said that professional secrecy is not a way for journalists to hide beyond a wall of impunity; on the contrary, they even face the risk of prison to defend such an important value, through which they may keep and strengthen confidence of society in their work.

It should be mentioned that, more than two decades ago, two episodes of different kind also occurred: with the formal (and carefully explained) agreement of the Union’s Ethics Council, two different journalists were allowed to reveal the identity of an information source that deliberately had used them to diffuse false information, with personal interests involved <sup>1407</sup>. Actually, this is the reason why that possibility of disclosing a source was included, as an exception, in the Ethics Code (article 6.), by the time of its revision in 1993. The previous Code had no such exception.

2.2. Much more often than the problems related to the professional secrecy, journalists have been facing problems related to the ‘legal secrecy’: criminal processes running in the courts are frequently protected by this kind of secrecy, in a number of stages before arriving to the public judgement in a court room, and when journalists publish any material directly or indirectly taken from the process, they are legally prosecuted for breaching the secret. Dozens of journalists have already been prosecuted for this legal infraction (particularly when the processes involve publicly well-known persons), supposed to protect accused persons before the real trial is made<sup>1408</sup>. But, to our knowledge, no one has so far been definitely convicted in a Portuguese court for this crime, either because it is always complicated to find evidence that the journalist actually broke the secret, or because the process eventually comes to an end even before trial (judicial processes in Portugal tend to last for years and the legal schedules sometimes force them to close the procedures with no final sentence). The only recent situations (two) where a journalist was convicted in a Portuguese court for breaching the ‘justice secret’ gave place to an appeal to the European Court of Human Rights (ECHR), where, in both cases, the

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<sup>1407</sup> See <http://www.jornalistas.eu/?n=111>.

<sup>1408</sup> The obligation to respect the ‘legal secrecy’ is detailed in article 86 of the Code of the Criminal Procedure (see <http://www.jornalistas.eu/?n=77>). An English version of this Code is also available at [http://www.gddc.pt/codigos/code\\_criminal\\_procedure.html](http://www.gddc.pt/codigos/code_criminal_procedure.html).



journalists involved were acquitted (and the Portuguese State convicted, on the basis of violation of the citizens' right to freedom of expression). The first case happened between 1998 (initial process) and 2008 (final court decision)<sup>1409</sup>. The second one finished in 2010 (ECHR decision)<sup>1410</sup>.

These were relevant episodes, since it became rather evident, from then onwards, that the European Court of Human Rights tends to value freedom of expression (and freedom of the press) more strongly than the 'legal secrecy', when matters of public interest – and of the citizens' right to information – are at stake. This might help to understand why no journalist has been convicted in court for breaking this secret, in spite of dozens of processes having been initiated against people from the media.

We will come to this point in the next chapter.

2.3 As for rules regarding the utilization of illegally/improperly obtained information, it should be mentioned that the Journalist Statute (which is, let us remember, a law voted by the Parliament) clearly states as a major duty of journalists the duty *"not to record images and sounds using unauthorized means"*, unless the safety of the people involved is at stake or reasons of public interest justify it (art. Nr. 14, f)<sup>1411</sup>. It also obliges journalist to identify themselves as such, unless there is a strong motive of public interest implied. A similar norm is included in the journalists' Ethics Code: the identification of a journalist as such is the rule, and exceptions will only be acceptable when reasons of *"undeniable public interest"* are at stake.

As said before, if a journalist breaks these norms, he/she may be sanctioned in disciplinary terms by the Commission for the Professional Chart (the weakest sanction is a formal public warning and the strongest is the suspension from work for a period of time that can go up to 12 months – which never happened, as far as we know<sup>1412</sup>). The disciplinary sanction

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<sup>1409</sup> See <http://www.publico.pt/portugal/jornal/tribunal-europeu-conclui-que-estado--portugues-violou-liberdade-de-expressao-sao-258529>. The deliberation of the ECHR can be read here: <http://www.gddc.pt/direitos-humanos/portugal-dh/acordaos/traducoes/Acordo%20Campos%20D%20maso%20-%20trad0800420%20-%20revista.pdf>.

<sup>1410</sup> See: [http://www.oa.pt/Conteudos/Artigos/detalhe\\_artigo.aspx?idc=1&idsc=31624&ida=84698](http://www.oa.pt/Conteudos/Artigos/detalhe_artigo.aspx?idc=1&idsc=31624&ida=84698).

<sup>1411</sup> See <http://www.gmcs.pt/pt/lei-n-199-de-13-de-janeiro-aprova-o-estatuto-do-jornalista>.

<sup>1412</sup> Although the available information about the disciplinary activity of the Commission for the Professional Chart was not updated since December 2013 (see <http://www.ccpj.pt/decisoesdaisciplinarias.htm>), we know that only minor sanctions have been imposed by the organization. And almost all of

is independent from a legal procedure (civil or criminal, or both) that also may be taken against journalists, if someone feels offended by their professional behavior.

A legal regulation of the 'State secrecy' also exists in Portugal<sup>1413</sup>, defining in some detail what may be treated as classified information – and, therefore, forbidding anyone (including journalists) to disseminate it by any means. As far as we know, no legal cases have recently been opened on this issues.

2.4. A few situations happened in Portugal, in the last years, related to the search of editorial offices and surveillance of journalists' communications. The laws are very clear in obliging any search of editorial offices to be authorized by a judge, and adding that such a search must be made in the presence of a formal representative of the Journalists Union (art. 11 of the Journalists Statute). Furthermore, the same Statute says any materials used by journalists in their work cannot be apprehended unless a judge orders so. Anyone who disrespects such norms may be accused of a crime against freedom of information and punished accordingly in a court of law (Journalists Statute, art. 19).

In spite of this, in 2014 a high court rejected an appeal made by a freelance journalist and by the Journalists Union (SJ), who claimed that a search of the journalists' house and computer were illegal and should be declared non admissible in court <sup>1414</sup>. The high court argued that the search had not been made in an editorial office, but in the journalists' private home, and referred to a set of suspicions that had not to do directly with the journalists' professional work, but with facts of his personal life. Still, the Journalists Union claimed that such a search had to be ordered by a judge (which it hadn't) and accompanied by a legal representative of the Union (which it wasn't), adding that a computer used by a journalist may always contain both private and professional materials, and in this case his professional secrecy could have been put in danger – which is forbidden by law. And the fact that he works as a freelance journalist makes his house his working place, because freelance professionals usually don't work in editorial

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them have to do with working as a journalist without having the mandatory Professional Card. Media industries are also subject to fines if and when they employ journalists who don't have the professional license, as can be verified in the Commission website: (<http://www.ccpj.pt/decisoesdaisciplinares.htm>).

<sup>1413</sup> See <http://www.gmcs.pt/pt/lei-organica-n-22014-de-6-de-agosto-aprova-o-regime-do-segredo-de-estado-e-altera-o-codigo-de-processo-penal>.

<sup>1414</sup> See <http://www.jornalistas.eu/?n=9226>. It is interesting to notice the coincidence: this freelance journalist, called Manso Preto, is the same that had already been legally sued and sentenced for refusing to disclose in court the identity of a confidential source of information (see above).

offices. The appeal was nevertheless rejected (and the case still runs in courts, with a new appeal).

A serious situation also occurred in November 2012, in the editorial office of the Portuguese public broadcaster *Radio Televisão Portuguesa* (RTP)<sup>1415</sup>. In the sequence of a political demonstration near the Parliament, in the evening of a day of a general strike, a couple of violent incidents occurred between police members and demonstrators. A couple of days later, police officers asked the editor-in-chief of the public television station RTP to view the whole images that had been taken during the demonstration (the ones that had been showed in the news bulletins but also the non-edited images that had not been diffused). Obviously, the police intended to identify, through those 'raw' images, the demonstrators that had been involved in the violent incidents. The police officers were given access to those images by the editors, on a kind of informal basis, even without the knowledge (or previous agreement) of the journalists that had been involved in the reporting of those events. The case was made public by the RTP Workers Committee and caused an enormous controversy, up to the point that RTP editor-in-chief eventually resigned from his post. The media regulator ERC (Regulatory Entity for the Media) was also asked to review the case and ended up with a long formal deliberation (Deliberation nr. 49/2013, of 28 February 2013 <sup>1416</sup>) where RTP is criticized in very strong terms. Among other things, ERC suggested that the editors' decision to show the images to the police officers may have put some journalists' professional secrecy in danger and infringed the law. ERC also suggested that the public broadcaster should define strict rules in order to prevent that non-diffused images might be used by external organizations for purposes that have nothing to do with the journalistic activity or scope.

Three other cases happened (one in 2006, one in 2007 and another in 2011) where the protection of journalists' material was somehow in danger, be it a long list of telephone calls made to different sources (a list that a telecommunications company delivered to the Portuguese Intelligence and Defense Service<sup>1417</sup>), or the data inside computers that were confiscated in the newsroom itself, following orders by the public prosecutor, but not

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<sup>1415</sup> See <http://www.jornalistas.eu/?n=9036>.

<sup>1416</sup> See

<http://www.erc.pt/download/YToyOntzOjg6ImZpY2hlaXJvltzOjM5OiJtZWRpYS9kZWNPc29lcy9vYmplY3RvX29mZmxpbmUvMjE0NS5wZGYiO3M6NjoidGl0dWxvltzOjlxOiJkZWxpYmVyYWVhby00OTlwMTMtZGoiO30=/deliberacao-492013-dj>.

<sup>1417</sup> See <http://www.jornalistas.eu/?n=8743>.

by a judge<sup>1418</sup>. Because of this, one of the confiscations was even declared illegal by a higher court of appeal and the legal process was closed without consequences<sup>1419</sup>. This suggests that the problem is not in the laws (which seem to be rather adequate) but in the practical actions decided and conducted by police officers, intelligence services or public prosecutors, not supervised by a judge.

2.5. As far as the right of access to public documents is concerned, there is also a law within the Portuguese framework: the Law nr. 46/2007, of 24 August<sup>1420</sup>. The right of access to public information is not an exclusive of journalists; on the contrary, it is a fundamental right for every citizen, as is said in the Article 5 of this law:

*“Everyone, with no need to evoke any particular interest, has the right of access to administrative documents, which includes the rights to consult, to reproduce and to be informed about their existence and content”.*

The only restrictions to this universal access are the situations where documents are classified under the state secrecy rules or protected by the legal secrecy (see above).

There has been some evolution on this matter. Traditionally, the Portuguese public administration was very closed and inaccessible. But in recent years, especially because of journalists’ insistence on this right of access granted by law – and sometimes even with their appeal to courts – things are changing. On an informal conversation with a well-known investigative reporter, he confirmed us that it is nowadays “much easier” to get administrative documents from public institutions (government offices, either at national level or at regional and local levels), because those institutions know that it is useless to deny access: sooner or later, the court will oblige them to do so. Of course, there are still many indirect ways to deny access to some information (suggesting, for example, that some private or personal information exists in the documents, and therefore they are not open to consultation) or to make it difficult in concrete terms: to delay things, to limit document consultation to a very short period of time every day, etc. But things are getting better in this domain too.

A “Commission of Access to Administrative Documents”, functioning under the supervision of the Parliament and presided by a judge, has a relevant

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<sup>1418</sup> See: [http://www.jn.pt/PaginalInicial/Interior.aspx?content\\_id=686242](http://www.jn.pt/PaginalInicial/Interior.aspx?content_id=686242). Also see <http://www.jornalistas.eu/?n=6413>.

<sup>1419</sup> See <http://www.jornalistas.eu/?n=4863>.

<sup>1420</sup> See <http://www.gmcs.pt/pt/lei-n-462007-de-24-de-agosto-regula-o-acesso-aos-documentos-administrativos>. (An English version of this law is also available at <http://www.cada.pt/modules/news/article.php?storyid=86>).

role in the enforcement of this law. Anyone is allowed to appeal to this Commission if the right of access to some public information is denied. And journalists, according to their Statute (art. 8), have the right to urgent answers whenever they appeal to this commission. Still, it doesn't have a binding vote: if the public service insists in denying access (even against the opinion of the Commission), the only way is an appeal to a court of law. And it has happened some times in recent years, as far as media work is concerned. All the Commission decisions are publicized in its website<sup>1421</sup>

2.6. What has been said here refers to mainstream media and to 'traditional' journalism. Actually, the Portuguese laws and regulations don't deal much with the new realities of the digital world we live in, and where new forms of gathering, handling and diffusing public information are increasingly present. Just to give an example: the scope of the regulatory entity for the media (ERC) covers all kinds of traditional media (press, radio, television), but, in what concerns content distributed "*through electronic communications networks*", ERC's power of surveillance and intervention is only possible when that content is "*edited*" and organized in a "*coherent framework*" (in a literal translation, "*content submitted to editorial treatment*" and "*organized as a coherent whole*"- see art. nr. 6 of ERC's Statute<sup>1422</sup>). It means that individual weblogs, or even a collective weblog where the different individual participants write and publish whatever they want, don't fall under ERC's regulatory power.

The same may be said in what concerns the protection of people working in these new non-institutional outlets, or people just doing some kind of non-professional journalism on an irregular basis. Since those people don't fit in the definition of journalist as appears in the Journalists Statute, they can't legally claim the inherent rights.

During the year 2014, ERC launched a public debate on the need to re-define the actual concept of media<sup>1423</sup>, trying to adjust it to the new realities surrounding us, particularly in what regards the so called "new media", as well as the multiple "content producers" that go beyond the traditional journalist. There aren't any public conclusions yet.

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<sup>1421</sup> See <http://www.cada.pt/>.

<sup>1422</sup> <http://www.erc.pt/documentos/legislacaosite/lei53.pdf>.

<sup>1423</sup> See:

<http://www.erc.pt/download/YToyOntzOjg6ImZpY2hlaXJvljtzOjM5OiJtZWRpYS9maWNNoZWlyb3Mvb2JqZWNoY19vZmZsaW5lLzE3NC5wZGYiO3M6NjoidGI0dWxvjljtzOjUwOiJzb2JyZS1hLXJlZGVmaW5pY2FvLWRhLW5vY2FvLWRILW9yZ2FvLWRILWNvbXVuaWNhYy1fQ==/sobre-a-redefinicao-da-nocao-de-orgao-de-comunicac>.

### 3. Reporting about ongoing investigations

3.1. The problem Portuguese journalists face more often when making information public has to do with the so-called 'legal secrecy'. As said above, a great number of legal processes running in courts are covered by this secret: a judge may decide that, during a certain period of time, no one is allowed to report anything directly picked up from ongoing processes, both with the intent to protect the investigation and to safeguard the accused 'presumption of innocence'. Since the Portuguese courts are traditionally very closed and don't have any tradition of making some basic information public (the existence of press offices in the more important courts is being discussed for years), information leaks occur very often, especially when the processes involve well-known persons or public institutions. And they occur from both sides, naturally trying to influence things in court by giving some (partial) data to the media – and to the public opinion. Because of this, dozens of journalists have already been sued for breaking the 'legal secrecy', but, as far as we know, never a single journalist was definitely convicted for that crime<sup>1424</sup>: as said before, evidence is hard to find, it takes a lot of time to instruct the legal processes and they eventually must be closed, etc.

In two situations – one involving the journalist Eduardo Dâmaso and the daily *Público*, in 1998, and another involving the journalist António Laranjeira and the weekly *Notícias de Leiria*, in 2000<sup>1425</sup> – there were accusations and convictions by a Portuguese court, but an appeal to the European Court of Human Rights (ECHR) reversed the previous decision and condemned the Portuguese State to pay a compensation to the prosecuted. The main argument was that the right to freedom of expression and the public relevance of the information diffused by journalists override the duty to keep that 'legal secrecy'. The court decision of the first case<sup>1426</sup> clearly states that the conviction of the journalist in the Portuguese court had violated Article 10 of the European Convention of Human Rights (ECHR)<sup>1427</sup>, concerning explicitly the Freedom of

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<sup>1424</sup> A report made by the services of the Public Attorney concluded that, only in two years (2011 and 2012), a total of 83 inquiries were open regarding journalists' breach of the 'legal secrecy'. But only 9 proceeded with a formal accusation and only 2 arrived to the stage of trial, one have been acquitted the other still pending of an appeal (see <http://www.asjp.pt/2014/01/11/procuradoria-quer-escutas-e-buscas-domiciliarias-a-jornalistas/>).

<sup>1425</sup> See: <http://www.smmp.pt/?p=7579>. Also see: [http://www.echr.coe.int/Documents/CP\\_Portugal\\_ENG.pdf](http://www.echr.coe.int/Documents/CP_Portugal_ENG.pdf).

<sup>1426</sup> Available at: <http://www.gddc.pt/direitos-humanos/portugal-dh/acordaos/traducoes/Acord%E3o%20Campos%20D%E2maso%20-%20trad0800420%20-%20revista.pdf> (Portuguese version).

<sup>1427</sup> See [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

Expression:

Article 10 – Freedom of expression

*“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”*

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

The court decided that the public interest of the information made public by the journalist “prevailed over the purpose, also legitimate, of keeping the secret of criminal investigation” [segredo de justiça]. It also stressed that the investigative journalists’ role is precisely “to inform and to alert the public” about issues such as those reported in the case under judgement; once the journalist was in possession of such information, “he/she could not be prevented from publishing” it.

In spite of this, now and then voices appear (mostly from the judicial organizations) claiming for a more severe action against journalists who break the ‘legal secrecy’. Actually, journalists are the most visible partner in this process, because they go public with the information they got (and with their name below). But, naturally, they are not taking directly the data from the processes: somebody leaks those data to them (lawyers, court officers, policemen, etc.), after getting them from the legal processes. And, according to some opinions, these material authors of the leakage are the real breakers of the ‘legal secret’ – not the journalists who afterwards publish the data. But, since they are confidential sources of the journalists, their identity is never disclosed because of the right/duty of ‘professional secrecy’... Still, some voices claim for more severe actions against journalists (higher fines, for example, as well as more investigation against them, through telephone taping or equipment search), which is far from being consensual in the Portuguese public opinion. Even the Justice Minister felt the need to declare recently that no further measures will be taken that somehow may harm the constitutional right to inform and to be

informed<sup>1428</sup>. In a very recent debate promoted by the Journalists Union about the 'legal secrecy', it became rather clear that, in general terms, journalists don't intend to restrain from publishing matters of public interest only because they are protected by such a 'secret', while the Public Attorney services insisted that courts must take more seriously their duty to inform the public when relevant public issues are under trial. If the courts learn how to communicate, they say, less and less temptations to breach legal secret will occur<sup>1429</sup>.

3.2. The decisions of the European Court of Human Rights (ECHR) against previous decisions by Portuguese courts have been a matter of great importance in the last years, especially in what concerns the freedom of expression (violation of the Article 10 of the ECHR), and go far beyond the two situations related to the 'legal secrecy' or 'secret of criminal procedure'. Actually, in the last 10 years – from 2005 to January 2015 – Portugal was convicted 18 times, under the allegation that Portuguese courts violated the principle of freedom of expression, which is three times more than the average number of convictions in 28 members of the European Union<sup>1430</sup>. Not all situations involved journalists, but all of them involved media: in some of them, they had to do with columnists or other people writing in the op-ed pages of a newspaper. In most of these situations, the conviction of the Portuguese courts pointed to the crime of libel (someone who felt offended by an opinion, or harmed in his/her honour, or right to his/her image, good name and reputation, etc.)<sup>1431</sup>.

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<sup>1428</sup> See <http://www.asjp.pt/2014/01/11/procuradoria-quer-escutas-e-buscas-domiciliarias-a-jornalistas/>.

<sup>1429</sup> See <http://www.jornalistas.eu/?n=9422>.

<sup>1430</sup> See <http://www.publico.pt/politica/noticia/tribunais-portugueses-exageram-nas-condenacoes-por-difamacao-1698686>.

<sup>1431</sup> The first case of a conviction by a Portuguese court that was withdrawn by the European Court of Human Rights, on the ground of the respect for the article 10 (Freedom of expression) of the European Convention of Human Rights, occurred in September 2000, although the legal procedure had been initiated in 1993. In this last year, the editor-in-chief of a relevant daily newspaper (Público) wrote an opinion text criticizing in very strong words the ideas and discourse of a right-wing politician who was preparing to run for the Parliament. The politician sued the journalist (and the newspaper), putting a complaint for defamation. In a first instance, the court acquitted the journalist, but in a higher court he was convicted and condemned to pay a sum of money to the politician as an indemnity for 'moral damage'. But the journalist appealed to the ECHR and eventually won: in 2000, the European court condemned Portugal for violating the fundamental right of the journalist (and of the newspaper) to freedom of expression. Although considering that his writings could be regarded as controversial, they didn't mean a personal attack with no reason; instead, they should be considered as the "risks of the political game and of the free debate of ideas", which is "the guarantee of a



According to an experienced Portuguese lawyer (and the successful defendant of several cases of appeal to the ECHR<sup>1432</sup>), freedom of expression in Portugal has traditionally been *“mistreated and disregarded both by the political power and by the citizens themselves”* (Teixeira da Mota, p. 13). As for the Portuguese courts, he says that two opposed interpretations of the law coexist: the *“conservative”* or *“traditionalist”* approach tends to value the personal honour and good name and reputation more than freedom of expressions and the citizens’ right to information, while the *“liberal”* or *“modern”* approach grants a higher importance to freedom of expression, namely when the freedom of opinion is at stake. Traditionally, the Portuguese courts tended to sentence journalists or people publishing in the media for libel, but the appeals to the European Court – where these convictions have been usually reversed, on the ground of freedom of expression – are changing things, even within the Portuguese courts. The *“liberal”* vision seems to be gaining room against the *“conservative”* interpretation and the jurisprudence of the ECHR has played a major role in that. After all, as Teixeira da Mota (pp. 97-98) also suggests, the *“restrictive character”* of freedom of expression that is still present in many Portuguese court decisions is not due to the laws, but to the personal interpretation of the laws made by the judges: with the same laws and the same (or similar) facts, judges have already decided in one way or another. Changes have to do with minds and culture, rather than with more (or different) laws. And jurisprudence helps to that.

As Teixeira da Mota (*ibid.*, p. 16) puts it:

*“In Europe, the European Convention of Human Rights – established during the years 1949 and 1950 within the Council of Europe, and aiming to ensure the collective defense of some of the rights of the Universal Declaration of the Human Rights – consecrates, in its article 10, in a very broad manner, the freedom of expression, although expressly admitting the possibility of some restrictions to it. The European Court of Human Rights has been playing an important role in the building of an European freedom of expression based on the principle that such restrictions are only acceptable when its need is imperative for a democratic society”.*

3.3. The right of reply is another one of the set of rights that are relevant in the context both of media freedom and of media responsibility. In Portugal, this right of reply is highly regarded, since it is established in the Constitution itself, as seen above:

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democratic society” (see <http://www.clubedejournalistas.pt/?p=2149>).

<sup>1432</sup> See Teixeira da Mota, Francisco (2013), “A Liberdade de Expressão em Tribunal”. Lisboa: Fundação Francisco Manuel dos Santos / Relógio d’Água Editores.

*“Every natural and legal person shall be equally and effectively ensured the right of reply and to make corrections, as well as the right to compensation for damages suffered”. (Article 37 – Freedom of expression and information – nr. 4)*

*“An independent administrative entity shall be responsible for ensuring the following in the media: (...)*

*g) Exercise of the rights to broadcasting time, of reply and of political response”. (Article 39 – Regulation of the media – nr. 1, g)*

This right of reply is also present, in more detail, in the sectorial laws for the media, particularly the Press Law: here, a whole section, with four long articles (24 to 27) is devoted to the rights of reply and of correction, namely obliging the media to publish / diffuse the replies with an identical degree of visibility to the piece that originated them<sup>1433</sup>. This is a matter of frequent disputes, reason why the right of reply still counts as one of the most invoked motives for citizens to address complaints to the Regulatory Entity for the Media (ERC)<sup>1434</sup>. In spite of this, things have changed very much in recent years, and nowadays the respect for the “right of reply” is more of a rule than an exception in most media.

When a complaint is presented to ERC and the regulator decides accordingly, the medium in question is obliged to publish the “*right of reply*” in the precise terms defined by the law.

The Journalist Statute also points as main duties of journalists

*“to rectify mistakes or inaccuracies they may be responsible for” and*

*“to refrain from filing charges without proof”, and*

*“to respect the presumption of innocence”*

of everybody before a court conviction (article 14, nr. 2). To break these principles and norms may lead to the opening of legal proceedings against journalists (be it for criminal or for civil responsibility), as well as to a disciplinary process (depending from the Commission of the Journalists Professional Chart).

<sup>1433</sup> See <http://www.gmcs.pt/pt/lei-n-299-de-13-de-janeiro-lei-de-imprensa>.

<sup>1434</sup> The annual Regulation Reports of ERC usually devote an entire chapter to the “right of reply” (see, for example, the Report for 2014, pp. 86-90 – available at: <http://www.erc.pt/download/YToyOntzOjg6ImZpY2hlaXJvltzOjM4OIJtZWRpYS9lc3R1ZG9zL29iamVjdG9fb2ZmbGluZS83Mi4yLnBkZiI7czo2OjI0aXR1bG8iO3M6NTA6InJlbGF0b3Jpby1kZS1yZWd1bGFjYW8tMjAxNC12ZXJzYW8tc2VtLWVkaWNhby1ncmFmljt9/relatorio-de-regulacao-2014-versao-sem-edicao-graf>), since the complaints about this item are “one of the main areas of activity” of the media regulator.

Besides the legal and disciplinary obligations, the journalists' Code of Ethics also insists, on its point 1, that *"the journalist must report the facts in an accurate and exact manner, and interpret them honestly. The facts must be proven and all the parts somehow involved must be heard"* <sup>1435</sup>.

Some media companies have also adopted and put in practice a set of more detailed professional standards and ethical norms, either in Style Books developed over time, or in specific codes of conduct or similar internal documents<sup>1436</sup>.

3.4. One of the most interesting laws that aim to protect journalists and their work in the public interest is the 'consciousness clause': according to the professional Statute (article 12), no journalist may be forced to do any kind of work that is contrary to his/her conscience, and his/her refusal in these situations can never give place to any disciplinary sanction. Furthermore, journalists are legally allowed to refuse any order (for editorial work) that comes from the company's management, instead of the editorial board.

These principles are designed to protect journalists' independence and autonomy, suggesting that their highest loyalty is always towards the public (in the defense of the public interest), not towards the company they work for (nor their commercial private interests). The law – directly inspired by identical norms granted to the French journalists in their process of professionalization, back in the 1930's – exists in Portugal since 1974, when the country recovered democracy after a long period of political dictatorship. In spite of this, its practical application has always been rare, and nowadays it is becoming even rarer: with the economic weakness of most of the media companies, with the severe downsizing of most newsrooms, with the increasing precariousness of journalists' labour contracts, people are afraid to invoke these special rights and tend to 'close the eyes' to any offense to them.

As for the legal responsibility for what has been published or publicly diffused, the individual journalist/author is always the first person to be asked for account. In court, he/she must either prove that what he/she published is true, or that he/she had all the motives, in good faith, to believe that it was true. And the decision by the judge may focus on the truth of the

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<sup>1435</sup> See [http://static.publico.pt/nos/livro\\_estilo/29-codigo-d.html](http://static.publico.pt/nos/livro_estilo/29-codigo-d.html).

<sup>1436</sup> See, for instance, PUBLICO Style Book (1997), [http://static.publico.pt/nos/livro\\_estilo/index.html](http://static.publico.pt/nos/livro_estilo/index.html), VISÃO Code of Conduct (2009), <http://visao.sapo.pt/codigo-de-conduta=f496736>, Code of Conduct of EXPRESSO journalists (2008), <http://expresso.sapo.pt/informacao/codigoconduta/codigo-de-conduta-dos-jornalistas-do-expresso=f198040> –, or the Style Book of LUSA Press Agency (2012) – <http://www.lusa.pt/lusamaterial/PDFs/LivroEstilo.pdf>.

published work but also (or specially) on the evaluation of the proper professional standards followed by the journalist when investigating the case.

Usually, the editor-in-chief is also legally co-responsible for what has been publicly diffused. In various situations, however, the editor-in-chief is replaced by another member of the newsroom management staff (a deputy editor, an executive editor...): it is only necessary that the editor-in-chief makes clear that he hadn't had previous knowledge of the concrete work that has been published. In any case, someone from the editorial hierarchy must be also accountable for what has been published, besides the journalist(s) who signed the piece of work.

## **6. Conclusion and perspectives**

6.1. Various laws intended to defend freedom of expression and freedom of the media, as well as to protect investigative journalism that necessarily comes with it, exist in Portugal at different levels of relevance and seem to be quite enough. In other words, we think there is no problem of lack of laws in the country (although some clarification between apparently contradictory laws might be useful), but there is often a problem with the full and thorough application of those laws.

6.2. As one famous investigative reporter told us in the context of this report about Portugal, the major difficulties faced by journalists have to do with the absence of a culture of responsibility, transparency and accountability, particularly when the public administration is on target. People in public functions don't feel the obligation or the need to be brought to account by citizens, mainly through the media; on the contrary, they tend to use power as something of their own, and they always feel uncomfortable when reporters legitimately ask for details of a public contest or of a controversial decision, in the context of their noble 'watchdog mission'. Even when the laws are invoked (for example the law of access to administrative documents), it is not rare that a number of practical excuses is put forward in order to keep documents more or less secret. Again, this is not about the law (which is good and appropriate), but about its practice. It's about (lack of) democratic culture, after all.

6.3. This cultural problem, still according to the investigative reporter we interviewed and to our own opinion, is rather overspread, touching many citizens who don't bother much about the misuse of public jobs. More than that, it even touches other fellow journalists who prefer 'not to take risks' and keep a low profile, looking at the daily routine news and nothing else. Sometimes, individual journalists don't get the internal support they would need to investigate stories that come to their hands: directly or indirectly, they are not given the time, the material means or the freedom of movements to go deeper on cases that would require a lot of investment.

Sometimes it happens because the media companies don't have the means to it, but it also happens because the management or the editors don't want to get in trouble, be it with the justice or with powerful persons.

6.4. The difficult situation of most media companies in Portugal, due to the present economic and financial crisis as well as to their traditionally small and not very profitable nature, contributes to make things worse. It's understandable that journalists tend not to invoke all their rights when a serious economic crisis is putting at stake the bare survival of their media outlet. In the last eight years, the number of active journalists in Portugal decreased by about 20 %, either because media consumption is much lower than before (especially because of the new competition ways of the digital world), or because advertising revenues are also decreasing dramatically in most cases. When the risk of losing the job is so present among journalists, some limitations are easily accepted (not to say self-imposed).

6.5. The complex digital involvement of the media industry brings new challenges to these issues, starting with the laws themselves. Much of what happens nowadays in the public sphere is somehow absent of the laws of the media sector, most of them still designed according to the mainstream, traditional, institutional media (press, radio, television). Online communication, weblogs, social media, etc., mean an increasingly great share of our daily media consumption rates, but not all of it adjusts any longer to the definitions and requirements we were familiar with. In recent years, a couple of investigative stories that had a huge impact on the Portuguese public opinion first appeared in weblogs, and their authors had some problems at different legal levels. Perhaps the protection nowadays granted to licensed journalists alone might also include those who perform real 'acts of journalism', in spite of their non-professional condition.

6.6. The explosion and world-wide proliferation of social networks, together with the dissemination of multiple mobile devices, also brings some new questions and challenges to the media environment – and specifically to journalistic work. The distinction between the public and the private areas of life is no longer clear as it was in the past. The track left by the routine navigation courses through the Internet risks to expose journalists and their sources of information to higher interferences. The confidence of the public in journalists and in their commitment to respect the 'professional secrecy', which is essential for the watchdog role of media in democratic societies, is more menaced today than a couple of years ago. All these changes ask for a deeper reflection and debate about the present and future condition of journalism.

## **25. Romania**

Cristina Bachmeier

## 1. Relevant Legislation and Case-law

In accordance with the principles of freedom of expression and right to information stated in the Universal Declaration of Human Rights as well as in the European Convention on Human Rights (the Convention), the Constitution of Romania guarantees an unrestricted person's right of access to any information of public interest.

Chapter 2 of the Romanian Constitution – “Fundamental rights and freedoms” – stipulates that the freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable and that any censorship shall be prohibited.<sup>1437</sup>

At the same time, the legislator is setting out explicitly the limitations of those freedoms as follows: freedom of expression shall not be prejudicial to the dignity, honour, privacy of person, and the right to one's own image; any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morality shall be prohibited by law.

The crime of “defamation of the country and the nation” provided for also by the Criminal Code<sup>1438</sup> was, however, abolished in 2006 as a result of an evaluation of offenses, which by their content could represent an interference of the State in the freedom of expression. It was envisaged that the values protected by the rule of criminality, such as “country” and “nation”, are abstract notions and can be interpreted in many ways by those who transmit ideas and opinions or by their recipients; this may create the risk to classify as a crime the formulation and communication of critical assessments of political, journalistic and historical nature. Thus the lack of clarity of the text deprives the recipient of his ability to understand the meaning of these provisions and to adapt his conduct. In addition, the values protected by the legal norm do not entitle an interference of the State in the freedom of expression according to Art. 10 (2) of the Convention, because they are not among those that the state can protect by restricting a certain right. Therefore the application of criminal sanctions could not be considered a justified measure in a democratic society, where the right to formulate critical opinions of political nature is an essential component of freedom of expression.<sup>1439</sup> The offenses of insult and libel

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<sup>1437</sup> Article 30 of the Romanian Constitution: <http://www.cdep.ro/pls/dic/site.page?id=371>.

<sup>1438</sup> Article 236<sup>1</sup> of the Old Romanian Criminal Code.

<sup>1439</sup> The Government's point of view presented to the President of the Senate in July 2014 for the proposed amendments to the Penal Code Act.

being also decriminalized, an adequate remedy remains possible only by means of a civil lawsuit.

The new Romanian civil code<sup>1440</sup> (NCC) illustrates the codification of various ECHR's decisions of the Romanian courts in the context of much litigation that took place in the last 22 years in Romania between the journalists and the private or public figures. The NCC (Articles 252-257) strives for a fair balance between the two rights equally guaranteed by the Constitution and the Convention, namely: the freedom of expression and the right to privacy. The provisions of the NCC apply to the entire press: media (print/online) or audiovisual. However they are not new for the audiovisual media (broadcasters) which was already – especially in light of the implementation of the AVMS Directive – subject to CNA's regulations (as through the Audiovisual Law<sup>1441</sup> and the Regulatory Code of the Audiovisual Content<sup>1442</sup>), but for the print press which standards are nowadays increasingly more aligned to the audiovisual content.

In respect of the right to information, the public authorities according to their competence shall be bound to provide for correct information of the citizens in public affairs and matters of personal interest, while public and private media shall be bound to provide correct information to the public opinion. Only the protection of minors/youth or of national security shall be reasons for the limitation of the right to information.<sup>1443</sup>

The Romanian Freedom of Information Law<sup>1444</sup> (FOI) stipulates in Art. 18 that the public authorities have the obligation to grant, without discrimination accreditation to journalists and to representatives of means of mass information. The public authorities may refuse the granting of accreditation or may withdraw the accreditation of a journalist only for deeds that stand against the normal development of the public activity and that do not concern the opinions expressed in the press by the respective journalist, within the conditions and limits of law. The refusal to grant

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<sup>1440</sup> New Civil Romanian Code, Law no. 287/2009, published in the Official Gazette of Romania, Part I, no. 511 of 24 July 2009, in force since 1th of October 2011.

<sup>1441</sup> The Audiovisual Law no. 504/2002 (text in force since 5 July 2015), as amended by the Law no. 181/2015, published in the Official Gazette of Romania, Part I, no. 484 of 2 July 2015.

<sup>1442</sup> Decision no. 220/2011 as amended by the Decision no. 197/2014 regarding the Regulatory Code of the Audiovisual Content (text in force since 4 May 2014), published in the Official Gazette of Romania, Part I, no. 243 of 4 April 2014.

<sup>1443</sup> Article 31 of the Romanian Constitution.

<sup>1444</sup> Romanian Law on Access to Information of Public Interest no. 544/2001 (with subsequent amendments and completions), published in the Official Gazette of Romania, Part I, no. 663 of 23 October 2001.



accreditation and the withdrawal of accreditation of a journalist shall be communicated in writing and does not affect the right of the press body to obtain the accreditation for another journalist. According to Art. 19 (3) of the FOI, the public authorities are obliged, through their internal governance rules, to carry out specific activities in the presence of the public and at the same time to allow the access of the press to those activities.

Gathering information is an essential preparatory step in journalism and is an inherent, protected part of press freedom. The European Court of Human Rights has reiterated that collecting information and guaranteeing access to documents held by public authorities is a crucial right for journalists in order to be able to report on matters of public interest, helping to implement the right of the public to be properly informed on such matters. In the case of Roșianu v. Romania,<sup>1445</sup> a presenter of a regional television programme, the Court came to the conclusion that the Romanian authorities had violated Article 10 of the European Convention on Human Rights by refusing access to documents of a public nature, which he had requested at Baia Mare, a city in the north of Romania. The Court's judgment clarifies that efficient enforcement mechanisms are necessary in order to make the right of access to public documents under Article 10 practical and effective.<sup>1446</sup>

The legal landscape represented by the normative acts is to be completed with the provisions of several codes of ethics that journalists adopt and adhere to in practice. However, in Romania a unique Code of Ethics of the journalists does not exist at the moment. Although the Media Organizations Convention adopted in 2004 is a homogenous content for the entire print media, many press entities elaborate and continue to examine ethical issues according to their own Code of Ethics as for instance, the Romanian Press Club (CRP).

## 2. a) Obtaining of information

In terms of accessibility, factual information can be divided in state secret („secrete de stat“), office secret („secrete de serviciu“) and public information. The way to operate with the first two types of information is regulated mainly by the Law on protection of classified information<sup>1447</sup>. The state secret information concerns national security, whose disclosure could

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<sup>1445</sup> Judgment by the European Court of Human Rights (Third Section), case of Roșianu v. Romania, Appl. No. 27329/06 of 24 June 2014.

<sup>1446</sup> Dirk Voorhoof, IRIS 2014-8:1/4, <http://merlin.obs.coe.int/iris/2014/8/article4.en.html>

<sup>1447</sup> Law no. 182/2002 on protection of classified information, published in the Official Gazette of Romania, Part I, no. 248 of 12 April 2002.

jeopardize national security and the country's defense, while the office secret information represents information whose disclosure is liable to bring prejudice to a public or private legal person.

The New Romanian Criminal Code foresees in Art. 227 the offence of "disclosure of professional secrecy" and its penalty as follows: "The disclosure, without right, of data or information regarding the privacy of an individual, which might bring harm to an individual, by someone who has knowledge thereof by virtue of profession or office, and who has the obligation to maintain the confidentiality of said data, shall be punishable by no less than 3 months and no more than 3 years of imprisonment or by a fine. Criminal action shall be initiated based on a prior complaint filed by the victim."

The use of hidden camera is in principle forbidden. Firstly, by the provisions of Art. 35 of the Regulatory Code of the Audiovisual Content (AV Code), which states that it is prohibited to broadcast conversations or show images recorded with microphones and cameras hidden, unless the records could not have been obtained or conducted under normal circumstances, and their content justifies a public interest. As outlined in article 31 AV Code, any problems, facts or events that influence society or community, are considered to justify the public interest, regarding in particular: the preventing or proving facts committing a criminal incident; the protection of public health or safety; or the reporting of misleading statements or cases of incompetence that affects the public.

Secondly, Art. 38 AV Code provides that the dissemination of audiovisual recordings, of telephone conversations or correspondence – from confidential sources or from sources whose credibility has not been properly verified – is only allowed, if there is a justified public interest and if they are accompanied by the point of view of the person concerned.

In any case, the images recorded with hidden cameras have to be broadcasted only accompanied by a graphic sign symbolizing a camera.

Further specifications regarding the illegal or unethical means to get information are mentioned in particular in most of the codes of conduct for journalists, as for instance in Art. 14 of the journalists Statute of Romanian public television: the journalist will not use recordings of private conversations etc., filmed with hidden camera, without prior consent of the person.

## **2. b) Boundaries of law enforcement**

Art. 9 AV Code stipulates that the searches of editorial rooms or of the main offices of the broadcasters shall prejudice neither the freedom of expression of journalists nor shall suspend the broadcasting of the programmes. In practice, there are no cases of conducted searches as a

result of breaches of duty or secrecy with regard to journalistic activity. In the most recent cases, the police have searched the main offices of certain broadcasters<sup>1448</sup> or publishers in the context of criminal procedures against the owners<sup>1449</sup> in order to collect relevant evidence of corruption or money laundering.

Activities that restrict the right to privacy, including communications surveillance, can only be justified when they are prescribed by law, when they are necessary to achieve a legitimate aim, and when they are proportionate to the aim pursued. Especially after the ECJ decision declared the Data Retention Directive invalid, many NGO's and independent nonprofit organizations (as ActiveWatch<sup>1450</sup>, for instance) are militating for free communication for public interest.

### 3. Reporting about on-going investigations

The elements outlining the structure of tort liability for one's own actions are provided by art.1357 (1) NCC: "he who causes damage to another by an unlawful act, committed with intent or fault, is obliged to pay compensation." The text of the law incorporates the provisions initially imposed by art. 998-999 of the 1864 Civil Code and configures the general conditions of liability for one's own actions, namely: the existence of a wrongful act, the existence of damage, the existence of a causal link between the wrongful act and the damage and, last but not least, the existence of fault, in any of its forms, according to art. 16 para. (4) of the NCC.

In addition, Art. 42 of the AV Code stipulates the conditions of legitimate reporting by ongoing investigations: it is prohibited to broadcast images or recordings of persons in pre-trial detention, or under arrest without their consent; it is prohibited to broadcast images or recordings of persons executing a custodial penalty, unless they prove violations of other rights or there is a legitimate public interest; the images and/or records of persons in a state of detention, arrest or serving a custodial sentence should not be presented in an excessive and unreasonable; in the audiovisual programs may not be offered, directly or indirectly, rewards and cannot be made promises to reward those who may testify in court.

At this point, it is worth being mentioned that the distinction between facts and value judgments is of great importance by reporting about ongoing

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<sup>1448</sup> <http://www.paginademedias.ro/2015/02/perchezitii-la-neptun-tv-si-la-ziarul-telegraf-administrate-de-sorin-strutinsky-un-apropiat-al-lui-radu-mazare/>.

<sup>1449</sup> <http://www.mediafax.ro/sport/perchezitii-dna-la-sediile-ziarului-si-televiziunii-patronate-de-penescu-4456639>.

<sup>1450</sup> <http://www.activewatch.ro/en/freeex/rapid-response/stop-surveillance-activities-in-romania>.

investigations. According to Art. 50 AV Code, the right of reply shall not be ensured in relation to expressed value judgments.

#### **4. Due diligence guidelines for journalists**

Art. 75<sup>1</sup> of the AV Code embodies the principle of the presumption of innocence, foreseen both by Art. 6 (2) of the Convention and by Art. 23 (11) of the Romanian Constitution: Any person shall be presumed innocent till found guilty by a final decision of the court.

In order to safeguard the protection of the right to one's own image, no person shall be showed in demeaning situations; if so, the pictures shall be blurred, as for example in case of handcuffs by arrested people in criminal proceedings. However, the right to one's own image shall not constitute an impediment in investigative journalism for finding out and reporting the truth.

#### **5. Liability in the editorial chain**

As stipulated in Art. 30 (8) of the Romanian Constitution, the civil liability for any information or creation made public falls upon the publisher or producer, the author, the producer of the artistic performance, the owner of the copying facilities, radio or television station, under the terms laid down by law. Indictable offences of the press shall be established by law. Consequently, the courts are deciding basically by applying the principle of solidarity in the event of tort and liability of the journalist or of the newspaper's publisher for attacks upon someone' honour and reputation.

#### **6. Conclusion and perspectives**

Collecting information for a news investigation is a difficult and risky task; the journalist is facing a lot of difficulties, such as the unjustified refusal of the authorities to provide the necessary information, the refusal of the unofficial sources to disclose their identity or the false qualification of public information as a state secret. Furthermore, the lack of alternative sources makes impossible to cross check information. This particular aspect – the refusal of officials or policy makers to provide information on the grounds that it is secret – constitutes a serious impediment to the work of the investigative journalist. However, officials often describe arbitrarily public information as a state secret, leading to the concealment of information of public interest or to unreasonable protection of a certain person.

The situation of the journalistic work is facing further more difficulties due to an excessive politicization of the media. "The independent voices find it increasingly difficult to make themselves heard in the partisan noise dominating media scene. Even more seriously, they risk being caught in

the crossfire between the two camps.”<sup>1451</sup> A journalist and director of a newspaper was the target of several insults and intimidation and discreditation attempts in 2014, while he published his investigations related to the organization of a sport event, which targeted a number of high-ranking politicians.

Last but not least, the funding of investigative journalism remains a big problem for both the press sector and the legislator. On 25 February 2015, the Romanian Senate rejected the draft act on setting up of a special fund for investigative journalism. The document proposed to support a so-called “Special Fund for Investigative Journalism”, meant to finance directly investigative journalism, but also the persons who dare to disclose acts of corruption through the mass media (print media, the radio, television and the Internet) or through a complaint directed to investigative and prosecuting bodies. The Government considered that the proposed document is contrary to Act no. 500/2002 on public finance (...) with regard to the setting up of special funds, the principles of universality and unity and the rules on budgetary expenditure.<sup>1452</sup>

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<sup>1451</sup> More information in Freeex Report „Media Freedom in Romania 2014-2015“, [http://www.activewatch.ro/Assets/Upload/files/raport%20freeex%202014%20\\_eng.pdf](http://www.activewatch.ro/Assets/Upload/files/raport%20freeex%202014%20_eng.pdf).

<sup>1452</sup> Eugen Cojocariu, IRIS 2015-5:1/32, <http://merlin.obs.coe.int/iris/2015/5/article32.en.html>.

## **26. Sweden**

Andreas Kotsios

## 1. Relevant Legislation and Case-law

Before starting with the analysis of the issues it is worth making a brief description of the regulatory framework regarding journalism in Sweden.

Sweden has four constitutional laws. Three of them refer to the freedom of expression. Firstly, the Instrument of Government (Regeringsformen) grants a general right to the freedom of expression<sup>1453</sup>. Regarding the more specific right to freedom of expression through the printed press and other media, such as radio, TV, media websites, web-TV and web-radio, the Instrument of Government refers to the Freedom of the Press Act (Tryckfrihetsförordning, hereinafter the Act) and the Fundamental Law on Freedom of Expression (Yttrandefrihetsgrundlagen, hereinafter the Fundamental Law)<sup>1454</sup><sup>1455</sup>. The provisions of both these constitutional laws are very similar: the Fundamental Law was introduced in 1991's in order to expand the scope of the Act to other media and therefore often refers directly to the Act – so, when there is no difference between the two laws the report will refer to the Act.

The cornerstones of the freedom of expression in media (the term freedom of expression in media will be used hereinafter in order to depict the freedom of the press provided in the Act and the freedom of expression on the radio, TV and Internet provided in the Fundamental Law) are a) the principle of public access (offentlighetsprincipen - Chapter 2, article 1 of the Act), namely that the public can have an insight into the activities of the state<sup>1456</sup>, and b) the freedom to communicate information and intelligence (meddelarfriheten - Chapter 1 article 1, paragraph 3 of the Act), meaning that anyone can freely provide information to the media about any subject for the purpose of publication. The fundamental idea is that everyone is free to express himself/herself; but in some cases, when this right is misused, consequences may follow<sup>1457</sup>.

The cases of misuse of this right are specified by the Act<sup>1458</sup> (the Fundamental Law refers to the Act). The liability system in such cases is characterised as artificial, successive and exclusive<sup>1459</sup>. By artificial, as it

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<sup>1453</sup> Chapter 2, article 1, paragraph 1, point 1 of the Instrument of Government.

<sup>1454</sup> Chapter 2, article 1, paragraph 2 of the Instrument of Government.

<sup>1455</sup> English translations of the Instrument of Government, the Act and the Fundamental Law can be found at the website of the Swedish Parliament, <http://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/The-Freedom-of-the-Press-Act/>, accessed 15 June 2015.

<sup>1456</sup> Prop. 2008/09:150, p. 272.

<sup>1457</sup> See *Wiveka Warling-Nerep and Hedvig Bernitz*, 'En Orientering i Tryckfrihet & Yttrandefrihet', (2009), Fjärde Upplagan, Jure Förlag AB, Stockholm, Sweden, p.14.

<sup>1458</sup> Chapter 7, articles 4 and 5 of the Act.

<sup>1459</sup> *Warling-Nerep and Bernitz*, p. 118.

is specified in Chapter 8, article 12 of the Act, it is meant that if the freedom of expression is misused, the person liable is presumed to have done the act with his/her “knowledge and consent”. Furthermore, according to the chain of liability, provided in the Act, only one person exclusively can be held liable and if this person cannot be held liable for some of the reasons specified in the Act, then the next person in the liability chain will (successive liability).

One more thing that must be pointed out in these introductory notes is that according to Chapter 1, article 3 of the Act and Chapter 1, article 4 of the Fundamental Law, these two laws are the only ones applying in cases of misuse of the freedom of expression in media (exclusivity as criminal and procedural laws).

Lastly, the regulatory system regarding the media is completed with some self-regulatory rules created by the actors of the media industry themselves. The media associations have created the Ground Rules for Press, TV, Radio (Spelregler för Press, TV, Radio)<sup>1460</sup>, which include ethical and professional rules. The application of these rules is monitored by the Swedish Press Council (Pressens Opinionsnämnd), the Professional Ethics Committee (Yrkesetiska nämnden) and the Audit Committee for Radio and TV (Granskningsnämnden för radio och TV).

By bearing in mind these introductory notes we can now start the analysis of the specific questions.

## **2. a) Obtaining of information**

As a general rule in Sweden everyone has the right to express himself/herself freely and without obstacles by the authorities (Chapter 1, article 1 of the Act). Furthermore, according to Chapter 1, article 2 of the Act<sup>1461</sup>, a priori scrutinization or prohibition of a printing by authorities is not allowed (general prohibition of censorship)<sup>1462</sup>. Only after the media have published the printing may the authorities react. And it is only in the specific cases that are provided in the Act (and the Fundamental Law which refers to the Act) that the authorities may react, namely in cases of offence against the freedom of expression in media (Chapter 7, articles 4 and 5 of

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<sup>1460</sup> The full text of the rules can be found on the website of the Swedish Media Publishers' Association, <http://www.tu.se/images/SPELREGLER2010.pdf>, accessed 17 June 2015.

<sup>1461</sup> See also Chapter 1, article 3 of the Fundamental Law.

<sup>1462</sup> It should be mentioned here that the Fundamental Law in Chapter 1, article 3 paragraph 2 leaves some space for censorship in cases of films and video recordings showed in public (e.g. cinemas).



the Act and Chapter 5, article 1 of the Fundamental Law which refers to the Act).

According to the Act, media are generally allowed to use any kind of information with no legal consequences as long as the act of publishing does not fall under Chapter 7, articles 4 and 5 of the Act and as long as the act remains within the scope of the Act (namely to ensure “the free exchange of views and the availability of comprehensive information”<sup>1463</sup><sup>1464</sup>, meaning that in cases where the scope of publication is only commercial, for example fraud or other acts concluded through media by purely economic motives, other laws may apply<sup>1465</sup>).

The offence catalogue in article 4, lists which acts committed through media constitute offences against the freedom of expression. More specifically, these acts are: high treason, instigation of war, espionage, unauthorized trafficking in secret information, carelessness with secret information, insurrection, treason or betrayal of the country, carelessness injurious to the interests of the country, dissemination of rumours which endanger the country, sedition, hate speech, offences against civil liberty, unlawful portrayal of violence, defamation, insulting language or behaviour, unlawful threats, threats made against a public servant and perversion of the course of justice.

Article 5 states that offences against the freedom of expression can also be constituted in acts committed through media where: a) someone deliberately publishes a secret public document, b) someone publishes information and thereby deliberately disregards a duty of confidentiality as specified in a special act of law [the Public Access to Information and Secrecy Act (Offentlighets- och Sekretesslagen - hereinafter the Secrecy Act)<sup>1466</sup>] and c) someone publishes information when the state is at war (or in danger of war).

It can be seen that in both articles 4 and 5 there are some provisions focusing on secret public information and secret public documents, namely unauthorized trafficking in secret information, carelessness with secret information as well as deliberate publication of secret public documents and information. However, it seems rather improbable that a person in the

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<sup>1463</sup> Chapter 2, article 1 of the Act.

<sup>1464</sup> See also Hans Gunnar Axberger, 'Kommentar till 1 kap 3 § Tryckfrihetsförordning, Karnov Juridik', <http://juridik.karnovgroup.se.ezproxy.its.uu.se/document/527360/1?versid=146-1-2005#SFS1949-0105-annotations>, accessed 15 June 2015.

<sup>1465</sup> See NJA 1905 p. 364 where a person was convicted for fraud since he used an advertisement in a newspaper to ask people to pay double postage without providing any service in return.

<sup>1466</sup> Chapter 13, article 5 of the Secrecy Act.

liability chain (described later in this report) will be found liable for one of these offences.

As far as the unauthorized trafficking in secret information and the carelessness with secret information (Chapter 7, article 4, points 4 and 5 of the Act) is concerned, it should be mentioned that first of all the information must be secret and the act must "hurt" the country<sup>1467</sup>. A case, NJA 1988 p. 118<sup>1468</sup>, can shed some light on why it is improbable that somebody will be found guilty for an offence that is provided for in Chapter 7, article 4 points 4 and 5. The case was about two articles in a newspaper (one article described how Sweden was threatened by a foreign country and the other that a Polish travel agent was a spy), which were based on military information of secret nature. It was found by the High Court that no person could be held liable under the Act since the information used was not "really important". Furthermore, some of the information was not even secret. Since the articles did not use any secret information of such importance that it could hurt the security of the state, the charges for offence against the freedom of the press were dismissed. It seems, therefore, that only in really extreme situations could the provisions of Chapter 7, article 4 apply.

Regarding the offences provided in article 5, in order for a person to be found liable, this person must publish the information either after obtaining the information while he/she had access to the document in the public service (e.g. the editor, which is one of the persons in the liability chain, must also be a public servant) or he/she had a duty of confidentiality<sup>1469</sup>. The possibilities for something like that occurring are not many. To publish, however, information that is characterised as a secret public document (according to the Secrecy Act) or that is communicated by a person that had a duty of confidentiality per se is not punishable (except if the act constitutes one of the offences of article 4).

If an offence against the freedom of expression in media is constituted, the penalties that can be incurred are firstly penalties provided in the Penal Code (Brottsbalken)<sup>1470</sup> against the person liable according to the liability chain (described later on in the report). Furthermore, according to Chapter

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<sup>1467</sup> Prop 2013/14:51 p. 22.

<sup>1468</sup> NJA 1988 s. 118, <https://lagen.nu/dom/nja/1988s118>, accessed 28 June 2015.

<sup>1469</sup> See Hans-Gunnar Axberger, Kommentar till 7 kap. 5 § Tryckfrihetsförordning, Karnov Juridik, [http://juridik.karnovgroup.se.ezproxy.its.uu.se/document/527360/elem/SFS1949-0105\\_K7\\_P5?versid=146-1-2005](http://juridik.karnovgroup.se.ezproxy.its.uu.se/document/527360/elem/SFS1949-0105_K7_P5?versid=146-1-2005), accessed 17 June 2015.

<sup>1470</sup> The Act and the Fundamental Law do not provide specific penalties to the persons liable but instead they refer to the corresponding provisions in Penal Code.

7, article 7 of the Act, the court can decide confiscation (the context of confiscation is also described below) even though such a measure has rarely been taken.

At this point it should be mentioned that, according to Chapter 7, article 3 of the Act, even a person that is not in the liability chain provided in Chapter 8 of the Act (persons protected under the right to anonymity, such as the person that communicated the information or the journalist/writer) can be found liable if he/she contributes in making information public and thereby becomes guilty of high treason, espionage, gross espionage, gross unauthorised trafficking in secret information, insurrection, treason (even attempt, preparation or conspiracy to that offence) or wrongful and deliberate disclosure of secret public documents as well as deliberate disregard of a duty of confidentiality<sup>1471</sup>. Therefore, even the communicator of the information, a person that normally cannot be held liable for an offence of the freedom of expression in media, may be held liable in the above-mentioned cases. More specifically, it is always punishable to deliberately release an official secret document to a journalist according to the Act. However, in case of just communicating information to journalists, a person that disregards a duty of confidentiality may be held liable only in cases where the duty of confidentiality is a so called qualified duty (kvalificerad tystnadsplikt)<sup>1472</sup>.

Additionally, Chapter 1 article 9 point 5 of the Act states that if the information is obtained unlawfully, e.g. in case of housebreaking, illegal wiretapping, unlawful threats etc., then the person obtaining the information cannot be protected under the provisions of the Act.

Regarding information about activities related to the private sector, however, the Act and the Fundamental Law do not provide any provisions. Therefore, such information, such as trade secrets, may be published without consequences, as long as it is still within the scope of the Act (to ensure the free exchange of views and the availability of comprehensive information)<sup>1473</sup>.

The person communicating the information, however, may be found liable. More specifically, according to the Act there is a general protection for the person communicating the information, which means that the authorities cannot make investigations to find his/her identity (as long as there is no

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<sup>1471</sup> For the last two see Chapter 20 of the Penal Code and Chapter 13 article 5 of the Public Access to Information and Secrecy Act.

<sup>1472</sup> See "Domstolsverkets handböcker – Brottmål – Offentlighet och sekretess", <http://www.dvhandbok.domstol.se/brottmal/avsnitt%2010.htm>, accessed 21 June 2015

<sup>1473</sup> See also note 13.

offence of the Chapter 7 article 3 of the Act) or take any reprisals against him/her. There are no provisions, however, regarding whistleblowers in the private sector which means that the employer may take any measures in order to find the identity of the informant as well as to bring him/her to court for violation of the provisions of the Trade Secrets Act (Lagen 1990:409). Additionally, as already stated, if the information is obtained illegally, for example by industrial espionage<sup>1474</sup>, housebreaking, data intrusion etc., the person obtaining the information cannot, anyhow, be protected under the Act. The media, however, may use the information with no consequences as long as the use is not against Chapter 7 articles 4 and 5 of the Act.

Even though solely the Act and the Fundamental Law determine what information can be used without legal consequences for the media, there are also ethical and professional rules, the Ground Rules for Press, TV, Radio<sup>1475</sup> (the Rules), that may apply in cases where information was obtained improperly, namely against the Rules. Here we could find situations such as the use of hidden cameras<sup>1476</sup> as well as breach of confidence by the journalist.

Specifically, in article 7 of the rules of publicity<sup>1477</sup><sup>1478</sup>, it is stated that journalists should always check if the publicity of an event violates the privacy of a person. Publication of such an event should only take place if there is an obvious public interest. By public interest is meant not what the public likes to know but what it needs to know. Additionally, article 8 of the rules of professional conduct states that a person who is interviewed should be informed about how the interview will be used.

The Professional Ethics Committee has found that hidden cameras can be used but only after other alternatives have been exhausted, as well as that hidden cameras should not be used in order to attract public attention but only in exceptional situations. For example, according to the Decision 2011-11-04 of the Committee<sup>1479</sup> regarding the use of hidden recording

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<sup>1474</sup> Articles 3 and 4 of the Trade Secrets Act.

<sup>1475</sup> Note 8.

<sup>1476</sup> It should be mentioned here that using hidden cameras is not illegal as long as they are not used in order to take pictures of persons that are at home, in the bathroom or similar situations and as long as the photographing or filming is justifiable, according to Chapter 5, article 6a of the Penal Code.

<sup>1477</sup> The Rules are divided into the rules of publicity and the rules of professional conduct.

<sup>1478</sup> An English translation of the rules on publicity can be found at the website of the Swedish Press Council, <http://www.po.se/english/code-of-ethics>, accessed 10 June 2015.

<sup>1479</sup> The decision can be found at the website of the Swedish Union of Journalist, <https://www.sjf.se/yrkesfragor/etik/yrkesetiska-namnden/beslut>, accessed

equipment by two journalists, it was found that the use was not against article 8 of the rules of professional conduct since the journalists considered other alternatives, talked with the editorial staff and they also informed the persons involved, before they broadcasted the program, that they were interviewed with hidden cameras. In another relevant decision (Decision 2012-12-05)<sup>1480</sup> the Committee stated that surprise interviews (where the journalist appears suddenly in front of the interviewee and tries to confront him/her) and hidden cameras should not be used regularly as part of the program but only when it is really needed and as an exception. Furthermore, the Committee found that article 8 of the rules of professional conduct, which states that interviewees with little experience should be treated with consideration, was not taken into consideration by the editorial board when they decided to do the surprise interview.

Regarding the breach of confidence articles 7 and 9 of the rules of professional conduct state that journalists must meet the wishes of the interviewees with regards to how and where their interview will be published as well as that falsification of the statements of an interviewee is not allowed, namely that the statement of the interviewee should not be misrepresented. In Decision 2012-02-08 of the Committee one interviewee claimed that the journalist acted against articles 7 and 9 of the Code because he did not made clear that there was an interview taking place. However, the Committee found that the interviewee was not unused to interviews since he was a local politician and since even though he claims that he did not wanted to be cited, he stated in the interview that he wanted to be cited for a specific thing, showing, thus, that he understood that he was being interviewed.

It should be noted here regarding the breach of confidence in connection to the relation between the journalist and the person that provides the information to the journalist, that there is a duty of confidentiality (tystnadsplikt) provided in Chapter 3, article 3 of the Act, meaning that if the identity of this person is revealed by the journalist (or the editorial staff) then the person who reveals the identity will be fined or will face imprisonment of maximum two years.

## **2. b) Boundaries of law enforcement**

In cases of an offence against the freedom of expression through media, Chapter 10 of the Act (and Chapter 7, article 3 of the Fundamental Law) refers to some specific coercive measures; one of them is seizure (the two other measures provided in Chapter 10, article 11 of the Act, namely arrest

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<sup>1480</sup> Ibid.

and ban of publication in cases of war, will not be analysed in this report since they refer only to situations in period of war). However, Chapter 14, article 5 of the Act states that coercive measures provided in other laws, such as by the Code of Judicial Procedure (Rättegångsbalken), may apply in situations that are not regulated by the Act. Such measures are the interception of electronic communication (Chapter 27, article 18 of the Code of Judicial Procedure), monitoring of electronic communication (Chapter 27, article 19 of the Code of Judicial Procedure), camera surveillance (Chapter 27, article 20a of the Code of Judicial Procedure) and bugging (Chapter 27, article 20d of the Code of Judicial Procedure). Lastly, search warrant can be granted in some situations according to Chapter 28, article 1 of the Code of Judicial Procedure.

Regarding the search of editorial offices, decision Nr 6372-07-31 of the Chancellor of Justice (Justitiekanslern, hereinafter the Chancellor)<sup>1481</sup> helps us understand the main principles applicable in such situations. As the Chancellor stated, there are no special rules that regulate coercive measures against media companies, meaning that coercive measures provided in other laws may apply. A proportionality evaluation, however, must be done since issues related to protection of the right to anonymity must be taken into consideration. Additionally, even though a decision for search is normally taken by the person in charge of the investigation, the prosecutor or the court, in cases where the search may create great nuisance, such as a search of an editorial office of a newspaper<sup>1482</sup>, only a court should order a search, except if there is a danger for delay (Chapter 28, article 4 of the Code of Judicial Procedure). It is interesting to mention here the fact that the Chancellor, in his decision, which was about a search which took place at the home of a journalist after decision by the prosecutor, mentioned that since the search took place at the home (and not at the editorial office) of the journalist, and after considering the type of the offence and other circumstances, the search could not be considered as great nuisance and therefore the decision of the prosecutor (after making a decision based on the proportionality principle) to proceed to the search was justifiable.

Regarding seizure of documents and other material we should make a distinction between cases where offences against the freedom of

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<sup>1481</sup> JK Dnr 6372-07-31, "Beslag av en Dator hos en Person med Anknnytning till ett medieföretag", <http://www.jk.se/sv-SE/Beslut/Tryck-OchYttrandefrihetsarenden/6372-07-31.aspx>, accessed 16 June 2015.

<sup>1482</sup> The Chancellor of Justice specifically mentioned the search of an editorial office of a newspaper as one of the situations where great nuisance is created.

expression are committed and cases where other offences are committed but people from the media are involved.

In the second type of cases, according to Chapter 27, article 2 paragraph 1 point 2 of the Code of Judicial Procedure, documents that contain information that is covered by the right to anonymity and the duty of confidentiality, (provided in Chapter 3, article 3 of the Act and Chapter 2, article 3 of the Fundamental Law), are generally protected against seizure. That means that if the authorities are investigating a crime, they cannot seize documents that are protected under the Act and the Fundamental Law. Of course this obligation is not absolute<sup>1483</sup>.

Continuing with the above mentioned decision Nr 6372-07-31, where the case was about the seizure of the computer of the journalist, it should be mentioned that the Chancellor stated firstly that even though Chapter 27, article 2 of the Code of Judicial Procedure is referring to documents, the files of a computer should also be treated in the same way so that the protection of the anonymity of the persons that provide information (meddelarskydd) will still function in the modern world. Secondly, it is interesting to examine how the search of the seized computer was made in order to guarantee that the right to anonymity of the communicator of the information was kept intact: the journalist and his lawyer were given the possibility to oversee the searching of the material by the authorities. Additionally the searching was targeted and limited, meaning that a specific name was searched; the documents were opened and after a quick visual control, if there was any possibility that a document was about a person protected under anonymity, then the document would be closed immediately without further investigation of the document.

In case, now, where the seizure takes place because of an offence against the freedom of expression in media, then it is Chapter 10, article 1 of the Act that applies. According to the Act if a confiscation could be decided by a court because of an offence against the freedom of expression in media, then it is also possible to decide for seizure. The decision for seizure is

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<sup>1483</sup> In the decision of the Chancellor of Justice "JK Dnr 2806-00-21 Klagomål mot en åklagare med anledning av att denne beslagtagit och kopierat ett videoband tillhörande ett TV-bolag", the Chancellor stated that "the rules of proportionality give, however, room to consider the interests of the freedom of expression beyond what is required by the provisions for the prohibition of seizures provided for in Chapter 27, article 2 of the Code of Judicial Procedure". The case was related to a serious offence against a child where the prosecutor seized a tape of an interview with the child's sibling. According to the Chancellor there was nothing wrong with the seizure since it was reasonably motivated and according to the law.

made by the Chancellor of Justice (Justitiekanslern - JK) and, as said, there must be a possibility for confiscation.

Confiscation, however, can only be decided by the court and only in cases of offence to the freedom of expression in media (Chapter 7, article 7 of the Act). It should be mentioned here that confiscation according to the Act means a) the destruction (normally by the police) of all the copies, b) making sure that the tools and the material needed for printing cannot be used for further misuse as well as c) that further distribution of the copies will result in penalties <sup>1484</sup>.

Regarding the rest of the measures provided in the Code of Judicial Procedure, namely interception of electronic communication (Chapter 27, article 18), monitoring of electronic communication (Chapter 27, article 19), camera surveillance (Chapter 27, article 20a) and bugging (Chapter 27, article 20d), the following applies:

According to the Code of Judicial Procedure a secret surveillance of electronic communication can take place either as interception of the context of the communication (Chapter 27, article 18) or as monitoring of the messages and geolocation of the equipment used (Chapter 27, article 19). These measures may take place in investigations only if such a measure is of extraordinary importance for the case, if someone is reasonably a suspect and for a crime where the penalty is imprisonment of at least two years (in case of interception) or at least 6 months (in case of monitoring)<sup>1485</sup>.

The same applies in case of camera surveillance (Chapter 27, article 20a) but only for a specific suspect and only if the penalty is imprisonment of at least two years. Camera surveillance may also take place, in case of no suspect, in a specific place where a crime took place in order to reveal the person that reasonably committed the offensive act (Chapter 27, article 20c).

Furthermore, bugging (secret home interception), according to Chapter 27, articles 20d and 20e of the Code of Judicial Procedure, can take place in specific situations (the article lists the offences for which bugging may be used, such as crimes with penalty of at least four years, espionage etc.) if there is a specific suspect and in a place where the suspect probably resides or in another place in which there is a high probability that the suspect will spend his/her time.

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<sup>1484</sup> *Wiweka Warling-Nerep and Bernitz*, p.110.

<sup>1485</sup> These measures may also be taken in some cases of special crimes described in the provisions of Chapter 27, articles 18 and 19 of the Code of Judicial Procedure.



In order for secret surveillance of each of the above-mentioned forms to take place, the court, after the prosecutor's request, has to decide after taking into consideration the proportionality principle<sup>1486</sup>. Regarding situations related to the media, Chapter 27, article 22 paragraph 1 of the Code of Judicial Procedure states that interception of electronic communication (Chapter 27, article 18) may not be used in calls or other messages in cases where one of the communicators is a person that cannot be called as a witness. By the same token, in the second paragraph it is stated that bugging (Chapter 27, article 20d) may not be used in conversations where one of the persons is a person that cannot be called as a witness. In cases where such a discussion or message is captured, the interception of the telecommunications as well as the bugging must stop immediately.

According to Chapter 36, article 5 paragraph 6 of the Code of Judicial Procedure, persons that cannot be called as witnesses include, amongst others, persons that have a duty of confidentiality under the Act and the Fundamental Law. That means that in the cases of bugging and interception of electronic communication, if there is material gathered from conversations between journalists and communicators (persons providing information to the journalists), the material must be destroyed immediately. For camera surveillance and monitoring of electronic communications, however, there is no such exception provided in the Code of Judicial Procedure.

### **3. Reporting about on-going investigations**

The Ground Rules for Press, TV, Radio and more specifically the rules on publicity<sup>1487</sup> provide for the duty of care about on-going investigations. Firstly, art 1, as a general rule, states that news must be comprehensive. Art 2 continues by declaring that journalists must be critical against the sources of the news. Art 5 states that in case of incorrect information this information must be corrected without delay. Additionally, in art 7 we find that journalists should refrain from publicity that may infringe private life unless there is obvious public interest. Art 9, moreover, refers to the obligation to show respect to victims and their relatives. Continuing, art 10 sets forth that information, such as ethnicity, sex, nationality, work, political, religious views as well as sexual orientation should not be used unless they really are important for the story. Furthermore, art 13 states that all sides of a story must be heard. More important, according to art 14, a suspect for a crime should always be regarded as innocent until otherwise

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<sup>1486</sup> It should be mentioned here that there is also an exception for some cases where the prosecutor alone can decide.

<sup>1487</sup> Note 26.

decided by the court. The final outcome of a decision of a court should also be recognized and followed. Lastly, the name, pictures or other identifiable information of persons should be used only if needed, according to art 15 and art 16.

The Swedish Press Council has made some judgements regarding the duty of care and what is considered ethical in cases of on-going investigations:

In case nr 81/2009 Östgöta Correspondenten<sup>1488</sup> the Council found that the newspaper acted against good journalistic practice when publishing the name of a politician in relation to domestic abuse. More specifically, after the prosecutor ordered an investigation regarding an incident of domestic violence (based on an anonymous report and rumours), the newspaper wrote about this fact and named the politician in question. The Council found that even though there was public interest, since the person in question was a politician, the newspaper should also take into consideration the fact that, because of the position of this person, the rumours could have as a goal to smear this person. Furthermore, by writing that the person in question was suspect for the offence while this person never became a suspect, the newspaper went too far regarding the term "suspect", causing, therefore, publicity damages to the person in question.

In another case, nr 40/2004 Oskarshamns-Tidningen<sup>1489</sup>, the Council found that a newspaper caused publicity damages to a person - a politician that was reported to the police for having retained a payment that was made by mistake to his company's account - by not informing the readers that the complaint lodged to the police was dismissed. The Council based the decision specifically on art 14 of the rules of publicity, namely that "the final outcome of a legal case should be published if it has been previously reported on".

Additionally, in the decision nr 70/2006 Expressen<sup>1490</sup>, the Council decided that a newspaper acted against good journalistic practice when, even though no person was named as suspect by the police for the death of a

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<sup>1488</sup> The decision can be found at the website of the Swedish Press Council, <http://www.po.se/faellningar/faellda-aerenden/117-politiker-felaktigt-uthaengd-foer-kvinnomisshandel-ii>, accessed 16 June 2015. See also decision nr 82/2009 Norrköpings Tidningar for the same case. <http://www.po.se/faellningar/faellda-aerenden/116-politiker-felaktigt-uthaengd-foer-kvinnomisshandel-i>, accessed 16 June 2015.

<sup>1489</sup> The decision can be found at the website of the Swedish Press Council, <http://www.po.se/faellningar/faellda-aerenden/264-brottsmisstanke-avskrevs-tidningen-rapporterade-ej>, accessed 16 June 2015.

<sup>1490</sup> The decision can be found at the website of the Swedish Press Council, <http://www.po.se/faellningar/faellda-aerenden/414-rapporterade-om-mordutredning-men-inte-om-att-den-lagts-ner>, accessed 16 June 2015.

two-year-old boy, the newspaper claimed that the suspicions were falling upon the father of the boy. Important in this case is the fact that the investigations, even though they were focused on the father of the child because of an anonymous information that the father had said that he wanted to kill the boy, they did not lead to naming him as a suspect and he was not even interrogated. Furthermore, the Council emphasized that since the investigation by the police was only based on anonymous information the newspaper should be even more careful when pointing out a person as a possible suspect. Lastly, the Council stated that the newspaper should, after all, write about the final outcome of the legal case, namely that the person in question was not even named as suspect.

Lastly, in nr 8/2012, Aftonbladet<sup>1491</sup>, the Council found that it is unacceptable to claim that a person is a criminal without sufficient support. The case was about a columnist who wrote that a policeman was "fabricating evidences" even though no such outcome came from examinations by the Chancellor of Justice, the Prosecutor-General, and the Court of Appeal.

#### **4. Due diligence guidelines for journalists**

As already stated, the media associations have created the Ground Rules for Press, TV, Radio. These rules have as a goal to "publish the things that are of importance for the citizens"<sup>1492</sup> as well as to monitor the trustworthiness of journalism<sup>1493</sup>.

In the rules on publicity there are rules related to objective truth or, as it is stated in art 1, to correct and comprehensive news. Art 2 declares that the journalists must be critical of their sources and check all information even if this information has already been published. Furthermore, it points out that the journalists must give the reader the possibility to distinguish between facts and comments. According to art 4 the pictures must also be correct and should not be used in order to mislead. In art 5 it is stated that in case of a mistake, the information must be rectified without delay. Continuing, art 7-10 focus on the respect of privacy of individuals and more specifically that the journalist should always consider the pros and cons of publicity in cases where there is a possibility that private life may be violated. Journalists should refrain from such publicity "unless the public

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<sup>1491</sup> The decision can be found at the website of the Swedish Press Council, <http://www.po.se/faellningar/faellda-aerenden/512-polis-pastods-vara-kriminell>, accessed 16 June 2015.

<sup>1492</sup> "Spelregler för Press, TV, Radio", Pressens Samarbetsnämnd, Februari 2010, p. 7.

<sup>1493</sup> Ibid p. 10.

interest obviously demands public scrutiny”<sup>1494</sup>. By public interest is meant not what the public wants to know but what the public needs to know, as already stated above. Additionally journalists should be very careful when they publish names and pictures of victims or relatives of victims (art 9). Moreover, journalists should not emphasize the ethnic background, sex, nationality, work, political and religious views or sexual orientation if there is no need for that in relation to the context (art 10). Additionally, according to art 13, journalists should also offer the opportunity to the criticized person to answer; they also should present the arguments of all parties involved. Regarding suspects of crimes, art 14 states that they should always be presumed innocent if there is no judgment by court and in the case there is a judgment then this judgment should be followed. As far as anonymity is concerned journalists, according to art 15, should publish names only in the cases when such publication is obviously in the public interest. In the same token if no name is published, journalists should avoid to publish photos or information regarding the job, title, age, nationality, sex or other information that can make the identification of this person possible (art 16).

Decisions by the Swedish Press Council can help define the criteria for objective truth.

In nr 8/2012, *Aftonbladet*<sup>1495</sup>, which was also mentioned above, the Council found that it is unacceptable to claim that a person is a criminal without sufficient support. The case was about a columnist that wrote that a policeman was “fabricating evidences” even though no such outcome came from examinations by the Chancellor of Justice, the Prosecutor-General, and the Court of Appeal.

Furthermore, in nr 41/2013, *Piteå-Tidningen*<sup>1496</sup>, regarding the statements of a newspaper that a project manager retained the money that he received for a “fake” exhibition, the Council declared that when a newspaper names a person in a pejorative context it must make sure that the information is true and that the case is described with the correct words. In the specific case, the information was firstly false and the words that were used, such as that the exhibition was “fake”, that the project manager “collected” 70000 kr, and that he “kept the money”, drew the picture that the person in question acted fraudulently in order to gain profit even though

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<sup>1494</sup> Article 7 of the Ground Rules for Press, TV, Radio.

<sup>1495</sup> The decision can be found at the website of the Swedish Press Council, <http://www.po.se/faellningar/faelldaerenden/512-polis-pastods-vara-kriminell>, accessed 16 June 2015.

<sup>1496</sup> The decision can be found at the website of the Swedish Press Council, <http://www.po.se/faellningar/faellda-aerenden/808-namngiven-pastods-ha-behallit-projektpengar>, accessed 16 June 2015.

this was not the case as proved by the documents provided to the Council. This is why the Council found that the newspaper created unjustifiable publicity damage and, therefore, was acting against good journalistic practice.

Another decision, nr 37/2003<sup>1497</sup>, focused on the anonymisation of information. Specifically, it was about a case where a newspaper published pictures from an investigation of a murder. The pictures showed the brutally murdered woman covered in blood. Even though the face was pixelated the Council found that the newspaper was acting against good publicity customs because the pictures were offensive against the relatives and the memory of the murdered woman by showing her in "horrible degradation". Additionally, the Council stated that even though there was public interest for the story itself, the pictures of a brutally murdered victim were not covered by it. In cases of crimes and accidents the names and pictures of the victims, even if anonymised, should be used sparingly.

Lastly, in exp nr 27/2014, Aftonbladet<sup>1498</sup>, the Council stated that many times it is not only the information of a case that must be published by the media but also the names of the people involved, such as in cases of serious crimes. However, relatives and victims should not endure unjustifiable publicity damages. This case was about the underage children of a convict which, even though their photographs were pixelated, could be identified by the detailed description by the newspaper of a specific event. The Council found that in such situations where information can create publicity damages to relatives or victims, media should be most careful. It therefore found that the newspaper acted against the good publicity customs.

## 5. Liability in the editorial chain

As stated in the beginning, the Act and the Fundamental Law have a liability system that is characterized as a) artificial, namely that the person liable is presumed to have committed the act with intention, b) exclusive, only one person can be liable, and c) successive, meaning that there is a liability chain in which if the first person of the chain cannot be held liable then the next person in the chain will, etc.

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<sup>1497</sup> The decision can be found at the website of the Swedish Press Council, <http://www.po.se/faellningar/faellda-aerenden/187-bilder-pa-torterad-kvinnaklandrades>, accessed 16 June 2015.

<sup>1498</sup> The decision can be found at the website of the Swedish Press Council, <http://www.po.se/faellningar/faellda-aerenden/850-artiklar-om-hagamannens-permission-med-sina-barn-broet-grovt-mot-god-publicistisk-sed>, accessed 16 June 2015.

As far as the Act is concerned, we have to make a distinction between periodical publications (such as journals, newspapers and other publications that are published with the same title at least four times a year and where a certification of publication is needed, according to Chapter 1, article 7 of the Act,) and non-periodical publications.

In periodicals the first person that can be held liable in cases of offences against the freedom to expression in media (Chapter 7, article 4 and 5) is the responsible editor at the time of publication (Chapter 8, article 1). The editor is the person registered in the Swedish Patent and Registration Office (Patent- och registreringsverket) and whose name is on every publication.

The second person that can be held liable is the owner (Chapter 8, article 2) if a) the certificate of the registration of the editor is missing at the time of publication, b) the editor, at the time of publication, has not fulfilled the eligibility requirements under Chapter 5, article 2 of the Act, namely the editor is not domiciled in Sweden, is an undischarged bankrupt, is a minor or an administrator has been appointed for him/her, c) the appointment as responsible editor has terminated for some other reason or d) the editor is just a straw man and generally does not have the power to decide about the context of the publication.

The third person in the chain is the printer of the periodical publication (Chapter 8, article 3) in cases where the identity of the owner of the periodical cannot be determined; and if it cannot be determined who the printer is, the fourth and last person of the liability chain may be held liable, namely the disseminator of the periodical (Chapter 8, article 4). If, however, the disseminator, in the case that he/she is prosecuted, reveals the producer of the periodical then only the latter will become liable. The same is the case when the producer reveals the owner. That means also that there is no right to anonymity in the chain of liability (distributor, producer, owner and editor) provided in the Act.

In the case of non-periodical publications the liability chain is somewhat different. If the author of the printed matter has revealed freely his/her name or the nickname under which he/she is known and does not retain his/her anonymity (Chapter 3) then he/she will be held liable for the offences provided for in Chapter 7, articles 4 and 5, according to Chapter 8, article 5 of the Act.

The second person in the chain for non-periodicals is the editor in the cases where the writer died before publication or in cases where the publication is a collection (Chapter 8, article 6). Again, here the editor must have given his/her name freely to the public. Both these actors can, therefore, keep their anonymity, if they want to, and by that remain free of any liability, even if their names are disclosed by others.

Third person in the chain for non-periodicals is the publisher (Chapter 8, article 7). By publisher is meant the person that takes care of the printing and the publication of another's printed matter, no matter who takes the financial risk of the publication. He/she can be held liable in cases where the first two actors remained anonymous or in the case that the editor died before the publication.

The next two persons in the chain, if there was no publisher or if the publisher cannot be identified, are the printer and the disseminator, as in the case of periodicals.

It should be mentioned here that in the case of non-periodicals the disseminator may reveal the printer and the printer may reveal the publisher but the publisher may not reveal either the editor or the author in the case that they have retained their anonymity (Chapter 3, article 5).

Chapter 8, article 10 complements the rules of the liability chain in the cases where the person that can be held liable is either unreachable (no known domicile in Sweden or not possible to ascertain his/her current whereabouts in Sweden) or is under 15 years of age. More specifically, in a case where the owner of a periodical publication as well as the author, the editor (in case they have given their names in public) or the publisher of a non-periodical publication do not have a known domicile in Sweden or their current whereabouts in Sweden cannot be ascertained in the case, then the next person alone in the liability chain will be held liable. By the same token, if the editor or the owner of a periodical publication or the author, the editor or the publisher of non-periodical publication is underage, then the next person alone in chain will be held liable.

The liability chain based on Chapter 6 of the Fundamental Law is somewhat different. According to art 1 of this chapter the first person of liability is the responsible editor of the radio or TV program or the technical recording. The second person, in case there was no editor at the time of the offence or if the editor was just a straw man, is the person responsible for appointing the editor, according to Chapter 6, article 2 p 1. Regarding technical recordings, the person liable is the disseminator of the recording (Chapter 6, article 3) if the recording does not have the information of Chapter 3, article 13, namely if it does not name the producer.

In all the above-mentioned situations, if we are talking about a company, if for example the owner of a periodical is a company, then the liable person is the legal representative of the legal person.

The penalties that can be granted, if liability is found for an offence against the freedom of expression in media, are the ones provided in the Penal Code, to which the Act refers.

Additionally, when damages related to offences against the freedom of expression in media are sought, for example in case of defamation, the

above mentioned liability chain will be used. There may, however, be some cases where more than one person is liable for damages. Firstly, “[i]f, by reason of circumstances under Chapter 8, article 10, liability has passed to such a person, the claim may also be pursued against the person liable forthwith before him or her”<sup>1499</sup>. Furthermore, a claim for damages can always be pursued against the owner of a periodical when such a claim is pursued against the responsible editor; and the publisher of non-periodical can always be held liable for damages along with the author or the editor. Additionally, in the case of a legal person, it could be held liable for damages together with the legal representative. In these cases the ones liable are jointly liable.

It should be mentioned here that these liability rules are applicable only for the types of offences mentioned in Chapter 7, articles 4 and 5 of the Act and Chapter 5, article 1 of the Fundamental Law. There are some offences, however, under Chapter 7, article 3 of the Act and Chapter 5, article 3 of the Fundamental Law, for which anyone could be held liable, even the communicator of the information or the journalist of a periodical or the author and the editor of a non-periodical. These offences have already been analysed above (Part 2, A(I)).

Lastly, it should be mentioned that in case of live TV, radio and internet transmissions the Fundamental Law states that the person liable is the person that appears in the media.

## 6. Conclusion and perspectives

The freedom of expression in media is a well-established freedom in Sweden. It is no coincidence that the first law regarding the freedom of the press was introduced in 1766 and that Sweden is considered to be one of the most journalist-friendly countries. In the 2015 World Press Freedom Index published by the Reporters without Borders, Sweden came 5th and no harassment of journalists by the authorities was registered<sup>1500</sup>. Furthermore, if we take a quick look in what media associations say about the freedom of expression in media in Sweden we can also see that they do believe that Sweden has a long tradition in the subject and that every person has the possibility to say or write almost anything he/she wants to<sup>1501</sup>.

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<sup>1499</sup> Chapter 11, article 1 of the Act.

<sup>1500</sup> Reporters without Borders, 2015 World Press Freedom Index, <http://index.rsfb.org/#!/index-details/SWE>, accessed 18 June 2015.

<sup>1501</sup> See Per Hultengård, "Det viktigt att vi och du och andra är rädda om yttrandefriheten, att vi står upp för den också när det blåser snålt, att vi använder oss av den, säger vår mening, talar om vad vi tänker och tycker,



From the analysis above we can see that the Act and the Fundamental Law create a fertile ground on which the freedom of expression in media can bloom: a) there is no a priori hindrance by public authorities, b) the persons obtaining information, communicating information and even the journalists who write the information down cannot be held liable for offences against the freedom of expression in media, c) the person that may be held liable knows from the start that if an offence against the freedom of expression in media is committed he/she will be held liable, d) there is a duty of confidentiality between the journalist and the person that communicate the information to him/her, and even more, it is not only the journalist that has that duty, but every "person that has been active in an enterprise for the publication of printed matter, or an enterprise which professionally provides news"<sup>1502</sup>, meaning that even the IT staff of a media company that fixes the computers of the journalists may not reveal the identity of the communicators and e) public authorities cannot inquire into the identity of the journalist or the person that communicated the information to the journalist and neither can they take reprisals.

On the other hand, there are many issues that are pointed out by journalists and academia. First, the Fundamental Law, by referring to a number of other laws, such as the Act and the radio and TV Act (1996:844), has become a very complicated piece of legislation that struggles to regulate very different types of media, such as TV, radio and Internet<sup>1503</sup>. Moreover, the existing legislation is based more or less on a physical world and therefore difficulties arise when it comes to a more virtual reality: both laws are "locked" in to a specific medium, such as the press, the radio etc.; the internet, however, is not just a medium but more of a platform, and currently many types of expression are not covered by the Act and the Fundamental Law. As an example, blogs cannot fall under Chapter 1 article 6 of the Fundamental Law, since it is the reader that initiates the transmission<sup>1504</sup>. Furthermore, if there is no certificate to publication, according to Chapter 1 article 9 of the Fundamental Law, or if the context can be changed also by others, e.g. by readers sending live comments, the Fundamental Law does not apply.

Another major problem that has triggered vivid debates in Sweden lately is the protection of the source of the information on the Internet. The decision nr 6372-07-31 of the Chancellor of Justice was mentioned above (Part 2,

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gör vår röst hörd!", 2014, Tidningsutgivarna, <http://www.tu.se/juridik-etik/tryck-och-ytrandefrihet/inspirationsartiklar/741-ytrandefriheten>, accessed 21 June 2015.

<sup>1502</sup> Chapter 3, article 3 of the Act.

<sup>1503</sup> *Wiweka Warling-Nerep and Bernitz*, p.111.

<sup>1504</sup> *Ibid* p.123.

A(II)). There the Chancellor stated that the law should change in order to include also information in digital form and not only information in “documents”. According to Chapter 27 article 2 of the Code of Judicial Procedure, a printed document may not be seized without a court's decision. However, a journalist's digital equipment may be seized even if the journalist is not a suspect, since digital equipment is not printed document<sup>1505</sup>.

Additionally, as mentioned above, public authorities may not inquire into the identity of the person who communicated the information to the media (except if there is an offence of Chapter 7, article 3 of the Act). However, in a digital world that seems to be a chimera. As already said, digital equipment does not enjoy the same protection as paper documents. As seen in Dnr 6372-07-31, the documents in the computer of the journalist were opened and checked and if the document might be considered as a document that had information that was under the duty of confidentiality then the document would be closed. It is, however, dubious whether such a practice should be considered as acceptable in order to protect the anonymity of the source<sup>1506</sup>.

Another issue is the laws regarding monitoring of the Internet. Two of them are of high relevance. One of them is the Signals Intelligence Act (2008:717) according to which signals that cross the Swedish borders are monitored. Even though there are some guarantees, such as that if there is information related to the duty of confidentiality the information that is gathered by the authority must be destroyed, it is difficult to know exactly when such information is captured. Another piece of legislation is the law that transposed the Data Retention Directive into Swedish law, namely the Electronic Communication Act (2003:389). Even though the Directive has been declared void, the law still applies in Sweden and telecom operators must still retain traffic information for six months. According to the Electronic Communication Act, the authorities, without a decision by court, may ask for the traffic information (geolocation included), of specific mobile numbers. Such data could reveal possible connections of a journalist<sup>1507</sup>. Moreover, as already mentioned, even though according to Chapter 36, article 5 paragraph 6 of the Code of Judicial Procedure regarding interception of electronic communication and bugging, if there is material gathered from conversations between journalists and communicators (persons providing information to the journalists) the material must be

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<sup>1505</sup> See *Sus Andersson, Petra Jankov, Fredrik Laurin and Anders Thoresson*, “Digitalt Källskydd - en introduktion”, 2015, Version 2, .SE:s Internetguide, nr 37, p. 75.

<sup>1506</sup> *Ibid* p.76.

<sup>1507</sup> *Ibid* p.81.

destroyed immediately, there is no such provision for camera surveillance and monitoring of electronic communications.

Lastly, even though authorities may not inquire into the identity of the person that disclosed the information, when it comes to the private sector, there is no such rule. That can create problems for the freedom of expression since our society is at a continually increasing rate based on the private sector, and even the state is acting through private companies (there is no protection for those working in state companies)<sup>1508</sup>.

Another vivid debate is related to the misuse of the freedom to communicate information and intelligence (*meddelarskyddet*)<sup>1509</sup>. More specifically, if a policeman/policewoman leaks secret information about investigations, which, even if they are secret, are not covered by the qualified duty of confidentiality, he/she is protected by the freedom to communicate information. That means that the journalist may not reveal the identity of the person who communicated the information and neither may the authorities inquire into the identity of the person who leaked the information, nor take reprisals against this person if they manage to find out his/her identity. Therefore policemen/policewomen may receive money for leaking information, something that may create obstacles to an ongoing investigation; and even though this constitutes bribery nothing can be done against it since the source cannot be revealed.

To sum up, the Swedish regulatory framework has created good conditions for journalism to pursue its purpose, namely to provide citizens with comprehensive information in order for them to be able to decide, as informed individuals, about their lives. There are however many challenges that need to be addressed so that journalists will continue to carry out their function without obstacles also in the future.

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<sup>1508</sup> Ibid p. 80. It is worth mentioning here that there is an enquiry that has still not led to proposal that suggests that the freedom to communicate information and intelligence should be expanded also to the private employees in health, education and care that are paid by taxpayers.

<sup>1509</sup> See *Claes Sandgren*, "Tidningarnas tipspengar till enskilda poliser är mutbrott", 2011, Dagens Nyheter, <http://www.dn.se/debatt/tidningarnas-tipspengar-till-enskilda-poliser-ar-mutbrott/> accessed 18 June 2015. See also *Ulrika Knutson*, "Svensk polis läcker för lite", 2011, Fokus, <http://www.fokus.se/2011/12/svensk-polis-lacker-for-lite/> accessed 18 June 2015.

## **27. Slovenia**

Blaž Zgaga

## 1. Relevant Legislation and Case-law

Main legal framework influencing the field of investigative journalism in Slovenia consists of Mass Media Act<sup>1510</sup> (2001, amended 2006), Law on Radio Television Slovenia<sup>1511</sup> (2005), Criminal Code<sup>1512</sup> (2008) and Criminal Procedure Act<sup>1513</sup> (1994, last amendment 2011, official consolidated text 2012 is used in this text).

There are also relevant self-regulatory provisions in the Code of Ethics of Slovene Journalists<sup>1514</sup> (2010), and a code of ethics of public service broadcaster RTV Slovenia Professional Criteria and Principles of Journalistic Ethics in the programs of RTV Slovenia<sup>1515</sup> (2000).

Decisions about complaints against possible violations of Code of Ethics of Slovene Journalists are made by Ethics Council/Court of Honour<sup>1516</sup> as a joint body of The Slovene Association of Journalists (DNS)<sup>1517</sup> and Slovene Union of Journalists (SNS)<sup>1518</sup>. Complaints against violations of RTV Slovenia Professional Criteria and Principles are considered by public broadcaster's Listener and Viewer Ombudsman<sup>1519</sup>.

Additionally, the second journalist's association - Association of Journalists and Commentators (ZNP) – introduced Ethical Code of American Society of Professional Journalists<sup>1520</sup> and has own Court of Honour. Financial daily newspaper Finance also has own code of ethics<sup>1521</sup>.

Decisions of Ethics Council/Court of Honour based on Code of Ethics of Slovene Journalists are sometimes accepted by the courts as an argument in the court trials, mostly for defamation cases. No legal provisions for such

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<sup>1510</sup> <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1608>.

<sup>1511</sup> Author is using the English translation, published at RTV Slovenia website: [http://www.rtvlo.si/files/RTV\\_Slovenija/zrtvs\\_1.pdf](http://www.rtvlo.si/files/RTV_Slovenija/zrtvs_1.pdf).

<sup>1512</sup> <http://www.policija.si/eng/images/stories/Legislation/pdf/CriminalCode2009.pdf>.

<sup>1513</sup> <http://www.policija.si/eng/images/stories/Legislation/pdf/CriminalProcedureAct2007.pdf>.

<sup>1514</sup> [http://www.razsodisce.org/razsodisce/kodeks\\_ns.html](http://www.razsodisce.org/razsodisce/kodeks_ns.html).

<sup>1515</sup> <http://www.rtvlo.si/strani/professional-standards/17#7.1>.

<sup>1516</sup> <http://www.razsodisce.org/razsodisce/razsodisce.html>.

<sup>1517</sup> <http://novinar.com/drustvo/>.

<sup>1518</sup> <http://sindikatsindikat-novinarjev.si/>.

<sup>1519</sup> Listener and Viewer Ombudsman position is introduced by RTV Statute: <http://www.rtvlo.si/strani/statute/34>; Ombudsman considers complaints on the basis of specific regulations: [http://www.rtvlo.si/files/varuhinja/2014\\_09\\_11-pravilnik\\_o\\_delovanju\\_varuha\\_pravic.pdf](http://www.rtvlo.si/files/varuhinja/2014_09_11-pravilnik_o_delovanju_varuha_pravic.pdf).

<sup>1520</sup> <http://www.znp.si/castno-razsodisce/kodeks-zdruzjenja-poklicnih-novinarjev>.

<sup>1521</sup> <http://www.finance.si/kodeks>.

direct influence of Ethics Council's decisions on court cases exist.

According to Regulations of work of Ethics Council/Court of Honour<sup>1522</sup> every complainant shall make commitment that he will not start a private criminal prosecution<sup>1523</sup> or libel suit against journalist until Ethics Council/Court of Honour makes decision about his complaint. If complainant begins prosecution or a libel suit Ethics Council/Court of Honour does not take complaint into consideration or interrupt consideration until Court's decision on the same case.

Ethic Council/Court of Honour is considering also complaints against possible violations of Code of Ethics of Slovene Journalists of non-members of The Slovene Association of Journalists (DNS)<sup>1524</sup> and Slovene Union of Journalists (SNS). Therefore, it can consider any journalist, who is publishing in Slovene media.

Despite freedom of expression and protection of sources are defined and guaranteed in Mass Media Act (Article 6<sup>1525</sup> and Article 21/2<sup>1526</sup>), other regulation as Criminal Code and Criminal Procedure Act do not offer Slovene investigative journalists any kind of additional protection related to protection of sources, search of editorial offices and seizure of documents or other material and surveillance of journalistic communication.<sup>1527</sup> According to jurisprudence journalists are not pressured to reveal their sources in criminal trials or libel suits.

According to both, Criminal Code and Criminal Procedure Act, a journalist has no different status than any other citizen. It means that journalists do not enjoy any privilege in criminal procedures or have any kind of additional legal protection.

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<sup>1522</sup> [http://www.razsodisce.org/razsodisce/pravilnik\\_ncr.html](http://www.razsodisce.org/razsodisce/pravilnik_ncr.html).

<sup>1523</sup> Mostly for crimes against Honour and Reputation.

<sup>1524</sup> <http://novinar.com/drustvo/>

<sup>1525</sup> Article 6: Mass media activities shall be based on freedom of expression, the inviolability and protection of human personality and dignity, the free flow of information, media openness to different opinions and beliefs and to diverse content, the autonomy of editorial personnel, journalists and other authors/creators in creating programming in accordance with programme concepts and professional codes of behaviour, and the personal responsibility of journalists, other authors/creators of pieces and editorial personnel for the consequences of their work.

<sup>1526</sup> Article 21/2: Editorial personnel, journalists and the authors/creators of pieces shall not be obliged to reveal the sources of their information, except in cases where such is stipulated by criminal legislation.

<sup>1527</sup> If journalist becomes suspect of serious crime for which communication surveillance is allowed (corruption, organized crime, extortion and similar), his communication can get monitored legally. But his communication cannot be legally under surveillance if he is a suspect of a crime Disclosure of Classified Information.

Since prosecutions of journalists for crime of Disclosure of Classified Information in recent years and consequent public discussions, Criminal Code was amended in July 2015. New provisions narrow possibilities for prosecution for this crime.

Mass Media Act offers some additional protection of journalists in Article 21/3.

Journalists may not have their employment terminated, a contracted concluded with them cancelled, their pay reduced, their status in the editorial board changed or their position worsened in any other manner for reason of the expression of opinions and standpoints in accordance with the programme concept and the rules, criteria and standards of the profession.

This protection is only on declarative level as no sanctions for possible violations are defined in the same Act.

According to Mass Media Act the responsible editor of media »shall be answerable for any information published,« unless stipulated otherwise by the same Act.<sup>1528</sup>

Additionally, Law on Radio Television Slovenia defines duties and obligations of journalists and editors in public broadcasting service with approximately 1000 journalists<sup>1529</sup> more specifically:

(Article 5)

Journalists and editors of RTV Slovenia and others directly involved in the

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<sup>1528</sup> Article 18: (1) Each mass medium must have a responsible editor, who shall be appointed and dismissed by the publisher/broadcaster in accordance with the present Act and the publisher's/broadcaster's basic legal act. Before appointing or dismissing the responsible editor the publisher/broadcaster must obtain an opinion from the editorial board, unless stronger influence on the part of the editorial board is stipulated in the basic legal act. (2) The responsible editor shall be answerable for the implementation of the programme concept and shall perform other tasks stipulated by the publisher's/broadcaster's basic legal act. (3) The responsible editor shall be answerable for any information published, unless stipulated otherwise by the present Act. (4) If a mass medium has more than one responsible editor, each shall be answerable for the publication of information in the programme area for which he/she is responsible. (5) The appointment of responsible editors of Radiotelevizija Slovenija radio and television programme services shall be set out by a separate act. (6) The provision of the third and the fourth paragraph above shall not apply to the responsible editor(s) of the special national television programme service, namely, for that part of the programme intended for direct broadcasting of the sessions of the National Assembly of the Republic of Slovenia (hereinafter: the National Assembly) and its working bodies.

<sup>1529</sup> There are approximately 2500 professional journalists in Slovenia.

creation or production of RTV programming shall in their work in particular:

- adhere to the principle of truthfulness, impartiality and integrity of information;
- respect human individuality and dignity;
- adhere to the principle of political balance and pluralism of world views;
- adhere to the principle of constitutionality and legality in the formulation of programming, including the prohibition on incitement to cultural, religious, sexual, racial, national or other forms of intolerance;
- ensure impartial and integral provision of information, such that citizens have the possibility to freely form their opinions;
- adhere to the principle of political independence and autonomy of journalists;
- institute professional ethics for reporters and the consistent distinction between information and commentary in journalistic reports;
- protect children and young persons from content that could have a harmful effect on their mental and physical development, and respect universal human values.

This provisions are of declarative meaning only as there are no sanctions for possible violations defined in the same Act.

## **2. Obtaining of information and boundaries of law enforcement**

Provisions regarding boundaries of journalistic investigations or investigative journalism are left to self-regulation to the Code of Ethics of Association of Slovene Journalists<sup>1530</sup> and to the public broadcasting service own Professional Criteria and Principles of Journalistic Ethics in the programs of RTV Slovenia.

During utilization of illegally/improperly obtained information, such as secret state papers, business/trade secrets, using hidden camera or through breach of confidence, Slovene journalists are bound by the following articles of Code of Ethics of Slovene Journalists:

(8) The journalist may agree with a source of information, which would otherwise be identified, for anonymity. Such a source can be used only if the information could not obtain in any other way and the publication is in the public interest. The journalist is obliged to respect the agreement on the anonymity of the source.

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<sup>1530</sup> No official English translation of Code of Ethics of Association of Slovene Journalists exists. All provisions of Code in this text are author's translation.



(9) The journalist should avoid paying for information.

(12) The journalist may not use illegal methods of data collection. If the information, which are of utmost importance to the public and cannot be obtained in other way, journalist must explain his behaviour and the grounds for it to the public.

(13) The journalist should be always introduce himself as a reporter and explain the purpose of collecting data. Status of the journalist may be withhold only in exceptional cases, where he is trying to obtain the information in the public interest, but he was unable to obtain it as a reporter.

(14) The journalist may make audio and video recording and photos only with the consent of the person photographed or filmed. Consent can be also silent (if a person does not object). Exceptionally, journalist may be filming, photographing without consent, where he has reasonable grounds to believe that in this way he will reveal an information which is in the public interest. The reasons for his decision must be explained in the article.

When using an exceptions allowed by Article 13 and 14, the reporter should obtain the prior opinion of the editor in chief.

Professional Criteria and Principles of Journalistic Ethics in the programs of RTV Slovenia, which is obligatory for journalists of the biggest media institution, defines methods of data collection in more detail.

#### (7.1) Clandestine methods of news gathering

Clandestine methods of news gathering should only be employed with due regard to their legality, to considerations such as fairness and invasion of privacy and whether the information to be obtained is of such significance as to warrant being made public, but is unavailable by other means.

#### (7.2) Misrepresentation

Deception must not be used to gain information. RTV Slovenia's employees, therefore, should not misrepresent themselves or their purposes to gain it.

However, there may be occasions when it serves a legitimate programme purpose for a journalist not to declare his or her profession, but to seek information as an ordinary member of the public. Occasions of this sort might occur, for example, during investigations of schemes to defraud the public. These investigations would usually be carried out in places to which the general public has access.

If it is considered important and in the public interest to seek information, without disclosing a journalistic purpose, in places in which the public normally does not have access, approval of the editor-in-chief in information programming must be obtained.

### (7.3) Hidden cameras and microphones

As a general rule, hidden cameras and microphones must not be used to gather information.

There may be occasions, however, when the use of such concealed recording devices may be regarded as being in the public interest. Occasions of this sort, for example, could include a report on the selling of drugs on the streets.

Even when justified, covert recording risks damaging public trust in RTV Slovenia. Consequently, prior authorisation must be obtained from the editor-in-chief of programming. Authorisation may be given only if the information gained serves an important purpose, is indispensable to that purpose and cannot be obtained by more open means. Moreover, it must concern serious crimes.

Light entertainment and similar programmes may include street polls if the people who feature prominently in these recordings have given their permission before the material is broadcast.

### (7.4) Leakage of official/confidential information

Leakage of information from governmental institutions is a special form of anonymous informing used when certain state officials wish to inform the public about confidential subjects. Such information may be useful, but it carries with it the possibility of being misleading, since the main aim of informants is not always to reveal the truth. Therefore, the publication of such information is always an ethical challenge to editors and journalists. Information from such sources has to be checked carefully regarding credibility and aim. However, it may constitute an important part of news reporting.

According to Criminal Code and Criminal Procedure Act Slovene investigative journalists are enacted with other citizens during data collection and publication. The Police and the Prosecutor may, in accordance to legislation, execute house searches in editorial offices and journalist's homes («Sava spy case», 2000<sup>1531</sup>), seizure documents or press material, notes, recordings, hard drives and all other digital memory or any other material they can find during house searches.

Investigative journalists, who focuses on national-security issues, police and crime reporting, are facing bigger possibility to find themselves under secret surveillance as a suspects of a crime of Disclosure of Classified Information.

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<sup>1531</sup> <https://cpj.org/2002/03/attacks-on-the-press-2001-slovenia.php>.

Since intense public discussions in Spring 2015 some provisions of this crime were amended by National Assembly in July 2015 and will become valid in October 2015.

Criminal code (Article 260<sup>1532</sup>) defines this crime in the following provisions:

(1) An official or any other person who, in non-compliance with his duties to protect classified information, communicates or conveys information designated as classified information to another person, or otherwise provides him with access to such information or with the possibility of collecting such information in order to convey the same to an unauthorised person, shall be sentenced to imprisonment for not more than three years.

(2) Whoever, with the intention of using it without authority, obtains information protected as classified information or publishes such information publicly, shall be punished to the same extent.

(3) Any person, who shall have elements of a criminal offence under the first Paragraph of this Article, shall not be punished, if it is about classified information, which reveals unlawful interference in human rights or fundamental freedoms, other constitutional or statutory rights, serious abuse of authority or power or other serious irregularities in enforcement of authority, public authorities or public services, and the offence is not committed out of greed and does not threaten human life or have no serious or irreversible adverse consequences for safety or legally protected interests of the Republic of Slovenia. (added in July 2015, valid since October 2015, author's translation)

(4) Notwithstanding the provisions of the second paragraph of this Article, a person who provide official secret, the content of which is contrary to the constitutional order of the Republic of Slovenia, for publication or publish it with intention to publicly disclose irregularities in the organization, operation and management of the service and if the publication has no harmful effect for state, shall not be punished. (added in July 2015, valid since October 2015, author's translation)

(5) If the offence from paragraph 1 of this Article has been committed out of greed or with a view to publishing or using the information concerned abroad, the perpetrator shall be sentenced to imprisonment for not more than five years.

(6) If the offence under paragraph 1 of this Article has been committed through negligence, the perpetrator shall be sentenced to imprisonment for

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1532

<http://www.policija.si/eng/images/stories/Legislation/pdf/CriminalCode2009.pdf>.

not more than one year.

The second paragraph allows incrimination of all journalists, who obtain and publish information which is classified as restricted, confidential, secret and top secret.

If the Prosecutor and the Police suspect journalist for Disclosure of Classified Information, they can, in accordance with Criminal Procedure Act, begin secret surveillance of a journalist, what is an intrusion into his privacy and even face-to-face communication with journalistic sources.

In the first paragraph of Article 149.a Criminal Procedure Act defines »if there are reasonable grounds for suspecting that a certain person has committed, is committing, is preparing to commit or is organising the commission of any of the criminal offences specified in the fourth paragraph of this article and if it is reasonable to conclude that police officers would be unable to uncover, prevent or prove this offence using other measures, or if these other measures would give rise to disproportionate difficulties, secret surveillance of this person may be ordered.«

The second paragraph exceptionally widens secret surveillance »against a person who is not a

suspect if it is reasonable to conclude that surveillance of this person will lead to the identification of a suspect from the preceding paragraph whose personal data is unknown, to the residence or whereabouts of a suspect from the preceding paragraph, or to the residence or whereabouts of a person who was ordered into custody, ordered to undergo house arrest or had an arrest warrant or an order to appear issued against him but who escaped or is in hiding and police officers are unable to obtain this information by other measures, or if these other measures would give rise to disproportionate difficulties.«

Secret surveillance is defined in the third paragraph: »Secret surveillance shall be carried out as continual or repeat sessions of surveillance or pursuit using technical devices for establishing position or movement and technical devices for transmitting and recording sound, photography and video recording, and shall focus on monitoring the position, movement and activities of a person from the preceding paragraphs.

Secret surveillance may be carried out in public and publicly accessible open and closed premises, as well places and premises that are visible from publicly accessible places or premises. Under conditions from this article, secret surveillance may also be carried out in private premises if the owner of these premises so allows.«

In the fourth paragraph of the same Article, different crimes for which secret surveillance can be ordered are listed. Among them is also Article

260 of the Criminal Code – Disclosure of Classified Information. Secret surveillance shall be permitted by the State Prosecutor on the basis of a written order and at the written request of the Police. In specific cases, where installation of technical devices for observation or if a person which is not a suspect is put under surveillance, only the Investigative Judge can order secret surveillance at the written request of the State Prosecutor.

The monitoring of electronic communications using listening and recording devices, control of letters and other parcels and wire-tapping of conversations with the permission of at least on person

participating in the conversation against journalists (as defined in Criminal Procedure Act, Article 150) is not allowed, as Disclosure of Classified Information is not a crime which allows use of such methods.

Nevertheless, house searches and confiscation of journalists materials is possible under same conditions as for all other crimes, only on order of Investigative Judge.

Investigative journalists in Slovenia can get prosecuted also for a crime Disclosure and Unauthorised Acquisition of Trade Secrets (Criminal Code, Article 236<sup>1533</sup>). The same provision as in Disclosure of Classified Information exist in the second paragraph of Article 236: »Whoever procures information designated as a trade secret with the intention of using it without authority shall be punished to the same extent.« The police can similarly use secret surveillance against journalists if they are suspect for this crime. However, there was no criminal prosecution against journalists for this crime yet.

### **3. Reporting about on-going investigations**

When making information public investigative journalists are obliged to respect general provisions of Mass Media Act and provisions of Code of

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<sup>1533</sup> Article 236: 1) Whoever, without due authorisation in non-compliance with his duties to protect trade secrets, communicates or conveys information designated as a trade secret to another person, or otherwise provides him with access to such information or with the possibility of collecting such information in order to convey the same to an unauthorised person, shall be sentenced to imprisonment for not more than three years. (2) Whoever procures information designated as a trade secret with the intention of using it without authority shall be punished to the same extent. (3) If the information under paragraphs 1 and 2 of this Article is of special importance, or if it has been conveyed to a third person with a view to being transferred abroad, or if the offence has been committed out of greed, the perpetrator shall be sentenced to imprisonment for not more than five years. (4) If the offence under paragraphs 1 or 3 of this Article has been committed through negligence, the perpetrator shall be sentenced to imprisonment for not more than one year.

Ethics of Association of Slovene Journalists, which defines basic principles of journalistic diligence:

(1) The journalist should verify the accuracy of collected information and avoid mistakes. Their mistakes - however inadvertently - must be recognized and corrected. In this case, the Journalists' Ethics Council may consider that the journalist did not violate the Code.

(2) The journalist should avoid improper, abusive personal presentation of data and facts.

(3) The journalist should, when publishing information involving serious allegations, obtain a response of those concerned by information, as a rule in the same article, otherwise as soon as possible. The same should be done when he is when summarizing the serious allegations from other media or archives. If a journalist was unable to obtain the response, he must explain this to the public.

(4) Journalist should not conceal an information crucial for understanding of the discussed topics.

(5) When publishing unconfirmed information or speculation, this should be expressly pointed out by the journalist.

(6) The journalist should identify the source of information whenever feasible.

(8) The journalist may agree with a source of information, which would otherwise be identified, for anonymity. Such a source can be used only if the information could not obtain in any other way and the publication is in the public interest. The journalist is obliged to respect the agreement on the anonymity of the source.

(9) The journalist should avoid paying for information.

(17) The journalist should respect the individual's right to privacy and avoid sensationalistic and unjustified disclosure to the public of anyone's privacy. Intrusion into an individual's privacy is only permissible if there is an overriding public interest. With public officials and others seeking power, influence and attention the public's right to be informed is greater. The journalist should be aware that gathering and publishing information and photographs may cause harm to individuals not accustomed to media and public attention.<sup>1534</sup>

Beside presented provisions about journalist's duties, journalist has right to turn down any job which is contrary to this code or his convictions (28). Additionally, no one is allowed to alter or revise the content of the

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<sup>1534</sup> Journalist should obtain the prior opinion of the editor in chief when publication present intrusion into an individual's privacy.

journalist's report or other piece of work without his consent. The journalist has the right to sign his piece of work and it may not be signed without his knowledge or against his will. (29)

Journalistic duty of care by reporting about on-going investigation is specifically required by Article 18 of the Code of Ethics of Slovene journalists.

(18) Reporting on judicial matters, the journalist should take into consideration that no one is guilty until legally found so. The journalist should exercise caution in publishing names and photographs of perpetrators, victims and their relatives when reporting on tragedies and pretrial proceedings.

There are no specific provisions in legislation or self-regulation codes to publish information after trial or preliminary proceedings that the person is found not guilty. In well-publicised trials Slovene journalists almost always inform public about all – both guilty or not guilty - judgements from the lowest to the highest courts.

Mass Media Act has very strict and comprehensive provisions about right to reply and correction (Articles 26 - 44), which originates in the Constitution. Specific and decisive role of editor in chief of media is defined in implementation of this right.

#### **4. Due diligence guidelines for journalists**

In Slovenia no general guidelines, codes or provisions exist regarding how to present "objective truth", minimum level of facts of evidences et cetera. The only provisions about minimal requirements for investigative journalism are defined in Professional Criteria and Principles of Journalistic Ethics in the programs of RTV Slovenia, which are obligatory only for journalists of public broadcasting service:

##### **(8) Investigative journalism**

- Investigative journalism calls for heightened skills and the maintenance of strict standards of accuracy. Investigative journalism must not be conducted without adequate resources and the time needed for exhaustive research.
- Programmes may lead the audience to conclusions on the subject being examined. These must be logical conclusions derived from the facts and not from expressions of editorial opinion or unfair methods of presentation. It is essential, therefore, that to conform to the principles of accuracy, integrity, fairness and comprehensiveness, the programmes must be based on the most scrupulous and painstaking research. They should take into account all the relevant evidence available and include recognition of the range of opinion on the matter in question.

- The opportunity for a response is essential to investigative programming. In the interest of fairness, opportunity must be given for all parties directly concerned to state their case.
- To avoid the possibility of being manipulated into advancing inaccurate or biased information, the journalist must carefully check the reliability of a source and must obtain corroborative evidence from other pertinent sources.

Beside general provisions of Code of Ethics of Association of Slovene Journalists investigative journalists and editors in many media are mostly left to their own decisions and criteria about minimal standards for »objective truth« and how to produce and publish an investigative story.

Jurisprudence in defamation libel and criminal cases is more extensive about minimal journalistic standards in investigative journalism. For example, former Prime Minister lost a libel suit against Finnish journalist Magnus Berglund<sup>1535</sup>, after the Court decided<sup>1536</sup> in detailed analyses of journalist's investigation, that journalist prepared a programme with needed diligence and has enough foundations for his opinion in collected information and that he truly believed in his words.

Despite many similar jurisprudence from defamation cases exist, there is no systematic analyses or discussions about these issues in Slovene journalistic community.

## 5. Liability in the editorial chain

Mass Media Act defines that the responsible editor of media »shall be answerable for any information published.« But in jurisprudence journalists personally bear criminal and civil responsibility for their work. Only in specific criminal cases responsibility is transferred to the editor in chief or to the publisher.

In Criminal Code a crime Public Notice of Criminal Offences against Honour and Reputation (Article 166) defines that editor in chief is responsible for all crimes against honour and reputation<sup>1537</sup> if author of the article is unknown before start of the trial, if article has been published without author's consent and if factual and legal barriers for prosecution of an author exist. Same incrimination is valid for a publisher or a printer of

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<sup>1535</sup> <http://en.rsf.org/slovenia-former-pm-sues-finnish-journalist-02-02-2010,36268.html>.

<sup>1536</sup> <http://www.rtvsllo.si/crna-kronika/visje-sodisce-potrnilo-odlocitev-okroznega-janseva-tozba-berglunda-zavrjnena/355782>.

<sup>1537</sup> Crimes against honour and reputation are: Insult, Slander, Defamation, Calumny, Malicious False Accusation of Crime, Insult to the Republic of Slovenia, Insult to Foreign Country or International Organisation, Insult to the Slovenian People or National Communities.



non-periodical printed publications and a manufacturer of record, CD, DVD, in a film or by other video, audio or other means intended for a broader circle of people.

## 6. Conclusion and perspectives

Except few paragraphs in Professional Criteria and Principles of Journalistic Ethics in the programs of RTV Slovenia there are no specific guidelines or other self-regulatory documents for investigative journalism in Slovenia.

On the other hand investigative journalists, specifically those who investigate intelligence, military, foreign policy affairs or business deals risk to become suspect of a crime of Disclosure of Classified Information and thus become a target of secret surveillance by the police and prosecutors.

Situation became worrying since November 2008, when National Assembly approved major modifications to the Criminal Code which amended previous Code from 2004<sup>1538</sup>. These amendments united three crimes – Disclosure of Official Secret (262), Disclosure of Military Secret (282) and Disclosure of State Secret (359)<sup>1539</sup> – into a single crime Disclosure of Classified Information (260)<sup>1540</sup>.

It was relevant for journalists that new united article omitted previous fifth paragraphs of the then Article 266 (Disclosure of Official Secret) and Article 282 (Disclosure of Military Secret) which offered better protection of journalists, if they publicly disclosed irregularities in the state institutions and the publication did not have harmful effect for the country.<sup>1541</sup> This provision has been introduced in 1999 and has been valid for disclosures of official and military secret, but not also for disclosure of state secret.

These changes to Criminal Code were a step back from previous provisions, as no legal grounds to defend journalists, who reveal irregularities in the public interest, at the court, were available any more.

Harsher provisions of the Criminal Code were consequently implemented by the Prosecutors in recent years. At least four journalist (Anuška Delić, Erik Valenčič, Peter Lovšin, Meta Roglič<sup>1542</sup>) were investigated by the police and/or prosecuted for Disclosure of Classified Information. A case

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<sup>1538</sup> <https://www.uradni-list.si/1/content?id=51064>.

<sup>1539</sup> Numeration of Articles is of Criminal Code (2004).

<sup>1540</sup> Numeration of Criminal Code (2008).

<sup>1541</sup> <http://en.rsfsf.org/slovenia-slovenian-justice-system-sanctions-19-02-2015,47598.html>.

<sup>1542</sup> <http://en.rsfsf.org/slovenia-slovenian-justice-system-sanctions-19-02-2015,47598.html>.

against Delić has been dropped<sup>1543</sup> in a trial after prosecutor withdrew indictment against her due to lack of evidences. The other three journalists are still in pre-trial phases and all have been interrogated by the police.

After many public protests in Slovenia and abroad against prosecution of journalists<sup>1544</sup> and public discussions, the Slovene government announced changes to the definition of this crime which reintroduced better protection of journalists, who revealed classified information in a public interest.

The parliamentary procedure started on 22 May 2015, National Assembly approved amendments to the Criminal Code on 9 July 2015<sup>1545</sup>. New provisions were published in the Official Gazette on 20 July 2015<sup>1546</sup> and they will become valid in three months after publication, on 17 October 2015.

Third and fourth paragraphs (look page 5) are added to the Article 260 (Disclosure of Confidential Information).

These latest changes are introducing a need to recognize public interest when journalists and editors are publishing classified informations, what is valuable relief for journalists and freedom of expression. On the other hand these changes are bringing new challenges for the Prosecutors and the Courts.

Nevertheless, lack of self-regulation provisions and standards of investigative journalism, lack of systematic training and education of investigative journalists, non-transparent media ownership of mainstream media, political interference in media and daily pressures in news desks often lead to investigative stories which more resembles »leak journalism« than a real investigative journalism.

## Epilogue

Legislative and self-regulation provisions of basics of investigative journalism are almost non-existent in Slovenia. Left to make own decision on a daily case to case basis, investigative journalists and editors may still risk criminal prosecution if they disclose confidential information. Systematic efforts in training and educating are needed, as well as self-regulation guidances for investigative journalism.

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<sup>1543</sup> <http://www.globalpost.com/article/6516696/2015/04/15/slovenia-drops-charges-against-investigative-reporter>.

<sup>1544</sup> <http://www.osce.org/fom/125386>.

<sup>1545</sup> [http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=C1257A70003EE6A1C1257E7D006355D3&db=kon\\_zak&mandat=VII](http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=C1257A70003EE6A1C1257E7D006355D3&db=kon_zak&mandat=VII).

<sup>1546</sup> <https://www.uradni-list.si/1/content?id=122585>.



## **28. Slovakia**

Juraj Polak

## 1. Questions 1. – 2.

The main legislation concerning mass media consists of the Act No. 167/2008 Coll.<sup>1547</sup> on the press (hereinafter only “Press Act”), the Act No. 532/2010 Coll.<sup>1548</sup> on PSB (hereinafter only “PSB Act” and the Act No. 308/2000 Coll.<sup>1549</sup> on Broadcasting and Retransmission (hereinafter only “Broadcasting Act”). Each Act focuses only on its separate field of interest (press, audiovisual media etc.) with lack of general legislation that would state basic principles and provide for common definitions.

Both PSB Act and Broadcasting Act lack any explicit or at least general provisions on illegally/improperly obtained information. The Press Act contain only general provision which obliges all public institutions on a basis of equality, to provide the publishers of periodicals and press agencies with information on their activities in order to supply true, current and impartial information to the public. The provision at the same time states that this obligation shall not affect the provisions of applicable regulations. As examples of the applicable regulations the footnote includes Acts on the protection of the (state) secrets<sup>1550</sup>, Act on military intelligence<sup>1551</sup> or Act on the Slovak Information Service<sup>1552</sup>. These Acts however do not address in any way the cases where disclosing or any other use of illegally/improperly obtained information may be in the public interest. The same applies to Code Civil which regulates the protection of the personal rights.

The above-mentioned footnote includes also the Act on freedom of information<sup>1553</sup>. From its adoption the Act No. 211/2000 Coll. on freedom of information is the most valuable and the most frequently used tool by journalists in Slovakia. Its main purpose is to ensure the public’s right to receive information. Naturally the legislation also possess lawful exceptions for refusing to disclose the requested information. These include classified information (state secrets), trade and tax secret or personal and private data.

But even the Act on freedom of information which aims specifically at public’s right for information does not contain neither detailed nor general provisions on the possible conflict of protected information vs. public interest. The Act however does stipulate rather broad exemptions on the trade secret where disclosing of following information does not constitute

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<sup>1547</sup> <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2008/167/20110901>.

<sup>1548</sup> <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2010/532/20140101>.

<sup>1549</sup> <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2000/308/20150701>.

<sup>1550</sup> <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/215/20150101>.

<sup>1551</sup> <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1994/198/20130101>.

<sup>1552</sup> <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1993/46/20140601>.

<sup>1553</sup> <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2000/211/20121201>.

the breach of trade secret - information related to a significant impact on health of the population, world cultural and natural heritage/environment including biological diversity and ecological stability, information on environmental pollution, information obtained through public funds or relating to the use of public funds, or to the disposal of state property or the property of municipality and information on state aid.

Quite limited state regulation for press media is conducted by Ministry of Culture (e.g. notifications/registers) whereas the Council conducts rather complex regulation for AVMS services for broadcasting and retransmission (CBR). Both organizations due to different reasons (lack of competences in case of CBR and unique nature of any press regulation) do not issue any guidance or other bylaws that would address the issue of obtaining the protected information in public interest.

Therefore, it is safe to state that neither the legislation nor the regulatory regimes do not provide any relevant guidance on the utilization of illegally/improperly obtained information.

Self-regulatory:

The Slovak Syndicate of Journalists passed in late 2010 (in effect since 2011) the Ethical code of journalist<sup>1554</sup>, which replaced the previous Code of ethics (1990). Current code do not cover only printed media but also most of the other relevant journalistic institutions (e.g. PSB, association of local TV broadcasters, news teams of a major commercial broadcasters etc.).

In section V point 9 code stipulates the "extraordinary means" of journalistic work such as, usage of the undercover means of acquiring information including hidden camera or hidden microphone, usage of anonymous or confidential sources and usage of unverified information. The points 10 to 13 of this section set out conditions under which it is permissible to use the extraordinary means.

The extraordinary means are permissible only if they are used in order to serve important public interest which cannot be achieved by other means. The usage of these means must be authorized on the top editor level. Important public interest is such interest that brings significant benefit for all or (at least) many citizens. The important public interest is inter alia prevention of the abuse of the executive power, proper functioning of the political system and civic institutions, protection of the life, public health, security and property of citizens or the protection of the morale and the fundamental values of society. The usage of extraordinary means must be flagged and explained to the viewers/listeners/readers within the relevant

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<sup>1554</sup> <http://www.ssn.sk/eticky-kodex-novinara/>.

article/programme.

It is worth mentioning that extraordinary means of journalistic works were addressed for the first time in the new Ethical code of journalist (which is still relatively recent) while previous code from 1990 did not address these issues whatsoever.

*Case law – Radio Twist A.S. vs. Slovakia*<sup>1555</sup>

When addressing the issue of the utilization of illegally/improperly obtained information one cannot miss one of the most infamous cases in Slovakia which eventually ended up in ECHR.

In 2006, the ECHR considered the sanctioning of a Slovak radio station to be a violation of freedom of expression. Radio Twist was convicted for broadcasting the recording of a telephone conversation between the State Secretary at the Ministry of Justice and the Deputy Prime Minister in a news programme. The recording was accompanied by a commentary, explaining that the dialogue related to an issue of a politically influenced power struggle in Slovakia in 1996. The Secretary at the Ministry of Justice filed a civil action against Radio Twist for protection of his personal rights. He argued that Radio Twist had broadcast the telephone conversation which was recorded in illegal manner. Radio Twist was ordered by the Slovakian courts to deliver to state secretary a written apology and to broadcast that apology within 15 days. The broadcasting company was also ordered to pay compensation for damage of a non-pecuniary nature (circa 3 300 Euro) due to the tarnishing of state's secretary dignity and reputation.

The Strasbourg Court however disagreed with these findings of the Slovakian Courts. Referring to the general principles the Court emphasized that the context and content of the recorded conversation was clearly political and that the recording and commentary contained no aspects relevant to the concerned politician's private life. Furthermore, the Court referred to the fact that the domestic courts did not provide any solid evidence that the programme contained untrue or distorted information. The Court points out that Radio Twist was sanctioned mainly due to the mere fact of having broadcast information that had been illegally obtained by someone else who had forwarded this to the radio station. The Court was, however, not convinced that the mere fact that the recording had been obtained by a third person contrary to the law could deprive the broadcasting company of the protection afforded by Article 10 of the Convention. The Court also noted that it was, at no stage, alleged that the radio station or its employees were in any way involved in the illegal

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<sup>1555</sup> [http://hudoc.echr.coe.int/eng?i=001-78603#{%22itemid%22:\[%22001-78603%22\]}](http://hudoc.echr.coe.int/eng?i=001-78603#{%22itemid%22:[%22001-78603%22]}).

recording. The Court observed that there was no indication that the journalists acted in bad faith or that they pursued any objective other than reporting in matters of public concern.

*Administrative fine/criminal prosecution for article that contained classified data*

Another example of the state authorities approach to the usage of illegally/improperly obtained information is the case of the press weekly Žurnál which in its article about the leak of classified data in the Secret Military Service published parts of concrete classified document. The National Security Agency (NSA) sanctioned<sup>1556</sup> the Chief Editor and a journalist (co-authors of the article) for failure to maintain the confidentiality of classified information of which they have learnt and to comply with the obligation to give notice of classified information and surrender it to the NSA or Police. Both journalists did not deny these facts as such. They stressed however that their motivation was solely to inform the public about problems with protecting classified documents in the Military Secret Service, and claimed to so having acted in the public interest. The article did not contain any names or other concrete facts that could directly endanger national security or people working in this sphere and the document itself contained information about actions from 2004.

The NSA in its decisions however stated that it is possible to inform the public about a classified-data leak without actually revealing some of the information. It also stated that the document as such was marked as classified and a journalist is not competent to decide what parts of the document may be revealed to public without any security hazards. NSA also considered that the gravity of this unlawful action was increased by the fact that the subjects published classified information in a national magazine (and its e-version) and therefore displayed it to a large part of the public and imposed the highest possible fine (circa 500 Euro).

It is certainly worth mentioning that during the administrative proceedings before the NSA the official criminal investigation was commenced due to the same violation which can however under certain circumstances also qualify as criminal offence. The charges were eventually dropped<sup>1557</sup>. Although the main argument of this decision was the fact that the journalists were already sanctioned by the NSA (due to the legal system of administrative proceedings the administrative fine came into effect even though it was challenged at court) the prosecutor also stated some relevant findings about the topic. The arguments for dropping the charges included

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<sup>1556</sup> <http://www.jetotak.sk/editorial/utajovane-informacie-verzus-vyssi-zaujempripad-zurnal>.

<sup>1557</sup> <http://www.sme.sk/c/3996130/zastavili-stihanie-redaktoriek-zurnalu-lebo-ich-potrestal-uz-nbu.html>.



the fact that the journalists acted in good faith to inform on the matter of public interest, the consequences in light of the protection of the state secret were “petty” and criminal punishment for such action would constitute “insensitive” interference of the executive with the freedom of press.

Journalists challenged the decision of NSA where the Regional Court in Bratislava first upheld the decision. Its judgment was eventually challenged at Supreme Court (court of final resort) where the journalist’s attorney pointed out that publishing given information in the article incited public consultation on a serious issue. The interest of the public in being informed may under specific circumstances prevail over the objective to preserve classified information. With reference to ECHR jurisprudence the attorney also argued that in specific cases journalists may decide whether or not it is necessary to reproduce documents to ensure the credibility of their statements. He stressed that in this case it was necessary to reveal classified information to provide “reliable and precise” information on an issue of general interest.

The Supreme Court<sup>1558</sup> in its reasoning stated that the amount of a fine is at the competent authority’s discretion and in this case the amount was within the range set by law. However, the Supreme Court stressed that the authorities’ considerations about the amount are an integral part of (the motivation of) its decision and therefore must be subject to a courts’ review, meaning they must be clear and concrete. This applies even more when imposing the maximum fine. In this case the reasoning about the amount was too vague and the decisions needed to be dismissed and the case was return to NBU for a new proceedings. One, however, cannot leave unnoticed the unfortunate fact that even though significantly valid questions were raised before the Supreme Court (possibility to reveal classified information in the public interest, level of balance between freedom of expression and national security) no answers were given. The Supreme Court limited itself to reviewing only those considerations that led to imposing the maximum fine but it did not deliver any opinion on the core issue as to whether such actions under these circumstances are acceptable or must be sanctioned (e.g. with less severe sanction) under relevant law.

The rather incomplete decision of Supreme Court strikes even more as missed opportunity due to the fact that the proceedings are still on-going according to the NSA<sup>1559</sup>. The journalists therefore learned that such action

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<sup>1558</sup> [http://www.supcourt.gov.sk/data/att/18245\\_subor.pdf](http://www.supcourt.gov.sk/data/att/18245_subor.pdf).

<sup>1559</sup> The response of the NSA stated only that the investigation is still on-going and the direct question whether NSA did issue any other decision after the decision of the Supreme Court remained unanswered.

does not constitute a criminal offence and imposing the maximum fine in administrative proceedings is unlawful however the comprehensive and detailed guidelines for such scenarios are still missing.

*CBR decision on using hidden camera*

Possibly arguable but rather clear instructions on using the hidden camera were given by the decisions of the CBR. The case in question involved recording made by a journalist with hidden camera which displayed doctor talking with his patient about receiving prior to the medical operation money for unclear purposes. The doctor in the recording admits the acceptance of the money and disputes only the actual amount. The recording was used in different programmes (investigative journalism/news) and the CBR open an administrative investigation (after receiving complaints from the doctor) on each of these programmes for possible interference with the doctor's right to maintain good reputation.

For the first investigative show CBR found<sup>1560</sup> that there was no violation of the law. CBR stated that the usage of the hidden camera is a method that is not rarely used by investigative journalists and that given case display a „classic“ scenario of the conflict between the general public's right to information and the right to protect good reputation of natural person. In order to resolve this conflict it is necessary to assess whether the methods and form of the report was proportionate to the level of the information's relevance to the general public. CBR took into account the fact that journalists did not present any own assessment of the doctor's action (taking money from patient) therefore the viewer could make his own assumptions and considerations about the key facts in the story. The CBR also reflected the significant importance to the general public and society of the reported topic and also the possible negative impacts that such actions (corruption in medical environment) may have on the society. While also recognizing the importance of the freedom of expression and freedom of press CBR ruled in favor of the TV journalists. Although CBR imposed sanction in the other case the reason was not the hidden camera but the presentations of the facts compared to the actual state of the investigation (for more see part 2.).

*Case law with respect to the trade secret*

As indicated before one of the most valuable tool used by journalists in Slovakia - Act on freedom of information contain an exception to the obligation to disclose the information with regard to the trade secret. This

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<sup>1560</sup> Point 32 of the minutes below:  
[http://www.rvr.sk/\\_cms/data/modules/download/1211540545\\_zapisnica\\_RV\\_R\\_102008\\_zo\\_dna\\_20\\_05\\_2008.pdf](http://www.rvr.sk/_cms/data/modules/download/1211540545_zapisnica_RV_R_102008_zo_dna_20_05_2008.pdf).

provision naturally caused considerable number of cases where public institutions claimed they cannot lawfully disclose particular information due to the fact that it falls within the trade secret.

Regional Court in Bratislava in 2007 (2 S 424/06) stated<sup>1561</sup> that in case of the contract between the undertaker of business activities and public institution the mere identification of data as trade secret and the intent of the entrepreneur to not disclose this information is not sufficient. The information still need to fulfill the other criteria (commercial nature, at least some potential value and not commonly accessible in business sector) of the trade secret. Due to the nature of given exception which interfere with general public right for information the burden of proof lies within the legal person which is obliged to disclose information under the freedom of information Act (hereinafter only "obliged subject").

The Supreme Court went a little further in his decision (6 SŽ 73/01<sup>1562</sup>) on refusal of disclosing the information by Agency on nuclear power due to the fact these information constitute trade secret. The Agency also refused to deal with the arguments in the applicant's appeal due to the fact that it felt incompetent to decide on which may or may not qualify as a trade secret of his business partner (private entity). Court stated that when obliged subject decides on the refusal of disclosing certain information due to the trade secret exception the clear, logical and non-arguable reasoning of why given information qualifies as trade secret is essential and necessary.

In Slovakia there is no explicit/official safeguards for journalists with regard to the legal (or other) norms addressing search warrants, seizure of documents or legal surveillance (carried by state officials). This means that provisions stipulating mechanism described above do not differ between journalist and any other natural person.

#### *Case law/practical examples*

One of the examples which show that it is not uncommon in Slovakia to treat journalists same as regular citizen is the case of "Gorilla" in particular the injunction to publish the book about this case. "Gorilla" is the name for a set of transcripts disclosed (anonymously) on the Internet from wiretap operation of the Slovak intelligence service. These transcripts describe in extraordinary straightforward manner "connection" among executive functionaries, minister and leading partner of a major financial group. What was initially regarded as presenting a mere bluff achieved through various means a considerable level of credibility and became arguably the most

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<sup>1561</sup> Page [http://www.viainuris.sk/stranka\\_data/subory/publikacie/zpibrozura.pdf](http://www.viainuris.sk/stranka_data/subory/publikacie/zpibrozura.pdf)  
<sup>1562</sup> <http://oad.sk/archiv/en/infolaw/verdicts/sc7301>.

influential case in Slovakia since joining Europe Union in 2004. Several months after the “Gorilla” case went public the journalist who worked on this case from the very beginning announced that he is preparing a book that would provide complete analyse of the case. Upon a submission by one of the main character of the case a court of first instance issued an injunction<sup>1563</sup> to prevent the publishing of a not-yet-existing book because of the possible damage to one of the leading figures’ reputation.

The injunction however not only prevented the journalist and the publisher for who he was working to publish the book but also ordered both parties to provide all materials (written, electronic etc.) that dealt with the book or its in-process parts and contain specific information about the claimant (court selected large amount of information from the already accessible transcripts which in its opinion could damage the claimant’s reputation). Even though the court was assessing major journalistic case and therefore it was rather probable that the requested material may contain sensitive journalistic information (sources etc.) the judge did not reflect in the order neither the sensitiveness of the requested materials nor the adequate level of protection for the journalistic materials.

Eventually the appellate court dismissed the injunction<sup>1564</sup> (the book was published) however the question on the possible conflict between the submission filed in order to protect the private interests and the confidentiality of the journalistic materials covering cases in public interest remained unresolved.

The question whether journalists are or are not to be regarded as a “privileged” group with regard to the law enforcement action was openly put on the table in another case of wiretap<sup>1565</sup>. The military intelligence service (MIS) upon instruction of the minister of defence tapped three journalists. After the fact about surveillance of the journalists became public massive protests of all media erupted and eventually the responsible minister was recalled. Even after four years his statements remain clear that no harm was done since all wiretappings were legal (based on a court order) and implemented in an effort to investigate serious crimes. The respective journalists, nevertheless, wrote about the MIS and alleged that the very reason why they were tapped was their journalistic activities. By monitoring these journalists and discovering their sources MIS wanted to reveal criminals inside its own structure. Later on special investigation within the MIS was conducted due to the suspicion that the acquiring of the

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<sup>1563</sup> <http://www.scribd.com/doc/80551248/uznesenie>.

<sup>1564</sup> <http://www.sme.sk/c/6413239/krajsky-sud-zrusil-zakaz-knihy-o-gorile.html>.

<sup>1565</sup> <http://www.sme.sk/c/6279948/galko-popiera-ze-nariadil-odpocuvanie-novinarov.html>.

court orders may have been accompanied by presenting untrue facts or statements to court or even the illegal conduct of the judges<sup>1566</sup> in question.

The case quickly became the political topic which naturally did not facilitate its resolving and in fact the investigation by the police and prosecutor office is still on-going. However, the early statements of the main representatives of the MIS or the competent Ministry as well as the enormous length of the investigation with no results show the Slovakia is far from comprehensive and clear guidelines on cases concerning the enforcement of the criminal mechanisms on journalists.

### **3. Reporting about on-going investigations**

#### *Legislation/regulatory*

Once again the legislation as well as state regulation (in form of guidelines etc.) is completely silent on the matter of reporting about on-going investigation. The Press Act does however contain rather detailed regulation on so called “right to follow-up report”. Any (natural) person who’s on-going investigation in front of any public institution was reported about by press publisher or press agency in form of news story containing factual information, this person may be identified by this report and the investigation was completed by an effective decision (without the possibility to appeal) has the right to apply for an follow-up report about the outcome of this investigation. Besides formal criteria the Press Act states a follow-up report must use only wording suggested by the applicant or wording mutually agreed on, at equivalent space and with the same font than the original report and must be labelled by the words „follow-up report“. No text containing value judgments must not accompany the published follow-up report or be published anywhere else within the same issue or agency report. The press publisher or press agency may refuse the application to follow-up report only under these circumstances – the application does not meet the formal requirements, publisher or agency already voluntarily published follow-up report and this follow-up report meets the legal requirements, publishing of the applied follow-up report would qualify as administrative/criminal offence or its publishing would be in contradiction with good manners (the applicant was not acting *bona fide*), publishing of the follow-up report would interfere with legally protected rights and interest of other.

Interestingly enough the Act on broadcasting lacks any similar regulation therefore the right for follow up report apply without any reasonable explanation only to the press media.

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<sup>1566</sup> <http://www.sme.sk/c/6811593/v-kauze-odpocuvania-novinarov-budu-vypovedat-sudcovia.html>.

### *Self-regulation*

Even though its importance for day-to-day journalistic work the Ethical Code is somewhat modest with regard to the reporting about on-going investigations. Code contains general obligation to respect the presumption of innocence. A journalist disclose the full name of the accused from criminal activities only in case where the disclosure of the full name serves the important public interest. Although this provision does not specifically refer to the article on extraordinary means of journalistic work (see first section/self-regulatory of this report) due to the fact that it uses the same wording “important public interest” it is safe to assume that the examples in the extraordinary means section apply also here. Code also contains somewhat dubious provision which states that journalist must not damage one’s good name, honor or dignity unless the subject itself does not incite suspicion that he or she acts against law or causes public outrage. From the legal point of view rather nonstandard provision however the most likely purpose of this provision is to state that reporting on one’s illegal or scandalous activities does not automatically damages his good name, honor and dignity (rather than giving a journalist a free pass to damage one’s reputation).

#### *Case law – CBR decision on the reporting about the corruption in medical environment*

As elaborated in the first section of this report CBR investigated cases concerning recordings made by a journalist with hidden camera which displayed doctor talking with his patient about receiving money for unclear purposes prior to the medical operation. The doctor in the recording admits the acceptance of the money and only the actual amount remains disputed. As stated before CBR declared that in the first programme where journalists did not make any own evaluation of the situation and presented only statements of the patient and accused doctor there was no violation of law. However in the other case CBR came to the conclusion<sup>1567</sup> that although the doctor was only accused at the time of the broadcast the journalist disrespect the presumption of the innocence when in the opening statement the journalist labelled the accused doctor as a “*doctor who in illegal manner accepted money (from patient)*”. CBR concluded that even the facts acquired and presented in the hidden camera recording did not justify such factual statement due to the fact that the recording proved only the acceptance of some money from the patient and the investigation was clearly only in the very early stage. Thus according to the CBR the

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<sup>1567</sup> Point 33 of minutes below. The decision no. RL/25/2008 is not published however author has this decision in his possession. [http://www.rvr.sk/\\_cms/data/modules/download/1211540545\\_zapisnica\\_RV\\_R\\_102008\\_zo\\_dna\\_20\\_05\\_2008.pdf](http://www.rvr.sk/_cms/data/modules/download/1211540545_zapisnica_RV_R_102008_zo_dna_20_05_2008.pdf).

broadcaster violated the law by damaging the reputation of the doctor. Nevertheless the CBR took into account the pressing importance of this topic when imposing the sanction and concluded that warning will have the sufficient educational effect which was in this case the most important aspect.

*Constitutional court on presumption of innocence*

When addressing the issue of reporting about on-going investigations one cannot overlook one of the most significant decision<sup>1568</sup> where Constitutional court defines boundaries or rather limits of the presumption of innocence. Court dismissed the complaint of a natural person who claimed that number of articles from various publishers interfered with his right to a fair trial by disrespecting the presumption of innocence when implying that he is guilty of charges he was only accused of at the time when the articles were published.

Core of the conflict was the citation or quotation of the indictments raised by relevant state authorities which according to the provisions of penal code contained detailed description of the anticipated criminal conduct of the accused. Court first pointed out that all of the challenged articles contained besides the passages flagged by claimant also contained extremely significant (from the presumption of the innocence point of view) parts that clearly and beyond any reasonable doubt presented to the reader that the person in question is only accused and the given quotations are either from the official indictments or relevant state authorities themselves. Court stated that these articles must be assessed in their complexity and not only the isolated parts of them. Court also refused the applicant's argument on the disproportionate or excessive nature of the media publicity of his cases by stating that court in no manner assessed the excessiveness of the publicity but only whether the publicity could be understood as implication of guilt. The Court however concluded that in given cases the statements presented only the stage of suspicion from the illegal conduct.

*Constitutional court on the reporting about the main suspect (not formally accused)*

Another most interesting case<sup>1569</sup> addresses the issue of reporting about the (officially confirmed) suspicions of the police on rather serious matter where mayor of the city in Slovakia was supposed to be killed by contract killer. The suspect of hiring a professional to kill the mayor was a local businessman. Daily paper wrote an article on the investigation of the police on the attempted murder of the high political representative where they

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<sup>1568</sup> [http://www.concourt.sk/rozhod.do?urlpage=dokument&id\\_spisu=14074](http://www.concourt.sk/rozhod.do?urlpage=dokument&id_spisu=14074).

<sup>1569</sup> [http://portal.concourt.sk/Zbierka/2010/62\\_10s.pdf](http://portal.concourt.sk/Zbierka/2010/62_10s.pdf).

also stated that at given time police suspects the local businessman who was only partially identified by his place of business (runs café on square however it was not specified which square) and his possible motive (city cancelled his lease contract for the place). Lower courts disputed that usage of words “apparently”, „allegedly“ or „might“ does not release publisher from responsibility on such serious allegations especially when these were not later confirmed. Lower courts also concluded that it is not a matter of public interest to report on such allegation if formal indictment is not raised.

Constitutional court stated that allegations in the article were not presented as factual statements and not even as value judgments but only as information of polemical nature. Furthermore if the subject did have at time of publishing the article the status of main suspect it is not possible to hold the publisher liable for presenting him as main suspect. Arguments of lower courts that the allegations in the article implied that this subject could carry out these illegal activities is irrelevant since the subject at given time actually was the main suspect irrelevant to whether the article would or would not be published. Such allegations shall not be viewed as interference with presumption of innocence since the subject was not marked as wrongdoer but only as the suspect. At given time these information could not be considered as false information since they were confirmed by relevant official authorities carrying the investigation.

#### **4. Due diligence guidelines for journalists**

##### *Legislation/regulatory*

The legislation as well as state regulation (in form of guidelines etc.) does not contain any criteria or other details for the presentation of the “objective truth”. The Press Act only regulates legal tools such as right to reply and right to correction however these only authorize subjects to demand reply or correction if any untrue, incomplete or distorted information about identifiable person occurs. But the Act does not provide any criteria or guidelines how to identify such facts. The Act on broadcasting similarly contains its own version of right of reply but once again besides general obligation to ensure objectivity and impartiality of news and current affairs programmes the law does not further address the issue what actually is and what is not true and objective information.

##### *Self-regulation*

The ethical code right in its section “Fundamental principles” declares impartiality, fair balance, objectiveness, chastity, honesty, truthfulness, responsibility and consistent verifying of facts as fundamental values of journalist. Furthermore code sets more detailed rules such as obligation to verify each information he publishes with due diligence. Information shall



be on a regular basis verified by two separate sources. Journalist shall never publish information if he's aware that it is false. Headlines of the articles or programmes as well as the trailers or advertising of these articles/programmes must not be misleading or untrue. Commentaries and opinion pieces must be clearly labelled and separated from the news and facts. Even in the opinion pieces journalist does not include value judgments that contradict facts.

#### *Case law*

In December 2009, the Constitutional Court of the Slovak republic stated<sup>1570</sup> that courts of first and second instance violated the freedom of expression of the weekly newspaper publisher. Press media often referred to this decision as “ground-breaking” or as a decision that deserves its place in constitutional law textbooks. Constitutional Court made some extremely valuable statements on the issue of assessing the “quality” or the objectiveness of the information presented by media e.g. that one cannot demand the same level of legal „exactness“ of a law journal from a general magazine, that decisions which refuse to protect speculative and to some level incorrect statements under freedom of expression would have “chilling-effects” on the journalistic society, when interpreting value judgment made in the public interest which may have different meanings – one must choose the interpretation that favours freedom of expression, because any other approach could be easily abused.

Although much less credited by media but maybe even more valuable decision was delivered by Supreme Court in February 2009 (5 Cdo 55/2008<sup>1571</sup>) where Court explicitly states that not each publishing of untrue (or more or less imprecise) information must automatically mean unjustified damage to natural person' honor, dignity or good reputation. Such interference occurs only if casual nexus between the damage and the interference with protected personal sphere of the natural person exists and if the interference exceed the tolerated level of intensity in such way which cannot be tolerated in democratic society. With regard to the free circulation of the information and opinions it is necessary to respect also certain specifics of the standard periodical print media for mass public (in contrast to professional publications) which in certain cases, especially when taking into account the scope of individual contributions and readers' interest, must accept certain simplifications. Therefore it is not possible to claim that each simplification must inevitably leads to interference with personality rights of the respected natural person. In such cases it is impossible to persist on the absolute preciseness of each factual

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<sup>1570</sup> [http://portal.concourt.sk/Zbierka/2009/83\\_09s.pdf](http://portal.concourt.sk/Zbierka/2009/83_09s.pdf).

<sup>1571</sup> [http://www.nssr.gov.sk/data/att/10866\\_subor.pdf](http://www.nssr.gov.sk/data/att/10866_subor.pdf).

statements and by this impose unrealistic demands. What matters is always the overall meaning of information which should correspond with the truth.

Constitutional Court in its decision<sup>1572</sup> from 2010 (already elaborated in previous part of the report) also delivered rather valuable opinions regarding the issue of verifying or sorting out the information provided by relevant official institutions. Court stressed that if competent official institution in criminal investigation provides to media certain information public has the right to receive it. It is then journalist's/publisher's task to present these information to public. However it is not task of the journalist to sort out which information public shall or shall not receive since public has the right to complete and accurate information. Journalists/publishers cannot bear responsibility for dissemination of information provided by official (state) authorities because it is their task and mission. It is the official institutions' duty to consider which information and into what extent are suitable for disclosure to the media. This approach is also fully in line with up-to-date jurisprudence of Constitutional Court which states that everybody has to right to place confidence (confidence in law) that state institution act toward him fully in line with the constitution and law whereby he cannot bear responsibility if state institutions does not do so. Publisher did not have at its disposal the materials and documents of the criminal investigation therefore he was not able to judge if and into what extent the findings are verified or relevant hence he could have legitimate trust only in the information he was given and which he published.

## **5. Liability in the editorial chain**

Rather complicated legal regime on the liability within the press media (publisher was hold liable for the content of the press however chief editor was liable to publisher etc.) of previous Press Act (in effect since 1966 to 2008) was replaced by rather simple regulation in the Press Act from 2008. Act clearly states that publisher is liable for content published in press periodical and press agency is liable for the content within the agency news. Act contains several exception which rule out the liability of the media as such (which means that also any other member of the staff may not be liable).

In case of services regulated by the Act on broadcasting the liability lies within the broadcaster or the provider of the on-demand service.

The only legislative exception is with regard to the liability towards the criminal offences. Due to the fact that Slovak penal code do not distinguish the liability of the legal entities the liability for the criminal offence always

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<sup>1572</sup> [http://portal.concourt.sk/Zbierka/2010/62\\_10s.pdf](http://portal.concourt.sk/Zbierka/2010/62_10s.pdf).

lies within the journalist in question (both TV or press).

#### *Case law*

For a quite considerable long time courts recognized the liability of the publisher only in cases where the author of the article was "official" employee of the publisher (with proper contract under the Labour Code). However most of the authors wrote for the publisher under formally different contract as freelance journalists (due to the tax reasons) therefore for some time most of the private lawsuits aimed directly at the journalist (e.g. Szoltes vs. Slovakia case<sup>1573</sup>).

Although the new law is quite clear on this question there was still recent case where courts addressed exactly this question. However after few appeals the final decision of the appellate court (14Co/392/2011<sup>1574</sup>) clearly stated that the liability lies within the publisher where the formal type of the cooperation with author of the certain article is irrelevant if the publisher still had actual powers to change or refuse to publish offered piece of work.

## **6. Conclusion and perspectives**

As revealed in several studies (mediadem case study report 2011<sup>1575</sup>, EP study 2012<sup>1576</sup>, VIA IURIS project<sup>1577</sup>) in the past Slovak journalists long suffered from incoherent approach of courts towards freedom of expression that seemed to clearly prefer personal rights over the freedom of media. This approach was by ECHR even named as the doctrine of "truthfulness of information" and best described in decision (Szoltes vs. Slovakia<sup>1578</sup>):

*"The Court notes in particular that it was mainly with a view to establishing the truthfulness of the factual basis of the article and its repercussions for D.'s good name and reputation that the domestic courts took and assessed evidence and drew conclusions...In other words, although the applicant argued that the article related to a matter of public concern (see paragraph 26 above), no evidence appears to have been taken or assessed, and no specific conclusions appear to have been drawn in respect of that argument; neither does any judicial attention appear to have been given to the presence or*

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<sup>1573</sup> [http://hudoc.echr.coe.int/eng?i=001-127115#{"itemid":\["001-127115"\]}](http://hudoc.echr.coe.int/eng?i=001-127115#{).

<sup>1574</sup> <http://otvorenesudy.sk/decrees/738758>.

<sup>1575</sup> <http://www.mediadem.eliamep.gr/wp-content/uploads/2012/01/Slovakia.pdf>.

<sup>1576</sup>

[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462467/IP-OL-LIBE\\_ET%282012%29462467%28A-NN-02%29-EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462467/IP-OL-LIBE_ET%282012%29462467%28A-NN-02%29-EN.pdf).

<sup>1577</sup> [http://www.viaiuris.sk/stranka\\_data/subory/analyzy/bsudy.pdf](http://www.viaiuris.sk/stranka_data/subory/analyzy/bsudy.pdf).

<sup>1578</sup> [http://hudoc.echr.coe.int/eng?i=001-127115#{"itemid":\["001-127115"\]}](http://hudoc.echr.coe.int/eng?i=001-127115#{).

*absence of good faith on the part of the applicant, the aim pursued by him in publishing the article, or any other criteria relevant to the assessment of the applicant's compliance with his "duties and responsibilities" within the meaning of Article 10 § 2 of the Convention."*

The findings of this report however shows that there is rather considerable shift in the court's approach. Several decisions from the previous part of the report clearly indicate that especially the Constitutional Court lays great emphasis on the cautious assessment of all aspects of the freedom of media cases. The impact of the Constitutional Court's case law is however not immediate. As many examples pointed out the "road to success" may have rather exhausting duration and it regularly involves experience on every court's instance.

The inappropriate (or sometimes unacceptable) length of the whole proceeding so vividly displayed e.g. by the example of the NBU administrative fine (the case is not finished for more than 8 years now) is unfortunately not the only remaining problem. The report clearly demonstrates that apart of few institutes the legislation or state regulation contain serious lacks on detailed regulation of several significant aspects of the day-to-day journalistic work. While the policy to intentionally leave certain details unregulated by legal norms and let courts or other public institutions fill in the gaps may be perfectly reasonable the fact that any state institution (including courts) do not collect and publish (with reasonable promotion) detailed guidelines based on the relevant case law or even address the key issues in its decision certainly generates some concerns.

The arguably weak influence (see for instance mediadem case study report 2011<sup>1579</sup>, EP study 2012<sup>1580</sup>) of the major journalistic self-regulatory body only aggravates the issue. With the lack of the effort on the side of the state the expectation for a strong reaction from the industry itself seems as a reasonable assumption. However to be truly able to substitute the determination of the public institutions in this matter the self-regulatory body has to possess great influence and undisputed position among journalists themselves. However this cannot be achieved without honest and perpetual moral as well as material support from the journalists, publishers, broadcasters and any other players in the market. Without such support the research and the debate (besides few outstanding projects of

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<sup>1579</sup> <http://www.mediadem.eliamep.gr/wp-content/uploads/2012/01/Slovakia.pdf>.

<sup>1580</sup> [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462467/IPOL-LIBE\\_ET%282012%29462467%28ANN0 2%29\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462467/IPOL-LIBE_ET%282012%29462467%28ANN0 2%29_EN.pdf).

several NGOs' e.g. VIA IURIS project<sup>1581</sup>) on key and vital issues remains shallow and general. This seems as a great missed opportunity especially when the report indicates considerable number of relevant decisions that could definitely serve as a solid foundation for a more detailed debate.

Evident example of the situation where the debate remained only on the surface is the already mentioned Szoltes vs. Slovakia<sup>1582</sup> case where journalist was ordered to pay large compensations for the interference with the personal rights of the claimants. The main argument of Slovak courts was the publishing of an untrue information about the existence of the police recording which affiliate claimant with murder case with alleged politic subtext. Journalist relied in this case on written statement of police investigator that he saw this recording in the police file while in front of the court journalist failed to prove that such recording ever existed.

While this case being rightfully displayed on various forums as the example of the courts' substantial failure to respect the principals set out by ECHR the actual decision also contains other worth to mention part on the government's submissions within the proceedings:

*"...the decisive criterion was whether there were any specific grounds on which the applicant should have been exempted from the obligation to verify the information obtained from its source. For the assessment of the case under that criterion the following elements were of relevance: what was the authority of the applicant's source; had the applicant carried out a reasonable amount of research before publication; did the article present the story in a reasonably balanced manner; and were the individuals concerned given the opportunity to defend themselves...As regards any independent research, the applicant himself had admitted that he had relied only on the information from C...Moreover, in the Government's submission the applicant's article was not balanced, he had failed to seek comments from those concerned, and he had unnecessarily identified D. by his full name. In conclusion, according to the Government, the applicant had failed to comply with the duties and responsibilities inherent in his profession of journalism."*

The fact that these submission represented reasonable and to case relevant argumentation was not disputed by the ECHR but as stated in the decision these criteria were not elaborated at all in the actual decision of domestic courts

*"The Court cannot fail to acknowledge the pertinence from the Convention point of view of the arguments and considerations*

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<sup>1581</sup> [http://www.viaiuris.sk/stranka\\_data/subory/analyzy/bsudy.pdf](http://www.viaiuris.sk/stranka_data/subory/analyzy/bsudy.pdf).

<sup>1582</sup> [http://hudoc.echr.coe.int/eng?i=001-127115#{itemid:\[001-127115\]}](http://hudoc.echr.coe.int/eng?i=001-127115#{itemid:[001-127115]}).

*proposed for the assessment of the present case by the Government (see paragraph 37 above). It notes however that these arguments and considerations are factually and legally somewhat different from those entertained by the domestic courts.”*

Even though the assessment of abovementioned criteria seems crucial for setting the proper boundaries for the future work of journalists in almost two years since the publishing of the decision there was no effort from any subjects active in public debate to at least acknowledge that this case contains also other elements that deserve and shall be resolved.

According to the author all of these findings confirm the pressing need of a joint effort from all involved subjects to find, identify, elaborate key aspects of the (investigative) journalistic work and potentially create comprehensive and detailed guidelines that would support and inspire the determination to report on the matters of public interest.



## **29. Turkey**

Olgun Akbulut



## 1. Questions 1. – 2.

### *Confidentiality Law*

Provisions in Turkish domestic law concerning confidential information/documents and the punishment upon their publication can be found in the Turkish Criminal Code.<sup>1583</sup>

#### *The utilisation of illegally/improperly obtained information*

The Turkish Criminal Code regulates the issue of secret state papers, business/trade secrets, or other type of breaches of confidence in various provisions. Access to and holding and disclosure of confidential state papers or information relating to public safety are regulated with high penalties by the Criminal Code.

Article 326 of the Code, under the title of “Disclosure of information relating to Public Security and political interests of the State” reads:

*“Any person who discloses secret information, especially about the Public security or domestic and foreign political interest of the State, is sentenced to imprisonment from five years to ten years.*

*If the offense is committed during war time, or puts the war preparations, or fighting power, or military movements of the Government in jeopardy, the offender is punished with imprisonment from ten years to fifteen years.*

*If the commission of offense is bound to negligence of the offender, offense by risking the war preparations, or fighting power, or military movements of Government, the offender is sentenced to heavy life imprisonment.”*

The crime of disclosing of confidential information is regulated in the following provision. Article 327 reads:

*“Any person who discloses confidential, especially about the Public security or domestic and foreign political interest of the State with the intention of spying on political and military affairs, is sentenced to life imprisonment. (2) If this offense is committed during war time, or puts the war preparations, or fighting power, or military movements of the Government in jeopardy, the offender is punished with heavy life imprisonment.”*

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<sup>1583</sup> Despite some mistakes, the following English version of the Turkish Criminal Code can be helpful: “Criminal Code Law No 5237”, Passed On 26.09.2004 (Official Gazette No. 25611 dated 12.10.2004), see <http://www.wipo.int/edocs/lexdocs/aws/en/tr/tr113en.pdf> (accessed on 30 July 2015).

The Code separately criminalizes the access to and disclosure of restricted information in Article 331 which reads:

*“Any person who gets secret information of which the disclosure is restricted pursuant to the laws and regulations of the competent authorities, is punished with imprisonment from one year to three years.*

*If this offense puts the war preparations, or fighting power, or military movements of the Government in jeopardy, the offender is sentenced to imprisonment from five years to ten years.”*

And the Article 333 on disclosure of restricted information reads:

*“Any person who publicizes information of which disclosure is restricted pursuant to the laws and regulations of the legislative authorities due to confidentiality, is punished with imprisonment from three years to five years.*

*If the offense is bound to negligence of the offender, the offender is punished with imprisonment from six month to two years in the event mentioned in first subsection: As for the case mentioned in the second subsection, punishment of imprisonment from three years to eight years is to be imposed on the offender.”*

Holding documents relating to public security is also regulated under Article 336 of the Code, which reads:

*“Any person who keeps information of which disclosure is restricted pursuant to the laws and regulations of the legislative authorities due to confidentiality, or is caught with documents containing such information where no acceptable reason could be shown for such hold, is punished with imprisonment from one year to five years.*

*If the offense is committed during war time, the offender is punished with imprisonment from three years to eight years.”*

The provisions listed above are placed under the section of the Code, which deals with the crimes against state secrets and the crime of spying. On the other hand, violation of business, banking and other type of commercial secrets are regulated in another section dedicated to the crimes committed in industrial, economical and business areas.

Article 239 of the Code under the title of “Disclosure of business secrets, banking secrets or information relating to customers” reads:

*“Any person who delivers information or documents which he holds by virtue of office about the customers, or discloses business secrets, banking secrets loc is sentenced to imprisonment from one year to three years, and also imposed punitive fine up to five thousand days upon complaint. In case of delivery or disclosure of this information*

*or documents to unauthorized individuals by the persons who unlawfully acquired such information/documents, the offender is punished according to the provision of this subsection.*

*Provisions of first subsection are applicable also for the information relating to scientific researches or discoveries or industrial practices.*

*Punishment to be imposed is increased by one third in case of disclosure of these secrets to the foreigners or their personnel domiciled outside of Turkey. In that case, no complaint is sought.*

*Any person who leads another person to disclose the information or documents within the scope of this article by using force or threat is punished with imprisonment from three years to seven years."*

The Code in Article 132 to 134, under the section of crimes against private life and privacy, is criminalizing the violation of communicational secrecy. The Article 132 reads:

*"Any person who violates secrecy of communication between the parties is punished with imprisonment from six months to two years, or imposed punitive fine. If violation of secrecy is realized by recording of contents of communication, the party involved in such act is sentenced to imprisonment from one year to three years.*

*Any person who unlawfully publicizes the contents of communication between the persons is punished with imprisonment from one year to three years.*

*Any person who openly discloses the content of the communication between himself and others without obtaining their consent, is punished with imprisonment from six months to two years,*

*The punishment determined for this offense is increased by one half in case of disclosure of contents of communication between the individuals through press and broadcast."*

In Article 133 of the Code, all forms of tapping and recording of conversations between the individuals are prohibited. The Article reads as follows:

*"Any person who listens non general conversations between the individuals without the consent of any one of the parties or records these conversations by use of a recorder, is punished with imprisonment from two months to six months.*

*Any person who records a conversation in a meeting not open to public without the consent of the participants by use of recorder, is punished with imprisonment up to six months, or imposed punitive fine.*

Any person who derives benefit from disclosure of information obtained unlawfully as declared above, or allowing others to obtain information in this manner, is punished with imprisonment from six months to two years, or imposed punitive fine up to thousand days.”

In addition to the tapping and recording of conversations of private persons, Article 134 of the Code also criminalizes other possible forms of violation of privacy. The Article reads:

*“Any person who violates secrecy of private life, is punished with imprisonment from six months to two years, or imposed punitive fine. In case of violation of privacy by use of audio-visual recording devices, the minimum limit of punishment to be imposed may not be less than one year.*

*Any person who discloses audio-visual recordings relating to private life of individuals are sentenced to imprisonment from one year to three years. In case of commission of this offense through press and broadcast, the punishment is increased by one half.”*

Under Turkish Criminal Code, delivery and acquisition of illegally obtained data in any means is also punished. The Article 136 of the Code reads:

*“Any person who unlawfully delivers data to another person, or publishes or acquires the same through illegal means is punished with imprisonment from one year to four years.”*

The law laying down limitations for the law enforcement concerning their activities on surveillance of journalistic activities is the Criminal Procedure Law. Under Turkish legal system, legal guarantees against public authorities in their actions are regulated as procedural guarantees. When law enforcement interferes the private activities of persons, constitutional rights, e.g. freedom of expression, freedom of press, fair trial rights, are protected first of all through criminal procedure law. In case of crimes committed under the scope of Anti-Terror Law, special procedures regulated in this law would apply.

Turkish Criminal Procedure Code has an extensive article on the location, listening and recording of correspondence of private persons. The Article 135 of the Code reads as follows:

*“The judge or, in cases of peril in delay, the public prosecutor, may decide to locate, listen to or record the correspondence through telecommunication or to evaluate the information about the signals of the suspect or the accused, if during an investigation or prosecution conducted in relation to a crime there are strong grounds of suspicion indicating that the crime has been committed and there is no other possibility to obtain evidence. The public prosecutor shall submit his decision immediately to the judge for his approval and the judge shall*

*make a decision within 24 hours. In cases where the duration expires or the judge decides the opposite way, the measure shall be lifted by the public prosecutor immediately.*

*The correspondence of the suspect or the accused with individuals who enjoy the privilege of refraining from testimony as a witness shall not be recorded. In cases where this circumstance has been revealed after the recording has been conducted, the conducted recordings shall be destroyed immediately.*

*The decision that shall be rendered according to the provisions of paragraph one shall include the nature of the charged crime, the identity of the individual, upon whom the measure is going to be applied, the nature of the tool of communication, the number of the telephone, or the code that makes it possible to identify the connection of the communication, the nature of the measure, its extent and its duration. The decision of the measure may be given for maximum duration of three months; this duration may be extended one more time. However, for crimes committed within the activities of a crime organization, the judge may decide to extend the duration several times, each time for no longer than one month, if deemed necessary.*

*The location of the mobile phone may be established upon the decision of the judge, or in cases of peril in delay, by the decision of the public prosecutor, in order to be able to apprehend the suspect or the accused. The decision related to this matter shall include the number of the mobile phone and the duration of the interaction of locating (the establishment). The interaction of locating shall be conducted for maximum of three months; this duration may be extended one more time.*

*Decisions rendered and interactions conducted according to the provisions of this article shall be kept confidential while the measure is pending.*

*The provisions contained in this article related to listening, recording and evaluating the information about the signals shall only be applicable for the crimes as listed below:*

- *The following crimes in the Turkish Criminal Code;*
  - a) *Smuggling with migrants and human trafficking (Articles 79, 80),*
  - b) *Killing with intent (Articles 81, 82, 83),*
  - c) *Torture (Articles 94, 95),*
  - d) *Sexual assault (Articles 102, except for subsection 1),*
  - e) *Sexual abuse of children (Article 103),*

- f) *Producing and trading with narcotic or stimulating substances (Article 188),*
- g) *Forgery in money (Article 197),*
- h) *Forming an organization in order to commit crimes (Article 220, except for subsection 2, 7 and 8),*
- i) *Prostitution (Article 227, subparagraph 3),*
- j) *Cheating in bidding (Article 235),*
- k) *Bribery (Article 252),*
- l) *Laundering of assets emanating from crime (Article 282),*
- m) *Armed criminal organization (Article 314) or supplying such organizations with weapons (Article 315),*
- n) *Crimes against the secrets of the state and spying (Articles 328, 329, 330, 331, 333, 334, 335, 336, 337),*
- *Smuggling with guns, as defined in Act on Guns and Knives and other Tools (Article 12),*
- *The crime of embezzlement as defined in Act on Banks (Article 22, subparagraphs 3 and 4),*
- *Crimes as defined in Combating Smuggling Act, which carry imprisonment as punishment,*
- *Crimes as defined in Act on Protection of Cultural and Natural Substances (Articles 68 and 74),*

*No one may listen and record the communication through telecommunication of another person except under the principles and procedures as determined in this Article.”*

This Article, among others, limits the possibility of interference in private persons' communication when there are strong grounds of suspicion indicating that any of the crimes listed under paragraph six of the Article has been committed. In addition to this condition, there should be no other possibility to obtain evidence that recording someone's communication during an investigation or prosecution can be decided by a judge. When irrevocable situations occur, the public prosecutor may also decide the location, listening and recording of correspondence.

The Anti-Terror Law in Article 6 and 14 also regulates the public officers' recording of the private communication under the scope of this law. Article 6 under the title "Disclosure and publication" reads as follows:

*“Those who announce that the crimes of a terrorist organization are aimed at certain persons, whether or not such persons are named, or who disclose or publish the identity of officials on anti-terrorist duties,*

*or who identify such persons as targets shall be punished with imprisonment from one to three years.*

*Those who print or publish leaflets and declarations of terrorist organizations which legitimizes or promotes the coercion, violence or threat shall be punished with imprisonment from one to three years.*

*Those who, in contravention of Article 14 of this law, disclose or publish the identity of informants shall be punished with imprisonment from one to three years.*

*If any of the offences indicated in the paragraphs above are committed by means of mass media, editors-in-chief (...) who have not participated in the perpetration of the crime shall be punished with a judicial fine from one thousand to five thousand days' rates."*

Article 14 of the Anti-Terror Law under the title "Non-disclosure of the identity of informants" reads:

*"The identity of those providing information about crimes or criminals within the scope of this law shall not to be disclosed, unless the informant has given permission or the nature of the information constitutes a crime by the informant."*

The same subject is also regulated in Article 25 of the Press Law. Under the Article, in order to keep as an evidence for the investigation and prosecution, public prosecutor or in case of peril the law enforcement can confiscate three copies of published materials.

### **3. Reporting about on-going investigations**

#### **a) Reporting the criminal investigations**

One of the highly disputed issues concerning investigative journalism is the limits on reporting the on-going criminal and political investigations. Under Turkish Criminal Law, ongoing criminal investigations are confidential. Until the prosecutor prepares an indictment criminal investigations are closed to public.

Confidentiality of criminal investigations is regulated in Article 285 of the Turkish Criminal Code. The Article states that:

*"Anyone who publicly breaches the confidentiality of an investigation shall be sentenced to a penalty of imprisonment for a term of one to three years or judicial fine. For the commitment of this crime following criteria must be met:*

*(1) violating the right to benefit from the presumption of innocence, confidentiality of communication, or right to privacy by explaining the content of the actions taken during the investigatory stage.*

*(2) the explanations about the actions taken during the investigatory*

*stage must be eligible to prevent the uncover the material reality.*

*Any person who breaches the confidentiality of the judicial decisions and actions taken accordingly against the parties of the investigation during the investigatory stage shall be sentenced to imprisonment for a term of one year to three years.*

*Any person who publicly breaches the confidentiality of the images of the hearing held closed to public according to law or judicial decision shall be penalized according to the first paragraph. However, for the commitment of this crime, publicly breach shall not be needed in case of a breach of the confidentiality decision for the protection of the witness. Where this offence is committed through the press or broadcasting the penalty shall be increased by one half.*

*In case of a commitment of the above crimes by a public employee through misusing the possibility of holding an official position, the punishment shall be increased half.*

*Where, at the stage of investigation or prosecution, any persons' image is broadcast in a way which could give the impression that they are guilty of an offence a penalty of imprisonment for a term of six months to two years shall be imposed."*

This Article intended to ensure the effective administration of justice by providing principles of fairness and access to facts, protection for officials charged with investigation and prosecution and to prevent the infringement of the presumption of innocence.<sup>1584</sup>

The above text of the Article 285 is the latest version of the provision as of 2012. The changes in the Article arrived following the disharmony found with the judgments of the European Court of Human Rights. The concept of confidentiality of investigation was defined in the new Article, and unlike with the previous version, judicial fines were regulated as an alternative sanction alongside imprisonment. Furthermore, aggravated punishment for journalists was abolished and it was clarified that reporting investigation and prosecution proceedings would not constitute the offence as long as the bounds of imparting information were not exceeded.<sup>1585</sup>

Journalists investigating the judicial investigations and court proceedings regularly face with judicial prosecutions on the base of two more provisions under the Turkish Penal Code. Article 384 under the title "Recording of

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<sup>1584</sup> Mehmet Yavuz, "Compliance of Articles 285 and 288 of Turkish Penal Code with the European Convention on Human Rights", Human Rights Review, Vol. IV, 2014, p. 190.

<sup>1585</sup> Ibid, 195.



sound or vision” prohibits the transfer of sound or vision during the investigation or prosecution:

*“Any person who records or transfers sound or vision during the investigation or prosecution without obtaining permission is sentenced to imprisonment up to six months.”*

The Article 288 of the Code criminalizes any type of public statements aiming to influence judicial process. The Article under the title “Attempt to influence a just trial” reads:

*“Any person, who makes a public statement, oral or written, with the aim of unlawfully influencing jurist, expert witness or witness in order to make them render an unlawful decision or make false statement during a pending case or an investigation, shall be subject to a judicial fine of no lower than fifty days.”*

This Article serves as a legal basis for many investigations launched against journalists. The reason of these investigations was mainly the vagueness of the term “influence” in the article.<sup>1586</sup> Similar provisions can be found in other legal systems but a fair balance has to be struck between freedom of expression and the protection of fair trial rights. The limit between journalistic freedom and influencing judiciary cannot be said to be clearly defined by the courts in Turkey.

The difference between Article 285 and 288 is the intention needed for the commitment of the crime in Article 288. The perpetrator must commit his act ‘with the intention of making jurists give an unlawful decision or making expert witness or witness make a false statement’.<sup>1587</sup>

Considering the above limitations regarding the reporting of ongoing investigations, prosecutions and hearings, the only provision that could balance them is the Article 28/5 of the Constitution. Article 28/5 reads:

*“No ban shall be placed on the reporting of events, except by the decision of judge issued to ensure proper functioning of the judiciary, within the limits specified by law”.*

Lastly, victims of reporting always have a right of reply and correction. Article 14 of the Press Law protects the honour of individuals against untrue news. Criminal courts are empowered to decide the new text for correction. Publication houses have to publish the new text as issued by the court.

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<sup>1586</sup> Ibid, 200.

<sup>1587</sup> Ibid, 203.

## b) Reporting the political investigations

Political investigations, known as parliamentary investigations, are regulated in the Constitution<sup>1588</sup>. Under Turkish constitutional system, parliamentary investigation concerning the Prime Minister or other ministers may be requested through a motion tabled by at least one-tenth of the total number of members of the Turkish Parliament. In the event of a decision to initiate an investigation, this investigation shall be conducted by a parliamentary commission. Following the Commission's submission of its report to the Parliament, the report will be distributed to the members of the Parliament for a debate. The Parliament may decide in a secret ballot to bring the person involved before the Supreme Court. Political party groups in the Assembly shall not hold discussions or take decisions regarding parliamentary investigations.<sup>1589</sup>

Reporting the parliamentary investigation process has also been a legal issue in the country. In late 2014, the Turkish Constitutional Court approved a judicial ban on reporting the parliamentary investigation process against four ex-ministers. The Court based its judgment on the right to privacy of the ministers.<sup>1590</sup> After this judgment, it has become clear

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<sup>1588</sup> "Parliamentary Investigation", see: <https://global.tbmm.gov.tr/index.php/EN/ycerik/37> (accessed on 30 July 2015).

<sup>1589</sup> Full text of the Article 100 of the Constitution about Parliamentary investigations reads as follows: "Parliamentary investigation concerning the Prime Minister or other ministers may be requested through a motion tabled by at least one-tenth of the total number of members of the Turkish Grand National Assembly. The Assembly shall consider and decide on this request with a secret ballot within one month at the latest. In the event of a decision to initiate an investigation, this investigation shall be conducted by a commission of fifteen members chosen by lot on behalf of each party from among three times the number of members the party is entitled to have on the commission, representation being proportional to the parliamentary membership of the party. The commission shall submit its report on the result of the investigation to the Assembly within two months. If the investigation is not completed within the time allotted, the commission shall be granted a further and final period of two months. At the end of this period, the report shall be submitted to the Office of the Speaker of the Turkish Grand National Assembly. Following its submission to the Office of the Speaker of the Turkish Grand National Assembly, the report shall be distributed to the members within ten days and debated within ten days after its distribution and if necessary, a decision may be taken to bring the person involved before the Supreme Court. The decision to bring a person before the Supreme Court shall be taken by a secret ballot only by an absolute majority of the total number of members. Political party groups in the Assembly shall not hold discussions or take decisions regarding parliamentary investigations."

<sup>1590</sup> Turkish Constitutional Court, Individual Application No: 2014/18803, Judgment of 10.12.2014.

that journalistic freedom may work until a court decides a ban on publishing the content and the identity of the parties of an ongoing political investigation at the parliament.

#### **4. Due diligence guidelines for journalists**

The existing legal criteria, in other words legal guidelines for journalists in reporting the truth are formulated by the criminal law branches of the Court of Cassation in Turkey. According to the established jurisprudence of the Court of Cassation, the news have to be up-to-date and real; there has to be a public and societal interest for the publication; and, a causal link and proportionality should exist between the subject and its expression.<sup>1591</sup> Later on, this formulation to a great extent, is regulated by the Law on Radio and Television Broadcasts in Article 8(1).

Turkish Press Law gives the highest level of guarantee to journalists in terms of not declaring their source of journalistic material. Article 12 of the Press Law reads: "The owner, responsible manager and author of periodic publications shall not be forced to declare their source of news including any information or documents or act as a witness".

Concerning the anonymisation or elimination of identification characteristics – blurred or pixelated photographs, Turkish law covers the area in different acts. Turkish Criminal Procedure Code Article 183 under the title "Ban of using voice and vision recording devices" reads as follows:

*"... it is forbidden to use in the justice building and after the main hearing has started within the court room, any device that makes a voice or vision recording and transmits it. This provision shall also apply during the other judicial interactions enacted within the judicial building and outside of the building."*

Turkish Press Code in Article 21 also prohibits the publication of the identity of certain individuals. The Law categorizes these individuals into three. First of all, concerning the news related to sexual relationship, the Law prohibits the publication of the identity of the individuals among whom marriage is prohibited under Turkish Civil Code. Secondly, the Law prohibits the declaration of the identity of the victims of the crimes committed against the minor people and women. And thirdly, the identity of the victims or perpetrator under the age of 18 shall not be made public.

#### **5. Liability in the editorial chain**

In Turkish Law liability is asserted to different persons within the editorial

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<sup>1591</sup> *Kayhan İçel and others*, Suç Teorisi [Theory of Crime], Beta yay, İstanbul, 2004, p. 170-172.

chain of newspapers and newsmagazines. In terms of criminal responsibility Article 11 of the Press Law regulates the responsible person(s) in details. According to this provision, primary criminal responsibility is imposed on the author. In case the author is not known or accessible, responsible manager or those responsible with his actions are under the criminal responsibility.

For the non-periodical publications, in case of an unknown author, criminal responsibility is imposed on the publisher.

From the perspective of civil law responsibility, Article 13 of the same Law regulates the responsible individuals for the pecuniary and non-pecuniary damages that may come out due to an illegal publication. Author and the publisher are jointly responsible for the both periodical and non-periodical publications. In case the publisher is a legal person, head of the administrative board or high level managers are the responsible persons together with the publishing company.

## **6. Conclusion and perspectives**

Currently, Turkish judicial system works under a huge political pressure in the country. Government's reaction to the conflicting judgments of the courts has been to support the judgments they like and heavily criticize those ones that found the administrative and judicial practices unlawful. This approach paves the way for the journalist to publish documents under the protection of above legislation as long as the publication politically supports the government policies. While pro-government media outlets are provided an extra-legal space in their work, critical media is disturbed with judicial proceedings on the basis of the rules listed in this report.

It's almost unanimously agreed that legal framework and its application is the key obstacle before the journalistic freedom in Turkey.<sup>1592</sup> However, from pure legal point of view, all the legal rules listed in this report should be interpreted under the light of freedom of expression as enshrined in the European Convention on Human Rights and the judgments of the European Court of Human Rights. The Turkish Constitution includes a dedicated provision on the status of international human rights instruments in the hierarchy of legal norms. Article 90, paragraph 5 of the Constitution reads as follows:

"International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental

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<sup>1592</sup> *Marc Pierini, Markus Mayr, Press Freedom in Turkey, Carnegie Europe, 2013, p. 7-8.*

rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”

The last sentence of the above provision refers to the international human rights conventions. This sentence was added to Article 90/5 by means of a constitutional amendment in 2004. The aim of this change was to make international human rights law directly applicable in Turkish domestic law in order to solve the ongoing disharmony between these two bodies of law.<sup>1593</sup>

Despite the constitutional rule, vague terms in the legal provisions together with the government pressure over the judicial organs result with the narrow interpretation of the rights devoted for journalistic freedom. At the end, domestic law falls short of international human rights standards. In a country where the high courts had difficulties addressing human rights violations from a liberal perspective, the ECtHR has turned into a supreme court providing redress to victims. Since the Convention system is seen as the system of ideals for a society to reach, the ECtHR precedents in the cases against Turkey are also welcomed by the media, academia, politics and so on. The main stream media and press present a supportive and encouraging view to the ECtHR. Polemical language is almost non-existent in the news concerning the ECtHR.

In 2010 with another constitutional amendment package, the Parliament introduced individual complaint procedure to the Turkish Constitutional Court. From its inception, the current Constitution of Turkey empowered the Turkish Constitutional Court (TCC) with abstract review of statutory norms, concrete review of statutory norms, dissolution of or deprivation of financial aid for political parties, trial of statesmen.<sup>1594</sup> In 2010, through a constitutional amendment package, Turkish Parliament empowered the TCC to deal with constitutional complaints. Jurisdiction of the Court *ratione materiae* comprises the fundamental rights which are regulated by both the Constitution and the European Convention on Human Rights.

The reasoning of the Constitutional amendment states:

“When European Court of Human Rights investigates if the domestic remedies are exhausted, it also considers if there exists an establishment for individual application and counts it as an effective remedy in eliminating violations of rights. For this reason, it is expected that, for those who claim being subjected to violations of

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<sup>1593</sup> *Olgun Akbulut*, “Interaction Between International Human Rights Law and Turkish Domestic Law”, *Humanities and Social Sciences Review*, Vol. 2, 2013, p. 100.

<sup>1594</sup> *Ibid.*

their fundamental rights, with the possibility of individual application, there will be a remedy of satisfaction at the domestic level through individual application before going to the European Court of Human Rights; thus, there will be a decrease in the number of cases opened and decisions made against Turkey. Establishment of effective means of individual application in Turkey will raise the standards lying in the core of supremacy of laws and rights.”<sup>1595</sup>

The TCC started receiving individual applications in September 2012. The ECtHR, in its judgment delivered on 30 April 2013, found that the procedure before the TCC afforded, in principle, an appropriate mechanism for the protection of human rights and fundamental freedoms.<sup>1596</sup> The constitutional complaint procedure opened a new era in the history of the TCC. For the first time the TCC appeared as the guardian of fundamental rights and freedoms.

In its 2013 progress report, the EU Commission stated that the TCC ‘delivered a number of important decisions aligning itself with the approach of the European Court of Human Rights’.<sup>1597</sup> The Commission stated that the decisions of the TCC concerning individual applications safeguarded and strengthened the protection of fundamental rights and freedoms and opened way for re-trials in a number of high profile cases.<sup>1598</sup>

The Turkish Constitutional Court lifted the government bans on social media sites (e.g., twitter and youtube) in 2014.<sup>1599</sup> Since then, the TCC found itself in the middle of a battle launched by the government. The then Prime Minister Erdoğan accused the President of the TCC of being either part of what he calls the parallel illegal structure within the state or of protecting it for his future personal ambitions.<sup>1600</sup>

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<sup>1595</sup> Türkiye Cumhuriyeti Anayasası - Madde Gerekeçeli [Constitution of the Republic of Turkey with the Reasonings of the Provisions] (TBMM publications 2011), p. 295.

<sup>1596</sup> Hasan Uzun v Turkey, Application No: 10755/13 (admissibility decision of 30 April 2013).

<sup>1597</sup> Turkey 2013 Progress Report, “Commission Staff Working Document”, (SWD (2013) 417, Brussels 16 October 2013), p. 63.

<sup>1598</sup> Turkey 2014 Progress Report, “Commission Staff Working Document”, (SWD (2014) 307, Brussels 08 October 2014), p. 45.

<sup>1599</sup> Turkish Constitutional Court, “Twitter Case”, Application No: 2014/3986, Judgment of 02 April 2014; “Youtube Case”, Application No: 2014/4705, Judgment of 28 May 2014.

<sup>1600</sup> “Turkish PM indirectly slams top judge of protecting the ‘parallel gang’”, Hurriyet Daily News, (27 April 2014), see [www.hurriyetdailynews.com/turkish-pm-indirectly-slams-top-judge-of-protecting-the-parallel-gang.aspx?pageID=238&nID=65631&NewsCatID=338](http://www.hurriyetdailynews.com/turkish-pm-indirectly-slams-top-judge-of-protecting-the-parallel-gang.aspx?pageID=238&nID=65631&NewsCatID=338) (accessed 10 May 2015).

One can argue that journalistic freedom can receive protection from a brave constitutional court in Turkey; however, it's still early to decide whether the constitutional court will be able to follow the jurisprudence of the ECtHR in all the cases pending before it. When a criminal court in Ankara issued a decision to ban on all type of media outlets from publishing any documents about the content of a Parliamentary Investigation Commission working on a bribery investigation against four ministers, the TCC approved the ban on the basis of right to privacy of ministers. This judgment came when the TCC was started being seen as the guarantor of the freedom of expression in the country.

To sum up, Turkey's legal barriers against investigative journalism reduce the democratic image of the country to the level of Russia and China. Only very brave journalists by putting their freedom and position at risk can dare to investigate and report the issues that can be offensive for the government.

## **30. United Kingdom**

Lorna Woods



## 1. Relevant Legislation and Case-law

### *Constitutional provisions*

The UK does not have a formal constitutional document. Nonetheless, human rights are protected via the Human Rights Act (HRA), which incorporates the European Convention on Human Rights (ECHR) and which the current Government apparently wishes to repeal. Legislation and sub-ordinate legislation is to be 'read and given effect in a way which is compatible with the Convention rights'.<sup>1601</sup> The HRA puts an obligation on the courts to 'take into account' not only the text of the ECHR, but also the rulings of the Convention court.<sup>1602</sup> Public authorities are to act in a way compatible with Convention rights<sup>1603</sup> and the meaning of 'public authority' includes the courts. No particular status is accorded to journalists or investigative journalism per se, the HRA pays particular attention to freedom of expression. Section 12 HRA provides that:

- special regard is to be had to the right of freedom of expression in any case where it is in issue, and
- 'where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
  - (a) the extent to which—
    - (i) the material has, or is about to, become available to the public; or
    - (ii) it is, or would be, in the public interest for the material to be published;
  - (b) any relevant privacy code'.<sup>1604</sup>

Section 12 also contains provisions relating to injunctive relief. It provides:

- "(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—*
- (a) that the applicant has taken all practicable steps to notify the respondent; or*
  - (b) that there are compelling reasons why the respondent should not be notified.*

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<sup>1601</sup> Section 3 HRA.

<sup>1602</sup> Section 2 HRA.

<sup>1603</sup> Section 6 HRA.

<sup>1604</sup> Section 12(4) HRA; for a discussion of the approach see eg. Barendt, E., 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998' (2009) 84 *Indiana Law Journal* 851.

- (3) *No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.*"

Additionally, it has been stated that respect for certain rights, including freedom of expression, forms part of the common law,<sup>1605</sup> although some commentators have noted that the right had not had a particularly high profile until the deliberations leading to the enactment of the HRA.<sup>1606</sup>

In *Campbell* we see the House of Lords drawing distinctions between different categories of speech,<sup>1607</sup> some – particularly political speech – being worthy of greater protection than others.<sup>1608</sup> This might give greater protection to investigative journalism. The importance of reporting was noted in *Jameel*,<sup>1609</sup> where again the House of Lords' reasoning was based on distinctions between types of speech.

The right to privacy is also protected by the same route: Article 8 has been incorporated via the HRA. There is no formal doctrine of privacy in English common law,<sup>1610</sup> though the idea that an Englishman's home is his castle is a truism.<sup>1611</sup> Because there is no overarching cause of action to protect privacy,<sup>1612</sup> the courts have developed this area in a piecemeal fashion, using doctrines such as property torts, confidentiality and the tort of the misuse of private information following the *Campbell* case.<sup>1613</sup> The Data Protection Act also affords some privacy protection. Following *Re S*, neither the right to freedom of expression, nor privacy have automatic

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<sup>1605</sup> *R v. Secretary of State for the Home Department* [2000] 2 A.C. 115 (H.L.); *Reynolds v. Times Newspapers Ltd.* [2001] 2 A.C. 127 (H.L.); *R v. Shayler* [2002] UKHL 11, [2003] 1 AC 247.

<sup>1606</sup> *Barendt, E.*, 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998' (2009) 84 *Indiana Law Journal* 851, p. 851, 854; *R (on the application of Laporte) v. Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55, [2007] 2 A.C. 105 (Lord Bingham).

<sup>1607</sup> *Campbell v. MGN Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457, 499.

<sup>1608</sup> *Ibid.*, see also *Belfast City Council v. Miss Behavin' Ltd.* [2007] UKHL 19, [2002] 1 W.L.R. 1420, 1426, para. 16.

<sup>1609</sup> *Jameel (Mohammed) v. Wall Street Journal Europe* [2006] UKHL 44, [2007] 1 A.C. 359.

<sup>1610</sup> *Home Office v Wainwright* concerning a strip search undertaken on the plaintiff while visiting prison.

<sup>1611</sup> *Entick v Carrington* (1765) 19 St Tr 1030 and more recently *AKJ v Commissioner of Police for the Metropolis* [2013] EWHC 32 (QB).

<sup>1612</sup> *Wainwright v Home Office* [2003] UKHL 53: the case did not involve the tension with freedom of expression. The matter ended up before the Strasbourg court where a violation of Article 8 on the facts was found.

<sup>1613</sup> See e.g. also *See also Douglas v Hello!*; *McKennitt v Ash*; *Lord Browne of Madingley v Associated Newspapers*; *Murray v Express Newspapers* [2008] EWCA Civ 446 [2009] Ch 281 *Donald v Ntuli* [2010] EWCA Civ 1276.

priority one over the other.<sup>1614</sup> It seems that the courts have developed a two-stage balancing test. This asks first whether Article 8 is engaged. Assuming the claimant has a reasonable expectation of privacy, the balance between privacy and freedom of expression is found through balancing in the light of a proportionality analysis<sup>1615</sup> and bearing in mind the obligations found in s.12. The wider public interest is taken into account.<sup>1616</sup> There is a “public interest” in exposing the truth and putting the record straight.<sup>1617</sup> Where the justification put forward for publication of personal information is that someone is guilty of hypocrisy in advocating a set of standards or aspirations and behaving differently, rather than making false factual statements, the outcome will depend on the particular circumstances.

### *General Law*

There is no general law regulating journalism, although broadcast journalism must comply with relevant codes: Ofcom Content Code and the BBC Editorial Guidelines. These cover both acquisition and dissemination of information. There is no definition of ‘investigative journalism’ so we end up with fact based assessments, often mediated through the concept of ‘public interest’. Compliance with a relevant code of conduct can be relevant in many assessments of ‘the public interest’ or ‘reasonableness’. Journalists must comply with law, though in some statutes there are ‘public interest’ exceptions. The difficulty is that the conception of the public interest may vary according to statute, or the existence of such a defence depend on how the offence is characterised (ie which piece of legislation is used).<sup>1618</sup>

## **2. Obtaining of information and boundaries of law enforcement**

### *Acquisition of Information*

Information from public bodies may be acquired under the *Freedom of Information Act*. The rights under the FOIA do not apply just to journalists. Freedom of information requests can also be made by organisations, for example a campaign group, or a company. There are limits to the right of access, notably information that it would be too expensive to produce, or

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<sup>1614</sup> Re S [2004] UKHL 47.

<sup>1615</sup> McKennit v Ash.

<sup>1616</sup> Campbell, para 149.

<sup>1617</sup> Campbell at paras 24, 58 and 151.

<sup>1618</sup> For a discussion see House of Lords Select Committee on Communications The Future of Investigative Journalism 3<sup>rd</sup> Report of Session 2010-2012, HL Paper 256, 16 February 2012, available at: <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/256.pdf>.

in response to a vexatious request. There are exemptions to the obligation to disclose, for example to information that is held in confidence or cannot be disclosed under other legislation. There are exemptions in respect of information for the security services,<sup>1619</sup> defence,<sup>1620</sup> international relations,<sup>1621</sup> relations between the home nations<sup>1622</sup> and the economy.<sup>1623</sup> Of note, is s. 35 which provides an exemption in respect of government policy. It is distinctive in that it is one of the exemptions subject to a public interest test (see also exemptions for investigations and law enforcement). In *R (on the application of Guardian News and Media Limited) v City of Westminster Magistrates' Court* the Guardian sought access to documents referred to in a deportation hearing. The judge refused on the basis that the FOIA granted exemption. On appeal, the Court of Appeal the argued:

"In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong."<sup>1624</sup>

The interpretation of s. 35 was in issue in *Department of Health v. Information Commissioner et al.*<sup>1625</sup> The case concerned the exemption of a minister's diaries as a class of content, rather than looking at the individual contents. The department argued that everything within a certain category of information should not be disclosed, rather than that harm lay in the disclosure of a specific document. Charles J rejected this approach [20]. The Government intends to review the FOIA.

The interception of communications is not permitted; unauthorised interception is a criminal offence, though this did not seem to be widely known or, if known, respected by some journalists. The relevant act was the *Regulation of Investigatory Powers Act* (RIPA), which provided limited exceptions for law and security forces to carry out such interception. Concerns about phone hacking led to the establishment by the London Metropolitan Police of a number of investigations: Operation Weeting, as regards phone hacking phone hacking (Operation Golding focussed specifically on hacking at the Daily Mirror); Operation Elveden, into illegal

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<sup>1619</sup> Ss 23 and 24 FOIA.

<sup>1620</sup> S. 26 FOIA.

<sup>1621</sup> S 27 FOIA.

<sup>1622</sup> S. 28 FOIA.

<sup>1623</sup> S. 29 FOIA.

<sup>1624</sup> *R (on the application of Guardian News and Media Limited) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, per Toulson LJ, para 85.

<sup>1625</sup> *Department of Health v. Information Commissioner et al* [2015] UKUT 159.

payments to public officials (see below); and Operation Tuleta, concerning alleged computer hacking (especially with regard to emails) and other criminal breaches of privacy not covered by the other two.<sup>1626</sup> The prosecutions have had variable results. The deputy editor of the News of the World was found not guilty of conspiracy charges, the jury seemingly believing that he had no idea that journalists were engaging in phone hacking.

Letters are also covered by RIPA.<sup>1627</sup> The theft of letters is also a crime, as is the theft of mobile phones and similar devices from which information may be obtained. From evidence given to the Leveson Inquiry, it appears that there was concern that mobiles and laptops were being stolen to order. A number of journalists were arrested for handling stolen goods as part of Operation Tuleta.<sup>1628</sup>

Journalists were also charged with computer hacking offences under the *Computer Misuse Act 1990* (CMA) following Operation Tuleta. According to s.1(1) CMA, the journalist "caused a computer to perform a function with intent to secure unauthorised access to a program or data held in a computer, knowing that such access was unauthorised". The first such case prosecuted concerned a former Sun reporter who had been given a 'found' mobile phone which had been lost at a night club from which he downloaded 'saucy' photographs of a BBC reporter. While the incident took place in 2009, he was not prosecuted until Operation Tuleta, approximately 4 years later. There has been no public statement (in terms of successful prosecutions) as to how successful Operation Tuleta was.

The NUJ Code of Conduct at clause 5 specifies that a journalist "Obtains material by honest, straightforward and open means, with the exception of investigations that are both overwhelmingly in the public interest and which involve evidence that cannot be obtained by straightforward means". It is hard to see that the phone hacking falls into this category. The Editors' Code deals with interception of communication directly, prohibiting it. Other subterfuge 'can generally be justified only in the public interest, and then only when the material cannot be obtained by other means'.<sup>1629</sup> According to the BBC, not only must deception be in the public interest but 'only likely to be acceptable when the material could not be obtained by any other means. It should be the minimum necessary and in proportion to the

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<sup>1626</sup> Northern Irish and Scots investigations also took place into email hacking: Operation KALMYK and operation Rubicon respectively.

<sup>1627</sup> S. 1(1) RIPA 2000.

<sup>1628</sup> S. 329(1) Proceeds of Crime Act 2002.

<sup>1629</sup> Editors' Code para 10.

subject matter'.<sup>1630</sup> Note that the Editors Codebook distinguishes between material which a journalist solicits and that which comes to the newspapers from a source: in that instance the newspaper might not be aware of the tainted nature of the source. (Note rules on confidentiality and the circumstances in which they arise, below).

The *Data Protection Act 1998* (DPA) in principle may affect the acquisition of information and its dissemination, although there is a broad exemption from many obligations for journalistic purposes.<sup>1631</sup> The exception has four elements:

- (1) the data is processed only for journalism, art or literature,
- (2) with a view to publication of some material,
- (3) with a reasonable belief that publication is in the public interest, and
- (4) with a reasonable belief that compliance is incompatible with journalism.

It is in the first place the role of the media to determine what is in the public interest. Note that the relevant regulatory codes of conduct could be relevant here. Following criticism by the Leveson Report, the ICO has now produced guidance on the application of the DPA for journalists.<sup>1632</sup>

Note, however, s. 55 DPA, which creates the offence of unlawfully obtaining personal data. The offence occurs when someone knowingly or recklessly obtains, discloses, or procures the disclosure of information about someone without the consent of the data controller responsible for that information. According to the ICO's guidance s. 55 offences could include obtaining information from another organisation by deception ('blagging'), hacking, exploiting poor security, via an unauthorised leak, or employing unscrupulous private investigators who use such methods. The journalistic exemption does not provide a defence for the offence, which may then affect the acquisition of information. While there is no specific journalism defence here, there is a general public interest defence to the s. 55 offence.

Operation Motorman was set up following an investigation into a private inquiry agent who had obtained information from the Police National Computer (PNC). As well as suggesting that there was a huge network of public officials selling information, journalists who bought the information were implicated – over 300 individual journalists. While the investigator pleaded guilty to offences under the DPA, the ICO was criticised for not

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<sup>1630</sup> BBC, Editorial Guidelines, para 6.4.17.

<sup>1631</sup> S 32 Data Protection Act 1998.

<sup>1632</sup> <https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf>.

investigating the matter thoroughly enough. The Leveson Inquiry revealed that the ICO was advised that journalists, who also engaged in blagging of information, were likely to have committed s. 55 offences. The ICO obtained legal advice which suggested the best course of action was not to prosecute:

"I understand that policy considerations [it should say] have led to their view [it should be 'the view'] that enforcement of some sort rather than prosecution is the way forward in respect of the journalists/newspapers."<sup>1633</sup>

According to the former deputy commissioner in the ICO, one consideration was the chilling effect on press freedom that the operation of data protection rules could have.<sup>1634</sup> Note that the predecessor provision to s. 55 was enacted in response to the intrusive behaviour of the press and the market in personal information.<sup>1635</sup> On inquiries linked to the Leveson Report see also Operation Elvedon below.

Should the police or security forces themselves seek to intercept communications with journalists using their powers under RIPA and now the *Digital Regulation of Investigatory Powers Act 2014* (DRIPA),<sup>1636</sup> this could give rise to serious concerns about confidentiality of sources. A judicial warrant is not required; authorisation by an officer within the same police force at the level of superintendent or above suffices. Last year concerns arose over the police over-use of the provisions, which included use of RIPA in relation to journalists and their sources, some of which appeared politically motivated in cases involving cabinet ministers.<sup>1637</sup> An inquiry by the then Interception of Communications Commissioner, Sir Paul Kennedy, suggested that judicial authorisation should be required even in the case of communications data.<sup>1638</sup> Currently a case is pending

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<sup>1633</sup> Leveson Report, Day 11 p. 32 lines20-24, available: <http://webarchive.nationalarchives.gov.uk/20140122145147/>; <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Transcript-of-Morning-Hearing-5-December-2011.pdf> [accessed 10 July 2015].

<sup>1634</sup> Aldhouse, F., Witness Statement to the Leveson Inquiry, available <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Witness-Statement-of-Francis-Aldhouse.pdf> [accessed 10 July 2015].

<sup>1635</sup> Aldhouse Statement.

<sup>1636</sup> Note DRIPA has been declared incompatible with EU law: *R (Davis) v SSHD* [2015] EWHC 2092 (Admin); the Government intends to appeal.

<sup>1637</sup> House of Commons, Home Affairs Committee Eighth Report, 3<sup>rd</sup> December 2014, available: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmhaff/711/71102.htm> [accessed 14th July 2015].

<sup>1638</sup> <https://www.gov.uk/government/publications/communications-data-draft-codes-of-practice-acquisition-disclosure-and-retention>; see more recently <https://www.rusi.org/downloads/assets/ISR-Report-press.pdf>.

before the European Court of Human Rights with regard to the interception of communications (which has been prioritised by the court) and *The Sun* complained to the Investigatory Powers Tribunal (IPT) following the revelation in September that the Met had secretly viewed the phone records of *The Sun* and the paper's political editor Tom Newton Dunn.

By contrast, under the *Police and Criminal Evidence Act* (PACE) (as amended) journalists must be notified by the authorities of an application to access their material and sources and have the ability to object, a right of hearing before a judge and the possibility of an appeal. This is a higher standard than applies normally under PACE, as journalists' materials such as a journalist's notes, photographs, computer files or tapes are classified as 'Special Procedure Material'. The London Met, investigating a leak under the OSA, sought to obtain journalistic material from Sky Broadcasting under PACE, but by relying on evidence presented to the court when Sky was not present. The PACE allows a magistrate to make such an order but not in relation to journalistic material. The judge made the production order and Sky sought judicial review of that decision. The Supreme Court upheld Sky's challenge, noting the special position of journalism.<sup>1639</sup> These special provisions do not apply, however, if the journalist is arrested and the material is considered relevant as evidence.

Journalists also have protection under the Contempt of Court Act from the obligation to reveal their sources,<sup>1640</sup> although the protection is not absolute.<sup>1641</sup> Clause 7 of the National Union of Journalists Code of Conduct requires journalists to protect their sources,<sup>1642</sup> and a similar approach can be found in the Editors' Code – referring to the 'moral obligation' of journalists to protect sources.<sup>1643</sup> During the phone hacking and related investigations, News Corp management and Standards Committee gave details of journalists' sources to the police concerned about payment to public officials (see below) and were criticised for it.

The Editors' Code specifies that journalist should not harass individuals. This clause was introduced following the death of Diana, Princess of Wales. Specifically, journalists 'must not persist in questioning,

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<sup>1639</sup> R (on the application of British Sky Broadcasting Limited) .v The Commissioner of Police of the Metropolis [2014] UKSC 17.

<sup>1640</sup> For approach to interpretation see Secretary of State For Defence v. Guardian Newspapers Ltd [1985] AC 339.

<sup>1641</sup> See e.g. X v. Morgan Grampian Publishers Ltd [1991] 1 AC 1 challenged in Goodwin v UK (1996) 22 EHRR 123. See now Ashworth Hospital Authority v. MGN Ltd [2002] 1 WLR 2033, especially para 66.

<sup>1642</sup> See also BBC Editorial Guidelines on consent to participation, clause 6.4.10 and 6.4.11.

<sup>1643</sup> Editors' Code, para 14.



telephoning, pursuing or photographing individuals once asked to desist; nor remain on their property when asked to leave and must not follow them. If requested, they must identify themselves and whom they represent'.<sup>1644</sup> According to the Codebook, very few cases on this clause went to adjudication under the former press regulator, the PCC.<sup>1645</sup> Repeated intrusion could fall under the Protection from Harassment Act 1997 (PHA).<sup>1646</sup> The term 'harassment' is not itself defined, but it 'includes' 'alarming the person or causing the person distress' (s7(2)). The court thus looks at the effect of the conduct, rather than the range of conduct capable of constituting harassment. The courts have noted that, '[t]o cross the boundary from the regrettable to the unacceptable the gravity of the conduct must be of an order which would sustain criminal liability under section 2'.<sup>1647</sup> A 'course of conduct' requires at least two instances of harassment, and the person ought to know that the conduct in question amounts to or involves harassment. It is a defence if the harasser can show that the course of conduct was, in the circumstances, objectively reasonable.<sup>1648</sup> In *Thomas v News Group Newspapers Ltd & anor*,<sup>1649</sup> the Court of Appeal ruled that harassment can be by repeated newspaper publication. In the more recent *Trimingham* case, Tugendhat J summarised the position under the PHA with regards to the press and freedom of expression as follows:

....a course of conduct in the form of journalistic speech is reasonable under PHA s.1(3)(c) unless, in the particular circumstances of the case, the course of conduct is so unreasonable that it is necessary (in the sense of a pressing social need) and proportionate to prohibit or sanction the speech in pursuit of one of the aims listed in Art 10(2), including, in particular, for the protection of the rights of others under Art 8.<sup>1650</sup>

Persistent press attention can give rise to injunctions stopping the press from intruding. *Kerner v WX & Anor*<sup>1651</sup> concerned the harassment by the press of a woman whose husband for sexual activity with a child: he was a teacher and the child was a 16 year old student. The press had been involved in watching the claimant's home and taking photographs, in the early morning and afterwards, in a way that was likely to be held at a trial

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<sup>1644</sup> Editors' Code, paragraph 4(ii); see also paragraph 5 regarding grief.

<sup>1645</sup> The Editors' Codebook, p. 41, available: <http://www.editorscode.org.uk/downloads/codebook/codebook-2014.pdf> [accessed 20th July 2015].

<sup>1646</sup> In the first reported case on the topic, the level of seriousness was not found: *Trimingham v Associated Press*[2012] EWHC 1296.

<sup>1647</sup> *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34.  
<sup>1648</sup> s1(3)(c) PHA.

<sup>1649</sup> [2001] EWCA Civ 1233.

<sup>1650</sup> *Trimingham* para 53.

<sup>1651</sup> [2015] EWHC 128 (QB); [2015] EWHC 1247 (QB).

to amount to harassment. This finding gave rise to an injunction and the injunction continued in view of likely continued press interest and the age of the son.

While there is no statutory underpinning for the following regime, police operate a system which allows them to deal with claims of harassment by issuing a 'Police Information Notice' (PIN). The aim is to show that an alleged harasser has been warned should she or he continue the complained of behaviour, thus establishing a course of conduct as required by the act. There have been concerns about this system for a number of reasons. In this context, note that journalists have been served with PINs, or accused of harassment. The Press Gazette reports that one journalist received such a notice after making two phone-calls and one doorstep visit, and that a second investigating an allegation of fraud received a similar notice after what he claimed was a made-up incident.<sup>1652</sup>

The *Official Secrets Act 1989* (OSA) is directed principally at civil servants, but may also affect journalists who receive relevant information (and disclose it). S. 5 OSA makes it an offence to disclose information covered by the act. The consent of the Attorney general is required to bring a case, following the normal prosecutorial guidelines. Following *Shayler*, it seems that there is no public interest defence that is read in to the act.<sup>1653</sup> The CPS has issued guidance on prosecutions in this area.<sup>1654</sup> It recognises that although there is a public interest in maintaining confidentiality, there is a public interest in receiving information. It has also been suggested that reliance on the privilege against self-incrimination could be used by journalists in this context.<sup>1655</sup> While the Public Interest Disclosure Act 1998 was designed to protect whistleblowers, it is arguable that the concept of 'protected disclosure' on which the system is based, is narrow and, in any event, does not apply to the police, MI5, MI6 or GCHQ (though it can apply to other Crown employees). It is however these areas that are likely to fall within the scope of stories uncovered by investigative journalism.

Misconduct in public office is a common law offence, dating back to the

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<sup>1652</sup> Ponsford, D., 'Journalist Investigating £100m investment fraud given 'absurd' harassment warning by Met Police', Press Gazette 25<sup>th</sup> April 2014, available at: <http://www.pressgazette.co.uk/journalist-investigating-%C2%A3100m-investment-fraud-given-absurd-harassment-warning-met-police> [accessed 10 July 2015].

<sup>1653</sup> R v Shayler [2002] UKHL 11.

<sup>1654</sup> [http://www.cps.gov.uk/legal/p\\_to\\_r/prosecuting\\_cases\\_where\\_public\\_servants\\_have\\_disclosed\\_confidential\\_information\\_to\\_journalists/](http://www.cps.gov.uk/legal/p_to_r/prosecuting_cases_where_public_servants_have_disclosed_confidential_information_to_journalists/).

<sup>1655</sup> Robertson and Nicol Media Law 5<sup>th</sup> ed (Penguin) [5-070].

eighteenth century,<sup>1656</sup> but there is no exhaustive definition. As a result the boundaries of the offence are uncertain and a disproportionately high number of the few cases brought cases are the subject of appeal. This can be clearly seen in the context of Operation Elveden which concerned payments by journalists to public officers, notably the police. At the moment it seems best practice is to use statute if a statutory offence is available.<sup>1657</sup> The recently enacted Criminal Justice and Courts Act 2015 provides for a new offence of corrupt or otherwise improper exercise of police powers and privileges<sup>1658</sup> but this was not available at the time of Operation Elveden.

The test for the common law offence is now as reformulated in Attorney General's Reference No 3 of 2003.<sup>1659</sup> The offence is committed when:

- a public officer acting as such;
- wilfully neglects to perform his duty and/or wilfully misconducts himself;
- to such a degree as to amount to an abuse of the public's trust in the office holder; and
- without reasonable excuse or justification.

The offence usually attracts a custodial sentence, not least to send a message to the public that those that betray the trust put in them by the public will be punished. Difficulties arise specifically in determining who is a public office and the level of public trust, and the scope of the offence does not seem to be static.<sup>1660</sup> Operation Elveden was not markedly successful, at least as regards the prosecution of journalists for aiding and abetting misfeasance. Thirteen journalists have been found not-guilty and the Court of Appeal quashed the conviction of one reporter, Panton, and gave fellow reporter Sabey leave to appeal.<sup>1661</sup> The Court of Appeal argued:

In the context of a case involving the media and the ability to report information provided in breach of duty and in breach of trust by a public officer, the harm to the public interest is in our view the major determinant in establishing whether the conduct can amount to an abuse of the public's

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<sup>1656</sup> R v Rembridge (1783) 3 Doug 327.

<sup>1657</sup> R v Rimmington, R v Goldstein [2005] UKHL63, paragraph 30.

<sup>1658</sup> S 26 Criminal Justice and Courts Act 2015.

<sup>1659</sup> [2004] EWCA Crim 868.

<sup>1660</sup> Ashworth, A. 'Misconduct in public office – ingredients of offence: misuse of public funds' [2010] Crim LR 779.

<sup>1661</sup> R v Chapman, Gaffney and Panton, R v Sabey and Brunt [http://www.cps.gov.uk/news/latest\\_news/cps\\_statement\\_operation\\_elveden\\_appeal/](http://www.cps.gov.uk/news/latest_news/cps_statement_operation_elveden_appeal/).

trust and thus a criminal offence. For example, the public interest can be sufficiently harmed if either the information disclosed itself damages the public interest (as may be the case in a leak of budget information) or the manner in which the information is provided or obtained damages the public interest (as may be the case if the public office holder is paid to provide the information in breach of duty).<sup>1662</sup>

Following this decision the Director of Public Prosecutions carried out a root-and-branch review of the controversial Operation Elveden cases and of the 12 cases left, nine were abandoned.<sup>1663</sup> The next case to trial, that of Sun reporter, France, resulted in a guilty finding. Cases involving the police have been more successful.

There is guidance from the DPP on assessing the public interest in bringing prosecutions in media cases,<sup>1664</sup> which supports the Code for Crown Prosecutors. The guidelines apply when prosecutors are considering whether to charge journalists – or those who interact with journalists – with criminal offences that may have been committed in the course of their work. The guidance emphasises that there are two separate questions affecting the public interest: that served by freedom of expression and the right to receive and impart information; and the question of whether the prosecution itself is in the public interest. Where there is no express public interest defence, or the courts have guidance on such issues, then the Guidance advises that prosecutors should assess whether the public interest served by the conduct in question outweighs the overall criminality. In so doing prosecutors should follow a three stage process: (1) assessing the public interest served by the conduct in question; (2) assessing the overall criminality; and (3) weighing these two considerations.

The industry codes also refer to the possibility of making payments following Government plans to legislate about payment to witnesses in criminal trials. Witnesses must not be paid while the trial is active (effectively this would be covered by the Contempt of Court Act); there is no public interest defence here. There is a possibility of payment being acceptable in situations where a trial is likely/foreseeable but only where there is a public interest in so doing, and there is an overriding need to

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<sup>1662</sup> Ibid para [36].

<sup>1663</sup>

[http://www.cps.gov.uk/news/latest\\_news/crown\\_prosecution\\_service\\_re\\_review\\_of\\_operation\\_elveden/](http://www.cps.gov.uk/news/latest_news/crown_prosecution_service_re_review_of_operation_elveden/);  
[http://www.cps.gov.uk/news/latest\\_news/no\\_further\\_action\\_against\\_one\\_in\\_dividual\\_for\\_conspiracy\\_to\\_commit\\_misconduct\\_in\\_public\\_office/](http://www.cps.gov.uk/news/latest_news/no_further_action_against_one_in_dividual_for_conspiracy_to_commit_misconduct_in_public_office/).

<sup>1664</sup> Available

here:  
[http://www.cps.gov.uk/legal/d\\_to\\_g/guidance\\_for\\_prosecutors\\_on\\_assessing\\_the\\_public\\_interest\\_in\\_cases\\_affecting\\_the\\_media/](http://www.cps.gov.uk/legal/d_to_g/guidance_for_prosecutors_on_assessing_the_public_interest_in_cases_affecting_the_media/) [accessed 14<sup>th</sup> July 2015].

make the payment. This is seen as a high bar, and even there the Codebook is alive to the risks of journalists unwittingly influencing the witness.

### 3. Questions 3. – 5.

#### *Reporting and Making Information Public*

Much of the legislation concerned looks at court reporting, in the interests of the administration of justice (ie ensuring a fair trial, which has the same end objective as open justice), with particular concern being paid to protect the rights of children and some classes of victim (e.g. ss 39 and 49 Children and Young Persons Act 1933 - prohibition on publication of a name, address or school calculated to identify a child; s. 5 Sexual Offences (Amendment) Act 1992 - prohibits publication of details that identify a victim of rape or other serious sexual offence who has anonymity).<sup>1665</sup> These provisions are repeated in the relevant industries codes.

The central piece of legislation for enforcement is the *Contempt of Court Act 1981*. For criminal contempt proceedings, the decision whether to bring an action is made by the Attorney General and the CPS. In deciding whether to bring a case, the Attorney-General will have regard to the public interest. The maximum penalty for contempt is 2 years' imprisonment; fines may also be levied. Community orders are not available. Usually media organisations are fined; imprisonment has not been used for over 60 years. Third party costs may be imposed on journalists/publishers where there has been serious misconduct but no such order has been made in respect of contempt by publication. There are a number of Practice Directions in this area, highlighting the concern to ensure the continuance of open justice as much as practicable.<sup>1666</sup>

The Contempt of Court Act sanctions the publishing of a potentially prejudicial article regarding an open case (section 2(3)). This strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced (s. 2(2)). An example was the publication by GQ of an article covering the phone hacking trial. There is some uncertainty as to the

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<sup>1665</sup> See Vassall-Adams, G., Reporting Restrictions in the Criminal Courts, (4<sup>th</sup> ed) (2015), available at: <https://www.judiciary.gov.uk/wp-content/uploads/2015/05/reporting-restrictions-guide-2015-final.pdf> [accessed 14th July 2015].

<sup>1666</sup> Practice Direction: Committal for Contempt of Court – Open Court, 27<sup>th</sup> March 2015; Practice Guidance: Committal for Contempt [2013] 1 WLR 1326, dated 3 May 2013; Practice Guidance (Committal Proceedings: Open Court) (No 2) [2013] 1 WLR 1753, dated 4 June 2013; and President's Circular: Committals (The Family Court Practice 2014 at p 2976), dated 2 August 2013.

meaning of both these provisions. Section 3 of the Act provides a defence of innocent publication where the publisher ‘does not know and has no reason to suspect that relevant proceedings are active’. Moreover, section 4 provides no contempt arises:

*“in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.”*

There is a further qualification to the strict liability rule:

*“A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion”.*

This is a form of public interest discussion exception and has been interpreted reasonably broadly and potentially can even cover accusations in such discussions.<sup>1667</sup>

Section 11 also provides that “In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld”. It is rare for the court to make such a direction in respect of a defendant.<sup>1668</sup> The media may make representations against the granting of an order and the media may appeal against an order (either under s. 4(2) or s.11) under s. 159 Criminal Justice Act 1988, a provision enacted to comply with the requirements of the ECHR.<sup>1669</sup> The Family Division has a specific system for notifying the media of the intention to apply for an injunction on reporting.<sup>1670</sup>

The Act also includes unauthorized recording of court proceedings and photographing or sketching a justice or witness under the definition of criminal contempt.<sup>1671</sup> The definition is broad enough to cover devices the primary function of which is not recording (e.g. a smart phone) to be covered by the prohibition.

Broadcasters under public service obligations in the Communications Act are under an obligation to report news and current affairs impartially. The BBC Guidelines describes this as ‘giving due weight to events, opinion and main strands of argument.’ Impartiality can be satisfied across a range of

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<sup>1667</sup> See A-G v. English [1983] 1 AC 116, especially 143-4.

<sup>1668</sup> Evesham Justices ex p McDonagh [1988] QB 553.

<sup>1669</sup> Hodgson v UK 11553/85.

<sup>1670</sup> <http://www.medialawyer.press.net/courtapplications/practicenote.jsp>.

<sup>1671</sup> s. 9 Contempt of Court Act.

programmes; the law does not require 'internal impartiality'. The press are not under this obligation. The Editors' Code specifies: 'The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact'. The press are under an obligation to 'take care not to publish inaccurate, misleading or distorted information, including pictures', and where there has been a significant error to publish a correction with 'due prominence'. It is contentious whether this latter requirement is respected. Further, 'a publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published'.

As regards civil law, one central limitation on journalistic endeavour is the doctrine of confidentiality. It may of course affect the acquisition of information (between third part discloser and journalist) but has principally arisen in relation to the media publication of stories based on information disclosed in breach of confidence. While the starting point for this in the modern era is the case of *Prince Albert v. Strange*,<sup>1672</sup> the test for the doctrine currently taken to be that set down in *COCO V A N CLARK (Engineers) Ltd*:<sup>1673</sup>

- (1) The information must have the necessary quality of confidence about it;
- (2) The information must be imparted in circumstances imposing an obligation of confidence; and
- (3) There must be an unauthorised use of that information to the detriment of the party communicating it.

While the necessary element of confidentiality may arise because of the context in which the information has passed such as kiss and tell stories, or because an employer has an expectation of confidence in an employee to protect commercially sensitive information, the obligation may arise in other contexts due to the sensitive nature of the content.<sup>1674</sup> In the *Naomi Campbell case*, the House of Lords held that there could be a claim in respect of the publication of information that was obviously private (reasonable expectation of privacy). *Campbell* is a landmark decision as the court dispensed with the requirement of a relationship of confidence and extended the remedy to cover intrusions of privacy where there has been a misuse of private information, which is now seen as a separate tort. It has been suggested that in *Campbell* and subsequent cases there has

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<sup>1672</sup> *Prince Albert v Strange* (1848) 2 De G & Sm 652.

<sup>1673</sup> *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

<sup>1674</sup> *Att-Gen v. Guardian Newspapers (No 2)* [1990] 1 AC 109, 281.

been a significant departure from the traditional view of confidentiality, essentially dispensing with the second requirement of the *Coco* test.<sup>1675</sup> Nonetheless, where confidentiality has arisen in a more traditional context (eg via contract) then the traditional approach should be applied rather than the balancing test in *Campbell*.<sup>1676</sup> Note that some of the investigations into criminal misbehaviour by journalists have resulted in the subjects of the stories bringing claims for misuse of private information.<sup>1677</sup>

Note there is a defence to breach of confidentiality, based on iniquity,<sup>1678</sup> which will overturn even legal privilege.<sup>1679</sup> In sum, if the defendant can show that a breach of the confidence was necessary in order to prevent the commission of a crime or to enable a crime to be punished, this will be a good defence. The iniquity defence has developed into a more general public interest defence.<sup>1680</sup> This, however, may return us to the question of whether something is in the public interest or just interesting for the public to know.<sup>1681</sup>

While an action can lead to an award of damages, one of the options available to a claimant is an injunction, stopping publication and a failure on the part of the publisher to comply could lead to a finding of contempt of court. Injunctions and more particularly the so-called 'super injunction' became the subject of an inquiry by Lord Neuberger.<sup>1682</sup> The Committee was set-up in response to press concerns about the perceived increase in anonymised proceedings and the use of injunctions to prevent the reporting on the fact that the injunction itself had been granted. From the figures available, it seems that the use of these injunctions were much less common than press reporting indicated.<sup>1683</sup> The result of the report was

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<sup>1675</sup> Hunt, C. D. L., 'Rethinking surreptitious takings in the Law of Confidence'(2011) IPQ 66; Philipson, G., 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act?' (2003) 66 MLR 726.

<sup>1676</sup> HRH the Prince of Wales v. Associated Newspapers.

<sup>1677</sup> See e.g. Hannon v. NGN, Statement in Open Court, available: <https://inform.files.wordpress.com/2015/07/hannon-v-ngn-comm-of-pol-sioc.pdf> [accessed 14th July 2015].

<sup>1678</sup> per Wood V-C in *Gartside v Outram* (1856) 26 LJ Ch 113.

<sup>1679</sup> *JSC BTA Bank v. Ablyazov et al* 8 August 2014.

<sup>1680</sup> *Lion Laboratories Ltd v Evans* [1985] QB 526; *X v Y* [1988] 2 All ER 648

<sup>1681</sup> *British Steel Corporation v Granada Television Ltd* [1981] 1 All ER 417 at pages 455e–f: contrast *Campbell v MGN* with *Campbell v Frisbee* [2003] ICR 141.

<sup>1682</sup> Available: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-2005-2011.pdf> [accessed 14th July 2015].

<sup>1683</sup> At the time of the report, these were *Ntuli v Donald* overturned by the Court of Appeal: [2010] EWCA Civ 1276; and *DFT v. TFD* [2010] EWHC 2335 (QB).



the provision of “Draft Guidance for Interim Non-Disclosure Orders”, a model “Explanatory Note” and a draft “Standard Form Order”.

The level of damages for privacy infringements have not been high: Naomi Campbell got £4,000 for being photographed after drug therapy sessions (coupled with the publication of her drug regimen). The Douglas/Zeta-Joneses got £3,750 for their unauthorised publication of wedding photographs. Max Mosley received £60,000 for the sex party reporting. These payments related to one-off stories. The phone hacking scandal was different and the privacy actions brought as a result have been the highest awarded. According to Mann J:

the defendant will have helped itself, over an extended period of time, to large amounts of personal and private information and treated it as its own to deal with as it thought fit. There is an infringement of a right which is sustained and serious. While it is not measurable in money terms, that is not necessarily a bar to compensation (distress is not measurable in that way either). Damages awarded to reflect the infringement are not vindictory. They are truly compensatory.<sup>1684</sup>

As well as being larger than previous privacy claims, they are substantially more generous than the figures awarded in respect of work place harassment, with which the behaviour of the journalists has been compared. It is unlikely that this is the dawn of a new era of generous damages but rather recognition of the uniqueness (it is to be hoped) of the phone hacking scandal.

The other obvious cause of action is libel (defamation), which has recently been the subject of revision arguably to favour freedom of speech over reputation. Concerns had been expressed about ‘libel tourism’ and the chilling effect of costs in particular on free speech. The High Court issued a statement on early resolution of defamation cases aimed at addressing this point.<sup>1685</sup> More substantively changes came with the Defamation Act 2013, which came into force January 2014. It specifies that a statement is not defamatory unless ‘its publication has caused or is likely to cause serious harm to the reputation of the claimant’.<sup>1686</sup> It also clarifies that ‘harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss’.<sup>1687</sup> This makes it more difficult for companies to succeed than was previously the

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<sup>1684</sup> Gulati v. MGM [2015] EWHC 1482.

<sup>1685</sup> <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Statements/mor-defamation-statement-02012014.pdf>.

<sup>1686</sup> S. 1(1) Defamation Act 2003.

<sup>1687</sup> S. 1(2) Defamation Act 2013.

case. By contrast to the position under the common law, the existence of serious harm is potentially a difficult hurdle for a claimant to overcome; the approach to the interpretation of the act and its relationship to the common law doctrine is not yet clear. In particular it is not clear whether s. 1 provides a new definition to 'defamatory' or whether it is setting an additional requirement for a claimant to prove, on top of the existing examples of defamatory meaning.<sup>1688</sup>

Some of the defences to defamation actions were changed by the new act, but have a family similarity to their predecessors: s. 2 provides a defence where the comment is true (formerly justification); s. 3 honest opinion is protected (formerly fair comment). Note here that the old 'fair comment' requirement that the comment be in the public interest does not appear in relation to honest opinion so that s. 3 should allow greater protection than its predecessor. As regards publishers, 'the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion'. S. 4 is significant in terms of journalism, as it provides the defence of public interest. Whereas the previous case law required certain standards of responsible journalism to be met, the new act states that it will be a 'defence to an action for defamation for the defendant to show that — a) the statement complained of was, or formed part of, a statement on a matter of public interest; and b) the defendant reasonably believed that publishing the statement complained of was in the public interest'. This seems to tilt the balance in favour of the speaker but it remains to be seen how the courts interpret it.

One final cause of action is the tort of intentionally inflicting mental suffering. This is a tort established in the nineteenth century in the case of *Wilkinson v Downton*<sup>1689</sup> but rarely used. The conduct element requires there to have been no justification or reasonable excuse. The tort was considered recently by the Supreme Court in *OPO v James Rhodes*<sup>1690</sup> in a successful appeal against an injunction prohibiting the publication of a memoir that dealt with the sexual abuse of the author at school, its devastating personal consequences for him and his redemption through music. The challenge to the publication had been brought by the author's ex-wife on the basis the book might cause psychological harm to his son and thus constituting the tort of intentionally inflicting mental suffering. The Supreme Court held that:

*"Freedom to report the truth is a basic right to which the law gives a very high level of protection. It is difficult to envisage any circumstances in which speech which is not deceptive, threatening or*

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<sup>1688</sup> *Cooke v MGN* [2014] EMLR 31.

<sup>1689</sup> [1897] QB 57.

<sup>1690</sup> [2015] UKSC 32.

*possibly abusive, could give rise to liability in tort for wilful infringement of another's right to personal safety. The right to report the truth is justification in itself."*

## **6. Conclusion and perspectives**

The phone hacking scandal was shocking and seems to have coloured views about the press in particular; the law (rather than self-regulatory mechanisms) for a time had a much higher profile, as can be seen from the Leveson Inquiry and that various investigations carried out by the Metropolitan Police. It is notable in this context that those involved seem to have been engaged in print journalism rather than broadcast journalism, and arguably not focussing on typical 'public sphere' speech but rather gossip and celebrity stories. Equally, however, it is the print sector that has broken some big stories: the phone hacking scandal itself and the Snowden revelations for example. It is here that we see another thread, the increase in surveillance from the state driven by the perceived needs of the war on terror and from the media in search of a good story.

The other battleground is the boundaries of privacy and confidentiality, especially in the context of figures in the public eye, where the media has arguably focussed on a meaning of public interest which equates to something the public is interested in. In this area, we have seen a re-characterisation of the issues as the balance between Articles 8 and 10. Despite the elevation of privacy issues into rights discourse, and the concerns about super-injunctions, the courts have not been over-keen to take a restrictive view of public interest, with the matter often being resolved in favour of freedom of expression.

### III. Annex 3: Authors of the national reports

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**Blaz Zgaga** is a freelance investigative journalist and co-author of the best-selling trilogy *In the Name of the State*, which explores arms smuggling in the Balkans during the conflicts of the 1990s. He was named among Reporters without Borders' 100 Information Heroes in May 2014.





#### **IV. Annex 4: Introducing the Institute of European Media Law (EMR)**

The Institute of European Media Law (EMR) was founded in 1990 as an independent legal research and consultancy institute specialising in European Media Law. The Institute acts as a service provider and neutral platform in a number of fields of media law and policy.

The team of EMR comprises several lawyers, one assistant, and several additional academic researchers. Their tasks cover the Institute's publication activities, studies and research, as well as assisting in the organisation of conferences. Focusing on different areas of media law, they are the contact persons for their respective fields of specialisation. While staying at the Institute, they frequently follow additional education and prepare for their Ph.D. Former staff hold responsible positions in media undertakings, regulatory authorities, science and the advocacy.

The EMR's technical capacity to execute the tasks proposed to high quality standards is based on a combined centralised structure together with elements of obtaining specific knowledge and ensuring access to relevant information through a decentralised network of national experts. In particular, the national experts (correspondents) of the EMR Media Network - that consists of about 180 media law experts from over 40 European countries - have contributed to numerous comparative legal studies of the Institute, e.g. the "AVMS RADAR – AudioVisual Media Services – Regulatory Authorities' InDependence And Efficiency Review" on behalf of the European Commission, DG Communications Networks, Content & Technology and the "Legal framework for photo journalists in the greater SaarLorLux region" on behalf of the Interregional parliamentary Counsel (*Interregionaler Parlamentarierrat*). In these cases, comprehensive country reports covering the relevant national legal framework and practise, have been drawn up, based on structures/questionnaires elaborated by the EMR.

Due to the partnership agreement between the European Audiovisual Observatory in Strasbourg, the Institute's task consists also of collecting relevant information, storing the necessary data and reporting to the Observatory on all important developments that are taking place in the countries falling under the EMR's geographical responsibility, among those the new Member States. Hence, the Institute has contributed several hundred articles towards the newsletter "IRIS – Legal Observations of the European Audiovisual Observatory", and, in addition, drafted several longer articles which have led to publications in the format of IRIS Special or IRIS plus. The EMR also disposes of reliable links to the European Platform of Regulatory Authorities (EPRA), the Secretariat of which is hosted by the European Audiovisual Observatory.

Furthermore, the EMR is consortium partner of the newly established European Centre for Press and Media Freedom. The EMR provides the Centre with legal analysis regarding developments in press and media freedom in Europe. It does so on the basis of regular reporting but also by in-depth studies of specific aspects for which this study is a first example.

The EMR contributes to the development of media law via a series of workshops, seminars and conferences on a national as well as international level (e.g. a workshop on “Smart devices and Data protection” in Berlin in cooperation with *Deutsche TV-Plattform* in April 2016; a conference on the legal and market situation of Media- and Data-Agencies in cooperation with the State Chancellery of Schleswig-Holstein in April 2016, the “Annual Conference on European Media Law” in Brussels organized in cooperation with the Academy of European Law (ERA) most recently in June 2016, a discussion on the topic “A technology neutral digital single market without borders” at the ANGA COM conference in June 2016).

Finally, the results of research activities (including legal studies) are edited by the EMR in its own series of publications (EMR Schriftenreihe), which also includes text and case books as well as conference proceedings.

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